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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,) Filed June 25, 1985

vs.)

FRANK LEE PROPPS,) 5-139
84-836

Defendant-Appellant.)

Appeal from the Iowa District Court for Polk County - Gene L. Needles, Judge.

Defendant appeals from conviction and sentence for false use of a financial instrument. On appeal defendant asserts that an unsigned money order is not a financial instrument within the meaning of Iowa Code section 715.1. AFFIRMED.

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Defendant appeals from conviction and sentence for false use of a financial instrument (FUFI), in violation of Iowa Code section 715.6 (1983), as amended by 1983 Iowa Acts, ch. 183, section 1. On appeal, defendant asserts that: (1) the trial court erred in overruling defendant's hearsay and best evidence objections to the admission of a photocopy of a copy of a money order; (2) an unsigned money order is not a financial instrument within the meaning of Iowa Code section 715.1; (3) the State presented insufficient evidence to prove that the defendant knew the money order was not what it purported to be; and (4) defendant received ineffective assistance of counsel when trial counsel failed to object to the omission of the knowledge element in the FUFI marshalling instruction. We affirm.

On October 27, 1983, the defendant, Frank Propps, and Darlene Arant entered Stew Hansen Dodge in Des Moines to purchase some auto parts. As payment, Propps tendered a money order made out for $193.50. The order was not signed by the maker, the payee was blank, and the figures appeared scratched and blurred. Stew Hansen's cashier was suspicious of the order and decided not to accept it. Propps and Arant left before the order was returned. A Stew Hansen employee then contacted the police. Propps and Arant were apprehended later that day. After a jury trial, Frank Propps was convicted of false use of a financial instrument. He has appealed from this determination.

I.

Defendant's first assignment of error is that a photocopy of the money order was improperly admitted at trial. He claims the trial court erred in overruling his hearsay and best evidence objections to this exhibit. We cannot agree.

Iowa Rule of Evidence 803(b) sets forth the foundation for admission of business records:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information

> transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In order to lay the foundation for introduction of the photocopy of the money order, the State called Michelle Carson as a witness. Carson testified that she worked at a Kwik Shop on Harding Road in Des Moines during October 1983. Her duties included selling money orders; she indicated that she sold the money order left at Stew Hansen Dodge by Propps as evidenced by her initials on the money order. Carson also described her normal routine when issuing money orders which included retaining a copy of the order for the store's home office, explained how the records were kept, and indicated that the photocopy of the money order in question was kept in the course of regularly-conducted business activity.

The State's next witness, police officer Ronald Warne, testified he went to the Kwik Shop where the money order was allegedly issued and photocopied the store's copy of the money order. It was this photocopy that was actually admitted into evidence.

Carson's and Warne's testimony adequately establishes the trustworthiness of the business records. It is apparent from Carson's testimony that she had actual knowledge of how the records were kept and that the photocopy of the money order in question was kept in the course of regularly-conducted business activity. Warne established that a copy of the store's records was obtained in a trustworthy fashion. Furthermore, the exhibit in question was used only to establish matters within the personal knowledge of the State's witnesses. Compare Union Story Trust & Sav. Bank v. Sayer, 332 N.W.2d 316, 320-21 (Iowa 1983). We therefore conclude that defendant's hearsay objection was properly overruled.

Contrary to defendant's assertion, we also believe that the admission of this evidence did not violate the best evidence rule. Iowa Rule of Evidence 1003 provides, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) under the circumstances, admission of the duplicate would be unfair." Since neither of these exceptions is applicable, it is evident that the trial court acted properly in overruling defendant's objection.

II.

Defendant also argues that an unsigned money order is not a financial instrument as defined in Iowa Code section 715.1 (1985) and that his conviction should be reversed.

False use of a financial instrument is an aggravated misdemeanor or class "D" felony, depending on the value of property involved, pursuant to section 715.6 of the Code. A financial instrument is defined at section 715.1:

> A check, bill, note, draft, bond receipt, or any writing which ostensibly evidences an obligation of, or surrender of right or claim by, the person who has purportedly executed it or authorized its execution. "Writing" includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, and other symbols of value, right, privilege, or identification.

