

UTTERING
G.L. c. 267, § 5

The defendant is charged with uttering a false, forged or altered (check or order for money) (promissory note) (order for property)¹. To prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

***First:* That the defendant offered or passed as true and genuine (a check or other order for money) (a promissory note) (an order for property)²;**

***Second:* That the (check or order for money) (promissory note) (order for property) was (falsely made) (forged) (altered);**

***Third:* That the defendant knew it was (falsely made) (forged) (altered); and**

***Fourth:* That the defendant offered or passed it with the specific intent to injure or defraud another.**

Commonwealth v. O'Connell, 438 Mass. 658, 664 n.9 (2003), citing *Commonwealth v. Levin*, 11 Mass. App. Ct. 482, 496 (1981) (elements of uttering).

To prove the first element, the Commonwealth must prove

¹ The District Court also has jurisdiction over the forgery of other documents. See note 1. This instruction may be adapted accordingly.

² See n. 1, *supra*.

beyond a reasonable doubt that the defendant offered or passed a (check or order for money) (promissory note) (order for property) to another. The Commonwealth need not prove that it was successfully passed to someone. Rather, the Commonwealth may prove this element beyond a reasonable doubt by proving that the defendant offered it to someone, even if it was not accepted.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the (check or order for money) (promissory note) (order for property) was (falsely made) (forged) (altered). The Commonwealth is not required to prove that the whole item was (falsely made) (forged) (altered), but must prove that at least one or more significant parts of it were (falsely made) (forged) (altered).

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that the (check or order for money) (promissory note) (order for property) was (falsely made) (forged) (altered). This requires you to make a decision about the defendant's state of mind at the time they offered or passed the item. You may examine the defendant's actions and words, all of the

surrounding circumstances, and any reasonable inferences from the evidence, to help you determine the extent of the defendant's knowledge at the time.

See Commonwealth v. Russell, 156 Mass. 196, 196-197 (1861) (prior acts of uttering may be admissible as to knowledge and intent to defraud).

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that the defendant acted with the specific intent to defraud another. It is not necessary that the defendant intended to injure or defraud a particular person or entity. To act with an intent to defraud means to act knowingly with the aim of deceiving or cheating another. The purpose is often to bring about gain or benefit either to oneself or to another person or entity. You may examine the evidence in the case, all of the surrounding circumstances, and any reasonable inferences you draw from that evidence, to help you determine whether the defendant intended to defraud another.

Commonwealth v. Analetto, 326 Mass. 115, 118 (1950) (defendant must have intended to defraud someone, but not necessarily any particular person); *Commonwealth v. Bond*, 188 Mass. 91, 92 (1905) (not necessary that intended victim have been misled by forgery). See also *United States v. Leahy*, 445 F.3d 634, 644 (3d Cir. 2006) (instruction on intent to defraud); *United States v. Phath*, 144 F.3d 146, 149 (1st Cir. 1998) (same).

If the Commonwealth proved each of the four elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth failed to prove any one element beyond a reasonable doubt, you must return a verdict of not guilty.

NOTE:

1. **District Court jurisdiction over uttering offenses.** General Laws c. 267, § 5 is a 10-year felony that punishes anyone who “with intent to injure or defraud, utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in [G.L. c. 267, §§ 1-4], knowing the same to be false, forged or altered.” The District Court does not have final jurisdiction over uttering most of the items referenced in § 5 and listed in §§ 1-4, but only over “uttering as true . . . a forged [promissory] note or order [for money or other property], knowing the same to be forged.” G.L. c. 218, § 26. The District Court also has final jurisdiction over the 3-year felony of uttering a false “railroad ticket, railroad mileage book or railroad pass, or a ticket, badge, pass or any written or printed license purporting to entitle the holder or owner thereof to admission to any exhibition, entertainment, performance, match or contest” (G.L. c. 271, § 6) and the 5-year felony of uttering a false “bank bill or promissory note payable to the bearer thereof or to the order of any person” or a traveler’s check (G.L. c. 267, § 10). The instruction may be adapted appropriately to cover such items.

2. **Checks.** Uttering a false, forged or altered check may be prosecuted under G.L. c. 267, § 5 because a check is “an order . . . for money” (G.L. c. 267, § 1). See *O’Connell, supra*; *Bond, supra*; G.L. c. 106, § 3-104 (a check is “a draft, other than a documentary draft, payable on demand and drawn on a bank” and is an order if, among other things, it is “an unconditional promise or order to pay a fixed amount of money”). Uttering a false check is not within the scope of G.L. c. 267, § 10 (uttering a false note) or 12 (possession with intent to utter a false note) because a check is not a “note,” “promissory note,” “bank bill” or “bank note” within the meaning of those sections. An attempt to negotiate a false check will support a conviction for attempted larceny (G.L. c. 266, § 30). *Commonwealth v. Green*, 66 Mass. App. Ct. 901, 845 N.E.2d 392 (2006).

3. **Claim of authority.** Lack of authority is not an element of the offense of uttering, but if a claim of authority is properly raised, the Commonwealth must prove the absence of authority beyond a reasonable doubt in order to prove the element of fraudulent intent. Such a claim must be raised by timely written notice pursuant to Mass. R. Crim. P. 14(b)(3) or is waived. Lack of authority and fraudulent intent may be proved by circumstantial evidence as well as by testimony from the purported maker. *O’Connell*, 438 Mass. at 664-665, 783 N.E.2d at 423-424. See Instruction 3.160 (License or Authority).

4. **Sufficiency of the evidence.** “[E]vidence that a defendant in an otherwise unremarkable bank transaction who cashed a check from a person who did not know the defendant and did not owe the defendant money, alone” was not sufficient to prove that the defendant knew the instrument was forged and acted with an intent to defraud. *Commonwealth v. Scordino*, 102 Mass. App. Ct. 586, 588 (2023), affirmed 494 Mass. 1031 (2024). See also *Commonwealth v. Oliver*, 494 Mass. 697, 702 (2024) (insufficient evidence of knowledge where merely based on account holder not being familiar with defendant, slight misspelling of signature, and cashing instead of depositing check for \$3,600 with no other “unusual circumstances”); *Commonwealth v. Bonilla*, 89 Mass. App. Ct. 263, 265 (2016) (defendant

wrote and deposited checks knowing that he did not have sufficient funds to cover the checks, but, because the checks were written from his own accounts and were not forged, false, or altered, insufficient evidence of uttering).

5. **Uttering is not a lesser included offense of larceny by false pretenses.** Because each offense requires proof of a fact that the other does not, uttering is not a lesser included offense of larceny by false pretenses and conviction on both offenses is not duplicative. *Commonwealth v. Crocker*, 384 Mass. 353, 360-361 (1981).