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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
April 6, 2022 Session

STATE OF TENNESSEE v. RONALD LYONS, JAMES MICHAEL USINGER, LEE HAROLD CROMWELL, AUSTIN GARY COOPER, AND CHRISTOPHER ALAN HAUSER

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Davidson County
No. 2017-A-79 Cheryl A. Blackburn, Judge

No. M2019-01946-SC-R11-CD

HOLLY KIRBY, J., with whom SARAH K. CAMPBELL, J., joins, concurring in part and dissenting in part.

I concur in the majority's conclusion that the evidence was sufficient to support the Defendants' convictions for forgery. I agree with the majority that the Defendants' conduct fits within the statutory definition of forgery under Tennessee Code Annotated section 39-14-114(b)(1)(B). I write separately to dissent from the majority's conclusion that the evidence was sufficient to support sentencing the Defendants for forgery as a Class A felony. Based on the text of the applicable statutes, I would hold that the evidence was not sufficient to support the jury's finding that the UCC-1s had a fair market value of at least \$250,000.[1] I would reverse the holding of the Court of Criminal Appeals as to the value associated with the Defendants' forgery convictions.

Our well-established standard for reviewing the sufficiency of the evidence consists of two distinct steps:

> Our standard for reviewing the sufficiency of the evidence underlying a criminal conviction is well-established. *First, we examine the relevant statute(s) in order to determine the elements that the State must prove to establish the offense.* Next, we analyze all of the evidence admitted at trial in order to determine whether each of the elements is supported by adequate proof.

[1] In their briefs to this Court, Defendants Hauser and Usinger argued that the evidence was insufficient to support the jury's determination of value. Defendants Cooper and Cromwell previously made similar arguments in their motions for new trials.

State v. Stephens, 521 S.W.3d 718, 723–24 (Tenn. 2017) (emphasis added) (citing *State v. Smith*, 436 S.W.3d 751, 761–65 (Tenn. 2014) as "conducting statutory interpretation of offense's elements before conducting sufficiency review"). *See also State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017) (stating that, "[t]o begin," we determine the statutory elements the State must prove) (citing *Stephens*, 521 S.W.3d at 723–24); *State v. Mitchell*, 592 S.W.3d 431, 437 (Tenn. 2019) ("[W]e must evaluate the proof in light of the elements of the crime" (citing *Gentry*, 538 S.W.3d at 420 as "recognizing that the first step of a sufficiency review is to 'examine the relevant statute(s) in order to determine the elements' of the offense that must be proven by the prosecution beyond a reasonable doubt'").

It is well-established, then, that we must analyze the statutory elements *before* we evaluate the proof for sufficiency. Here, the majority skips over this step entirely. Instead, it quotes the statute that defines "value," recites the pattern jury instructions on valuation, and then goes straight to its conclusion that the evidence is sufficient, without ever having determined the elements of valuation the State must prove.

Respectfully, that's contrary to our own caselaw. Our jurisprudence requires us to first review the pertinent statutes to determine the statutory elements. As explained below, analyzing the statutory elements in this case necessarily leads to the conclusion that the evidence here cannot support sentencing the Defendants for forgery as a Class A felony.

The State argues that the value of the UCC-1s to grade the forgery offense is the amount in the description of collateral, because that established the property in which the Defendants claimed a possessory interest. As noted by the majority, the collateral descriptions in the UCC-1s were intended to convey an impression that the victims owed the Defendants millions of dollars. Mr. Birdsell's testimony about Defendant Cooper's comments ("Well, that's four million dollars") would be a basis for the jury to infer that the Defendants believed that filing the UCC-1s would result in their obtaining money in some amount from the victims.