The State presents two arguments to counter defendant's contention that an unsigned money order is not a financial instrument. It argues that if the instrument is listed above in the Code, it is not necessary it evidence an obligation of, or surrender of a right or claim. Only those instruments not specifically listed must meet this criteria. A money order is a draft, the State says, and therefore does not need to evidence an obligation or surrender of claim. In the alternative, it is argued that a writing need not be negotiable to fit the definition of a financial instrument.

Our decision here necessarily involves interpretation of the statute. The

intent of the legislature in drafting the statute is controlling in our interpretation. Hubbard v. State, 163 N.W.2d 904, 909 (Iowa 1969). The court is to look at the object to be accomplished, the evils to be remedied or purpose to be served, and then give a liberal construction to the law which will best effect its purpose. Shidler v. All American Life and Financial Corporation, 298 N.W.2d 318, 321 (Iowa 1980). All parts of the statute should be read together and we are not to give undue importance to a single or isolated part. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981).

The State contends that it was the intent of the legislature in drafting the statute in question to include within the chapter fraud committed using various instruments, citing 4 J. Yeager & R. Carlson, Iowa Practice: Criminal Law and Procedure § 352 (1979) for authority. The actions described in the statute are proscribed because they are a threat to the economic system since they violate the integrity of devices vital to the functioning of the system. Id. False use of an unsigned money order also violates the integrity of the economic system, the State says, and legislative intent is furthered by including it in the definition of a financial instrument.

The State also relies on the case of State v. Tussing, 340 N.W.2d 257, 279 (Iowa 1983), for its proposition. There, the court indicated a savings withdrawal slip is a financial instrument since, although it is not expressly listed in the statute, it is included in the general language of the Code. Id. at 297.

In our interpretation of the statute, we first look to the words used in the Code. In examining the section as a whole, we cannot agree that the legislature first listed items which were unconditionally included in the definition of financial instruments, and then gave an alternative general definition. Instead, it appears the legislature listed specific examples of what could be a financial instrument, and then gave the general definition which would include all the various instruments too numerous to list. This is the type of situation which occurs

commonly enough in drafting law that the courts have developed the principle of ejusdem generis; where specific words are followed by general words, and the general definition is to be construed as limited by the specific examples. See e.g. DeMore by DeMore v. Dieters, 334 N.W.2d 734, 738 (Iowa 1983).

We believe this also comports with the intent of the legislature. Part of the purpose in writing Chapter 715 was to consolidate identical and essentially related criminal offenses. Note, False Use of a Financial Instrument, 60 Iowa L. Rev. 548, 550 (1975). Forgeries not involving financial instruments are treated elsewhere in the Code, and apparently "the underlying rationale is . . . that the use of these documents does not result in a surrender of right or a claim of right in some property." Id. at 550-51 (citing Proposed Code ch. 4, Coordinating Amendments § 72 amending Iowa Code § 98.38 (1973); § 106 amending Iowa Code § 114.25 (1973); § 149 amending Iowa Code § 147.84 (1973)).

Essentially, we conclude that in order for a writing to be considered a financial instrument, it must evidence "an obligation of, or surrender of right or claim by, the person who has purportedly executed it or authorized its execution." Thus, the question which we must address is whether a money order not signed by the maker fits this definition. This is a question of first impression in Iowa. The intent of the legislature regarding this statute has been previously discussed only in terms of the fact that some sort of alteration is required before a conviction can be had. See State v. Schoelerman, 315 N.W.2d 67, 73-75 (Iowa 1982); State v. Sanders, 309 N.W.2d 144, 147 (Iowa Ct. App. 1981).

In analyzing the statutory provision as a whole, we believe that an unsigned money order is a financial instrument within the meaning of section 715.1. Due to the very nature of a money order, signed or unsigned, it evidences a surrender of right or claim. The purchaser of a money order pays a sum of money and in return receives the order as evidence of payment. The surrender of claim or right to a specified amount of money is made at the time the money order is issued. If a

purchaser neglects to sign the money order, this would certainly affect the negotiability of the instrument; however, it does not change the fact that the purchaser tendered money at some point in order for it to be issued. Thus, unlike a check, for instance, a money order by its very existence represents the surrender of right required by section 715.1.

The defendant argues that such a conclusion would be inappropriate. He claims that the provisions of the Uniform Commercial Code and our prior case law indicate that a writing must be signed or have legal efficacy in order to be a financial instrument. We disagree.

