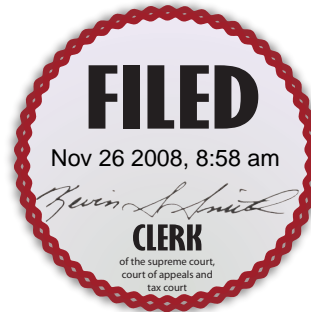


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD MALLARD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A03-0802-CR-36

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable J. Woodward Miller, Judge
Cause No. 71D01-0309-FC-327

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Donald Mallard appeals his conviction for forgery, a Class C felony. Mallard presents two issues on appeal: 1) whether the trial court properly admitted into evidence a check similar to the one Mallard was charged with forging; and 2) whether sufficient evidence supports Mallard's forgery conviction. Concluding that the trial court properly admitted the check into evidence and that sufficient evidence supports Mallard's conviction, we affirm.

Facts and Procedural History

On November 5, 2002, Mallard visited the Mishawaka branch of Community Wide Federal Credit Union in St. Joseph County and deposited a check purportedly drawn on the account of Monaco Coach in the amount of \$579.26. At trial, Mallard claimed the check was payment for a \$500.00 chess set he sold that day. The teller, Naomi Miramontes, asked to see Mallard's identification. Miramontes was not familiar with the check and called upon her supervisor, Amy Schlemmer, for approval. Schlemmer inspected and approved the check by placing her initials at the top right corner of the check. At a later date, the bank manager informed Miramontes that the check deposited by Mallard was in fact counterfeit.

An employee from the payroll office of Monaco Coach testified at trial that she had no record of Mallard ever working for Monaco Coach, nor any record of a payroll check being issued to Mallard. She testified that the check was not an authentic Monaco payroll check because it contained Mallard's address. She did acknowledge, however,

that the check could have come from another department at Monaco Coach if it was compensation for independent contractor services.

The State also sought to enter into evidence a check from Mallard's previous employer, Klink Trucking Inc., which was made out in virtually the same amount, contained the same routing and account numbers (as well as other similarities), and had been deposited by Mallard only a week before he deposited the Monaco Coach check. Mallard had not been charged with any crime in relation to the Klink check. Mallard objected to admission of this evidence, arguing that it was improper under Indiana Evidence Rule 404(b) because the State did not provide notice as required by that rule and because it was not proper impeachment evidence. After a lengthy side-bar, the trial court admitted the check into evidence. The trial court reasoned that the Klink check impeached Mallard's prior statement that the Monaco check seemed legitimate. The trial court also stated, "I think it can go to knowledge, as well [I]t would be admissible substantively, as well as evidence of impeachment." Transcript at 206. Furthermore, the State introduced evidence that Mallard previously had been convicted of check deception.

Mallard testified on his own behalf and did not dispute that he deposited the Monaco check; however, he argued that he did not know the check was counterfeit. Mallard stated that he received the check from a businessman in return for the sale of a chess set. According to Mallard, a week prior to the sale, he met with a businessman who expressed an interest in the chess set. Mallard informed the businessman that the sale price for the chess set was \$500.00 and provided his name, address, and telephone number to the businessman. Mallard claimed he received a call from the businessman a

week later and met him in a parking lot where the businessman gave Mallard a typed check in the amount of \$579.26 with Mallard's name and address typed as payee. Mallard stated that the businessman wanted to complete the transaction that day and insisted on following Mallard to his bank and waiting outside while he deposited the check. Mallard was unable to recall the businessman's name, address, or any other identifying characteristics, except for a detailed description of what the businessman was wearing the day of the sale.

During direct examination by his counsel, Mallard was asked to explain why the check amount was almost \$80.00 over the asking price of the chess set. Mallard responded that the businessman wanted to compensate Mallard for the sales tax. Mallard's own attorney then pointed out that the applicable sales tax for a \$500.00 chess set would only be \$30.00, to which Mallard responded, "You know, hey, I did not know. Okay? So I mean it was like all legit. So." Id. at 177. Mallard's counsel also asked if Mallard could explain why he was being paid with a business check from Monaco Coach and how his name and address was printed on the check. Mallard had no explanation other than "I just knew that it was a check, and I was getting five hundred and some dollars for the chess set." Id. at 179. Finally, Mallard stated that the chess set was originally intended as a gift for his sister, Melinda, and that he had to give her something else instead. Melinda later corroborated Mallard's story that the chess set was intended for her, but acknowledged that she did not witness any part of the sale or the banking transaction.

The jury found Mallard guilty of forgery, and he now appeals his conviction.

