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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Weld District Court; Honorable Shannon Lyons; and Case Number 2011CR1341	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JARED COWEN	
Douglas K. Wilson, Colorado State Public Defender JULIA CHAMBERLIN 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #47181	Case Number: 2014CA2354

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

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In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED WHEN IT REQUIRED MR. COWEN TO PAY RESTITUTION ON AN ACQUITTED CHARGE AS A CONDITION OF HIS PROBATION, WHEN THIS RESTITUTION WAS NOT CAUSED BY MR. COWEN'S CRIMINAL CONDUCT.

A. Standard of Review

Mr. Cowen disagrees with the Attorney General's application of the "gross abuse of discretion" standard of review to Mr. Cowen's restitution claim. Answer Brief, p. 6 (citing *People v. Smith*, 181 P.3d 324, 325 (Colo. App. 2007)). In *Carrillo v. People*, 974 P.2d 478, 485 (Colo. 1999), the Colorado Supreme Court disapproved of courts' use of "gross abuse of discretion" and "clear abuse of discretion" because "[t]he use of these modifiers creates the appearance of inconsistency and unfairness." *Id.* These modifiers could raise "the unfortunate implication that this judge might have reached a different result by applying an unmodified abuse of discretion standard." *Id.* Thus, the court held that "the phrases 'abuse of discretion,' 'clear abuse of discretion,' and 'gross abuse of discretion' contained in our prior case law all have the same meaning." *Id.* Accordingly, this Court should apply the unmodified abuse of

discretion standard to review Mr. Cowen's restitution claim. *See People v. Montanez*, 300 P.3d 940, 942 (Colo. App. 2012) (applying an abuse of discretion standard of review to a restitution claim).

B. Relevant Facts

The Attorney General claims that "[t]here were no distinct facts[]" between Count 1 (fraud by check for $9,327.65) and Count 2 (fraud by check for $13,158). Answer Brief, pp. 10-11. The Attorney General argues that Mr. Cowen wrote two separate checks because "he had financed the $13,158" and both checks were for Mr. Cowen's truck repairs. *Id.* However, in making this argument, the Attorney General contradictorily acknowledges the key distinction between these counts: Mr. Cowen believed that he had financed the $13,158 check, but not the $9,327.65 check. *Id.*

The record reflects that Mr. Cowen believed Landmark Financial would loan him $13,158:

- Elite Diesel acknowledged that Landmark Financial had loaned Mr. Cowen's company, J&S Trucking, money for truck repairs on May 3, 2011, and June 1, 2011. R. Tr. 10/7/14, pp. 92-94.
- Mr. Cowen spoke with Landmark Financial about financing for a $13,158 loan. R. Tr. 10/7/14, pp. 156-57.

- Mr. Cowen believed that Landmark Financial would loan him $13,158. R. Tr. 10/8/14, pp. 152-53.
- Landmark Financial emailed Samara Weidner, an employee at Elite Diesel, for a payment invoice on May 26, 2011. R. Tr. 10/7/14, pp. 62, 203.
- Samara Weidner testified that she did not agree to wait to deposit Mr. Cowen's $13,158 check until after Mr. Cowen had received the loan from Landmark Financial. R. Tr. 10/8/14, p. 245. However, Samara Weidner contradictorily sent Landmark Financial an invoice for payment on May 31, 2011 (four days after Mr. Cowen gave her the $13,158 check). R. Tr. 10/7/14, pp. 62-63.
- During deliberations, the jury relied upon the evidence that Samara Weidner sent Landmark Financial an invoice for payment on May 31, 2011. The jury asked: "We would like to see the paperwork, email invoice dated 5/31/2011." R. CF, p. 289.
- Landmark Financial halted the loan process only after Gary Novotny repossessed Mr. Cowen's truck sometime after May 27, 2011. R. Tr. 10/7/14, pp. 167-68. Defense counsel asked Diane Rapue, an employee of Landmark Financial, "So then at that point with that information was the loan process stopped?" *Id.* at 168. Diane Rapue responded, "Oh, yes." *Id.* Thus, Landmark

Financial acknowledged that there was a "loan process" initiated for Mr. Cowen's truck.

