

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0037

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DALE STEVEN MARTELL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Robert L. Deschamps III, Presiding

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STATEMENT OF THE ISSUE

Whether the district court committed harmless error by allowing a State witness to testify at trial by two-way video.

STATEMENT OF THE CASE

On January 2, 2019, Missoula County filed an Information charging Appellant Dale Steven Martell (Martell) with felony theft in violation of Mont. Code Ann. § 45-6-301(1) and forgery in violation of Mont. Code Ann. § 45-6-325(4). (Doc 6.) An Amended Information was filed on July 10, 2019, which omitted the forgery charge. (Doc. 25.) Prior to trial, the State moved to allow an out-of-state witness to testify at trial via video. (Doc. 17.) Over Martell's objection, the district court granted the State's motion and allowed the witness to testify by two-way video. (Doc. 18; Tr. at 16, 172-180.) The jury found Martell guilty and written judgment was issued on November 20, 2019. (Docs. 28, 35.)

STATEMENT OF THE FACTS

On June 13, 2018, Corporal Kamerer of the Missoula Police Department responded to EZ Money Check Cashing and Loans (EZ Money) regarding a reported forgery. (Doc. 1 at 2.) Corporal Kamerer spoke with Lousie Doty (Doty) who explained that she had cashed a check from Martell on June 1, 2018, in the

amount of \$2,780. (*Id.*) The check was from the Lakefield Veterinary Group (Lakefield Veterinary). (*Id.*) Doty stated that she thought the check was suspicious, but she cashed it anyway because Martell had been a regular customer since 2011. (*Id.*) Doty reported that the bank notified her that the check was altered or fictitious. (*Id.*) Doty stated that she contacted Lakefield Veterinary and learned that the check had been issued in January for \$510. (*Id.*) She contacted Martell and he claimed that the issue was a mistake. (*Id.*) Martell told Doty that he would return the money. (*Id.*) Doty reported to Corporal Kamerer that she continued to contact Martell over the next few weeks, but he never returned the money. (*Id.*)

Detective Stacey Lear (Detective Lear) was assigned to continue the investigation. (Doc. 1 at 2; Tr. at 181, 183.) Detective Lear attempted to contact Martell by phone but it was disconnected. (*Id.*) Detective Lear also attempted to contact Martell by mail but he did not respond. (*Id.*)

Martell was arrested and charged by Information with felony theft and forgery. (*See* Docs. 2, 6.) The State would later file an Amended Information dropping the forgery charge. (Doc. 25.) The Amended Information specifically alleged that: “On or about or between the 1st and 13th days of June, 2018, the above-named Defendant purposely or knowingly obtained or exerted unauthorized control over money owned by EZ [Money] Check Cashing and Loans with the

purpose of depriving the owner of the property.” (*Id.* at 1 (citing Mont. Code Ann. § 45-6-301(1)).)

Prior to trial, the State moved to allow a representative from Lakefield Veterinary to testify by video. (Doc. 17.) The State affirmed that the company was in Washington State, approximately 481 miles from Missoula, Montana. (*Id.* at 1.) The State provided that the representative was expected to testify that the check cashed at EZ Money had already been issued to another vendor, and Lakefield never had any contact with or knowledge of Martell. (*Id.* at 2.) The State argued that video testimony by this witness should be allowed because “the distance and expense to secure a witness from Washington State to provide only a few minutes of testimony is unreasonable and impractical.” (*Id.* at 3-4.) The State cited to *City of Missoula v. Duane*, 2015 MT 232, 380 Mont. 290, 355 P.3d 729, in support of its motion. (*Id.* at 2-4.)

Martell objected to the motion and argued that the facts of *Duane* were distinguishable from the instant case. (Doc. 18 at 2.) Martell asserted that the district court should deny the motion because allowing the video testimony would violate his right “to meet the witnesses against him face to face” pursuant to article II, section 24 of the Montana Constitution. (*Id.* at 1-2.)

At trial, the district court addressed the State’s motion for video testimony. (Tr. at 16.) The court granted the motion after concluding that the video testimony

would satisfy the standards set out in *Duane*, i.e., the witness would be under oath in real time, the jury could observe the witness, and the witness would be subject to cross-examination. (*See id.*) The district court also stated:

And I think that the State has made a reasonable showing that it's impractical to haul somebody 481 miles each direction to talk about whether or not this is a legitimate check written on their account or not. And it's more or less foundation type testimony. It's minor. I just think it's an appropriate place to use this kind of testimony.

(*Id.*)

The State called four witnesses during its case in chief: Doty, Alecia Drevon, an accounts payable supervisor at Lakefield Veterinary, Darwin Rush, a branch manager at First Interstate Bank, and Detective Lear. (Tr. at 140, 172-73, 176-77, 181.)

Doty testified that she had worked at EZ Money and had reported the theft. (Tr. at 140.) Doty stated that EZ Money provided a check cashing service and would cash people's checks for a small fee. (*Id.* at 141.) Doty affirmed that she knew Martell and he was a longtime customer. (*Id.* at 141.) Doty testified Martell brought in a check to cash in June 2018. (*Id.* at 142-43.) Doty could not remember the exact date, but knew it was a Friday. (*Id.*)¹

¹ Although Doty testified that she could not remember the exact date Martell cashed the check, the parties agree that it was June 1, 2018. (Appellant's Br. at 2.)

