

70742-6

70742-6

No. 70742-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

KAVEN HILL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Kaven Hill committed the crime of forgery.

2. The trial court erred by denying Mr. Hill's motion in arrest of judgment.

3. The trial court erred by refusing to give Mr. Hill's proposed jury instruction on the doctrine of legal efficacy. CP 15.¹

4. The introduction of notations stamped on the back of the purported forged document after he deposited them violated Mr. Hill's constitutional right to confront and cross-examine the witnesses against him.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of the crime beyond a reasonable doubt, including the identity of the defendant. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. In order to convict Kaven Hill of forgery as charged, the State was required to prove beyond a reasonable doubt that Mr. Hill, with the intent to injure or defraud, possessed, offered,

¹ Because the proposed instruction is not numbered, appellant is unable to comply with RAP 10.3(g).

disposed of, or put off as true a written instrument which he knew to be forged. RCW 9A.60.020(1)(a).

a. Where the evidence showed that Mr. Hill believed that the “money order” he created would access funds he was legally entitled to and presented it with that explanation at his credit union, must Mr. Hill’s forgery conviction be dismissed in the absence of proof of that he acted with the intent to injure or defraud another?

b. Where the evidence showed that Mr. Hill openly presented a “money order” at his credit union, believed it would access funds he was legally entitled to and, and explained to the credit union employees that he was attempting to access a United States Treasury account in his name, must Mr. Hill’s forgery conviction be dismissed in the absence of evidence that he knew the written instrument was forged?

c. To be convicted of forgery, a defendant must possess, offer, or put off as true a written instrument that, if genuine, would have some legal efficacy or be the basis of legal liability. Where the money order Mr. Hill deposited at his credit union was not drawn on a financial institution, was payable to both Mr. Hill’s business and the “U.S. Treasury without recourse,” was for a much higher amount than

is the norm for money orders, and contained unusual extraneous language, must Mr. Hill's forgery conviction be dismissed in the absence of evidence that the purported money order had legal efficacy?

2. A defendant is entitled to have the jury instructed on every element of the charged crime, and it is reversible error for the court to fail to provide the jury with the definition of a technical term in the "to convict" instruction when requested by the defense. For the purposes of Washington's forgery statute, an "instrument" must be an instrument that would have legal efficacy or affect legal rights if genuine. The trial court defined "written instrument," "complete written instrument," and "incomplete written instrument," but refused to give the jury Mr. Hill's proposed instruction explaining the legal efficacy doctrine. Where the evidence showed that the purported money order presented by Mr. Hill would have had no legal effect if genuine, must Mr. Hill's conviction be reversed due to the trial court's refusal to give the defendant's proposed instruction?

3. The Sixth Amendment confrontation clause prohibits the introduction of testimonial hearsay unless the declarant is unavailable to testify and the defendant had the prior opportunity to cross-examine the declarant. The trial court introduced the purported money order Mr.

Hill used to open an account at his credit union and refused to redact information that was later stamped on the money order stating “RETURNED UNPAID. NON-TREASURY ITEM.” The witness who stamped this information on the money order did not testify, and the State did not call any other witness from the Treasury Department to explain when or why the stamp was made. Where Mr. Hill’s defense was that his money order was designed to access his account at the U.S. Treasury, was the stamped information testimonial hearsay that violated his Sixth Amendment right to confront the witnesses against him?

C. STATEMENT OF THE CASE

A former long-time federal employee, Kaven Hill was the owner of a small business, DBP Inc., which assisted Native American tribes with economic development. 6/27/13 RP 108-110. Through internet research, Mr. Hill became convinced that the United States Treasury creates a \$1 million bond for every citizen at birth. Id. at 114-18, 121. The bonds are then traded on the New York Stock Exchange. Id. at 117, 121-22. Although the accounts are secret, Mr. Hill believed a citizen is entitled to the money in his account and can access it to use for the payment of debt if he learns how to do so. Id. at 139.

Mr. Hill was surprised and frightened by this information, and he spent several months researching to verify its accuracy. 6/27/13 RP 115-16, 118-20, 124-25, 136, 155-56. Mr. Hill looked at Uniform Commercial Code and financial websites, for example, and also found a Joint House Resolution 196-06/133 from the 112th Congress that authorized the use of the bonds. Id. at 115, 136-38, 155, 157, 167-68. Mr. Hill was also swayed by YouTube testimonials from citizens who reported they used this information to successfully pay their own debts. Id. at 142-43, 155.