Based on this evidence, the jury acquitted Mr. Cowen of Count 2. R. Tr. 10/9/14, p. 81. The contested element in Counts 1 and 2 was whether Mr. Cowen intended to defraud Elite Diesel. *See Id.* at 63 (defense counsel argued during closing: "Now, we talked a little bit earlier that the real issue here is Jared Cowen's intent to defraud."); *Id.* at 67 (the prosecution argued in rebuttal: "The issue in this case is did he write those checks with the intent to defraud[.]") Thus, in acquitting Mr. Cowen of Count 2, the jury must have found that the evidence about Landmark Financials' loan negated Mr. Cowen's intent to defraud Elite Diesel. As such, the record belies the Attorney General's assertion that Count 1 and Count 2 were not factually distinct. Answer Brief, p. 11.

C. Analysis

Although the Attorney General argues that Mr. Cowen's "claim fails for many reasons[,]" it does not address Mr. Cowen's argument that the trial court lacked authority to impose restitution for Mr. Cowen's non-criminal conduct. Answer Brief, pp. 7-11.

"Every order of *conviction of a felony*, misdemeanor, petty, or traffic misdemeanor offense . . . shall include consideration of restitution." § 18-1.3-603(1), C.R.S. (2015)

(emphasis added). The purpose of restitution is for "[p]ersons *found guilty* of causing such suffering and hardship should be under a moral and legal obligation to make full restitution to those harmed by their *misconduct*[.]" § 18-1.3-601(1)(b), C.R.S. (2015) (emphasis added). Restitution is defined as "any pecuniary loss suffered by a victim . . . and other losses or injuries proximately caused by an *offender's conduct* and that can be reasonably calculated and recompensed in money . . . or injuries proximately caused by an *offender's conduct*[.]" § 18-1.3-602(3)(a), C.R.S. (2015) (emphasis added).

The underlying rationale of restitution, as cited by the Attorney General, comports with the principle that restitution must be directly related to a defendant's criminal conduct. *See* Answer Brief, pp. 7-8. For instance, the legislature declared that restitution helps "[c]rime victims[,]" it is "a mechanism for the rehabilitation of offenders[,]" it acts as a "deterrent to future criminality[,]" and it compensates crime victims for their "suffering and hardship[.]" § 18-1.3-601(1)(a),(c),(e), C.R.S. (2015). Restitution serves none of these salutary benefits if a court orders a defendant to compensate a victim for losses caused by non-criminal conduct.

Colorado courts have likewise limited restitution to a defendant's criminal conduct. For instance, in *People v. Brigner*, 978 P.2d 163, 164 (Colo. App. 1999), the prosecution charged the defendant with three counts of defrauding a secured

creditor.[1] The defendant pled guilty to one count, and the prosecution dismissed the remaining counts. *Id.* At the restitution hearing, the prosecution sought $178,000 (the agreed upon amount for purchasing the cows), rather than the cows' fair market value of $67,842.57. *Id.* The trial court imposed $178,000 in restitution. *Id.*

On appeal, a division of this Court cautioned that "[a] defendant may not be ordered to pay restitution for losses that did not result from the conduct that was the basis of the defendant's criminal conviction."[2] *Id.* This Court reversed the trial court's restitution order because the defendant's criminal conduct only caused the loss of the cows' collateral, which was $67,842.57. *Id.* "Although the victim contended that defendant was responsible for the decline in the value of the cattle, the criminal charges against defendant were based solely on his unauthorized sale of the cattle, not on any negligence or mismanagement on his part prior to the sale." *Id.*; *see also People v. Estes*, 923 P.2d 358, 360 (Colo. App. 1996) (rejecting the trial court's imposition of $9,000 in restitution where the victim voluntarily lent the defendant money because

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[1] § 18-5-206(1)(c), C.R.S. (1998). This statute "makes it a crime to dispose of collateral subject to a security interest with intent to defraud the creditor." *Brigner*, 978 P.2d at 164.

[2] "Section 16-11-204.5(1), C.R.S. (1998), provides that, as a condition of every sentence to probation, the court shall order the defendant to make full restitution to the victim of his or her conduct 'for the actual damages that were sustained.'" *Brigner*, 978 P.2d at 164.

"[t]here is no evidence that the $9,000 automobile loan was the result of any criminal activity.").

