

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.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY..... 1

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

    2. **The failure to give Mr. Hill’s proposed jury instruction on legal efficacy violated his constitutional right to present a defense**..... 7

        a. Mr. Hill ‘s proposed instruction provided a technical definition of the term “written instrument” ..... 8

        b. Mr. Hill was entitled to the instruction because it informed the jury of his defense ..... 10

        c. Mr. Hill’s case is not governed by cases addressing lawful court orders ..... 11

        d. Mr. Hill’s conviction must be reversed because the trial court did not give his proposed instruction..... 15

    3. **The admission of the notations on Exhibit One violated Mr. Hill’s constitutional right to confront the witnesses against him** ..... 15

B. CONCLUSION..... 18

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>State v. Allen</u> , 101 Wn.2d 355, 678 P.2d 798 (1984).....	9, 15
<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995).....	4
<u>State v. Boss</u> , 167 Wn.2d 710, 223 P.3d 506 (2009).....	11
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997), <u>cert. denied</u> , 523 U.S. 1007 (1998).....	8
<u>State v. Chavez</u> , 163 Wn.2d 262, 180 P.3d 1250 (2008) .....	13
<u>State v. Davis</u> , 73 Wn.2d 271, 438 P.2d 185 (1968), <u>overruled on other</u> <u>grounds</u> , <u>State v. Abdulle</u> , 174 Wn.2d 411 (2012).....	2
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	4
<u>State v. Jasper</u> , 174 Wn.2d 96, 271 P.3d 876 (2012) .....	16, 18
<u>State v. Kuluris</u> , 132 Wash. 149, 231 P. 782 (1925).....	10
<u>State v. Miller</u> , 156 Wn.2d 23, 123 P.3d 827 (2005) .....	11
<u>State v. Morse</u> , 38 Wn.2d 927, 234 P.2d 478 (1951).....	10, 14
<u>State v. Pouncy</u> , 168 Wn.2d 382, 229 P.3d 678 (2010) .....	8, 9
<u>State v. Scoby</u> , 117 Wn.2d 55, 810 P.2d 1358, 815 P.2d 1362 (1991).....	4, 10, 13, 14, 15
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988) .....	9
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001) .....	8
<u>State v. Taes</u> , 5 Wn.2d 51, 104 P.2d 751 (1940).....	5, 10, 14

<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	13
--	----

**Washington Court of Appeals Decisions**

<u>Joy v. Dep’t of Labor &amp; Industries</u> , 170 Wn. App. 614, 285 P.3d 187 (2102), <u>rev. denied</u> , 176 Wn.2d 1021 (2013) .....	6
<u>State v. Carmen</u> , 118 Wn. App. 655, 77 P.3d 368 (2003), <u>rev. denied</u> , 151 Wn.2d 1039 (2004).....	11
<u>State v. Flora</u> , 160 Wn. App. 549, 553, 2459 P.3d 188 (2011).....	9
<u>State v. Green</u> , 157 Wn. App. 833, 239 P.3d 1130 (2010).....	12
<u>State v. Koch</u> , 157 Wn. App. 20, 237 P.3d 287 (2010), <u>rev. denied</u> , 170 Wn.2d 1022 (2011).....	10
<u>State v. O’Donnell</u> , 142 Wn. App. 314, 174 P.3d 1205 (2007) .....	9
<u>State v. Smith</u> , 72 Wn. App. 237, 864 P.2d 406 (1993)... 5, 7, 10, 13, 14	
<u>State v. Stiltner</u> , 4 Wn. App. 33, 479 P.2d 103 (1971).....	5, 14
<u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005).....	7

**United States Supreme Court Decisions**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	3
<u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).....	10
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	16
<u>Holmes v. South Carolina</u> , 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).....	10

<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).....	16
--	----

**Federal Circuit Court of Appeal Decision**

<u>United States v. Hemphill</u> , 514 F.3d 1350 (D.C. Cir. 2008), <u>cert. denied</u> , 555 U.S. 1130 (2009).....	17
--	----