In addition, Mr. Hill called the United States Treasury and talked to Leonard Whatley in financial services. 6/27/13 RP 122-23, 158-59. When Mr. Hill provided Mr. Whatley with his “packet number,” which consisted of Mr. Hill’s social security number preceded by zero, Mr. Whatley gave Mr. Hill the information he needed to access his account. Id. at 122-23, 126-27, 159-60.

Mr. Hill was convinced that his conversation with Mr. Whatley confirmed the existence of the account in his name in the Treasury Department. 6/27/13 RP 126, 130, 161-62. He therefore used the information he received from Mr. Whatley and numbers from the back of his birth certificate to create an instrument entitled “money order.”

Id. at 126-32, 166-67. Mr. Hill signed the “money order” which authorized the payment of \$377,986 to DBP, Inc., with the understanding that it would access his personal account held by the Treasury Department. Id. at 149, 154, 162; 7/1/13 RP 7-8; Ex. 1.²

Mr. Hill used the money order to open a business account at Verity Credit Union in Auburn, where he was an established member. 6/27/13 RP 14, 18, 20, 38, 110-11. Verity branch manager Michael Ladoe, however, put an extended hold on the account because “the whole thing, for [lack of] a better word, didn’t look right.” Id. at 28, 92-93.

Mr. Ladoe opined that \$1,000 is normally the maximum amount for money orders and they are normally prepaid, but Mr. Hill’s document was for a much higher amount and was not issued by a financial institution. Id. at 21, 41, 49. In addition, Mr. Ladoe noticed extraneous writing on the money order, including a memo line with unusual language and the statement, “payable to the U.S. Treasury without recourse,” which Mr. Ladoe had never seen before. Id. at 20, 27-28; Ex. 1. The item was also payable to two different entities, DBP, Inc. and the U.S. Treasury. Id. at 41-42. Mr. Ladoe, however,

² A copy of Exhibit One is attached to this brief.

explained that Mr. Hill was very earnest and emphatic in his belief that he could obtain money in this manner and willingly explained how he created it. 6/27/13 RP 44-45.

Assistant Manager Sharie Watson processed Mr. Hill's money order but was suspicious for the same reasons as Mr. Ladoe. 6/27/13 RP 87, 90-92. Ms. Watson sent a copy of the money order to the credit union's fraud officer Melissa Mutic. 6/27/13 RP 51, 56-57. She agreed the money order looked "odd." Id. at 57. In addition to the reasons cited by Mr. Ladoe, Ms. Mutic noted that Mr. Hill's name was spelled incorrectly on the money order. Id. at 57-58. Mr. Hill, however, testified that was the spelling of his name on his Social Security Card. Id. at 131-32.

Ms. Watson later talked to Mr. Hill on the telephone when he called to ask when the funds would be available. Id. at 97-98. Mr. Hill seemed confident that the check would be honored and adamant that the account was legitimate. Id. at 98.

After the money order was returned to the credit union without payment, Mr. Hill was upset when Verity refused to try to process the money order a second time. 6/27/13 RP 33-34, 63-64. Mr. Hill believe the money order was valid and the credit union was not sophisticated

enough to handle it correctly. Id. at 35, 65. The credit union then closed Mr. Hill's business and personal accounts. Id. at 36-37.

The King County Prosecutor charged Mr. Hill with one count of forgery. CP 1. At trial before the Honorable James Cayce, the purported money order was introduced as evidence. Ex. 1. It included stamped markings, "RETURNED UNPAID. NON-TREASURY ITEM," but the State did not call a witness from the Treasury Department to testify about the markings or their meaning. Id. Mr. Hill unsuccessfully objected to the introduction of the stamped information on the grounds that its admission violated his constitutional right to confront and cross-examine the witnesses against him. 6/26/13 RP 12-14; 6/27/13 RP 23-25.

Mr. Hill was convicted as charged. CP 13. He moved for dismissal of the charge on the grounds that no rational jury could have found beyond a reasonable doubt that he (1) had the intent to injure or defraud, (2) falsely made a written instrument, or (3) created a written instrument with legal efficacy.³ CP 52-61; 8/9/13 RP 14-20. The motion was denied, and Mr. Hill was given a standard range sentence. CP 46-51, 62; 8/9/13 RP 20. He now appeals. CP 63-74.

³ Similar motions were denied mid-trial. 6/27/13 RP 100, 104, 105-07.