The Attorney General cites *People v. Pagan*, 165 P.3d 724, 731 (Colo. App. 2006), for the proposition that a "criminal conviction establishing the defendant's culpability is not required to impose restitution." Answer Brief, p. 9. To the extent that *Pagan* contradicts § 18-1.3-603(1), C.R.S. (2015), which provides that restitution must be imposed upon "[e]very order of conviction of a felony," its holding is incorrect. Nonetheless, *Pagan* is distinguishable from Mr. Cowen's case.[3] *See* Opening Brief, pp. 12-14.

In *Pagan*, the defendant was charged with two counts of theft, which "involved the same victim, the same set of facts, and the same financial loss[.]" 165 P.3d at 729. After trial, the jury acquitted the defendant of theft of $15,000 or more, but convicted him of theft from an at risk adult of $500 dollars or more but less than $15,000. *Id.* at 726. The trial court subsequently imposed $15,000 in restitution, plus interest. *Id.* On cross-appeal, a division of this Court addressed whether the doctrine of collateral estoppel and double jeopardy principles barred an award of restitution over $15,000. *Id.* at 728-29. Significantly, *Pagan* does not apply here because it did not address the issue presented: whether courts can impose restitution on non-criminal conduct. *Id.*

[3] Moreover, a division of this Court is not bound by another division's decision. *People v. Zubiate*, 2013 COA 69, ¶ 48.

However, without providing any analysis whatsoever, the Attorney General inserted Mr. Cowen's information into a quote from *Pagan*:

> Third, the jury's acquittal on count two "merely established that the prosecution failed to prove *beyond a reasonable doubt* that [Cowen committed fraud by check]. The trial court was still free to reach a contrary conclusion for restitution purposes under the applicable burden of proof, a preponderance of the evidence." *Pagan*, 165 P.3d at 731 (emphasis in original).

Answer Brief, p. 10. This is misleading. In this quote, *Pagan* addressed whether the trial court was collaterally estopped from imposing more than $15,000 in restitution. 165 P.3d at 731. This excerpt discussed the amount of damages the defendant's criminal conduct caused, not whether the defendant actually engaged in criminal conduct. *Id.*

Next, the Attorney General argues that "Cowen has not argued there was a lack of evidence to prove by a preponderance of the evidence that his actions were the proximate cause of Elite Diesel's loss[.]" Answer Brief, p. 10. However, the record reflects that the jury convicted Mr. Cowen of fraud by check for $9,327.65 (Count 1), and acquitted him of fraud by check for $13,158 (Count 2). R. CF, pp. 290-91. Unlike *Pagan*, here the facts and monetary loss underlying both offenses were distinct. Thus, Mr. Cowen's criminal conduct in Count 1 caused $9,327.65 in damages.

Moreover, the Attorney General's argument that the trial court could find Mr. Cowen's criminal conduct by a preponderance of the evidence at the restitution hearing is erroneous. Answer Brief, p. 10. The trial court can only impose restitution upon "conviction of a felony[.]" § 18-1.3-603(1), C.R.S. (2015). It is axiomatic that the prosecution must prove every element of a charged crime beyond a reasonable doubt to sustain a criminal conviction. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, § 25; *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Hardin*, 607 P.2d 1291, 1294 (Colo. 1980). Here, the prosecution failed to do so. If this Court adopted the Attorney General's position, then Mr. Cowen's exercise of his fundamental right to a jury trial would be meaningless because the trial court could disregard the jury's acquittal, find Mr. Cowen criminally culpable on Count 1, and punish him accordingly. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25.

Further, the trial court's statements at the restitution hearing reflect that it found Mr. Cowen guilty of defrauding Elite Diesel in Count 2, rather than finding Mr. Cowen's criminal conduct in Count 1 proximately caused Elite Diesel's losses in Count 2. The trial court reasoned: "the Defendant has done a good job of saying, look, I didn't understand that, I thought I was going to get the loan. The fact of the matter is he didn't have the loan and he knew he didn't have the loan, and *the Court is absolutely convinced of that fact*, by far more than a preponderance of the evidence." R. Tr.

10/24/14, p. 29 (emphasis added). However, the trial court had no statutory authority to impose restitution on Mr. Cowen's non-criminal conduct. § 18-1.3-603(1), C.R.S.

Accordingly, the trial court abused its discretion when it imposed restitution on Mr. Cowen's non-criminal conduct. Thus, the trial court's restitution order should be vacated, and remanded for further proceedings.