None of the Defendants here received any money from the victims, but the State need not prove they *actually* obtained property or services to be convicted of the offense of forgery. *See State v. Odom*, 64 S.W.3d 370, 374 (Tenn. Crim. App. 2001). In *Odom*, the defendant forged a check for $250,000, and was charged with forgery as a Class B felony. *Id.* at 371. Noting that the theft statute refers to property or services "obtained," the defendant argued she "could never be guilty of anything more than a Class E felony because she received no property or services" in connection with the forged check. *Id.* at 371. The appellate court rejected this argument. It explained that the offense of forgery is considered "complete by the forgery with the fraudulent intent, whether any third person be actually injured or not." *Id.* at 372 (citation omitted). The appellate court reasoned that the term "obtained" in the statute "relate[d] only to the crime of theft, which requires actual

receipt of property or services." *Id.* at 374. It construed the statutes as intended to punish forgery "according to the apparent value of the writing forged . . . ., using the values set forth in the theft grading statute." *Id.* Thus, the jury could use the face value of the check forged by the defendant. *Id.*

In that sense, then, the "apparent" value of the property or services is sufficient. In *Odom*, the document was a negotiable instrument which, if authentic, can be used to obtain money. The amount written on the check is the amount of money the defendant could have obtained had she cashed the check, i.e., the "apparent" value of the forged check. *See id.*

Here, the jury was instructed to find the apparent fair market value of the UCC-1s at the time and place of the offense. *Fixing apparent value*, 7 Tenn. Prac. Pattern Jury Instr., T.P.I.-Criminal 11.03(b). I agree that the statutory definition of "value" at issue in this appeal is the "fair market value of the property or service at the time and place of the offense." Tenn. Code Ann. § 39-11-106(a)(39)(A)(i) (2018 & Supp. 2022).[2]

Although section 39-11-106(a)(39) defines "value," it does not define the phrase "fair market value" as used in the statute. We construe provisions in the criminal code "according to the fair import of their terms." *State v. Majors*, 318 S.W.3d 850, 859 (Tenn. 2010) (quoting Tenn. Code Ann. § 39-11-104 (2006)). We give the words in statutes "their ordinary and natural meaning" and may "refer to dictionary definitions where appropriate." *Majors*, 318 S.W.3d at 859 (quoting *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985)). *See also Cutshaw v. Hensley*, No. E2014-01561-COA-R3-CV, 2015 WL 4557490, at *5 (Tenn. Ct. App. July 29, 2015) (defining fair market value under dictionary definitions); *State v. Jones*, 589 S.W.3d 747, 759 (Tenn. 2019) ("As we often do when faced with undefined statutory terms, we look to Black's Law Dictionary for a possible answer."). Fair market value means "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." *Value* ("*fair market value*"), *Black's Law Dictionary* (11th ed. 2019).

Important to this appeal, forgery is graded under the same statute that grades theft offenses. That statute punishes theft of property or services as a Class A felony "if the value of the property or services *obtained* is two hundred fifty thousand dollars ($250,000) or more." Tenn. Code Ann. § 39-14-105(a)(6) (2018 & Supp. 2022) (emphasis added).

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[2] I agree with the majority that, because the jury in this case was instructed without objection to determine valuation by ascertaining the apparent fair market value of the bogus UCC-1s, we should not address whether the UCC-1s constitute "evidence of a debt" under Tennessee Code Annotated section 39-11-106(a)(39)(B).

The term "obtain" is statutorily defined:

> (A) "Obtain" means to:
> (i) *Bring about* a transfer or purported transfer of property or of a legally recognized interest in property, whether to the defendant or another; or
>
> (ii) Secure the performance of service.

Tenn. Code Ann. § 39-11-106(a)(27)(A) (emphasis added).

Thus, although we have construed the forgery statutes as not requiring the defendant to *actually* obtain property or services, these statutes show valuation for forgery is not divorced from the concept of obtaining property or services. Reading these statutes together, as we must, they show that, to have "fair market value," the forged document, if authentic, must at least be capable of facilitating or "bringing about" the "transfer" of services, property, or a legally recognized interest in property. Tenn. Code Ann. §§ 39-11-106(a)(39)(A)(i); 39-14-105(a)(6); and 39-11-106(a)(27)(A). These are the statutory elements of valuation the State was required to prove.