D. ARGUMENT

1. **The State did not prove beyond a reasonable doubt that Mr. Hill was guilty of forgery.**

In order to convict Mr. Hill of forgery, the State had to prove beyond a reasonable doubt that, with intent to injure or defraud another person, he possessed, offered, disposed of, or put off as true a written instrument that he knew to be forged. Mr. Hill opened a business account at his credit union using a money order he believed would draw on his funds in the U.S. Treasury, but the money order was so obviously false that, even had it been genuine, it created no legal liability on the part of any person or institution. Mr. Hill's forgery conviction must be reversed because the State did not prove beyond a reasonable doubt that he had the intent to injure or defraud, that he knew the money order was a forgery, or that the money order, if genuine, had legal efficacy.

a. The State was required to prove every element of forgery beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The critical inquiry on

appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Mr. Hill was convicted of forgery for offering a false written instrument. CP 13, 24, 32. The relevant section of the forgery statute reads:

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

(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)(b).

b. The State did not prove beyond a reasonable doubt that Mr. Hill acted with the intent to injure or defraud. The intent to commit a crime may be inferred “if the defendant’s conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.” Vasquez, 178 Wn.2d at 8 (quoting State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)). Intent may be inferred from circumstantial evidence, but not evidence that is “patently equivocal.” Id. (quoting Woods, 63 Wn. App. at 592).

The intent to injure or defraud is an essential element of forgery.⁴ RCW 9A.60.020(1); Vasquez, 178 Wn.2d at 7. “‘Defraud’ means ‘[t]o cause injury or loss to . . . by deceit.’” State v. Simmons, 113 Wn. App. 29, 32, 51 P.3d 828 (2002) (quoting Black’s Law Dictionary 434 (7th ed. 1999)). The relevant definition of “‘injure’” is “‘to inflict material damage on.’” Id. (citing Webster’s Third New International Dictionary 1164 (1986)). The State did not prove beyond a reasonable doubt that Mr. Hill intended to injure or defraud.

Mr. Hill created a money order that he believed would access an account in his name in the U.S. Treasury Department, and he used the money order to open a business account at his credit union. Mr. Hill clearly believed that the money order he presented was valid and that it would access funds that were held in an account in his name by the Treasury Department. He did not intent to injure or defraud anyone, and he did not do so.

c. The State did not prove beyond a reasonable doubt that Mr. Hill knew the written instrument was forged. The forgery statute also requires the State to prove beyond a reasonable doubt that the

⁴ Although the jury was not so instructed in Mr. Hill’s case, the intent can be to defraud “any person, association or body politic or corporate whatsoever.” Vasquez, 178 Wn.2d at 7 (quoting RCW 10.58.040).

defendant knew the item he possessed or presented was forged. RCW 9A.60.020(1)(b).

Mr. Hill testified in detail that he created the “money order” only after confirming his account and learning what information to put on the written instrument through internet research and talking to a Treasury Department official. 6/27/13 RP 115-20, 122-27, 155-62, 167-68; 7/1/13 RP 4-6. He presented the instrument openly at the credit union where he had an account for years. 6/27/13 RP 20, 38-39, 44-45, 110. He provided his identification and items such as the articles of incorporation of DBP, Inc, and the instrument itself contained Mr. Hill’s name and social security number. *Id.* at 18-20, 39-40; Ex. 1. See State v. Lutes, 38 Wn.2d 475, 480, 230 P.2d 786 (1951) (“as a general rule, forgery cannot be charged if the accused signs or uses his own true or actual name”). Moreover, the instrument did not state that it was drawn on any financial entity. 6/27/13 RP 41; Ex. 1.

Thus, while Mr. Hill created Exhibit 1, he believed he had followed the direction that were necessary to access the Treasury account in his name to which he was legally entitled. The State did not prove beyond a reasonable doubt that Mr. Hill knew Exhibit 1 was forged.

d. Exhibit 1 did not have the apparent legal efficacy necessary to support a forgery conviction. The rule of legal efficacy has long been the law of Washington. State v. Scoby, 117 Wn.2d 55, 57-58, 810 P.2d 1358, 815 P.2d 1362 (1991); State v. Smith, 72 Wn. App. 237, 239-42, 864 P.2d 406 (1993) (and cases cited therein); see State v. Taes, 5 Wn.2d 51, 53, 104 P.2d 751 (1940); State v. Kuluris, 132 Wash. 149, 152-52, 231 P. 782 (1925); State v. Stiltner, 4 Wn. App. 33, 36, 479 P.2d 103 (1971). The rule provides that, “in order to be the subject of a forgery, the instrument which is forged must be such that if genuine it would appear to have some legal efficacy or be the basis of some legal liability.” Stiltner, 4 Wn. App. at 36; accord Taes, 5 Wn.2d at 53; Smith, 72 Wn. App. at 239. Thus, in Smith, a forgery conviction was reversed where the defendant tried to cash a check that had no drawer’s signature. Smith, 72 Wn. App. at 238, 243. Forgery may be based upon an incomplete written instrument, “but not when it is so incomplete that it would lack legal efficacy even if genuine.” Id. at 243.

