

70742-6

70742-6

NO. 70742-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KAVEN LIONEL HILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

COURT OF APPEALS DIV I
STATE OF WASHINGTON

[Handwritten signature]

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	5
1. THE EVIDENCE WAS SUFFICIENT TO SUPPORT HILL’S CONVICTION	5
a. There Was Sufficient Evidence To Prove That Hill Acted With The Intent To Injure Or Defraud	6
b. There Was Sufficient Evidence To Prove That Hill Knew The Instrument Was Forged ...	7
c. Hill’s Money Order Had The Apparent Legal Efficacy Necessary To Support A Forgery Conviction	9
2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO INSTRUCT THE JURY ON THE DOCTRINE OF LEGAL EFFICACY	13
a. Relevant Facts	14
b. Standard Of Review	14
c. Legal Efficacy Is A Threshold Issue Affecting Admissibility Of The Instrument, Not An Element Of The Offense	15

i.	Apparent legal efficacy is not a statutory element of forgery.....	17
ii.	Apparent legal efficacy is not an implied element of forgery	18
iii.	Apparent legal efficacy is a question of "applicability," a threshold issue of admissibility	20
d.	Hill Waived Any Objection To The Legal Efficacy Of The Money Order By Not Objecting When It Was Admitted	21
e.	The Trial Court Properly Declined To Instruct The Jury On The Doctrine Of Legal Efficacy	22
3.	THE ADMISSION OF THE STAMP ON THE MONEY ORDER WAS PROPER UNDER THE CONFRONTATION CLAUSE	23
a.	Relevant Facts	23
b.	An Out-Of-Court Statement That Is Not Testimonial Does Not Violate The Confrontation Clause	24
c.	The Stamp On The Money Order Is Not Testimonial.....	25
d.	Any Error Was Harmless.....	28
D.	<u>CONCLUSION</u>	29

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 24, 25

In re Winship, 397 U.S. 358,
90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 5

Melendez-Diaz v. Massachusetts, 557 U.S. 305,
129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) 25, 27

United States v. Foerster, 65 M.J. 120
(C.A.A.F. 2007) 27

United States v. Hemphill, 514 F.3d 1350
(D.C. Cir. 2008) 26

Washington State:

Anfinson v. FedEx Ground Package Sys., Inc.,
174 Wn.2d 851, 281 P.3d 289 (2012)..... 14

Cent. Washington Bank v. Mendelson-Zeller, Inc.,
113 Wn.2d 346, 779 P.2d 697 (1989)..... 19

State v. Abdulle, 174 Wn.2d 411,
275 P.3d 1113 (2012)..... 6

State v. Aitken, 79 Wn. App. 890,
905 P.2d 1235 (1995)..... 13

State v. Boss, 167 Wn.2d 710,
223 P.3d 506 (2009)..... 15, 16

State v. Bourgeois, 133 Wn.2d 389,
945 P.2d 1120 (1997)..... 15

<u>State v. Carmen</u> , 118 Wn. App. 655, 77 P.3d 368 (2003).....	17, 19, 20, 22
<u>State v. Davis</u> , 73 Wn.2d 271, 438 P.2d 185 (1968).....	6
<u>State v. Gray</u> , 134 Wn. App. 547, 138 P.3d 1123 (2006).....	21
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<u>State v. Jasper</u> , 174 Wn.2d 96, 271 P.3d 876 (2012).....	24, 25, 27, 28
<u>State v. Mason</u> , 160 Wn.2d 910, 162 P.3d 396 (2007).....	24
<u>State v. Miller</u> , 156 Wn.2d 23, 123 P.3d 827 (2005).....	15, 16, 17, 18, 20, 21, 22
<u>State v. Perez-Cervantes</u> , 141 Wn.2d 468, 6 P.3d 1160 (2000).....	21, 22
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	15, 22
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	5, 7
<u>State v. Scoby</u> , 117 Wn.2d 55, 810 P.2d 1358, <u>amended</u> , 117 Wn.2d 55, 815 P.2d 1362 (1991).....	9, 10, 15
<u>State v. Smith</u> , 72 Wn. App. 237, 864 P.2d 406 (1993).....	13, 15, 19
<u>State v. Taes</u> , 5 Wn.2d 51, 104 P.2d 751 (1940).....	12