**United States Constitution**

U.S. Const. amend. VI.....	4, 10
U.S. Const. amend. XIV .....	4, 10

**Washington Constitution**

Const. art. I, § 22 .....	4, 10
---------------------------	-------

**Washington Statutes**

RCW 62A.3-505 .....	17
RCW 9A.04.060 .....	13
RCW 9A.60.020 .....	1, 2

**Washington Court Rules**

RAP 10.3 .....	6, 7
----------------	------

**Other Authority**

Fed. R. Evid. 1006 .....	17
--------------------------	----

A. ARGUMENT IN REPLY

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

Kavin Hill was convicted of forgery for preparing and attempting to open an account with a money order he believed would draw on personal funds held in the U.S. Treasury. The money order was so obviously false that, even had it been genuine, it would not have created legal liability. 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.

The essential elements of forgery as charged in this case are that the defendant (1) with the intent to injure or defraud, (2) possessed, uttered, offered, disposed of, or put off as true a written instrument (3) which he knew was falsely made. CP 1, 24, 32; RCW 9A.60.020(1)(a). The State argues that, viewing the evidence in the light most favorable to the prosecution, it proved every element of forgery beyond a reasonable doubt. Brief of Respondent at 5-13 (hereafter BOR).

First addressing the intent element, the State claims that the facts of the case demonstrate the intent to defraud the credit union or the U.S. Treasury. BOR at 6 (citing State v. Davis, 73 Wn.2d 271, 289,

438 P.2d 185 (1968), overruled on other grounds, State v. Abdulle, 174 Wn.2d 411 (2012)). The Davis Court, however, pointed out that criminal intent may not be inferred from acts that are “patently equivocal.” Davis, 73 Wn.2d at 289.

Mr. Hill created a money order that he believed would access an account in his name in the U.S. Treasury Department. He used it to open a business account at a credit union where he had an account and known. 6/27/13 RP 14, 18, 20, 38, 110-11. He provided identification and items such as the articles of incorporation of his business, and the money order contained Mr. Hill’s name and social security number. Id. at 18-20, 39-40; Ex. 1. Mr. Hill did not try to hide what he was doing from the credit union employees, but instead explained why he was entitled to the money. Id. at 35, 44-45, 64, 72-73, 98. Mr. Hill believed that the money order he presented was valid and would access funds that he had a legal right to use. 6/27/13 136-138, 149; 6/28/13 RP 7-8. The State did not prove he acted with the necessary criminal intent.

The forgery statute also requires the State to prove beyond a reasonable doubt that the defendant knew the item he possessed or presented was forged. RCW 9A.60.020(1)(b). The prosecutor points

out that Mr. Hill testified that he created the money order and thus knew it was not issued by the U.S. Treasury. BOR at 7-9. The jury, however, was required to find beyond a reasonable doubt that Mr. Hill know that item was “falsely made.” CP 32; RCW 9A.60.020(1)(b).

Mr. Hill testified that he engaged in research that convinced him that the money order was lawful, including speaking to an official at the Treasury Department. 6/27/13 RP 115-20, 122-27, 155-62, 167-68; 7/1/13 RP 4-6. Thus, while Mr. Hill created Exhibit 1, he believed he had followed the required procedure to access an account to which he was legally entitled. The State did not prove beyond a reasonable doubt that Mr. Hill “falsely made” the money order.

Finally, Mr. Hill’s conviction must be reversed because the document he deposited, Exhibit 1, did not have the apparent legal efficacy necessary to support a forgery conviction. The State first asserts that Mr. Hill waived this issue by not raising it when Exhibit 1 was admitted. BOR at 10. The State is incorrect.