Doty stated that EZ Money's procedure was to call the bank to make sure that the check was issued from a valid account, and then call the company that issued the check to confirm that it is a valid check. (*See* Tr. at 142.) However, it was "very late in the day" on a Friday and Doty could not verify the check. (*Id.*) Doty testified that she was hesitant to cash the check because it was for an amount higher than Martell usually cashed, but she decided to do so because he was a longtime customer and because Martell stated that the money was for his son's graduation party that weekend and he wanted to provide "a nice party for [his] son." (*See id.* at 142-43.)

Doty testified that the next Monday morning, she called the company that issued the check, i.e., Lakefield Veterinary, and was told that the check number on the check had been issued earlier in the year in January for a different dollar amount. (Tr. at 144; Defendant's Ex. C (Doty's handwritten notes stating that she called "Lakefield Vet. Group" on June 4, 2018, and was told that the check was "Fake") (attached as State's App. 1). Doty was also informed that the check had been issued to someone other than Martell. (Tr. at 144.) Doty stated that it was her belief that someone had stolen that check's information. (*Id.*)

Doty testified that she called Martell "immediately" and told him that the check was fictitious and that he needed to return the money. (Tr. at 147-48; State's App. 1 (Doty's notes stating she called Martell on June 4, 2018, and told him that

the check was “fake”).) Martell told her that he would call the company. (Tr. at 148.) Doty testified that she called Martell at least seven times over the next few weeks and there “was always a reason why he couldn’t make it back in.” (*Id.* at 148-49.) However, Doty affirmed that “[t]here was no repayment.” (*Id.* at 148.) Doty testified that EZ Money suffered a loss of \$2,780. (*Id.* at 149.)

Doty reported that First Interstate Bank, EZ Money’s bank, eventually returned the check with a letter that stated that it was “fictitious.” (Tr. at 144; *see also* State’s Exs. 1-3 (letter from First Interstate Bank with a copy of the check stating that it was being returned because it was an “Altered/Fictitious Item”) (attached as State’s App. 2)). Doty testified that she contacted law enforcement on June 13, 2018, and reported the incident. (*Id.* at 150.)

During cross-examination, defense counsel successfully admitted Doty’s handwritten notes memorializing her attempts to both verify the check with Lakefield Veterinary and to seek repayment from Martell after notifying him the check was “fake.” (Tr. at 157; *see* State’s App. 1.) Doty agreed with defense counsel that this document was a true and accurate copy of the record she kept at the business. (Tr. at 156.) Defense counsel also confirmed with Doty that she called Martell on June 4, 2018, to tell him the check was “fake.” (*Id.* at 157.) Doty testified that she then called Martell repeatedly over the next nine days. (*Id.* at 158.)

The State next called Alecia Drevon (Drevon) by two-way video. (*See* Tr. at 172.) Drevon was sworn in and confirmed that no one else was in the room with her. (*Id.*) Drevon testified that she was employed by Lakefield Veterinary, located in Kent, Washington. (*Id.* at 172-73.) Drevon testified that in her role as the accounts payable supervisor, she had the ability to both keep and look up records for Lakefield Veterinary. (*Id.* at 173.) Drevon confirmed that these business records are made at or near the time of the event that they depict. (*Id.*) Drevon testified that payments from Lakefield Veterinary are recorded with check and invoice numbers. (*Id.* at 174.)

Drevon testified that she was familiar with “Check No. 1036821,” and stated that it was issued on January 26, 2018. (Tr. at 174.) Drevon stated that the check was issued to “GTM Outdoor Services” in the amount of \$510. (*Id.*) Drevon stated that GTM Outdoor Services provided lawn maintenance for Lakefield Veterinary and was a normal vendor. (*Id.*) The prosecution presented Drevon with a copy of the check that was cashed by Martell at EZ Money and she stated it had the same check number as the check that had been previously been issued to GTM Outdoor Services. (*Id.* at 175.) The prosecution then asked:

Q. Who was this check made out to?

A. Dale Martel[l].

Q. And do you know if Dale Martel[l] is a vendor or somebody that your company has done business with?

A. He's not in our system at all.

Q. Has your business done business with anybody in Missoula, Montana?

A. No.

Q. And what was the amount of this check?

A. \$2,780.

Q. Was this a legitimate check issued from your business, Lakefield Veterinary Group?

A. No.

(Id. at 175-76.)

Following the State's direct examination, Martell declined to cross-examine Drevon and she was excused. (Tr. at 176 ("THE COURT: Okay. Cross-examination? [Defense Counsel]: No cross, Your Honor. THE COURT: All right, there will be no cross-examination. I guess you're excused, ma'am, and thanks for your participation.").)

Darvin Rush (Rush), First Interstate Bank's branch manager for the retail department, testified next. (Tr. at 176-77.) Rush reviewed the letter sent by First Interstate Bank to EZ Money and a copy of the returned check. (*See id.* at 178-79.) Rush testified that the check was "returned because it was a fictitious item deposited into the account of EZ Money." (*Id.* at 178.)