II. THE TRIAL COURT REVERSIBLY ERRED WHEN IT DENIED MR. COWEN'S PROPOSED INSTRUCTION, AND THE PROSECUTOR CANNOT SHOW THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. Standard of Review

The Attorney General, relying upon *People v. Walden*, 224 P.3d 369, 378-79 (Colo. App. 2009), argues that this issue should be reviewed under the harmless error standard of review rather than the constitutional harmless error standard of review. Answer Brief, pp. 13-14. This is erroneous.

Here, the trial court found that Mr. Cowen raised at least a scintilla of evidence to instruct the jury on the affirmative defense of mistake of fact. R. Tr. 10/8/14, p. 229; *see People v. Andrews*, 632 P.2d 1012, 1016 (Colo. 1981) ("a mistaken belief of fact [i]s an affirmative defense"); § 18-1-407(1), C.R.S. (2015) ("'Affirmative defense' means that unless the state's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, shall present some credible evidence on that issue."). "If any evidence in the case raises the issue of mistake, then 'the guilt of the defendant

must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.'" *Andrews*, 632 P.2d at 1016 (quoting § 18-1-407(2), C.R.S. (1973)).

The trial court denied Mr. Cowen's proposed instruction, which would have instructed the jury that his affirmative defense of mistake of fact must be evaluated under a subjective standard. R. Tr. 10/8/14, p. 233; *see People v. R.V.*, 606 P.2d 1311, 1313 (Colo. App. 1979), *rev'd on other grounds*, 635 P.2d 892 (Colo. 1981) ("there is no requirement in the statute that the mistake be reasonable."). As argued below, the jury would not have known to evaluate Mr. Cowen's affirmative defense under this standard. Thus, the trial court's denial of Mr. Cowen's proposed instruction effectively lowered the prosecution's burden of disproving Mr. Cowen's affirmative defense. *See People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005) ("Because a defendant's constitutional right to due process is violated by an improper lessening of the prosecution's burden of proof, such error cannot be deemed harmless."); *Lybarger v. People*, 807 P.2d 570, 582-83 (Colo. 1991) (finding that an improper affirmative defense instruction effectively removed the affirmative defense from the jury's consideration and was not harmless). Since the Attorney General agrees that Mr. Cowen preserved this issue for appeal, Answer Brief, p. 13, and the trial court's ruling affected Mr. Cowen's

constitutional rights, the constitutional harmless error standard of review applies. *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012).

To the extent that *Walden*, 224 P.3d at 378-79, found that the trial court's denial of the defendant's affirmative defense instruction should be reviewed under the harmless error standard, this is incorrect. The Colorado Supreme Court has repeatedly held that a trial court's erroneous denial of a defendant's affirmative defense "cannot be deemed harmless." *Garcia*, 113 P.3d at 784; *Lybarger*, 807 P.2d at 582-83.

B. Analysis

First, the Attorney General argues that the trial court did not err when it refused Mr. Cowen's proposed instruction because "it was duplicative of the instruction given." Answer Brief, p. 14. This is wrong. The mistake of fact instruction generally stated, "The defendant engaged in the prohibited conduct under a mistaken belief[.]" R. CF, p. 281. Whereas defense counsel's proposed instruction more specifically provided, "With regard to the affirmative defense of mistake of fact, the jury must apply a subjective standard. That is, if Mr. Cowen entertained an honest belief, no matter how wrong or unreasonable that belief was, that he would have sufficient funds to cover the checks, he is not guilty of Fraud by Check." *Id.* at 238. The proposed instruction communicated to the jury that they must evaluate Mr.

Cowen's belief under a subjective rather than a reasonable person standard, and the mistake of fact instruction did not.

A trial court must tailor instructions to the particular circumstances in a given case so that the jury is adequately advised of the law pertaining to the defendant's case. *People v. Garcia*, 28 P.3d 340, 349 n. 8 (Colo. 2001); *see People v. Nunez*, 841 P.2d 261, 265 (Colo. 1992) (the trial court has an "affirmative obligation to cooperate with counsel to either correct the tendered theory of the case instruction or to incorporate the substance of such in an instruction drafted by the court."). "[I]f supplementary instructions are needed to state a defendant's position, then such instructions should be submitted to the jury." *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999).