Constitutional Provisions

Federal:

U.S. Const. amend. VI 24
U.S. Const. amend. XIV 5

Statutes

Washington State:

RCW 9A.60.010 18
RCW 9A.60.020 18
RCW 62A.3-104 10, 11

Rules and Regulations

Washington State:

ER 103 21
ER 401 20
ER 402 21
RAP 2.5 21
Uniform Commercial Code 10, 11, 19

A. ISSUES PRESENTED

1. The evidence is sufficient to support a conviction if, when the evidence and all reasonable inferences that can be drawn from it are viewed in the light most favorable to the State, a rational trier of fact could find that each element of the crime has been proven beyond a reasonable doubt. The evidence at trial showed that the defendant created without permission what purported to be a money order drawn on the U.S. Treasury and attempted to use it to obtain over \$377,000. Was there sufficient evidence for a rational jury to find that the defendant acted with intent to injure or defraud, that he knew the money order to be forged, and that the money order had apparent legal efficacy?

2. Questions of law are decided by the trial court, not the jury. The apparent legal efficacy of a written instrument is a question of law that goes to the admissibility of the instrument. Did the trial court properly exercise its discretion in declining to instruct the jury on the requirement of apparent legal efficacy?

3. A statement is testimonial, and therefore implicates the Confrontation Clause, if the statement is made under circumstances that would cause a reasonable witness to believe that the statement would be used in a later criminal proceeding.

A stamp stating "Return Unpaid, Non-Treasury Item" was placed on a rejected money order by the Federal Reserve in the ordinary course of processing it, with no knowledge of whether criminal prosecution was likely to occur. Did the trial court properly conclude that the stamp is not testimonial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Kaven Lionel Hill, was charged with one count of Forgery. CP 1. A jury found him guilty as charged. CP 13. Hill received a standard range sentence of 30 days of confinement, with 29 days converted to community restitution. CP 49. Hill timely appealed. CP 63-64.

2. SUBSTANTIVE FACTS.

After opening a new business account at Verity Credit Union (Verity), Hill presented an item that purported to be a money order for the initial deposit into the new account. 2RP¹ 13, 20-21. It listed "Kaven L. Hil" in the upper left corner, had a line stating "Pay to the

¹ There are four volumes of the Report of Proceedings. They will be referred to as follows: 1RP (June 26, 2013), 2RP (June 27, 2013), 3RP (July 1, 2013), and 4RP (December 13, 2012, July 1, 2013, and August 9, 2013).

order of:" followed by the name of Hill's business, was signed by Hill, and was written in the amount of \$377,986.00. Ex. 1. At the bottom of the check were a routing number and what appeared to be an account number. 2RP 24-29; Ex. 1. The words "money order" appeared at the top, and the words "Payable to the U.S. Treasury without recourse" appeared below the signature line. 2RP 21; Ex. 1. The "Memo" line was unusually long. 2RP 27; Ex. 1.

Verity employees were suspicious that the item was not genuine, as Hill's name was misspelled, there was excess verbiage on the item, and money orders are usually capped at \$1,000. 2RP 21-22, 91-92. A hold was put on the money in Hill's account, and the money order was sent to the Federal Reserve for processing like a normal check or money order, to see if it would be rejected or accepted. 2RP 92. The Verity branch manager explained to Hill that there would be a hold on the funds until the item cleared; however, later the same day Hill called Verity and attempted to convince an assistant manager to release the funds. 2RP 11, 31, 87, 94-95.

Before or while the money order was processed, Verity's fraud officer did some research into the item. 2RP 59. She was

able to verify that the routing number of "000000518" at the bottom of the check was an actual routing number for the U.S. Treasury. 2RP 59-60; Ex. 1. However, the fraud officer also discovered videos on YouTube containing instructions on how to create the type of money order presented by Hill. 2RP 60.