Detective Lear also testified regarding her investigation. (Tr. at 184.)

Detective Lear testified that she made unsuccessful attempts to contact Martell.

(*See id.*) However, Detective Lear testified that she was able to speak with

someone at Lakefield Veterinary. (*Id.* at 184, 189.) On cross-examination, defense

counsel questioned Detective Lear about her conversation with Lakefield

Veterinary and at one point read a portion of the transcript of the conversation into

the record:

Q: And so, I have a transcript of your conversation. You told her, quote, Just so you guys are aware, I think that someone probably either intercepted that through you guys or GTM Outdoor Services, and made some counterfeit copies, and that may be what I'm dealing with here. Um, but there's nothing that you need to do on your end.

Is that what you told them at Lakefield Veterinary Group?

A. That sounds accurate.

(*Id.* at 189.)

Defense counsel also asked Detective Lear if she had called GTM Outdoor

Services and Detective Lear replied, "I did not." (Tr. at 190.) Defense counsel then

asked, "You didn't think it would be a good idea to let GTM services know that

somebody was probably intercepting and counterfeiting checks related to their

business," and Detective Lear replied, "no." (*Id.*)

After the State rested, Martell moved to dismiss for insufficient evidence.

(Tr. at 200.) Martell argued that the State had failed to prove his mental state and

“that he purposely or knowingly exerted unauthorized control over the funds from EZ Money Check Cashing.” (*Id.*)

The State responded that it had met the elements of theft and argued that Martell’s mental state could be inferred from Doty’s testimony. (*Id.* at 201.) Specifically, Doty testified that she called Martell repeatedly to tell him that the check was altered or fictitious and he needed to return the money. (*Id.*) Now, fourteen months later, Martell had “never made any payment on it. That’s theft. The State made a prima facie case.” (*Id.* at 201-02.)

The district court agreed that the State had met the elements of theft, but under a slightly different legal theory.

I think the State has made a prima facie case.

The testimony is that Lakefield Veterinary Group has no relationship or transactions with Dale Martel[1]; yet, Mr. Martel[1] presented a check made out to him from this entity, and accepted cash for it.

And he’s not accused of forgery; he’s accused of theft. But the—I think the circumstantial evidence suggests that, when he doesn’t have a relationship with this vendor or this company, that any negotiable instrument he presents from them is not legitimate. And his state of mind can be inferred from the facts and circumstances in evidence.

And the facts and circumstances show it’s a bogus check. And so, it would have been nice to have had a statement from him, knowing exactly how he came into possession of this thing, which we don’t have.

But I think there’s enough to get past a motion to dismiss, so it’s denied.

(Tr. at 201-02.)

During the State's closing argument, it emphasized that "theft is exerting unauthorized control over property that's not yours." (Tr. at 210.) The State stated that:

Numerous witnesses told you the problems with this check. First, Ms. Dot[]y was notified that the check was illegitimate; it came back from her bank. First Interstate Bank described to you the process they go through to send the check on down the line to get paid back when they receive a deposit. That check was flagged as fictitious or altered.

Lakefield Veterinary Group provided testimony today from Alecia Drevon. She told you that Lakefield had no relationship with Mr. Martel[]; he was not employed by them or contracted to do any business, and that check was not legitimate. I don't know why Mr. Martel[] had it. But when he got paid for it, he had cash that was not his.

If you walk out of your house in the morning and you find a wallet that has \$100 in it, you're not stealing anything if you pick up that wallet. That is not theft because there's no unauthorized control over the property of another. But if a moment later somebody comes running up to you and said, I just dropped my wallet. Here's what it looks like. Here's what's inside of it, and you refuse to give it back, you've now exerted unauthorized control over somebody's property. And finding something or being in possession became something else: a crime, theft.

(*Id.* at 211-12.) The State highlighted the exhibits introduced at trial, including the letter from First Interstate and the copies of the returned check. (*Id.* at 212.) The State recounted that Doty testified that she called Martell numerous times and, although he said he would return the money, he never did. (*Id.* at 213.) After repeating the elements of theft, the State argued that Martell acted "knowingly" by keeping the money after Doty told him there was a problem with the check.

(*Id.* at 215.) Thus, the State argued that by the time Doty had called Martell, the elements of theft had been satisfied. (*See id.* (“A person acts knowingly when the person is aware of his or her conduct. Which he became aware of when notified by Ms. Dot[y, if not earlier.”].))

During Martell’s closing argument, defense counsel argued that the State had failed to prove that Martell did not know that the check was fake when he presented it to EZ Money. (Tr. at 217, 219 (“There’s no facts or circumstance in evidence that shows that he knew this check was fraudulent.”).) Martell argued that “it matters whether he knew it was fraudulent or not.” (*Id.* at 217.) Without this proof, Martell contended that “the State cannot prove that his control was unauthorized.” (*Id.*)

During the rebuttal argument, the State responded:

[Defense counsel] just said there are no facts regarding this check being fraudulent. Ms. Dot[y called the defendant and told him it was. That’s knowledge. He knew that the check was fraudulent. Lakefield Veterinary Group testified he never did any business for them; yet, he’s holding a check from a group in Kent, Washington, 20 miles south of Seattle, for \$2,780.