The instrument that Mr. Hill brought to the credit union was now drawn on any bank or financial institution. 6/27/13 RP 41; Ex. 1. In Taes, the defendants were charged with presenting a writing that

looked like a bank check but did not contain the name of any bank. Taes, 5 Wn.2d at 53. The Supreme Court affirmed the trial court's dismissal of the charges because the purported check lacked legal efficacy. Id.

It will be observed that the instrument here involved purports to be a bank check, but does not contain the name of any bank. It is, in effect, an order to pay money without stating what bank or person is to pay it. As we view it, this instrument, if genuine, would not have any efficacy as affecting a legal right. This being true, it would not furnish the basis for the charge.

Id. The same is true in Mr. Hill's case. Exhibit 1 does not contain the name of any bank or financial institution that is to pay the money and is thus too incomplete to support a forgery conviction.

Other characteristics of the money order made it clear to the credit union employees that it was unlikely to have any legal effect. It was payable to two different entities, Mr. Hill and the Treasury Department. 6/27/13 RP 41-42; Ex. 1. While the credit union employees knew the maximum for a money order was normally \$1,000, this one was for a much higher amount. 6/27/13 RP 20-21; 57, 91. It was signed by Mr. Hill as the "executor/beneficiary/grantor/administrator," which was also unusual, as was the language that it was payable to the U.S. Treasury "without

recourse.” 6/27/13 RP 58; Ex. 1. Verbiage at the bottom of the money order was also unusual. 6/27/13 RP 58. As Ms. Mutic explained, “It wasn’t making any sense as far as what a money order should look like or typically does look like.” Id.

In short, Exhibit 1 is so incomplete that it would lack legal efficacy even if genuine. Mr. Hill’s forgery conviction must therefore be dismissed. Smith, 72 Wn. App. at 243.

e. Mr. Hill’s forgery conviction must be reversed and dismissed.

Viewing the evidence in the light most favorable to the prosecution, the State did not prove beyond a reasonable doubt that Mr. Hill acted with the intent to injure or defraud or that he knew the written instrument was a forgery. In addition, the item did not look like a money order and did not contain the name of a financial institution that would pay it. The money order was so incomplete and nonsensical that the State failed to prove beyond a reasonable doubt that it would have legal efficacy if genuine. Mr. Hill’s forgery conviction must be reversed and vacated. Vasquez, 178 Wn.2d at 18; Taes, 5 Wn.2d at 54; Smith, 72 Wn. App. at 243.

2. The failure to give Mr. Hill's proposed jury instruction on legal efficacy violated his constitutional right to present a defense.

The jury must be instructed on every element of the charged crime, and the instructions must define any technical terms or expressions. A forgery conviction may only be based upon a written instrument which, if genuine, would have legal effect or be the basis of legal liability. Mr. Hill proposed a jury instruction providing this definition of instrument, but the trial court refused to give the instruction. Mr. Hill's conviction must be reversed because the jury was not provided with this definition of written instrument.

a. The accused is entitled to have the jury instructed on his theory of the case, including the definition of technical terms. The accused's constitutional right to due process includes the right have the jury instructed on his theory of the case if supported by the evidence. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1062 (1997); State v. George, 161 Wn. App. 86, 100, 249 P.3d 202, rev. denied, 172 Wn.2d 1007 (2011); State v. Ginn, 128 Wn. App. 872, 878, 177 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006). The refusal to so instruct is reversible error. Redmond, 150 Wn.2d at 495; Williams, 132 Wn.2d at

260. This Court reviews a trial court's decision not to give a defendant's proposed instruction de novo if the refusal is based on a ruling of law. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