The money order was eventually returned to Verity stamped "Return Unpaid, Non-Treasury Item." 2RP 57; Ex. 1. Verity then closed all of Hill's accounts. 2RP 36-37. If the money order had been accepted, it would have resulted in a transfer of money from the U.S. Treasury into Hill's account. 2RP 46-47.

Hill testified at trial that he had created the money order on his home computer following instructions found on the internet. 2RP 112, 164. He claimed that he had merely been attempting to lawfully access a limitless account in his name at the Treasury Department. 2RP 113-39, 149.

Additional facts are included below in the sections to which they pertain.

C. ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT TO SUPPORT HILL'S CONVICTION.

Hill contends that there was insufficient evidence for any rational jury to find beyond a reasonable doubt that he acted with intent to injure or defraud, that he knew the money order was forged, or that the money order had apparent legal efficacy. These claims should be rejected. Sufficient evidence was presented for a rational jury to find that Hill, with intent to injure or defraud, possessed or offered an apparently legally effective written instrument that Hill knew to be forged.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When an appellant claims that there was insufficient evidence to support his conviction, the reviewing court views the evidence and all inferences that can reasonably be drawn from it in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Viewing the evidence in that light, if any rational trier of fact could have found each element of the

crime proven beyond a reasonable doubt, then the evidence is sufficient to support the conviction. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

- a. There Was Sufficient Evidence To Prove That Hill Acted With The Intent To Injure Or Defraud.

In order to convict Hill of forgery, one of the elements the State had to prove beyond a reasonable doubt was that Hill “acted with intent to injure or defraud” when he presented the forged money order. CP 32. Specific criminal intent may be inferred from a defendant’s conduct and the surrounding circumstances where it is plainly indicated as a matter of logical probability. State v. Davis, 73 Wn.2d 271, 289, 438 P.2d 185 (1968), overruled on other grounds by State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012).

Here, the evidence established that Hill had created a homemade money order and presented it as a valid money order drawn on the U.S. Treasury in an attempt to have Verity credit his account with more than \$377,000. 2RP 46-47, 112. These facts plainly indicated intent to defraud either the credit union or the Treasury as a matter of logical probability. This inference was

supported by evidence that Hill, despite being told by the Verity manager that a hold would be placed on the funds for several days until the money order was verified, attempted to persuade an assistant manager to release the funds to him later the same day. 2RP 31, 94-95.

Hill contends that there was insufficient evidence of intent to injure or defraud because he testified that he did not intend to injure or defraud anyone. Brief of Appellant at 11. In doing so, he fails to view the evidence in the light most favorable to the State, as is required. Salinas, 119 Wn.2d at 201. The jury was free to find Hill's stated intentions not credible, and clearly did so. Because Hill's actions supported an inference of intent to defraud as a matter of logical probability (an inference that was exceptionally strong once the jury found Hill's testimony not credible), the evidence was sufficient for a rational jury to find beyond a reasonable doubt that Hill acted with intent to injure or defraud.

b. There Was Sufficient Evidence To Prove That Hill Knew The Instrument Was Forged.

Another element the State had to prove to convict Hill was that Hill "knew that the instrument had been falsely made,

completed, or altered." CP 32. The jury was given the following instruction on knowledge:

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. . . .

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 31.

Testimony at trial established that a normal money order is purchased from an institution by paying the value of the money order up front. 2RP 21. The money order presented by Hill purported to be drawn on the U.S. Treasury. Ex. 1; 2RP 133-34. But by his own admission, Hill produced his money order on his home computer. 2RP 112. The evidence therefore established that although Hill presented the money order as drawn on the U.S. Treasury, Hill was aware that the money order was not in fact issued by the U.S. Treasury.

While Hill testified that he believed that the homemade money order was a valid means of accessing the Treasury money, the same circumstances that indicate an inference of intent to defraud as a matter of logical probability also indicate a nearly-

identical inference that Hill knew the homemade money order he presented was not a legal means of acquiring Treasury funds.