[Defense counsel] said it matters whether he knew it was fraudulent. Well, I do agree, and I just discussed that. But you’re also going to find that in the jury instructions, that’s not actually one of the elements.

You know that that’s important because he needed to learn, at some point, that he should not be in possession of that money. Either it was at the moment that he was cashing it or when he was told that he was in possession of a fake or fraudulent check.

So you know that you get to bring your personal experiences about how some of that works and how you process knowledge like

that. But there is no doubt that Mr. Martel[1] knew about it because of Ms. Dot[]y telling him.

Ladies and Gentlemen, if you loan a friend a car, that's not stealing. If you loan your friend your car and he never brings it back, that is. Sometimes timing is important. I'm not telling you to pick a certain second of a certain hour of a certain day of when that occurred. At some point between June 1st of 2018, and now, Mr. Martel[1] knew that he shouldn't have been in possession of that cash, and he's guilty of theft.

(Tr. at 221-22.)

Following closing arguments, the jury sent up a note with two questions:

“What does exerted unauthorized control over the cash mean? Does this need to be initial act?” (Tr. at 227.) For the first question, the district court responded, “Apply a common English definition to these words.” (*Id.* at 232.) The answer to the second question generated a discussion among the parties. (*See id.* at 228-32.)

The district court believed that the jury was asking if the State needed to prove that it was Martell's “intent” to exert unauthorized control over the money at the time he cashed the check, i.e., on June 1, 2018, and not at some later point in time. (*See Tr.* at 228-29 (“It seems to me like the way it was charged was his intent. And I'm using the word that doesn't exist in our law. But his intent had to be formed at the time he obtained control and not formed at some subsequent time.”).) The district court found that the State needed to prove that Martell had unauthorized control over the money on the date he took control. (*See id.* at 232 (“And I think by the way this case is charged, it has to occur when you take

unauthorized control, period; that's when it starts.") The district court held that the answer to the second question was, "Yes." (*Id.*)

The State objected to the court's supplemental instruction. (Tr. at 232-33.) The State argued that additional guidance on the issue was not proper and the district court should respond by telling the jury that "they are left with the evidence and the instructions that they've already been given." (*Id.* at 232) The district court noted the State's objection and gave the supplemental instruction. (*Id.* at 233 ("And I understand that the State objects to my answer on the second question. And your objection is noted and preserved. But as somebody told me a long time ago, you can't commit error against the State.")) The jury unanimously found Martell guilty of theft. (*Id.* at 234-36.)

SUMMARY OF THE ARGUMENT

Under the facts and record of this case, the State acknowledges that the district court committed trial error by allowing Drevon to testify by two-way video. However, this error was harmless. Contrary to Martell's argument that this testimony was introduced to prove that he "knowingly" cashed a fake check and was aware the check was counterfeit at the time he cashed it, the State's arguments before the district court and the jury belie this argument. Importantly, the State did not need to prove that Martell knew the check was fake when he cashed it. Indeed,

as repeatedly stated by the prosecution during trial, Doty's testimony established the mental state requirements for simple theft, namely that when she called Martell and told him the check was fake, he should have been aware at that point that his control over the money was unauthorized. Simply put, the State did not need Drevon's testimony to prove the requisite mental state for theft.

Instead, Drevon's testimony was introduced as further evidence to show that the check was fake, which supported the fact that Martell was not authorized to receive EZ Money's \$2,780 in cash. Drevon's testimony was cumulative of other evidence which established this point. Indeed, every witness testified that the check was fake, a point defense counsel conceded during questioning. There was no real dispute about whether the check was fake, and Drevon's testimony was cumulative evidence of this fact.

Recognizing this point, Martell attempts to confuse the issue and argue that the State was bound under the law-of-the-case doctrine to a legal theory that required proof that Martell was aware the check was counterfeit at the time he cashed it. However, the law-of-the-case doctrine does not apply to this case. Importantly, the preliminary jury instruction which stated that Martell was charged with theft, alleged to have been committed "on or about June 1, 2018," did not add an unnecessary element to the case because this was not a "to convict" instruction and was merely background information. Further, the district court's supplemental

instruction, which addressed the jury’s question about whether the cashing of the check was “an initial act,” could arguably be interpreted as adding an unnecessary element to simple theft. However, the State timely objected to the supplemental instruction which precludes application of the law-of-the-case doctrine.

ARGUMENT

I. Standard of review

This Court exercises plenary review of constitutional questions and applies de novo review to a district court’s constitutional interpretations of Article II, Section 24 of the Montana Constitution. *State v. Mercier*, 2021 MT 12, ¶ 11, 403 Mont. 34, 479 P.3d 967; *State v. Bailey*, 2021 MT 157, ¶ 17, 404 Mont. 384, 489 P.3d 889.

II. The Court should affirm Martell’s conviction.

A. Pursuant to the Court’s decision in *Bailey*, the State recognizes that the district court erred by allowing Drevon to testify by two-way video.