It is well settled that the State must prove every element of the charged offense beyond a reasonable doubt, and the jury must therefore be instructed that it must find every element of the charged offense in order to convict the defendant. State v. Mills, 154 Wn.2d 1, 7-8, 10, 109 P.3d 415 (2005); State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). In addition to instructing the jury as to the elements of the charged offense, the court should define any technical words or expressions. State v. Pouncy, 168 Wn.2d 382, 389, 229 P.3d 678 (2010); State v. Scott, 110 Wn.2d 682, 689-90, 757 P.2d 492 (1988) (referring to the "long-recognized" technical term rule); State v. Allen, 101 Wn.2d 355, 361-62, 678 P.2d 798 (1984). A term is technical if its meaning differs from common usage. State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998); Allen, 101 Wn.2d at 358.

b. Mr. Hill requested the court instruct the jury on the legal efficacy doctrine. A forgery conviction may not be based upon a writing that would not have any legal efficacy if it were genuine. Taes, 5 Wn.2d at 53; Smith, 72 Wn. App. at 239-42; Stiltner, 4 Wn. App. at 36. RCW 9A.60.010 defines “complete written instrument,” “incomplete written instrument,” and “written instrument” but does not define “instrument.” RCW 9A.60.010(1), (2), (7); Scoby, 117 Wn.2d at 57. The courts therefore look to the common law definition of instrument: “an instrument is something which, if genuine, may have legal effect or be the foundation of legal liability.” Scoby, 117 Wn.2d at 57-58.

Mr. Hill therefore proposed that the jury be instructed on this definition of instrument. The proposed instruction read:

In order to constitute forgery, the written instrument must be such that it would have some efficacy in affecting some legal right.

CP 15 (citing Taes, *supra*; Smith, *supra*).

The trial court refused to give the instruction because the cited cases did approve the legal efficacy doctrine as a jury instruction and the court opined “it’s an issue for the judge, not the jury.” 7/1/13 RP 9.

No instruction otherwise informed the jury of the requirement that the written instrument appear to have actual legal efficacy. CP 16-35.

c. The trial court erred by failing to give Mr. Hill's proposed instruction. The trial court instructed the jury that it could convict Mr. Hill of forgery if it found beyond a reasonable doubt that, with the intent to injure or defraud, he "possessed or offered or disposed of or put off as true a written instrument which had been falsely made, completed or altered," and "knew that the instrument had been falsely made, completed or altered." CP 32 (Instruction 13). The trial court also defined "written instrument," and "forged instrument." CP 25-26 (Instructions 6-7). The court, however, refused to give Mr. Hill's proposed instruction informing the jury that the written instrument must, if genuine, have legal efficacy. 7/1/13 RP 9.

In Washington, a conviction for forgery cannot be based upon a purported written instrument which, if genuine, lacked legal efficacy. Taes, 5 Wn.2d at 53; Smith, 72 Wn. App. at 239-42; Stiltner, 4 Wn. App. at 36. Mr. Hill's proposed instruction was thus a correct statement of the law.

The instruction was also supported by the evidence. The purported money order did not appear genuine to the credit union

employees. It was not drawn on any financial institution and thus lacked legal efficacy. Ex 1; 6/27/13 RP 41. See Taes, 5 Wn.2d at 53. It said it was paid to the order of both Mr. Hill's company and the United States Treasury. Ex. 1; 6/27/13 RP 41-42. It contained superfluous language. Ex 1; 6/27/13 RP 92. And it was for over \$1,000, which the bank employees believed was the maximum for a money order. Ex. 1; 6/27/13 RP 91. Thus, the evidence supported the giving of the instruction.

d. Mr. Hill's conviction must be reversed and remanded for a new trial. A defendant has the right "to have the jury base its decision on an accurate statement of the law applied to the facts of the case." State v. Miller, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). The defendant "should not have to convince the jury what the law is." State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987); accord Pouncy, 168 Wn.2d at 392 ("It is not sufficient that counsel were able to argue to the jury their respective understandings of the term based on expert testimony; lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is.").

Although conviction for forgery may not be based upon a writing that, if genuine, would not have any legal efficacy, Mr. Hill's

jury was never instructed that it to find that the purported money order would have any legal impact if genuine. Defense counsel briefly touched on the meaninglessness of the purported money order in closing argument. 1/7/13 RP 34-35. This argument, however, could only have confused the jury as the instructions did not provide any way in which that information could be applied to the case. CP 24-32 (Instructions 5-13). The jury was also instructed to use the law set forth in the instructions, not that stated by the lawyers. CP 17, 19 (Instruction 1).