The money order in this case was so obviously fake that, even if Hill hadn't actually created the document himself, a reasonable person in Hill's situation would have known that the money order was a forgery. See State v. Scoby, 117 Wn.2d 55, 61-63, 810 P.2d 1358, amended, 117 Wn.2d 55, 815 P.2d 1362 (1991) (obviousness of inauthenticity supports conclusion that defendant knew of the inauthenticity). On that basis alone, the jury was permitted to infer that Hill himself knew it was falsely made. CP 31. However, when combined with Hill's admission that he, and not the U.S. Treasury, had created the instrument, there was more than sufficient evidence for the jury to find beyond a reasonable doubt that Hill knew the money order was falsely made.

c. Hill's Money Order Had The Apparent Legal Efficacy Necessary To Support A Forgery Conviction.

In order to convict Hill of forgery, the State had to prove that the item Hill presented to the credit union was a written instrument that had been falsely made, completed, or altered. CP 32. In order for a written instrument to support a conviction for forgery, the

instrument must have apparent legal efficacy. Scoby, 117 Wn.2d at 57-58. In other words, the writing must be “something which, if genuine, may have legal effect or be the foundation of legal liability.” Id.

As discussed in section two below, apparent legal efficacy is a question of law for the court to decide and the issue is waived if not raised when the instrument is admitted. However, even if it were a question for the jury, there was sufficient evidence that the instrument would have been legally effective, if genuine, for the jury to convict Hill.

Under the Uniform Commercial Code (UCC), “instrument” means a negotiable instrument, which is defined as

an unconditional promise or order to pay a fixed amount of money, with or without interest . . . if it:
(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
(2) Is payable on demand or at a definite time; and
(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money

RCW 62A.3-104(a), (b). Hill’s money order appeared to have all the necessary elements to be a valid negotiable instrument under the UCC—it identified and was signed by the person ordering payment (the accountholder out of whose account the money was

supposedly to be transferred, "Kaven L. Hill"), it contained an unconditional order to pay money upon demand to a specified recipient ("Pay to the order of DBP, Inc."), and it specified a fixed amount to be paid (\$377,986.00). Ex. 1.

The fact that the instrument was drawn on a bank (the U.S. Treasury) made the instrument a "check" within the specialized meaning of that term under the UCC,² but that element was not required in order to be a negotiable instrument. RCW 62A.3-104(f). Even if it were, the money order contained a valid routing number identifying the U.S. Treasury as the institution on which the instrument was drawn, despite Hill's mistake in writing "payable to the U.S. Treasury" when his testimony established that he meant "payable by the U.S. Treasury." 2RP 60, 133-34.

If the money order had been genuine, it would have had the legal effect of transferring funds into Hill's bank account. 2RP 46. It was thus apparently legally effective and could support a conviction for forgery.

² "Check' means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank, or (ii) a cashier's check or teller's check. *An instrument may be a check even though it is described on its face by another term, such as 'money order.'*" RCW 62A.3-104(f) (emphasis added).

Hill relies on State v. Taes, 5 Wn.2d 51, 104 P.2d 751 (1940), in asserting that his money order would have lacked legal efficacy even if it had been genuine. However, this reliance is misplaced. In Taes, the defendant had presented an item that purported to be a bank check, but it apparently contained no information whatsoever about what bank was being ordered to pay the money. Id. at 53. The court found that the check lacked legal efficacy even if genuine because it was “an order to pay money without stating what bank or person is to pay it. Id.

In Hill's case, in contrast, the routing number on the money order correctly identified the U.S. Treasury as the bank that was being ordered to disburse the funds. Taes is therefore not on point. Furthermore, Hill offers no authority that holds that a bank's correct routing number is insufficient to effectively identify the applicable financial institution, and the State is aware of none. The inclusion of the correct bank routing number was sufficient to make the money order legally effective if it had been genuine.

