

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

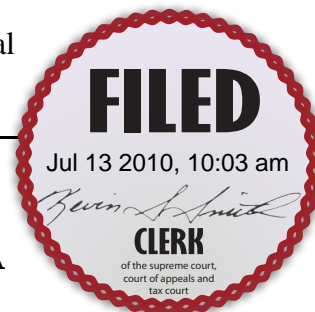
ATTORNEY FOR APPELLANT:

THOMAS P. KELLER
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

OTIS TATE, JR.,)

Appellant-Defendant,)

vs.)

No. 71A04-1003-CR-138

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R. W. Chamblee, Jr., Judge
Cause No. 71D08-0810-FC-321

July 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Otis Tate, Jr., appeals his conviction for Class C felony forgery. Tate was accused of uttering a forged check. He claimed to have innocently received the check from a culpable third party. At trial, Tate sought to introduce evidence of the alleged alternative perpetrator's criminal history. The trial court prohibited him from doing so. We conclude that Tate's proffered evidence was inadmissible pursuant to Indiana Evidence Rule 404(b). We affirm the judgment of the trial court.

Facts and Procedural History

Susan Call lived in South Bend. One day her home was burglarized and her checkbooks stolen. Within a few hours of the burglary, Tate entered a credit union and attempted to cash one of Susan's stolen checks. The check was made out to Tate in the amount of \$500. It was purportedly signed by Susan, and the memo indicated it was for a washer and dryer set. Credit union teller Jaymaya Watson noticed that the signature on the check did not match an exemplar of Susan's signature that was on file. Jaymaya confirmed that the check was unauthorized and notified police. Tate was later arrested.

The State charged Tate with Class C felony forgery. Ind. Code § 35-43-5-2. The State alleged that Tate, "with intent to defraud, did utter a written instrument, to-wit: check number 0968 in the amount of Five Hundred Dollars (\$500.00) on the checking account of Susan M. Call, by presenting the same for payment at Teachers Credit Union, in such a manner that said written instrument purported to have been made by another person or by the authority of one who did not give authority." Appellant's App. p. 52.

Tate's explanation at trial was that he had received the check from a woman named "Tempist" or "Temple" Franklin as payment for a used washer and dryer combo. Tate was allegedly selling the washer and dryer in order to raise some money. His friend introduced him to a prospective buyer who identified herself as "Tempist." Tempist agreed to purchase the washer and dryer and gave Tate the check in question. Tate saw that the name printed on the check was "Susan Call," but he assumed he was transacting with Susan and that Tempist was her nickname. Only after attempting to cash the check did Tate discover the buyer was not Susan.

The defense sought to introduce evidence that a "Temple" Franklin had been charged with forgery in St. Joseph County on two prior unrelated occasions. Franklin apparently pled guilty in those cases to lesser offenses of conversion and attempted theft. The defense proffered certified copies of Franklin's chronological case summaries. The trial court excluded the evidence on relevancy grounds.

The jury found Tate guilty as charged. He now appeals.

Discussion and Decision

Tate argues that the trial court erred by excluding evidence of Temple Franklin's criminal history. He claims he should have been allowed to introduce evidence "which would indicate that some other individual was responsible for the theft of the checks." Appellant's Br. p. 3. According to Tate, jurors would more likely have believed his account "if they had been aware of Temple Franklin's criminal background." *Id.* at 6. "Since the only question before the jury was Tate's intent at the time of presenting the check, the Trial Court should have allowed Tate to present evidence of the identity of the

person who gave him the check If the jury believed that Temple Franklin had passed a forged check to Tate, they could have found that Tate was a victim of Temple Franklin, and acquitted him of the forgery.” *Id.* at 3.

We should first clarify that Tate was not prohibited from advancing his defense that another person committed the offense charged. The trial court allowed Tate to present testimony that Tempist or Temple Franklin had passed the bad check and was responsible for the forgery. The trial court excluded only the evidence of Franklin’s criminal history, which is the evidence at issue on appeal.

Indiana Evidence Rule 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” Pursuant to Rule 404(b), evidence of a person’s prior misconduct may not be introduced to show criminal propensity and action in conformity therewith. Ind. Evidence Rule 404(b). The evidence may be admissible, however, if independently relevant to prove the identity of the perpetrator, motive to commit the offense charged, etc. *Id.* Rule 404(b)’s list of permissible purposes is illustrative but not exhaustive. *Embry v. State*, 923 N.E.2d 1, 9 (Ind. Ct. App. 2010), *trans. denied*. The traditional role of Rule 404(b) has been to bar evidence of the defendant’s uncharged misconduct to prevent conviction on the basis of unrelated prior bad acts. *Garland v. State*, 788 N.E.2d 425, 428 (Ind. 2003). But evidence of prior misconduct by persons other than defendants is subject to Rule 404(b) as well. *Id.* at 430.

The following test is applied in deciding whether 404(b) evidence is admissible: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. *Roop v. State*, 730 N.E.2d 1267, 1270 (Ind. 2000). Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

In order to comply with the first sentence of Rule 404(b), the proponent of prior bad acts evidence must "fashion a theory of logical relevance other than using character as circumstantial proof of conduct." 2 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 9:29 (2009).

To be probative on the issue of identity, prior offenses of a third party must be "strikingly similar" to the crime charged. *Camm v. State*, 908 N.E.2d 215, 231 (Ind. 2009), *reh'g denied*. Specifically, the inquiry is whether the crimes are so similar that one can say with reasonable certainty that one and the same person committed them. *Id.* "Not only must the methodology of the two crimes be strikingly similar, but the method must be unique in ways which attribute the crimes to one person." *Id.*

Tate's theory was that a woman named "Tempist" or "Temple" Franklin had passed a forged check to him and that he unwittingly attempted to cash it. To support this explanation, Tate offered evidence that a Temple Franklin had twice been charged

with forgery and pled guilty to conversion and attempted theft. Tate evidently wished to suggest that, because Franklin was involved in alleged forgeries or thefts in the past, she likely forged Susan's check in this case. Use of the evidence in this manner plainly implicates the forbidden propensity inference and thus violates Evidence Rule 404(b). *See Camm*, 908 N.E.2d at 230-32; *Garland*, 788 N.E.2d at 430-31; *Roop*, 730 N.E.2d at 1270.

Tate attempts to invoke Rule 404(b)'s permissible purposes to justify admission of the evidence. He claims that Franklin's criminal history would have shown the true "identity" of the forger and therefore negated his own "intent" to defraud.

With regard to identity, Tate cites no "striking similarities" between the present offense and Franklin's prior crimes which might evince Franklin's modus operandi and suggest she was the perpetrator in this case. The record in fact discloses no details of Franklin's prior offenses.

Tate's "intent" theory also fails, as it still relies on propensity as circumstantial proof of conduct in violation of Rule 404(b). In other words, the purported inferential chain connecting Franklin's bad acts to Tate's lack of intent is roughly as follows: (1) Temple Franklin was charged with forgery and convicted of conversion and attempted theft in the past; (2) Franklin has a propensity to commit forgery or related crimes; (3) Franklin forged Susan's check in conformity with her criminal propensity; (4) Tate was not the true forger in this case; (5) Tate did not know Susan's check was forged; (6) Tate did not intend to defraud Susan or the credit union when he attempted to cash the check. This line of reasoning remains dependent on the forbidden character inference, and

therefore, although clothed as a use of Rule 404(b)'s "intent exception," it is not a legitimate theory of independent relevance.

Accordingly, we conclude that Franklin's criminal history was inadmissible third person character evidence, and the trial court did not err by excluding it.

Affirmed.

NAJAM, J., and BROWN, J., concur.