The court's decision not to give a proposed instruction may be harmless error. Pouncy, 168 Wn.2d at 391. "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." Id. (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)).

Here, the term in question provided an important addition to the court's definition of "written instrument," which was an important element of the crime. The error in failing to give Mr. Hill's proposed instruction was not harmless. Had the jury been informed of the doctrine of legal efficacy, it could easily have concluded the purported

money order in this case was nonsensical. For example the money order was not drawn on any financial institution. It was payable to both Mr. Hill and the U.S. Treasury, the entity he believed had his account with sufficient funds to cover the money order. And it included a “memo” stating that “acceptance of warehouse receipt it paying down continuance reoccurring balance to DBP, Inc.” In short, the money order did not make sense or have any legal effect.

The court’s decision not to give Mr. Hill’s proposed instruction error in this case took away Mr. Hill’s ability to convince the jury that the written instrument in this case was so obviously ineffective that presenting it was not a forgery. The error was not trivial, formal, or academic. This Court cannot be convinced that the jury’s verdict would have been the same had the jury been given Mr. Hill’s proposed instructions. Mr. Hill’s conviction must be reversed and remanded for a new trial. Pouncy, 168 Wn.2d at 392; Allen, 101 Wn.2d at 632.

3. The admission of the notations on Exhibit One violated Mr. Hill’s constitutional right to confront the witnesses against him.

Mr. Hill had the Sixth Amendment right to confront and cross-examine the witnesses against him. The State argued that Mr. Hill’s money order was rejected by the U.S. Treasury as a non-Treasury item.

The State did not call a witness from the Treasury Department, but relied only upon information apparently stamped on the money order after it was deposited and before it was returned to the credit union. Mr. Hill's conviction must be reversed because his constitutional right to confrontation was violated when the stamped information was admitted without providing him the opportunity to cross-examine any witness from the Treasury Department.

a. The Sixth Amendment guarantees the accused the right to confront and cross-examine the witnesses against him. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."⁵ U.S. Const. amend. VI. "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); Crawford v. Washington, 541 U.S. 36, 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

⁵ This guarantee applies to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); accord State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Thus, the integrity of the fact-finding process is jeopardized if the right to confrontation is denied. Darden, 145 Wn.2d at 620.

This Court reviews Mr. Hill’s confrontation clause challenge de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

b. Mr. Hill objected to the introduction of the information stamped upon the purported money order. The words “RETURN UNPAID” and “NON-TREASURY ITEM” appear to have been stamped on the front of the money order Mr. Hill used to open a business account at his credit union. Ex. 1; 6/27/13 RP 23-25. Prior to trial, Mr. Hill argued that the admission of those markings violated his Sixth Amendment right to confront the witnesses against him and that the markings were also hearsay. 6/26/13 RP 12-14. Defense counsel pointed out that it was unknown what institution put the stamp on the purported money order or what the stamp meant. 6/26/13 RP 14. The court admitted the information because it saw no reason for a Treasury

Department witness to testify in light of the Uniform Commercial

Code:

I don't agree on the confrontation issue. I think the statute does make it admissible as an exception to hearsay. I don't think it makes sense to require someone from the U.S. Treasury to come here.

So I will allow it. And maybe the Court of Appeals will disagree with me, but that's my ruling. It can come in.

6/26/13 RP 15.

The next day defense counsel asked the court to readdress its ruling, arguing that the U.C.C. provision relied upon by the prosecutor. RCW 62A.3-505, created an unconstitutional mandatory presumption and that Mr. Hill should be permitted to cross-examine his accuser.

6/27/13 RP 4-5, 7, 8. The court ruled that the stamp was not testimonial and refused to address counsel's hearsay argument. Id. at 7, 8.

Mr. Hill again objected when Exhibit 1 was admitted and the credit union manager testified that someone in the processing system added the stamped "return unpaid." 6/27/13 RP 25-26, 28.

c. The admission of the stamp violated Mr. Hill's constitutional right to confront the witnesses against him. "[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible

against the accused . . .” Bruton v. United States, 391 U.S. 123, 138, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (Stewart, J., concurring). In Crawford, the United States Supreme Court announced the Confrontation Clause forbids the introduction of “testimonial” hearsay against the accused unless the declarant is unavailable and the defendant had the prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 54.