Hill also contends that the money order lacked apparent legal efficacy because there were many indications that it was likely not genuine. Brief of Appellant at 14-15. However, the quality of the forgery is not the proper test for apparent legal efficacy—the

inquiry turns only on whether the elements of a legally effective instrument are ostensibly present. See, e.g., Id.; State v. Smith, 72 Wn. App. 237, 238-43, 864 P.2d 406 (1993) (unsigned check not legally effective); State v. Aitken, 79 Wn. App. 890, 894, 905 P.2d 1235 (1995) (“Because the withdrawal slip directs the bank to pay funds from the account of its customer, it has legal effect and may be the basis of legal liability.”).

Because there was sufficient evidence to prove that Hill acted with intent to injure or defraud and knew the instrument was forged, and because the money order presented by Hill would have been legally effective if it were genuine, Hill’s conviction should be affirmed.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO INSTRUCT THE JURY ON THE DOCTRINE OF LEGAL EFFICACY.

Hill contends that the trial court erred when it declined to give Hill’s proposed jury instruction regarding the doctrine of legal efficacy. This claim should be rejected. Whether a written instrument has the apparent legal efficacy necessary to support a conviction for forgery is a question of law for the court to determine, not a question for the jury.

a. Relevant Facts.

Hill did not raise the issue of legal efficacy in pre-trial motions, nor did he object to the admission of the forged money order for lack of apparent legal efficacy.³ 1RP 2-15; 2RP 26. Hill later proposed a jury instruction which stated, "In order to constitute forgery, the written instrument must be such that if genuine it would have some efficacy in affecting some legal right." CP 14-15. The trial court declined to give that instruction on the grounds that legal efficacy is "an issue for the judge, not the jury." 3RP 9.

b. Standard Of Review.

Instructions given to the jury are reviewed de novo for errors of law. Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012). However, so long as the instructions given are proper, a trial court's decision not to give a particular proposed instruction is reviewed only for abuse of discretion.⁴ Id. A trial court abuses its discretion only when no

³ Hill objected to the admission of the money order only on the grounds that the stamp on the money order stating "Return Unpaid, Non-Treasury Item" was hearsay and violated the Confrontation Clause. 2RP 4-5, 24-26.

⁴ Even if this Court were to apply the de novo standard urged by Hill, the trial court's decision not to give the requested instruction should be upheld.

reasonable judge would have reached the same conclusion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

c. Legal Efficacy Is A Threshold Issue Affecting Admissibility Of The Instrument, Not An Element Of The Offense.

The doctrine of legal efficacy states that a written instrument cannot support a charge of forgery unless it is "something which, if genuine, may have legal effect or be the foundation of legal liability." State v. Smith, 72 Wn. App. 237, 243, 864 P.2d 406 (1993) (quoting Scoby, 117 Wn.2d at 57-58).

A defendant is normally entitled to have the jury instructed on his theory of the case if the instruction is supported by the evidence, properly states the applicable law, and is not misleading. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). However, a defendant is not entitled to a jury instruction on a question of law, as legal questions are decided by the court and not the jury. State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005); State v. Boss, 167 Wn.2d 710, 718-19, 223 P.3d 506 (2009).

In determining whether a particular requirement is an element of the offense, which must be proven to the jury, or a legal question for the court to decide, the Washington Supreme Court's

analysis in State v. Miller is instructive. See Boss, 167 Wn.2d at 717-19 (applying reasoning of Miller to decide whether lawfulness of court order is a question for the jury in prosecution for custodial interference). In Miller, the court was faced with the question of whether the validity of a no-contact order was an element of the crime of violating the order and therefore an issue for the jury. 156 Wn.2d 23. The court first looked at the statutory elements of the crime of violation of a court order, noting that while the existence of a no-contact order was required by the statute, its validity was not mentioned. Id. at 27-28. The court next assessed whether validity was an implied element of the offense, and held that it was not, because implied elements are submitted to the jury, yet issues related to the validity of a court order “are uniquely within the province of the court.” Id. at 31.