Martell argues that his right to confrontation was violated when the district court granted the State’s motion and allowed Drevon to testify by two-way video. (Appellant’s Br. at 7.) Martell’s cites to both the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution for his argument. (*Id.*) However, in his response to the State’s motion for video testimony,

Martell only asserted his right to confrontation under the Montana Constitution. (Doc. 18 at 1-2 (citing only to Article II, Section 24).) Because Martell failed to raise a specific objection to the State’s motion under the Sixth Amendment, he has waived any objection under the United States Constitution. *See State v. Roundstone*, 2011 MT 227, ¶ 31, 362 Mont. 74, 261 P.3d 1009 (“Generally, a constitutional issue is waived if not raised at the earliest opportunity.”). Accordingly, this Court should only review Martell’s claim under the Montana Constitution.

“In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face[.]” Mont. Const. art. II, § 24; *Bailey*, ¶ 41. “A criminal defendant’s right to confrontation guarantees the right to fully cross-examine testimonial witnesses.” *Bailey*, ¶ 41 (citing *State v. Stock*, 2011 MT 131, ¶ 29, 361 Mont. 1, 256 P.3d 899). “Under Montana’s confrontation clause, a witness may testify via two-way video only when the ‘moving party makes an adequate showing on the record that the personal presence of the witness is impossible or impracticable to secure due to considerations of distance or expense.’” *Bailey*, ¶ 42 (quoting *Duane*, ¶ 25).

Nevertheless, a “showing of ‘impossibility’ or ‘impracticability’ does not obviate the State’s burden to also sufficiently demonstrate that dispensing with literal face-to-face confrontation would be ‘necessary to further an important

public policy.” *Bailey*, ¶ 42 (quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990)). Furthermore, “[j]udicial economy, standing alone, does not satisfy the constitutional requirement that a defendant’s right to in-person confrontation at trial may be replaced by testimony via two-way video.” *Bailey*, ¶ 42 (quoting *Mercier*, ¶ 26).

Here, the State’s motion for video testimony argued that, pursuant to *Duane*, the district court should allow Drevon to testify by video because “the distance and expense to secure [her] from Washington State to provide only a few minutes of testimony is unreasonable and impractical.” (Doc. 17 at 3-4.) In granting the motion, the district court found “that the State has made a reasonable showing that it’s impractical to haul somebody 481 miles each direction to talk about whether or not this is a legitimate check written on their account or not.” (Tr. at 16.)

Upon review of these findings, and the rationale cited in the motion for video testimony, the State agrees with Martell that the district court granted the motion for video testimony based on judicial economy. As discussed in *Bailey*, judicial economy, by itself, cannot meet the impossibility or impracticability standard set in *Duane*. Because the record does not indicate that Drevon’s testimony was necessary to further an important public policy aside from judicial economy, the State agrees with Martell that, based on the specific facts and record

of this case, the district court erred by allowing Drevon to testify via video.

However, this error was harmless.

B. Cumulative evidence supported Martell’s conviction.

This Court has long “held that a judgment of conviction will not be reversed unless the error prejudiced or tended to prejudice the substantial rights of the defendant.” *State v. Huerta*, 285 Mont. 245, 251-52, 947 P.2d 483, 487 (1997) (citations omitted). This Court has “further held that in criminal cases no judgment will be reversed for technical errors or defects which do not affect the substantial rights of the defendant, and when the record is sufficient to establish the guilt of the defendant, a new trial will not be granted, even though there was error, unless it clearly appears that the error complained of actually impaired the defendant’s right to a fair trial.” *Huerta*, 285 Mont. at 252 (citations omitted). Pursuant to statute, “[a] cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.” Mont. Code Ann. § 46-20-701(1).

This Court has “adopt[ed] a two-step analysis to determine whether the alleged error prejudiced the criminal defendant’s right to a fair trial and is therefore reversible.” *State v. Van Kirk*, 2001 MT 184, ¶ 37, 306 Mont. 215, 32 P.3d 735. Under the first step, the Court must initially determine “whether the claimed error is categorized as ‘structural’ error or ‘trial’ error.” *Van Kirk*, ¶ 37. “If structural,

the inquiry ends and the verdict is reversed.” *Van Kirk*, ¶ 41. However, “[i]f the error is the more typical ‘trial’ error, then the analysis proceeds to the second step, which involves the determination of whether the error was harmless under the circumstances.” *Van Kirk*, ¶ 41.

Here, under the first step of the harmless error analysis, Martell does not dispute that allowing the video testimony was trial error. Indeed, this Court has found that “[a] constitutional deprivation of the defendant’s confrontation right is a trial error and is subject to harmless error review.” *Mercier*, ¶ 31 (citation omitted); *Bailey*, ¶ 46. Accordingly, this Court should find that allowing Drevon to testify by two-way video was trial error and proceed to the second question of whether this error was harmless.

1. The State presented cumulative evidence that Martell’s control over the \$2,780 was unauthorized because the “check” he cashed was fake.