The Crawford Court, however, declined to provide a definitive definition of what qualifies as a “testimonial” statement, instead offering examples of the “core class of testimonial statements.” Id. at 51-52. These include ex parte in-court testimony, affidavits or other “pretrial statements that declarants would reasonably expect to be used prosecutorially,” and affidavits or statements “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Id. Subsequent decisions have done little to shed light on a precise definition of testimonial. See Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 2260, 183 L.Ed.2d 89 (2012) (Thomas J., concurring in judgment) (“formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized

dialogue such as custodial interrogation”); Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143, 1165, 179 L. Ed. 2d 93 (2011) (responses to police interrogation is not testimonial if the “primary purpose” of the interrogation is to meet an ongoing emergency).

The Court has not recently addressed financial records in the context of the Sixth Amendment’s right to confront witnesses. It has, however, made it clear that laboratory test results prepared for purposes of investigation and prosecution of crimes fall within the “core class of testimonial statements” described in Crawford. Melendez-Diaz, 557 U.S. at 310 (addressing “certificates of analysis” stating the weight of bags taken from the defendant and that the seized substance contained “Cocaine”); Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705, 2716-17, 180 L. Ed.2 d 610 (2011) (confrontation clause requires analyst who conducted blood alcohol test and wrote report to testify and be available for cross-examination; report is testimonial).

The Washington Supreme Court has also held that certificates attesting to the existence or nonexistence of public records are testimonial statements for purposes of the Sixth Amendment. Jasper, 174 Wn.2d at 114-15. At issue in three consolidated cases were (1) an affidavit from the Department of Licensing (DOL) stating the Jasper’s

license was suspended on a certain date together with copies of letters from the DOL to the defendant; (2) a certified copy of Cienfuegos's DOL driving record, including a letter of revocation as an habitual traffic offender and an affidavit stating his license to drive had not been reinstated by a particular date; and (3) a certificate from an employee of the Department of Labor and Industries showed that Moi did not have a specialty or general contractor's license. Id. at 101, 103-04, 107. In determining that the various records were testimonial, the Jasper Court reasoned that the certificates were affidavits created for trial and thus "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 115 (quoting Melendez-Diaz, 557 U.S. at 311, in turn quoting Crawford, 541 U.S. at 52).

Using a check that is returned without payment can be the basis for legal liability. The stamps in this case were not necessarily produced specifically for trial, but they were nonetheless statements of fact made under circumstances in which the maker would reasonably believe they would be available for later use at trial. The stamped statement that the purported money order was returned as unpaid and that it was a non-treasury item were substantive evidence against Mr.

Hill, whose guilt was predicated upon the fact that the check was not genuine. The stamped information was thus testimonial.

d. Mr. Hill did not have the opportunity to cross-examine a Treasury Department witness and there was no showing such a witness was unavailable. The admission of testimonial hearsay violates a criminal defendant's constitutional right to confront witnesses unless the defendant had an opportunity to cross-examine the declarant and the declarant is unavailable to testify. Crawford, 541 U.S. at 68. The State did not call any witnesses from the Treasury Department, and Mr. Hill thus no opportunity to cross-examine the person who placed the stamp on the money order.

The burden is on the State to show the witness is unavailable. State v. DeSantiago, 149 Wn.2d 402, 410-11, 68 P.3d 1065 (2003); State v. Hurtado, 173 Wn. App. 592, 606, 294 P.3d 838, rev. denied, 177 Wn.2d 1021 (2103). To demonstrate unavailability for purposes of the confrontation clause, the State must show a "good faith effort" to obtain the witness's presence at trial. DeSantiago, 149 Wn.2d at 411; Hurtado, 173 Wn. App. at 606. If the State makes no effort to produce a witness, it cannot rely on the mere possibility that the witness might refuse to testify. Hurtado, 173 Wn. App. at 606-07.

The State did not make any effort to obtain a witness from the Treasury Department. Nor did the prosecutor assert it would be impossible to do so. See State v. Suleski, 67 Wn.2d 45, 49, 406 P.2d 613 (1965) (Treasury agent testified at trial concerning his investigation); California v. Hung Thanh Mai, 57 Cal.4th 986, 305 P.3d 1175, 1188 (2013) (Treasury Department agent testified concerning counterfeit traveler's checks); United States v. Salman, 531 F.3d 1007, 1010 (bank examiner for Treasury Department testified concerning investigation), cert. denied, 555 U.S. 1008 (2008). The admission of the hearsay statements violated Mr. Hill's constitutional right to confront and cross-examine the witnesses against him.