The Miller court concluded that issues relating to the validity of a court order are issues of the “applicability” of the order to the crime charged, and held that an order is “not applicable” to the charged crime if it cannot legally support a conviction for violating it. Id. The court held that applicability is a threshold issue for the trial court to determine as part of its gate-keeping function, and orders that are not applicable should not be admitted. Id.

In holding that validity was a legal question for the trial court to decide, the Miller court cited with approval the logic of State v. Carmen, 118 Wn. App. 655, 664, 77 P.3d 368 (2003), which had analyzed the similar issue of whether the State must prove to the jury that a prior conviction for violation of a court order involved the type of order required by the statute defining predicate convictions. Miller, 156 Wn.2d at 30; Carmen, 118 Wn. App. at 660. Carmen reasoned that if a prior conviction did not qualify as a valid predicate conviction under the statute, then it was not relevant and should not have been admitted. Miller, 156 Wn.2d at 30; Carmen, 118 Wn. App. at 663-64.

With the roadmap of Miller and Carmen to guide this Court, it becomes clear that the apparent legal efficacy of a written instrument, like the validity of a no-contact order, is a threshold legal issue for the court, and not a question for the jury.

- i. Apparent legal efficacy is not a statutory element of forgery.

Like the validity of a no-contact order, the issue of legal efficacy is mentioned nowhere in the statutes defining forgery:

A person is guilty of forgery if, with intent to injure or defraud:

- (a) He or she falsely makes, completes, or alters a written instrument or;
- (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

RCW 9A.60.020(1).

“Written instrument” is defined as “(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or (b) any access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.” RCW 9A.60.010(7). Because nothing in the statutes pertaining to forgery requires the State to prove the legal efficacy of the written instrument, legal efficacy is not a statutory element of forgery.⁵ See Miller, 156 Wn.2d at 27-28.

- ii. Apparent legal efficacy is not an implied element of forgery.

An implied element is a non-statutory element articulated by the courts, and identifies a fact that must be proven to the jury. Id. at 28. Examples of implied elements articulated by the courts in the past include the existence of guilty knowledge in a prosecution for

⁵ The court in Miller noted that “[t]he legislature likely did not include validity as an element of the crime because issues concerning the validity of an order normally turn on questions of law[, which] . . . are for the court, not the jury, to resolve.” Miller, 156 Wn.2d at 31. The omission of any mention of legal efficacy in the forgery statute likely has the same explanation.

possession of a controlled substance, and the fact that property was taken from the possession of another in a prosecution for robbery. Id.

In contrast, the apparent legal efficacy of a particular written instrument is not a question of fact. The only facts that are relevant in evaluating whether a written instrument would have legal efficacy if genuine are the contents of the instrument itself, which are not in dispute where the instrument at issue can be viewed.

Apparent legal efficacy is therefore a question of law—one that requires analysis of caselaw and statutes governing negotiable instruments, such as the UCC. See Cent. Washington Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 353, 779 P.2d 697 (1989) (where facts are not in dispute even questions of fact can be determined as a matter of law); Smith, 72 Wn. App. at 243 (looking to UCC to evaluate apparent legal efficacy of unsigned check). Jurors are simply not equipped to conduct such nuanced legal analyses. See Carmen, 118 Wn. App. at 663 n.2 (noting comparative expertise of judges in analyzing legal authority by which predicate no-contact orders were issued).

It is improper to ask the jury to decide questions of law, yet implied elements must be submitted to the jury; thus, questions of

law are never implied elements. Miller, 156 Wn.2d at 28-31. The apparent legal efficacy of a particular written instrument is a question of law. It is therefore not an implied element.

- iii. Apparent legal efficacy is a question of “applicability,” a threshold issue of admissibility.

Like the validity of the predicate conviction in Carmen and the no-contact order in Miller, the apparent legal efficacy of the written instrument in a forgery case is properly addressed as a threshold issue of “applicability,” without which the instrument is not admissible. See Miller, 156 Wn.2d at 30. As with the validity of no-contact orders and predicate convictions, the relationship between apparent legal efficacy and relevance requires such a result.