We recognize that pursuant to the U.C.C. a writing must be signed by the maker or drawer in order to be considered a negotiable instrument. Iowa Code § 554.3104(1)(a) (1985). However, there is nothing within the terms of section 715.1 which would indicate that the phrase "financial instrument" should be equated with the term "negotiable instrument." In fact, in defining the term "financial instrument" the legislature listed several examples which clearly are not negotiable within the meaning of the U.C.C. Pursuant to section 715.1, credit cards, trademarks, tokens, stamps, and seals are all examples of writings which can be financial instruments, although they are not negotiable instruments.

In accordance with the plain language of the statute, we therefore conclude that a writing need not be negotiable in order to be considered a financial instrument. Any conclusion to the contrary would limit the applicability of Chapter 715 far beyond its terms, a result which we should make every attempt to avoid.

Defendant also relies on the case of State v. Couch, 250 Iowa 56, 68, 92 N.W.2d 580, 582 (1958), to support the proposition that a writing must have legal efficacy in order to be a financial instrument. Although this case was decided before the enactment of Chapter 715, we recognize its relevancy since Chapter 715 merely represents a consolidation of related offenses, not a change in

substantive law. However, we do not believe Couch supports defendant's position. In Couch, the supreme court defined forgery as "the false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability." Id. (emphasis added.) We find it significant that the court chose to qualify its definition with the terms "might" and "apparently." Certainly, this is different than saying a writing must have legal efficacy.

In conclusion, we hold that an unsigned money order is a financial instrument within the meaning of section 715.1. As such, defendant's argument to the contrary is not a sufficient basis for reversal.

III.

Defendant also argues that the State did not present sufficient evidence to prove that defendant knew the money order was not what it was purported to be, as required by Iowa Code section 715.6 (1985).

In reviewing the defendant's claim, we view the evidence in a light most favorable to the State. State v. McFadden, 320 N.W.2d 608, 614 (Iowa 1982). All the evidence is considered, not merely the evidence that supports the verdict. Id. We will uphold the verdict if it is supported by substantial evidence which could convince a rational trier of fact of defendant's guilt beyond a reasonable doubt. Id.

Applying these principles, we conclude that the conviction should be affirmed. Evidence at trial established that a money order was purchased in the amount of $1.50 and altered to $193.50. The money order was suspicious on its face because it apparently had been erased, one number was lower than the rest, and the money order was not signed. When defendant attempted to use the money order to purchase automobile parts, it was not immediately accepted. When the clerk went to check the money order the defendant fled. The fact that defendant attempted to use an altered money order coupled with the fact that he fled would

support the allegation that he knew the order was not what it was purported to be.

Furthermore, the fact that defendant fled distinguishes this case from State v. Martin, 341 N.W.2d 728 (1983), relied on by the defendant. In Martin, the supreme court held that defendant's failure to voluntarily endorse a forged check and the fact that he made withdrawals within a few days of depositing the check did not rise to the level of substantial evidence. Id. at 730. We find it significant that Martin's actions were entirely consistent with innocence. In the case at bar, it cannot be said that defendant's actions were consistent with innocence. To the contrary, the fact that he fled when he could not complete the transaction would indicate guilt.

Thus, viewing the evidence in the light most favorable to the State, we conclude that evidence was sufficient to establish the knowledge element of the crime.

IV.

Defendant's final assignment of error is that he received ineffective assistance of counsel when his trial attorney failed to object to the omission of the knowledge element in the FUFI marshalling instruction.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Strickland v. Washington, ____ U.S. ____, ____, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), the United States Supreme Court enunciated this test for prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Applying these principles in the present case, we find that, as a whole, Propps had effective representation.

The marshalling instruction given by the trial court permitted the jury to convict the defendant if it found the State had proven the following elements beyond a reasonable doubt:

> 1. That on or about October 27, 1983 the defendant used a money order in one or more of the following ways:
>
> a. by altering such money order so as to materially change the right or obligation which it purports to represent.
>
> b. tendered or offered such money order to Stew Hansen's Dodge in the course of a financial or commercial transaction, with the representation, either express or by implication, that the instrument is what it purports to be and that he is a person who is shown on its face to be one who may rightfully so use such instrument.
>
> c. possessed such money order, knowing it to be false or knowing that he had no right to use or possess it.
>
> 2. That such money order was a Financial Instrument as defined in Instruction No. 7.
>
> 3. That he did so with the intent to obtain fraudulently anything of value.