Mr. Hill did not plead guilty. He pled not guilty and went to trial, thus requiring the State to prove every element of the 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, §, 22. Like the defendant in Scoby, Mr. Hill specifically challenged the legal efficacy of the written instrument in the trial court. See State v. Scoby, 117 Wn.2d 55, 57, 810 P.2d 1358, 815 P.2d 1362 (1991) (defendant moved to dismiss charges on the grounds that a \$1 bill is not a written instrument for purposes of the forgery statute). Mr. Hill addressed legal efficacy in a motion to dismiss after the State rested and a post-trial motion in arrest of judgment and dismissal. CP 59-61; 6/27/13 RP 105-07; 8/9/13 RP 19-20. Defense counsel also argued in closing that the document “has no effect” and the credit union employees were not surprised when it was not honored. 7/1/13 RP 34-35.

Moreover, the sufficiency of the evidence may always be raised on appeal after trial. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998) (appeal is the first time the sufficiency of the evidence can realistically be challenged); State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995) (sufficiency of evidence may always be challenged for first time on appeal). This Court should reject the State’s argument and consider Mr. Hill’s challenge to his forgery conviction on this basis.

The State’s argument that the purported money order in Mr. Hill’s case passes the legal efficacy test must also be rejected. BOR at

9-13. The common law rule of legal efficacy 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.” State v. Smith, 72 Wn. App. 237, 239, 864 P.2d 406 (1993) (holding check that lacks a drawer’s signature is insufficient to support forgery conviction); accord State v. Taes, 5 Wn.2d 51, 53, 104 P.2d 751 (1940) (bank check without the name of a bank, if genuine, would not have any efficacy affecting a legal right); State v. Stiltner, 4 Wn. App. 33, 36-37, 479 P.2d 103 (1971) (handwritten note on court file jacket could not support conviction for forgery because it lacked legal efficacy and could not be the basis for legal liability).

In Mr. Hill’s case, the credit union employees did not believe the document Mr. Hill presented was a genuine money order. It was not drawn on any bank or financial institution. 6/27/13 RP 41; Ex. 1. It was payable to two different entities, Mr. Hill and the Treasury Department.<sup>1</sup> 6/27/13 RP 41-42; Ex. 1. It was signed by Mr. Hill as the “executor/beneficiary/grantor/administrator,” which was not the

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<sup>1</sup> The State claims that Mr. Hill testified that he meant to write “payable by the U.S. Treasury.” BOR at 11 (citing 6/27/13 RP 133-34). What Mr. Hill said, however was that “payable to the U.S. Treasury without recourse” meant that “the account is being drawn upon at the U.S. Treasury Department without recourse.” 6/27/13 RP 133-34.

norm for a money order, nor was the language stating 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; Ex. 1 (“Acceptance of warehouse receipt is paying down continual recurring balance to DBP, Inc. Technical Administrative-Consulting Services”). And, the money order was for a much higher amount than a genuine money order. 6/27/13 RP 20-21; 57, 91.

The State argues that the money order would have legal effect if genuine because it included the U.S. Treasury routing number. BOR at 12. The State, however, provides no authority for this argument, especially when there was no valid account or account number. *Id.* The State also refers this Court to the Uniform Commercial Code, without providing any authority that UCC definitions are relevant in determining the sufficiency of the evidence in a forgery prosecution. BOR at 10. This Court need not address a legal argument that is not supported by authority. *Joy v. Dep’t of Labor & Industries*, 170 Wn. App. 614, 629, 285 P.3d 187 (2102), rev. denied, 176 Wn.2d 1021 (2013); RAP 10.3(a)(6); RAP 10.3(b).

The State’s argument that Exhibit 1 would have had legal efficacy had it been genuine must be rejected. The credit union

employees knew that the purported money order was not genuine, but deposited it to humor Mr. Hill, who genuinely believed he could use it to access an account in his name at the U.S. Treasury. The document thus lacked the legal efficacy necessary to support a forgery conviction.