Under the second step of the harmless error analysis, “the State, as the ‘beneficiary of a constitutional error[,]’ bears the burden of proving that the error was harmless beyond a reasonable doubt.” *Mercier*, ¶ 31 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). This “assessment of harmlessness cannot include consideration of whether the witness’s testimony would have been unchanged, or the jury’s assessment unaltered, had there been confrontation[,]’ and instead harmlessness must ‘be determined on the basis of the remaining

evidence.” *Mercier*, ¶ 31 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988)). Rather, the Court “consider[s] ‘the importance of the witness testimony in the prosecution’s case, whether the testimony was cumulative, [and] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points[.]’” *Mercier*, ¶ 31 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

In weighing whether the testimony was cumulative, the Court must determine whether the testimony was admitted to prove an element of the offense or for some other purpose. *See Van Kirk*, ¶¶ 45-47. “If the tainted evidence was admitted to prove an element of an offense, to prove harmless error the State must direct us to the cumulative admissible evidence that proves the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no reasonable possibility it might have contributed to the conviction.” *State v. Santillan*, 2017 MT 314, ¶ 35, 390 Mont. 25, 408 P.3d 130 (citations omitted). “But if the tainted evidence was not admitted to prove an element of the offense, then the admission of the evidence will be deemed harmless only if the State demonstrates that the quality of the tainted evidence was such that there was no reasonable possibility it might have contributed to the conviction.” *State v. Derbyshire*, 2009 MT 27, ¶ 47, 349 Mont. 114, 201 P.3d 811 (citations omitted).

Pursuant to the amended information, Martell was charged solely with theft under Mont. Code Ann. § 45-6-301(1). (Doc. 25.) As reflected in the jury instructions, the State sought a conviction under Mont. Code Ann. § 45-6-301(1)(b). (*See* Doc. 27 at 18-19 (detailing the elements of “Theft – By Unauthorized Control”).) Pursuant to this subdivision, “[a] person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over property of the owner and . . . purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property.” Mont. Code Ann. § 45-6-301(1)(b).

Here, Drevon’s testimony was introduced to satisfy an element of theft, namely that Martell obtained or exerted unauthorized control over property belonging to EZ Money, i.e., the \$2,780 in cash. Indeed, the State’s sole theory of the case was that Martell committed theft by failing to return the money after being notified that the check was fake, not that Martell *knew* that the check was fake when he cashed it. (Tr. at 201-02, 210-13, 215.) Contrary to Martell’s argument that the State introduced Drevon’s testimony to satisfy the required “mental state” for theft (Appellant’s Br. at 13), Drevon’s testimony was cumulative evidence introduced to further support the fact that the check was fake, which further confirmed that Martell’s control over the \$2,780 was unauthorized.

Drevon’s testimony establishing that the check was fake was cumulative of a plethora of evidence on this point. Doty testified that she called Lakefield Veterinary the Monday after Martell had cashed the check and was told that the check number on the check had been issued earlier in the year to someone other than Martell and for a different dollar amount. (Tr. at 144.)² Rush, the branch manager at First Interstate Bank, also testified that the check was “fraudulent.” (Tr. at 179.) Indeed, Martell never argued that the check was legitimate and even acknowledged, through defense counsel, that the check was fake and was counterfeited from a check originally issued to GTM Outdoor Services. (Tr. at 157 (defense counsel describing the check as “invalid” and “fake”); Tr. at 192 (defense counsel asking Detective Lear, “You didn’t think it would be a good idea to let GTM services know that somebody was probably intercepting and counterfeiting checks related to their business?”).) Martell also admitted into evidence Doty’s

² The State notes that Martell did not object to this testimony as hearsay. (See Tr. at 144.) Because Martell failed to object, he waived any objection to this evidence on appeal. *State v. Paoni*, 2006 MT 26, ¶ 16, 331 Mont. 86, 90, 128 P.3d 1040 (“A defendant waives an objection and may not seek appellate review when a defendant fails to make a contemporaneous objection to an alleged error in the trial court.”). Furthermore, later in Doty’s testimony, the State asked her if she had ever spoken with someone at Lakefield Veterinary to confirm that the check was illegitimate. (*Id.* at 149-50.) At that point, Martell objected to the question on hearsay grounds and Doty answered “Yes” before the district court sustained the objection. (*Id.* at 150.) However, the court did not strike Doty’s affirmative answer from the record. (*Id.* at 149-50.) The statement thus remained in the record and was considered by the jury.

handwritten notes where she described how she called Lakefield Veterinary and was told that the check was “fake.” (State’s App. 1.) Thus, considering that Martell conceded that the check was fake, there was no reasonable possibility that Drevon’s testimony, which further confirmed that the check was illegitimate, contributed to Martell’s conviction. *Santillan*, ¶ 35.

Recognizing that there was overwhelming evidence to this point, Martell makes the misguided argument that this evidence was introduced to satisfy the required mental state, i.e., that Martell acted purposely or knowingly. However, in its arguments regarding Martell’s motion to dismiss for insufficient evidence and in its closing statements before the jury, the State consistently argued that the “purposely or knowingly” requirements under Mont. Code Ann. § 45-6-301(1)(b) were satisfied by Doty’s testimony, not Drevon’s statements. (Tr. at 202 (“As the Court knows, a mental state would be inferred. And Ms. Dot[y]’s testimony was that she explicitly told him the problems with the check.”); Tr. at 221 (“[Defense counsel] just said there are no facts regarding this check being fraudulent.