Applying these statutory elements, for example in *Odom*, the amount on the face of the check in *Odom* represented its "fair market value" because the check was a negotiable instrument.[3] *See* 64 S.W.3d at 373–74. If authentic, the check was capable of "bringing about" the "transfer" of that amount of money; that was its apparent "fair market value." Similarly, in *State v. Finch*, the intermediate appellate court valued forged receipts. 465 S.W.3d 584 (Tenn. Crim. App. 2013), *overruled on other grounds by State v. Menke*, 590 S.W.3d 455 (Tenn. 2019). The defendant argued the receipts had no apparent value. *Finch*, 465 S.W.3d at 600. The *Finch* court disagreed because "a buyer, upon returning a receipt to the seller, may receive a refund of monies, a store credit, or goods in kind." *Id.* (quoting *Commw. v. Sneddon*, 738 A.2d 1026, 1028 (Pa. Super. Ct. 1999). Thus, the receipts "had an apparent value of the purchase amounts listed on them." *Finch*, 465 S.W.3d at 600.

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[3] A negotiable instrument is "payable on demand or at a definite time." *Negotiable Instrument*, *Black's Law Dictionary* (11th ed. 2019). A check "may play its role as a money substitute." *Pero's Steak and Spaghetti House v. Lee*, 90 S.W.3d 614, 623 (Tenn. 2002) (quoting Robert Hillman, et al., *Common Law and Equity Under the Uniform Commercial Code*, P 14.01[1] (1985).

Here, the State had to show that the forged UCC-1s, if authentic, could facilitate or "bring about" the "transfer" of at least $250,000. In the Defendants' trial, Mr. Burton described UCC-1s to the jury: where they are posted on the Secretary of State's website, how they are filled out, what information they contain, and importantly, their purpose. Mr. Burton described UCC-1s only as financing statements—used to serve notice to the world that the person who filed the UCC-1 claims an interest in the debtor's property, as collateral for the debt referenced in the statement.[4] At no point did Mr. Burton describe UCC-1s as negotiable instruments or any other type of document that could be used to "bring about" the "transfer" of money, property, a "legally recognized interest in property," or anything else. Indeed, there is *no* evidence in the record that would support a finding that the fraudulent UCC-1s, if authentic, could have been used to obtain anything.

Nor *could* the State offer such evidence. "[T]he purpose of a UCC-1 financial statement is simply to provide sufficient notice to third parties to instigate further inquiry." *Regions Bank v. Bric Constructors, LLC*, 380 S.W.3d 740, 771 (Tenn. Ct. App. 2011). Tennessee commercial law governing financing statements expressly notes: "The [UCC-1] itself indicates merely that a person may have a security interest in the collateral indicated. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs." Tenn. Code Ann. § 47-9-502 cmt. 2 (2018 & Supp. 2020). UCC-1s are only a form of notice. They cannot be said to have any readily ascertainable "fair market value," apparent or otherwise. *See* Tenn. Code Ann. § 39-11-106(a)(39)(A)(i).

Here, the majority ignores the imperative to examine the relevant statutes "in order to determine the elements that the State must prove to establish" valuation. *Stephens*, 521 S.W.3d at 723–24. To prove a valuation of at least $250,000, the statutes required the State to prove that the forged UCC-1s, if authentic, could facilitate or "bring about" the "transfer" of at least $250,000.[5] It did not.

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[4] In fact, the State's witness, Mr. Burton, also testified that the UCC-1s were only a form of notice. Mr. Burton was asked "to be clear, when I'm filing this UCC1 financing statement, that, in and of itself, does not create a creditor/debtor relationship?" Mr. Burton responded "That's my understanding." Mr. Burton was then asked "It's notice of that relationship?" Mr. Burton again responded "That's my understanding."

[5] "Whenever a determination of value is necessary to assess the class of an offense . . . the determination of value shall be made by the trier of fact beyond a reasonable doubt." Tenn. Code Ann. § 39-11-115 (2018).

Absent such evidence, I would hold that the UCC-1s in this case have no readily ascertainable apparent fair market value under Tennessee Code Annotated section 39-11-106(a)(39)(A)(i). Consequently, they should be considered documents whose value cannot be ascertained. *See* Tenn. Code Ann. § 39-11-106(a)(39)(C). I would reverse the holding of the Court of Criminal Appeals as to the value associated with the Defendants' forgery convictions, and remand the case to the trial court to resentence the Defendants' forgery convictions as Class E felonies. *See* Tenn. Code Ann. § 39-14-114(c) ("in no event shall forgery be less than a Class E felony.").

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HOLLY KIRBY, JUSTICE