If a particular written instrument lacks the apparent legal efficacy necessary to support a conviction for forgery, then its existence does not make it any more likely that the defendant committed forgery by means of that instrument. Such an instrument is therefore not relevant, and not admissible. ER 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.”); ER 402 (“Evidence which is not relevant is not admissible.”).

Apparent legal efficacy thus fits the rubric of “applicability” announced in Miller perfectly. Just as a no-contact order is not applicable to a charge of violation of a court order if it will not support a conviction, so too a written instrument is not applicable to a charge of forgery if the instrument will not support a conviction.

- d. Hill Waived Any Objection To The Legal Efficacy Of The Money Order By Not Objecting When It Was Admitted.

Because apparent legal efficacy is a threshold question of admissibility, challenges to the apparent legal efficacy of an instrument must be raised by a timely objection on specific grounds. See ER 103(a)(1). By waiting until the State had rested before challenging the apparent legal efficacy of the money order, Hill waived any objection. See State v. Gray, 134 Wn. App. 547, 557-58, 138 P.3d 1123 (2006) (defendant waived any objection to validity of predicate conviction by not raising the issue until after the State rested). He may not now challenge the apparent legal efficacy on appeal. RAP 2.5(a); See State v. Perez-Cervantes, 141

Wn.2d 468, 482, 6 P.3d 1160 (2000) (admissibility of evidence may not be challenged for first time on appeal).

- e. The Trial Court Properly Declined To Instruct The Jury On The Doctrine Of Legal Efficacy.

Jury instructions must correctly apprise the jury of the applicable law that governs the decisions the jury must make. Redmond, 150 Wn.2d at 493. As an issue of applicability, apparent legal efficacy relates only to the admissibility of the instrument, and is thus a question of law for the trial court to decide. See Miller, 156 Wn.2d at 31. Hill's proposed instruction was a statement of law pertaining only to a question of law within the purview of the court; as such, it was not *applicable* law for the jury's purposes. See Carmen, 118 Wn. App. at 667-68 (trial court properly rejected proposed instruction on question of law that must be determined by the court). The trial court therefore properly declined to give Hill's proposed instruction on the doctrine of legal efficacy.

3. THE ADMISSION OF THE STAMP ON THE MONEY ORDER WAS PROPER UNDER THE CONFRONTATION CLAUSE.

Hill contends that the admission of the stamp stating "Return Unpaid, Non-Treasury Item" on the money order violated his constitutional right under the Confrontation Clause. This claim should be rejected. Because the stamp was imposed in the ordinary course of business and not in anticipation of litigation, the stamp was not testimonial and therefore its admission did not violate the Confrontation Clause.

a. Relevant Facts.

At trial, the State offered the money order presented by Hill as Exhibit One. 2RP 26. Visible on the money order was a stamp stating "Return Unpaid, Non-Treasury Item" that was placed on the money order when it was processed by the Federal Reserve and failed to clear. 2RP 25, 62-63, 97. It is standard protocol that a check that is submitted for processing and does not clear will be stamped before being returned to the institution that submitted it. 2RP 25.

Hill objected to the admission of the money order on the grounds that the stamp was hearsay and violated the Confrontation

Clause. 1RP 12-15; 2RP 4-9, 26. The trial court overruled the objection, finding that the stamp was not testimonial and not barred by the hearsay rules. 2RP 7, 26.

b. An Out-Of-Court Statement That Is Not Testimonial Does Not Violate The Confrontation Clause.

Challenges to the admissibility of evidence based on the Confrontation Clause are reviewed de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. U.S. Const. amend. VI; Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Within the meaning of that clause, "witnesses" are those who make testimonial statements against the defendant. State v. Jasper, 174 Wn.2d 96, 109, 271 P.3d 876 (2012). A non-testimonial statement does not implicate the Confrontation Clause. Id.

c. The Stamp On The Money Order Is Not Testimonial.