The State does not address whether the failure to give the instruction was harmless, thus apparently conceding this issue. RAP 10.3(b); RAP 10.3(a)(6); State v. Ward, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005). For the reasons state above and in the Brief of Appellant, Mr. Hill's forgery conviction must be reversed and dismissed. 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.**

Charged with forgery, Mr. Hill proposed a jury instruction informing the jury of the common law doctrine of legal efficacy, which provides that a forgery prosecution may not be based upon a written instrument that, if genuine, would not have any legal effect.<sup>2</sup> The instruction would have provided the jury with law it needed to decide

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<sup>2</sup> The instruction, CP 15, reads:

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

Mr. Hill's case and was essential his defense, and the trial court's refusal to give this instruction requires reversal of his conviction.

In response, the prosecutor asserts that the doctrine of legal efficacy is only relevant to the admissibility of an instrument as evidence. BOR at 13-22. The authority provided by the State does not address jury instructions, forgery prosecutions, or the definition of the term "instrument." The State's analogy to cases addressing the validity of court orders is off point and should be rejected.

a. Mr. Hill's proposed instruction provided a technical definition of the term "written instrument." There is no question that the jury must be instructed that it must find every element of the charged offense in order to convict the defendant. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). The trial court must also define technical words and terms used in jury instructions. State v. Pouncy, 168 Wn.2d 382, 389, 229 P.3d 678 (2010); State v. Brown, 132 Wn.2d 529, 611, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Words and expression that are commonly understood, however, need not be defined. Brown, 132 Wn.2d 611-12. "The technical term rule attempts to ensure that criminal defendants are not convicted by a jury

that misunderstands the applicable law.” State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

Thus, it is reversible error for a trial court to refuse to instruct the jury on the statutory definition of a mental element when requested by the defense. State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 798 (1984) (intent); State v. Flora, 160 Wn. App. 549, 553, 553, 2459 P.3d 188 (2011) (accepting State’s concession that trial court erred by not giving defendant’ proposed instruction defining recklessness). Similarly, the term “personality disorder” must be defined for the jury hearing a civil commitment proceedings under RCW 71.09. Pouncy, 168 Wn.2d at 391-92. The court, however, need not define the word “theft” for the jury because the term is commonly understood. State v. O’Donnell, 142 Wn. App. 314, 325, 174 P.3d 1205 (2007).

In order to convict Mr. Hill of forgery, the jury was required to find beyond a reasonable doubt that he possessed, offered, or put off as true a “written instrument” that had been falsely made, that he knew “the instrument” had been falsely made, and that he acted with the intent to injure or defraud. CP 32. “The recognized rule is that, in order to constitute a forgery, a writing or instrument must be such that if genuine it would have efficacy as affecting some legal right.” State

v. Morse, 38 Wn.2d 927, 929, 234 P.2d 478 (1951) (citing State v. Kuluris, 132 Wash. 149, 231 P. 782 (1925) and Taes, supra); accord Scoby, 117 Wn.2d at 57-58. This common law definition of instrument for the purposes of forgery is not common knowledge and should have been given to the jury as requested. The court's refusal to give his proposed instruction denied Mr. Hill the right to have his case decided by a jury that understood the law.

b. Mr. Hill was entitled to the instruction because it informed the jury of his defense. The federal constitution guarantees “a meaningful opportunity to present a complete defense.” Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)); U.S. Const. amends. VI, XIV; accord Const. art. I, § 22. Due process thus requires that jury instruction “fully instruct the jury on the defense theory.” State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), rev. denied, 170 Wn.2d 1022 (2011). Mr. Hill's proposed instruction informed the jury of the doctrine of legal efficacy, part of Mr. Hill's defense. See Smith, 72 Wn. App. at 243 (reversing forgery conviction because written instrument so incomplete that it would lack legal efficacy even if genuine).