Ms. Dot[y] called the defendant and told him it was. That’s knowledge. He knew that the check was fraudulent.”.) Thus, pursuant to the State’s theory of the case, Martell acted “purposely or knowingly” when controlling the money because Dot[y] called him within days to tell him that the check was fake and he needed to return the money. Even if Martell had some good faith belief that the check was

real at the time he cashed it, which was not supported by the evidence in any way,³ by the time Doty called him, on Monday, he was aware that his control over the money was unauthorized, which satisfied the requirements of Mont. Code Ann. § 45-6-301(1). Further, when Martell knowingly failed to return the money to EZ Money after being told the check was fake, the required mental state under subdivision (1)(b) was satisfied, namely that Martell purposely or knowingly used the money in a manner that deprived EZ Money of its property. Mont. Code Ann. § 45-6-301(1)(b).

Misinterpreting these elements, Martell contends that to satisfy the mental state requirement for theft, the State needed to prove that Martell was aware that the check was fake on the day he cashed it. (*See* Appellant's Br. at 7, 10-13). This is not a requirement under Mont. Code Ann. § 45-6-301(1)(b). The elements of theft under subdivision (1)(b) simply require the State to prove: (1) "a knowing exertion of control," (2) "a purpose to deprive," and (3) "that the owner must be deprived of the property." *State v. White*, 230 Mont. 356, 358-59, 750 P.2d 440, 441 (1988). Martell argues a standard that does not exist under the law.

³ During trial, defense counsel seemed to imply that Martell's ex-wife, who purportedly resided in Washington State, may have had something to do with the counterfeit check. (*See* Tr. at 134, 152, 189, 218.) However, this vague argument was never fully fleshed out by Martell.

As this Court has repeatedly discussed, “the method by which unauthorized control is obtained or exerted is immaterial in subsection (1)” of Mont. Code Ann. § 45-6-301(1). *State v. Shively*, 2009 MT 252, ¶ 17, 351 Mont. 513, 216 P.3d 732; *State v. Meeks*, 2008 MT 40, ¶ 9, 341 Mont. 341, 176 P.3d 1073 (quoting the Commission Comments to Mont. Code Ann. § 45-6-301). Thus, it makes no difference under Mont. Code Ann. § 45-6-301(1) whether Martell knew that the check was fake when he cashed it. *See Shively*, ¶ 17-18 (concluding that the State was not required to prove that the defendant knew the property was stolen to be convicted under Mont. Code Ann. § 45-6-301(1)(a), because the statute only requires a knowing exertion of control over the property with the purpose to deprive the owner); *see also State v. Long*, 227 Mont. 199, 204, 738 P.2d 487, 490-91 (1987) (affirming a conviction for theft of a boat where the defendant initially exercised lawful control with the owner’s permission, but later exceeded the permission governing its use); *White*, 230 Mont. at 357, 750 P.2d at 440 (affirming defendant’s conviction for theft under subdivision (1)(b) for failing to return a truck after the owner withdrew permission for the defendant to use it). Consequently, to obtain a theft conviction under Mont. Code Ann. § 45-6-301(1),

the State was not required to prove that Martell was aware the check was fake when he cashed it.⁴

Furthermore, Martell argues that Drevon's testimony was detrimental to the defense because it established that Martell lacked a business relationship with Lakefield Veterinary, which Martell argues created "a resulting inference of knowing deception." (Appellant's Br. at 12.) However, as discussed, the State did not need to prove that Martell knowingly deceived EZ Money when it received the money. Martell was charged with simple theft under Mont. Code Ann. § 45-6-301(1), not theft by "threat or deception," pursuant to Mont. Code Ann. § 45-6-301(2). Thus, to satisfy the "purposely or knowingly" requirement, the State merely needed to show that Martell was aware of his control over the money and that this control was unauthorized. As continuously argued by the State during trial, when Doty called Martell and told him that the check was fake, Martell should have been aware that his control over the money was unauthorized.

The lack of a business relationship between Martell and Lakefield Veterinary would, however, provide evidentiary support for the State's argument

⁴ The State acknowledges, however, that the prosecution could have sought a conviction for theft under the theory that Martell was aware the check was counterfeit at the time he cashed it. As previously recognized by this Court, the Commission Comments to the theft statute reflected the commission's "inten[tion] that all forms of theft could be charged and proved under subsection (1)." *Shively*, ¶ 17 (quoting the Commission Comments to Mont. Code Ann. § 45-6-301). However, as reflected in the record, this was not the State's theory of the case.

that Martell's control over the money was unauthorized because the check was fake. Nevertheless, as discussed above, there was considerable additional evidence introduced to show that the check was counterfeit. Accordingly, Drevon's testimony, which further established that the check was fake and Martell's control over the \$2,780 in cash was unauthorized, was cumulative of additional evidence to this point. Although the district court erred by allowing Drevon to testify by two-way video, this error was harmless and Martell's conviction should be affirmed.