A statement is testimonial if it is made under circumstances that would cause a reasonable witness to believe that the statement would be used in a later criminal proceeding. Jasper, 174 Wn.2d at 111 (citing Crawford, 541 U.S. at 52). As noted by the Supreme Court in Crawford, business records are by nature not testimonial. 541 U.S. at 56. The exception, of course, is when the business activity to which the records pertain is the production of evidence for use at trial, such as a laboratory report documenting forensic analysis of evidence in a criminal case. Jasper, 174 Wn.2d at 112 (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)).

Here, the stamp on the money order is not testimonial. It was not created in preparation for criminal prosecution; instead, it was placed on the instrument as part of the normal course of processing all checks and money orders through the Federal Reserve. 2RP 25, 97. Some sort of stamp is placed on any check or money order that is rejected, whether it be for insufficient funds or some other reason. 2RP 25. As such, the stamp was not placed on the check in anticipation of criminal prosecution, and is not

testimonial. See United States v. Hemphill, 514 F.3d 1350, 1358 n.2 (D.C. Cir. 2008) (bank records not testimonial).

Hill contends without authority that a person who places such a stamp should reasonably know that it might one day be used in a criminal prosecution, and that the stamp is therefore testimonial. Brief of Appellant at 28-29. This argument is problematic on several levels. First, there is no evidence in the record that the decision to place such a stamp on the money order was made by a thinking being capable of foreseeing litigation, rather than by a computer or machine as part of an automated process.

Furthermore, all that would be known by the entity placing the stamp was that the money order was invalid in some respect, either by lacking a valid account number, being signed by someone not possessing an account at the U.S. Treasury, or for some other reason. How that deficiency came to be, and whether it was the result of mistake or intentional wrongdoing, would be beyond the knowledge of the entity placing the stamp. Thus, the entity placing the stamp could not know whether criminal prosecution was likely to occur or not, and cannot be said to be acting in anticipation that the stamp would be used in a criminal trial.

Finally, Hill points to no case that holds that a business record is testimonial simply because a business can speculate that there might be a criminal trial someday in which the record might be used. If that were the rule, large swaths of business records would become testimonial, such as an auto body shop's records of the work performed to repair a car that was in an accident, or a hospital's records of a patient's injuries reportedly sustained in a brawl.

Such an expansive definition of "testimonial" is clearly not contemplated by the existing caselaw. See Melendez-Diaz v. Massachusetts, 557 U.S. at 312 n.2 (medical reports created for treatment purposes are not testimonial); United States v. Foerster, 65 M.J. 120, 124 (C.A.A.F. 2007) (victim's affidavit to bank regarding forged checks not testimonial, despite knowledge of possible use by law enforcement, where primary purpose was to obtain reimbursement for stolen funds); Jasper, 174 Wn.2d at 112 (business of producing evidence for trial is exception to the general rule that business records are not testimonial).

Because the stamp on the money order is not testimonial, the trial court did not violate the Confrontation Clause by admitting

it. Even if a violation did occur, it was harmless for the reasons stated below.

d. Any Error Was Harmless.

A violation of the Confrontation Clause is reviewed under the constitutional harmless error standard. Jasper, 174 Wn.2d at 117. Under that standard, the State must show beyond a reasonable doubt that the error did not contribute to the verdict. Id.

In this case, even had the stamp been redacted from the money order, the jury would still have heard testimony by credit union employees that the check did not clear and was returned by the Federal Reserve. 2RP 62. That testimony would have established that Hill did not really have a limitless account in his name at the U.S. Treasury as he claimed. 2RP 149. Additionally, Hill's admission that he had created the money order on his home computer without the permission of the Treasury Department provided overwhelming evidence that the money order was not a valid Treasury Department money order.

In light of all that, the stamp on the money order was merely cumulative, and the jury's verdict would have been exactly the

same had the stamp not been admitted. Any error in admitting the stamp was therefore harmless.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hill's conviction.

DATED this 13th day of May, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine L. Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. KAVEN LIONEL HILL, Cause No. 70742-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of May, 2014.

W Brame
Name
Done in Seattle, Washington

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY 14 PM 3:04