c. Mr. Hill's case is not governed by cases addressing lawful court orders. The State responds to Mr. Hill's argument concerning his proposed instruction by analogizing to cases addressing the validity of court orders. BOR at 15-21 (citing State v. Boss, 167 Wn.2d 710, 223 P.3d 506 (2009) (juvenile court order giving custody of child to Department of Social and Health Services); State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005) (domestic violence no-contact order); and State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003) (two prior convictions for violating no-contact orders), rev. denied, 151 Wn.2d 1039 (2004)). In Boss and Miller, the court held that the existence of a court order was an element of the crimes of custodial interference and violation of a no-contact order. Boss, 167 Wn.2d at 718-19; Miller, 156 Wn.2d at 24. The lawfulness of the court orders, however, was question for the trial court to decide as a matter of law. Boss, 167 Wn.2d at 718; Miller, 156 Wn.2d at 24. In Carmen, the Court of Appeals found that the judge, and not the jury, determines the validity of prior convictions that are a necessary element of felony violation of a no contact order. Carmen, 118 Wn. App. at 667-68.

The cases relied upon by the State address judicial orders, and their rulings do not extend to written instruments. This Court, for

example, declined to extend the reasoning of Miller and related cases to a trespass notice in State v. Green, 157 Wn. App. 833, 845-46, 239 P.3d 1130 (2010). Instead, this Court concluded that in a prosecution for criminal trespass, the State had the burden of proving beyond a reasonable doubt to the jury that the school district lawfully issued the trespass notice. Green, 157 Wn. App. at 850-51. The trespass order was easily distinguished from a court order, which is entitled to deference, because it was not issued based upon by facts found by a court after affording the parties due process.

Violation of the judicial order gives rise to criminal punishment without evidence regarding the facts underlying the order, because those facts have already been established in a prior judicial proceeding. The notice of trespass issued by the school district is not a judicial order and was not issued with the same procedural protections as a judicial order. The school district's notice of trespass is not entitled to the same deference as a judicial order.

Id. at 846. This State must reject the State's misguided invitation to address Mr. Hill's proposed instruction by using the "roadmap" of cases addressing court orders. BOR at 17.

Even if this Court agrees that written instruments should be viewed as court orders, the State's reasoning does not support the conclusion that the jury instruction was properly refused. For example,

the State begins by arguing the apparent legal efficacy is not a statutory element of forgery. BOR at 17-18. A common law element or term may be defined for the jury. “Assault,” for example, is not defined in the criminal code, but juries are routinely provided the common law definition of assault. State v. Chavez, 163 Wn.2d 262, 273-74, 180 P.3d 1250 (2008); State v. Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994). Mr. Hill’s instruction would have provided the jury with “the common law definition of the term ‘instrument.’” Scoby, 117 Wn.2d at 57.

The State also argues that legal efficacy is not an implied element of forgery. BOR at 18-20. This argument flies in the face of the long line of Washington cases addressing the doctrine. The Smith Court reviewed this common law tradition and found that doctrine of legal efficacy survived the adoption of the Criminal Code of 1975 and amendment of the forgery statute. Smith, 72 Wn. App. at 239-43; see RCW 9A.04.060 (“The provisions of the common law relating to the commission of crime and punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state . . .”). It is clear that Washington forgery convictions may not be based upon a written

instrument that, if genuine, would have no legal effect. Scoby, 117 Wn.2d 57-58 (looking to the common law for guidance in defining term “instrument” in forgery statute); Smith, 72 Wn. App. at 243 (written instrument may not support charge of forgery if it is so incomplete that it would lack legal efficacy if genuine).

The State’s claim that legal efficacy is a question of “applicability” and not an element of forgery must be rejected. The State fails to refer this Court to any cases addressing forgery, the legal efficacy doctrine, or even jury instructions. BOR at 20-21. Washington cases have repeatedly used the legal efficacy doctrine in reviewing the sufficiency of the elements of forgery. Scoby, 117 Wn.2d at 57-61 (altered \$1 bill had legal efficacy necessary to support conviction); Morse, 38 Wn.2d at 930 (upholding forgery conviction); Taes, 5 Wn.2d at 53 (upholding dismissal of forgery conviction after State rested); Smith, 72 Wn. App. at 243 (reversing forgery conviction based upon unsigned check); Stiltner, 4 Wn. App. at 36 (affirming trial court’s dismissal of forgery count because forgery would have no legal efficacy if genuine).

d. Mr. Hill's conviction must be reversed because the trial court did not give his proposed instruction. The State argues that Mr. Hill cannot challenge the court's failure to give his jury instruction because he did not object to the admission of Exhibit 1. BOR at 21-22. The State's argument is not based upon authority addressing jury instructions. Mr. Hill requested the instruction and may challenge the court's refusal to instruct the jury on appeal. CP 14-15.