Here, the mistake of fact instruction did not adequately instruct the jury on how to evaluate Mr. Cowen's mistaken belief under the particular facts of this case. For instance, defense counsel tendered this instruction because of the facts of Mr. Cowen's case:

> So I think it is helpful to them. And, again, I would just point to sort of the nature of this being a financial transaction, that I imagine everyone in this courtroom and everyone in the jury does and does in a different way and it is personal to them. And they could render a verdict based on how they would handle a particular situation.

R. Tr. 10/8/14, pp. 232-33. However, the prosecution, in arguing against giving the proposed instruction, erroneously wanted the jury "to go back and say, look, you

know, [Mr. Cowen] said it was this. Do we believe that, is that *reasonable for us*, you know." *Id.* at 231 (emphasis added).

The facts of Mr. Cowen's case do not make the proposed instruction duplicative. Mr. Cowen testified that he did not have $9,327.65 in his checking account on May 27, 2011, but he had sufficient funds to cover this amount in various T-Cheks. R. Tr. 10/8/14, p. 155. He stated that if he did not have this "off number" of $9,327.65, then he would have asked for a different loan amount or asked his brother, Ryan Cowen, to cover more of the payment. *Id.* at 156-57. Mr. Cowen testified that Samara Weidner agreed to deposit the check later after he had transferred sufficient funds into his checking account. *Id.* at 157. Defense counsel asked, "Why didn't you postdate the checks for May 31st, 2011 or after the holiday?" *Id.* at 158. Mr. Cowen responded, "I guess I should have, but you believe when you take their word on face value, you know, and I never, never thought that it would be like this. I never – good ol' people, you know, that is where I figured it come from." *Id.*

During closing argument, the prosecution focused on Mr. Cowen's unreasonableness in failing to postdate the check. The prosecution argued: "Cash is cash. You hand it over. End of story. But a check, you can write on there. He could have come in on May 27th and, if this agreement was in place with Sam Weidner as he

said there was, he could have written 'May 31st' or 'June 1st,' whatever it would be. Everybody knows how a postdated check works." R. Tr. 10/9/14, p. 36. Thus, the prosecution urged the jury to evaluate the reasonableness of Mr. Cowen's mistake.

Second, the Attorney General argues that "the trial court did not err because Cowen was not entitled to a mistake of fact affirmative defense instruction." Answer Brief, pp. 15-16. Under § 18-1-504(1)(a), C.R.S. (2015), a person is relieved of criminal liability if his mistaken belief of fact "negatives the existence of a particular mental state essential to commission of the offense[.]" The Attorney General's argument is erroneous notwithstanding its reliance on decisions from other panels of this Court finding that a mistake of fact affirmative defense instruction is not required where the prosecution necessarily disproves the affirmative defense by proving the mens rea element beyond a reasonable doubt. *See Walden*, 224 P.3d at 379; *People v. Bush*, 948 P.2d 16, 18-19 (Colo. App. 1997); *People v. Stephens*, 837 P.2d 231, 234 (Colo. App. 1992). These cases were wrongly decided and this Court is not bound by them. *See People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008) (one division of the court of appeals is not bound by the decision of another division).

These cases eviscerate the mistake of fact affirmative defense because if, as these cases hold, the mental state instruction adequately encompasses the mistake of fact defense, then there would never be a case where the mistake of fact affirmative

defense instruction applies. *See General v. State*, 789 A.2d 102, 111 (Md. App. 2002) ("Were we to accept the State's argument that the instruction on intent and knowledge fairly covered the mistake of fact defense, there would never be an occasion to give the instruction."). This is contrary to § 18-1-504(1)(a), C.R.S. (2015). Because the General Assembly determined that mistake of fact was an affirmative defense, if sufficient evidence warrants this defense then an instruction encompassing it must be given. *See* § 18-1-504(3), C.R.S. (2015); § 18-1-407(2), C.R.S. (2015); *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) ("In Colorado, if presented evidence raises the issue of an affirmative defense, the affirmative defense becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable."). Thus, where, as here, the evidence supports the giving of a mistake of fact affirmative defense instruction, it is proper for the trial court to give it.