2. Martell is incorrect that the law of the case doctrine applies to this case.

Recognizing that the State was not required to prove that he knew the check was fake at the time he cashed it, Martell contends that the State was somehow bound to this legal theory when it did not object to a preliminary instruction that provided background information about the case. (Appellant's Br. at 11.) This instruction, listed as Jury Instruction No. 4, stated: "An Information has been filed charging the Defendant, Dale Martell, with the offense of Theft, alleged to have

been committed in Missoula County, State of Montana, on or about June 1, 2018.”⁵ (Doc. 27 at 7 (attached as State’s App. 3).) Additionally, in response to a jury question which the district court interpreted as asking if the State was required to prove that it was Martell’s “intent” to exert unauthorized control over the money at the time he cashed the check, the district court gave a supplementary instruction, over the State’s objection, which answered the jury’s question in the affirmative. (See Tr. at 228-29, 232.) Martell argues that these instructions established the “law of the case” which required the State to prove that Martell knowingly cashed a fake check. Martell is incorrect.

While it is true that this Court has previously held “that when the State fails to properly object to a jury instruction, the instruction, whether it includes an unnecessary element or not, becomes the law of the case once delivered, and the

⁵ Although not addressed by Martell, the transcript reflects that when reading this preliminary instruction, the district court used the phrase, “on or *before* June 1, 2018,” instead of “on or *about* June 1, 2018,” as actually reflected in the written jury instructions. (*Compare* Tr. 128 with Doc. 27 at 7.) However, Martell does not argue that the district court’s apparent misreading of this preliminary instruction prejudiced him in any way. This, of course, is because the written jury instructions, which contained the correct language, were sent back with the jury during deliberations. (Tr. at 223-24.) Thus, because Martell fails to raise any issue with this district court’s slight misreading of Jury Instruction No. 4, he has waived the issue on appeal and should not be allowed to pursue any argument regarding this point in his reply brief. *See State v. Porter*, 2018 MT 16, ¶ 16, n. 1, 390 Mont. 174, 410 P.3d 955 (citations omitted) (“This Court will not entertain an argument first raised in a reply brief.”).

jury is accordingly bound by it.” *State v. Crawford*, 2002 MT 117, ¶ 27, 310 Mont. 18, 48 P.3d 706. However, this holding was qualified by two points. First, “[i]n criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction.” *State v. Azure*, 2008 MT 211, ¶ 22, 344 Mont. 188, 196-97, 186 P.3d 1269; *Crawford*, ¶ 25 (citing *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900, 902 (Wash. 1998)). Thus, in order for the law-of-the-case doctrine to apply, the offending element must have been given in the jury instruction which listed the elements necessary “to convict” the defendant. *See Azure*, ¶ 22; *see also Hickman*, 135 Wash. 2d at 102, 954 P.2d at 902. Second, for this doctrine to apply, the instruction must have been given without the State’s objection. *Crawford*, ¶ 27; *Azure*, ¶ 29 (holding that the State’s objection to a supplemental instruction barred the application of the law-of-the-case doctrine).

Here, turning to Jury Instruction No. 4, although the State did not object to this instruction, this instruction did not add an unnecessary element or bind the State to a legal theory which required proof that Martell was aware the check was fake when he cashed it. Critically, this instruction was a preliminary instruction which provided background information about the case and was not a “to convict” instruction listing the elements for a theft conviction. *Azure*, ¶ 22. Thus, it makes no difference under the law-of-the-case doctrine whether the State objected to this

instruction as it did not list the elements for theft. Instead, Jury Instruction No. 16, which contained no such time period, provided the elements of theft and served as the “to convict” instruction. (Doc. 27 at 19 (attached as State’s App. 4).)

Accordingly, this instruction did not bind the State to a legal theory which required proof that Martell knew that check was illegitimate when he cashed it.

Further, the Court’s supplemental jury instruction, given in response to the jury’s question about whether the State needed to show that the cashing of the check was “an initial act,” could be interpreted as adding an unnecessary element to the theft offense, namely that the State needed to prove that Martell was aware the check was counterfeit when he brought it into EZ Money. (*See* Tr. at 228-33.) However, as noted by the district court, the State objected to this supplemental instruction and correctly argued that the State was not required to prove that all the elements of theft were met at the time Martell took possession of the money. (*See* Tr. at 232-33.) Thus, although the Court abused its discretion in giving this instruction, the State was not bound to this error as it timely asserted its objection. Because of this timely objection, the law-of-the-case doctrine is not applicable.

Azure, ¶ 29.

CONCLUSION

This Court should affirm Martell's conviction.

Respectfully submitted this 31st day of August, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,303 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

/s/ Michael P. Dougherty
MICHAEL P. DOUGHERTY

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0037

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DALE STEVEN MARTELL,

Defendant and Appellant.

APPENDICES

Defendant’s Exhibit C, DC-18-758 (Doty’s Notes)Appendix 1

State’s Exhibits 1-3, DC-18-758
(First Interstate Bank letter and copies of counterfeit check)Appendix 2

Jury Instruction No. 4, DC-18-758Appendix 3

Jury Instruction No. 16, DC-18-758Appendix 4

CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-31-2021:

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