Mr. Hill requested a jury instruction providing the jury with "the common law definition of the term 'instrument.'" Scoby, 117 Wn.2d at 57. The State side-steps the issue by urging this Court to review the court's decision not to give the instruction as if the instrument were a prior conviction or other court order. The trial court erred, and Mr. Hill's conviction must be reversed. Allen, 101 Wn.2d 632.

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

Mr. Hill objected to the admission of the phrases "RETURN UNPAID" and "NON-TREASURY ITEM" stamped on the front of the money order on the grounds that they violated his constitutional right to confront the witnesses against him. BOA at 22-33. He argues that the statements were testimonial and he did not have the opportunity to

cross-examine the maker of the statements. BOA at 22-31. The State responds that the stamped statements were not testimonial and their introduction was harmless. BOR at 23-29.

In support of its argument that the phrases are not testimonial, the State relies upon dicta, one federal case, and a military case. The United States Supreme Court has never ruled that business records like the stamps on the money order in this case are not testimonial, and statements that they are “by nature not testimonial” are dicta. BOR at 25; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (addressing crime laboratory analysis certificates); Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (statement to investigating law enforcement officer). The Washington Supreme Court has also not addressed business records, and the State merely refers this Court to the Jasper Court’s recitation of the Melendez-Diaz Court’s dicta. BOR at 25, 27 (citing State v. Jasper, 174 Wn.2d 96, 112, 271 P.3d 876 (2012)).

The State also misrepresents the holding of a federal case, which holds that the district court did not abuse its discretion in admitting summary chart prepared by the government in a prosecution for embezzlement and other crimes spanning a seven-year period. BOR at

25-26; United States v. Hemphill, 514 F.3d 1350, 1353-54, 1358-59 (D.C. Cir. 2008) (citing Fed. R. Evid. 1006), cert denied, 555 U.S. 1130 (2009). In a footnote, the Hemphill Court finds that the chart was not testimonial, citing the Crawford dicta for the proposition that “bank records and credit card statements” are not testimonial. Hemphill, 514 F. 3d at 1358 n.2. The Hemphill opinion does not provide the authority the State needs to show that the stamp on the money order in this case was not testimonial.

The State’s argument that the stamped phrases were not made in anticipation of a criminal prosecution is based largely on hypothesis. BOR at 26-27. Under the Uniform Commercial Code, however, a stamp saying payment was refused is admissible and creates a “presumption of dishonor.” RCW 62A.3-505. The maker of any such stamp is thus well-aware that it could be used in a prosecution or later civil litigation.

Finally, the error in admitting the stamped statements were not harmless. Mr. Hill’s defense was that he was legally entitled to money in a Treasury account in his name. The credit union employees did not testify why the money order was returned. See 6/27/13 RP 28-29, 57, 62-63. The introduction of the stamped statements, including “Non-

Treasury Item,” was not harmless, and Mr. Hill’s conviction must be reversed and remanded for a new trial. Jasper, 174 Wn.2d at 120.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court must reverse and dismiss Mr. Hill’s forgery conviction because the State did not prove the essential elements of the crime beyond a reasonable doubt.

In the alternative, the conviction should 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 17<sup>th</sup> day of June 2014.

Respectfully submitted,



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Washington Appellate Project  
Attorneys for Appellant

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

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

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **REPLY 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:

[X] STEPHANIE GUTHRIE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] KAVEN HILL 3449 NE SHORE CLIFF ST BREMERTON, WA 98311	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF JUNE, 2014.

x \_\_\_\_\_ 

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