Courts in other jurisdictions recognize the importance of separately instructing the jury on mistake of fact. In *State v. Freeman*, the Iowa Supreme Court held that it was error for the trial court to refuse to give a mistake of fact instruction. There, the court cogently observed:

> Mistake of fact . . . remains a separate and distinct issue notwithstanding its relation to the State's duty to prove criminal intent . . . . [Mistake of fact] did not vanish merely

> because it can be stated the mistake could not coexist with a criminal intent.

267 N.W.2d 69, 70-71 (Iowa 1978). Similarly, in *People v. Crane*, the Illinois Supreme Court held that "[s]ince Illinois recognizes the defense of mistake of fact, when this defense is supported by the evidence it is not sufficient to merely inform the jury of the mental state requirements, but it must also be informed of the validity of the mistake of fact defense." 585 N.E.2d 99, 102 (Ill. 1991).

Here, while the elemental and intent definitional instructions accurately informed the jury of the required mental state, it did not direct the jury to the mistake of fact affirmative defense. R. CF, pp. 278, 282. The court's instruction on the intent requirement for fraud by check did not tell the jury that the prosecution was required to disprove the mistake of fact defense beyond a reasonable doubt. Therefore, the trial court did not err when it gave the jury a mistake of fact affirmative defense instruction.

C. The error was not harmless beyond a reasonable doubt.

The Attorney General argues that Mr. Cowen's tendered instruction was harmless because it was "'duplicative of the elements the prosecution was already required to prove beyond a reasonable doubt.'" Answer Brief, p. 16 (quoting *Walden*, 224 P.3d at 379). However, the trial court's refusal to instruct the jury on how to evaluate Mr. Cowen's affirmative defense was not harmless beyond a reasonable

doubt. Indeed, as discussed above, the facts in this case required additional instructions in order to adequately advise the jury on the relevant law. In a case where Mr. Cowen did not postdate the check but, instead, made an oral agreement with Samara Weidner to cash the check on a later date after he deposited T-Chek's into his checking account, the jury could have found Mr. Cowen's mistake honest but unreasonable.

Indeed, the jurors' question during deliberations suggests that they had difficulties evaluating Mr. Cowen's affirmative defense. For instance, the jury asked: "Does it make any difference if there is a verbal agreement to postpone deposit?" R. Tr. 10/9/14, p. 72. The prosecution believed that the jury's question could be "talking about the affirmative defense[.]" *Id.* at 73-74. Consequently, the trial court's denial of Mr. Cowen's tendered instruction was not harmless beyond a reasonable doubt, and his conviction in Count 1 should be reversed, and his case remanded to the trial court.

III. THE TRIAL COURT REVERSIBLY ERRED IN GIVING INSTRUCTION # 13, OVER MR. COWEN'S OBJECTION, BECAUSE IT WAS IRRELEVANT AND MISLEADING TO THE ISSUES IN MR. COWEN'S CASE.

A. Analysis

Mr. Cowen relies on the arguments and authorities raised in his Opening Brief. *See* Opening Brief, pp. 27-31.

B. Instruction #13 created a reasonable possibility that the jury was improperly misled in reaching a verdict.

The Attorney General asserts that Mr. "Cowen was not unfairly prejudiced when the prosecution argued that the fact that he knew he did not have sufficient funds was evidence that he intended to defraud Elite Diesel." Answer Brief, p. 20. However, as discussed in Mr. Cowen's Opening Brief, the prosecution relied on Instruction #13 to argue that Mr. Cowen also intended to defraud Elite Diesel. *See* Opening Brief, pp. 31-33. Moreover, the prosecution's argument and Instruction #13 *did* confuse the jury. During deliberations, the jury asked: "Is the <u>intent</u> to 'defraud by check' defined as writing a check knowing you don't have the funds?" R. CF, p. 286 (emphasis in original). Consequently, Instruction #13 created a reasonable possibility that the jury was improperly misled in reaching a verdict and Mr. Cowen's conviction on Count 1 must be reversed, and Mr. Cowen's case remanded for a new trial.

<u>CONCLUSION</u>

Based on the arguments and authorities in this Reply Brief, together with the arguments and authorities in the Opening Brief, Mr. Cowen respectfully asks this Court to reverse Count 1 and remand this case for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on July 29, 2016, a copy of this Reply Brief of Defendant-Appellant was electronically served through ICCES on Ethan E. Zweig of the Attorney General's office.