(emphasis added).

It is argued on appeal that trial counsel failed to perform an essential duty since he did not request that the knowledge element be included in this instruction. Although the State concedes that the knowledge element was missing, this court finds defendant's claim somewhat puzzling. The knowledge element for a FUFI charge has been stated as follows:

> Knowledge that (a) instrument is not what is purports to be or (b) he or she is not the person or authorized agent of the person who, as shown on the instrument, has the right to so use the instrument.

State v. Martin, 341 N.W.2d 728, 730 (Iowa 1983). In the case at bar, paragraph 1(c) contains language which expresses this precise idea.

"[A] defendant does not have the right to have instructions submitted in any particular form. It is only required that the instructions actually submitted set

forth the law fairly." State v. Savage, 288 N.W.2d 502, 508 (Iowa 1980). We do not believe the instruction is reasonably susceptible to the interpretation offered by the defendant and conceded to by the State. Although the knowledge element is not set out in a separate paragraph, the instruction read as a whole adequately informs the jury of this requirement. Thus, we cannot say trial counsel breached a duty in failing to object to the instruction on the grounds urged by the defendant; nor can we say that it resulted in denying defendant a fair trial.

Finding no error, we affirm the trial court's decision in all respects.

AFFIRMED.

Hayden, J. concurs and Oxberger, C.J. dissents.

OXBERGER, C.J., (dissenting).

I respectfully dissent.

The majority admits that in order for a writing to be considered a financial instrument, it must evidence an obligation of or surrender of a right or claim, yet concludes that an unsigned money order evidences such an obligation. I believe our statutes and case law is to the contrary and indicate an unsigned money order cannot be a financial instrument.

I believe the two cases cited by the majority go further than merely stating that some sort of alteration must occur with a forgery, and indicate the general intent of the legislature was to assure that the forgeries occurring under the FUFI statute involve use of an instrument that shows legal efficacy.

In State v. Schoelerman, 315 N.W.2d 67, 75 (Iowa 1982), the court indicated that when a person writes a check on a bank where he knows he does not have an account, he is guilty of theft, but not FUFI. It concluded such an act was not forgery since the check was exactly what it purported to be. Id. at 73. In the instance before the court, the money order was exactly what it purported to be; a piece of paper that could become a legal money order if signed. This is similar to the situation at Scholerman, where presenting a properly endorsed check not backed by funds, or an altered but unendorsed money order has a lesser impact on the system than in presenting an altered valid check or money order.

This concept has been discussed further in a case where we concluded that when a check is presented by a person who should not have the check, but the endorsement and all other aspects of the check are proper, a theft may have occurred, but FUFI is an improper charge. State v. Sanders, 309 N.W.2d 144, 147 (Iowa Ct. App. 1981). In our holding we noted the following excerpt from 4 J. Yeager, and R. Carlson, at § 365:

> Note that one violates this section when he makes a false bearer instrument, but he does not violate this section when he wrongfully negotiates without endorsement a genuine bearer instrument even though he intends to

> defraud the rightful owner of the instrument by doing so. The former action threatens to place false instruments in circulation, which tends to lessen the acceptance of all instruments, and consequently damages the financial system. The latter action has no such consequences and can be treated as a mere theft under section 714.1.

Id. at 146. Again, defendant here did not place into circulation a false instrument since the money order is not a financial instrument when it is not signed. It does not tend to lessen the acceptance of all instruments. As with a properly endorsed check which has not been altered, it does not involve the type of damage to the financial system which Chapter 715 was intended to prevent, and instead is a mere theft.