A Georgia defendant was convicted of forgery and theft by deception for using money orders that the state asserted were counterfeit in Forrester v. Georgia, 315 Ga.App. 1, 726 S.E.2d 476, 477-78 (2012). The only evidence to show that the money orders were counterfeit, however, were copies of the processed money orders, each of which was stamped with the words "Payment Stopped Counterfeit." 726 S.E.2d at 479. The court found that the defendant's right to confront witnesses was violated because she was denied the opportunity to cross-examine the person who made the determination

that the money orders were counterfeit. Id. at 480. Similarly, Mr. Hill's constitutional right to confrontation was violated by the admission of the wording stamped on the processed money order,

e. The violation of Mr. Hill's confrontation right was not harmless beyond a reasonable doubt, and his conviction must be reversed. When constitutional error is identified on appeal, the conviction must be reversed unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); Jasper, 174 Wn.2d at 117. In determining harm associated with a violation of the confrontation clause, courts may consider factors such as the importance of the testimony to the State's case, whether the testimony was cumulative, the presence of corroborating or contradicting evidence, the extent of cross-examination permitted, and the overall strength of the prosecution's case. Van Arsdall, 475 U.S. at 684; Jasper, 117 Wn.2d at 117.

In Forrester, the appellate court concluded that the introduction of the information stamped on the money orders - "Payment Stopped

Counterfeit” - not only violated the confrontation clause, it also relieved the State of its burden of proving that the money orders were counterfeit and shifted the burden of proof to the defendant to prove they were not. Forrester, 726 S.E.2d at 480. The court pointed out that the State did not present any testimony concerning how the determination that the items were counterfeit was made or what identifying factors the institution relied upon to make the determination. Id.

The State did not present any information as to why Mr. Hill’s money order was marked “Return Unpaid. Non-Treasury Item” or what criteria were used to make the decision. The heart of Mr. Hill’s defense was that he had created a money order to access a Treasury Department account in his name. He had no way to counter the stamped statement that his money order was a “Non-Treasury Item.” In addition, the admission of the stamped statements relieved the State of its burden of proving that there was no Treasury account.

The State cannot demonstrate beyond a reasonable doubt that the introduction of the messages stamped on the processed money order did not contribute to the jury’s guilty verdict. Mr. Hill’s conviction

must be reversed and remanded for a new trial. Jasper, 174 Wn.2d at 120.

E. CONCLUSION

Mr. Hill's forgery conviction must be reversed and dismissed because the State did not prove the essential elements of the crime beyond a reasonable doubt.

In the alternative, the conviction must be reversed and remanded for a new trial because (1) the jury was not instructed on a technical definition of "instrument," and (2) Mr. Hill's constitutional right to confront the witnesses against him was violated.

DATED this 11th day of February 2014.

Respectfully submitted,



Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX

EXHIBIT ONE

000000043
08/21/2012
9010066327

is a LEGAL COPY of
check. You can use it
same way you would
the original check.

2102/21/90 10282
0E0040092200000

WARNING: THIS DOCUMENT HAS SECURITY FEATURES IN THE PAPER

KAVEN L. HIL
BOND # F3107813
BC # 134-7110

10282

RETURN UNPAID
MONEY ORDER

Money Order # 40282-000007240

PAY TO THE ORDER OF: DBP, INC. CONSULTING SVC. # 81303200615

NON-TREASURY ITEM

AMOUNT:

3377,886.00XXXXX

X THREE HUNDRED SEVENTY-SEVEN THOUSAND NINE HUNDRED AND EIGHTY-SIX DOLLARS
(to be applied to principle and interest)

0269040088

executor/beneficiary/grantor/administrator Account Name: KAVEN L. HIL
No.: 200 04 0010 PAYABLE TO THE U.S. TREASURY WITHOUT RECOURSE

MEMO
ACCEPTANCE OF WAREHOUSE RECEIPT IS PAYING DOWN
CONTINUAL REOCCURING BALANCE TO DBP, INC. TECHNICAL ADMINISTRATIVE CONSULTING SERVICES

40282

000000518-000007240 120815

1: 777777776:

00000 7 21.0

0037798600

2: 325081885:

0037798600

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Sinc...
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 70742-6-I
)	
KAVEN HILL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

U.S. MAIL
 HAND DELIVERY

KAVEN L. HILL
3449 NE SHORE CLIFF STREET
BREMERTON, WA 98311

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 HAND DELIVERY

FILED
STATE OF WASHINGTON
COURT OF APPEALS DIV. 1
2014 FEB 11 PM 4:35

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF FEBRUARY, 2014.

x. 

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