Our case law further indicates that in order for a forgery to occur, the altered instrument must have legal efficacy, or the foundation of legal liability. State v. Couch, 250 Iowa 56, 58, 92 N.W.2d 580, 582 (1958); State v. Meeks, 245 Iowa 1231, 1237, 65 N.W.2d 76, 79, cert. denied, 348 U.S. 902, 75 S. Ct. 225, 99 L. Ed. 708 (1954). The majority says Couch does not apply because it states forgery is altering or falsely making, "with intent to defraud, . . . any writing which, if genuine, might apparently be of legal efficacy or (create) the foundation of legal liability." Couch at 58, 92 N.W.2d at 582. I believe the majority makes too much of the use of the words "might" and "apparently." It seems evident the court was stating that the instrument must have the appearance of legal efficacy, even though other circumstances show it does not. This is confirmed by the statements made in Corpus Juris, where the Iowa Supreme Court found the above quote. There, authorities also indicate, "in order to constitute the crime of forgery, the writing must possess some apparent legal efficacy, because otherwise it would have no tendency to defraud, or in other words the writing must be one which, if genuine, might injure another." 37 C.J.S. Forgery § 14 (1943). How is it possible that an unsigned check or an unsigned money order could have any "apparent" legal efficacy, or have any tendency to defraud? No one would accept a unsigned check or money order and, while remaining unsigned, could injure no one.

Our statutes also confirm that a money order must be endorsed in order to have legal efficacy. The Uniform Commercial Code states that in order for a writing to be a negotiable instrument it must "be signed by the maker or drawer" and "(n)o person is liable on an instrument unless his signature appears thereon." Iowa Code SS 554.3104(1)(a), .3401(1)(1985).

The money order itself indicates that it has no legal efficacy until the terms of the agreement are met. The terms are set out on the order:

> PURCHASE AGREEMENT
>
> You, the purchaser, agree to immediately complete this Money Order by: 1) Filling in the information on the front of the Money Order, and (2) Signing the Money Order and printing your address at the bottom where shown.
>
> LIMITED RECOURSE:
>
> If this Money Order has been forged, altered, or stolen, recourse is only against the endorser. This means that only you, who have signed as purchaser, or anyone else signing on the back of the Money Order, is responsible for payment in these circumstances.

(emphasis added).

A money order has been described as equivalent to a personal check, where a sum of money is deposited with a bank, and the person can then draw against the amount by the written order. State v. LaRue, 5 Wash. App. 299, 303, 487 P.2d 255, 258 (1971), Annot., 65 A.L.R. 2d 1299 (1975). As with a personal check, it follows that until it is signed the paper has no legal import.

This conclusion has been reached in another jurisdiction where the court held that its forgery laws were not violated when counterfeit bank bills were brought into the state because the bills were blank. State v. Haas, 433 So.2d 1343 (Fla. Dist. Ct. App. 1983). Noting that bank bills were promises to pay a sum to the bearer, the court nevertheless indicated, "As a blank form, it does not even qualify as a check because it has not been filled in nor purportedly signed." Id. at 1344. The concurring opinion added, "I agree a blank, unsigned cashier's check is no more than a scrap of paper and certainly not a formal bank bill or note." Id. at 1345.

The defendant here presented a money order without endorsement, and in so doing gave the clerk nothing more than a piece of paper which could become evidence of a binding transaction. Although parts of the order were scratched and blurred, without a signature it still was not a financial instrument. Defendant could have just as easily given a piece of paper to the clerk with "money order" written at the top and figures written below. It would have as much legal meaning. I agree that here the money order was nothing more than "a scrap of paper." The fact that the paper belonged to the store from which it was taken may constitute theft, but it cannot provide the elements necessary for a charge of false use of a financial instrument.

The majority points to the fact that the Code appears to include as financial instruments items which have no legal efficacy in themselves. Specifically, section 715.1 includes a credit card within its definition of financial instruments. Since a credit card is not negotiable in itself, nor needs to be signed, the majority argues the legislature must have intended to include nonnegotiable items within financial instruments.

I do not believe mere possession of a stolen credit card necessarily falls within false use of a financial instrument. It may constitute only theft, depending on the circumstances of each case. However, in each credit card transaction, a credit card slip must be signed. Credit cards also provide for the signature of the owner on the back. The act of falsely signing a name to the back of a credit card, or falsely signing a credit card slip, or altering the slip, clearly falls within the proscribed conduct of section 715.6. Merely possessing another person's properly signed credit card is similar to possessing another person's properly signed check. As in Sanders it appears to me that the act may constitute theft, but not FUFI.

Contrary to the majority's contention, I do not believe this interpretation unduly restricts Chapter 715, but rather limits this section of the Code to its purpose of consolidating like offenses with a similar adverse impact on the financial system, and providing similar sentences for such acts.

I would reverse the conviction.