Discussion and Decision

I. Admission of Evidence

Mallard contends that the trial court erred in admitting the Klink check into evidence. Mallard argues that the check was inadmissible under Rule 404(b) or for impeachment purposes.

A. Standard of Review

A trial court is afforded broad discretion when ruling on the admissibility of evidence. Goodner v. State, 685 N.E.2d 1058, 1060 (Ind. 1997). We review a trial court's decision to admit evidence under an abuse of discretion standard. Cowan v. State, 783 N.E.2d 1270, 1274 (Ind. Ct. App. 1992), trans. denied. A trial court abuses its discretion when "its evidentiary ruling is clearly against the logic, facts and circumstances presented." Id.

B. Indiana Evidence Rule 404(b)

Rule 404(b) provides that:

Evidence 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Mallard contends the check "could not have been offered as a prior bad act since the State never provided 404(b) notice." Appellant's Brief at 4. Our supreme court has stated that:

[r]easonable notice of intent to offer evidence of other crimes, wrongs, or acts is a prerequisite for admissibility. The defendant has the burden to make a "reasonably understandable and sufficiently clear"

request for such notice from the State. Moreover, a defendant who is not given notice after making a proper request must object to the State's 404(b) evidence at trial to preserve any error for appeal.

Hatcher v. State, 735 N.E.2d 1155, 1158 (Ind. 2000) (citations omitted).

Mallard did object at trial to the introduction of the Klink check on grounds that Rule 404(b) notice was not given by the State. However, it is not clear whether Mallard satisfied his burden to make a reasonably understandable and sufficiently clear request for such notice from the State. There is no evidence in the record that Mallard ever filed a motion for notice of Rule 404(b) evidence. Accordingly, we assume that no motion was ever made and the State was under no duty to offer notice of its intent to use the Klink check. Moreover, the record reveals that the Klink check was disclosed during discovery and Mallard was aware of its existence. Therefore introduction of the Klink check should not have come as a surprise. See id. (stating that the purpose of the reasonable notice requirement is to reduce surprise and to promote the early resolution of questions of admissibility). Mallard's failure to make a request for prior act evidence (or to make a record supporting that he did so), coupled with Mallard's knowledge of the Klink check, which effectively removed any element of surprise, demonstrates that the Klink check was procedurally admissible under Rule 404(b).

The purpose of Rule 404(b) is to prevent the jury from convicting a defendant on the basis of uncharged conduct. Cowan, 783 N.E.2d at 1275. When a defendant objects to the admission of evidence based upon Rule 404(b), the court engages in a two-step analysis: 1) "determine whether the evidence of the prior bad acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act"; and 2)

determine whether the probative value is substantially outweighed by the danger of unfair prejudice. Id. On appeal, we apply the same analysis as the trial court, but under an abuse of discretion standard. See id.

1. Relevance of Evidence for Issue other than Propensity

In the present case, the Klink check is relevant evidence of Mallard's plan or scheme to defraud the bank. The fact that both the Klink and Monaco checks used the same font, routing, and account numbers, were made out in virtually the same amount, and were drawn from Key Bank supports the reasonable inference that Mallard either used the Klink check in some way when creating the forged Monaco check, or had forged the Klink check along with the Monaco check and used the same template in forging both checks. Evidence of a plan or scheme constitutes relevant evidence of intent to defraud the bank, and the Klink check therefore passes the first step of Rule 404(b).

Further, the fact that the Monaco check was identical in many respects to the Klink check and that Mallard cashed the Klink check only a week before the Monaco check supports the reasonable inference that he knew or should have known the Monaco check was not legitimate. This also makes the Klink check relevant evidence of the knowledge element of the forgery offense.

2. Weighing Probative Value against Prejudicial Effect

Acknowledging that admission of the Klink check was relevant to issues other than Mallard's propensity to commit the charged crime, we must next engage in a balancing test and determine whether the probative value of this evidence was substantially outweighed by its prejudicial effect. Id. The Klink check had been marked

with a stamp reading “counterfeit,” but the stamp was redacted before the check was entered into evidence. Mallard argued at trial that admission of the Klink check with the word “counterfeit” redacted would lead the jury to conclude the Klink check was also counterfeit, resulting in a substantially prejudicial effect.

Redacting “counterfeit” from the top of the Klink check removed any substantial prejudice. Furthermore, while use of the Klink check with the word counterfeit redacted might lead some jurors to draw an improper inference that the check was counterfeit, such an inference is more speculation than reasonable inference and, at any rate, is not substantially prejudicial. Moreover, as the State argued, some jurors might not have inferred the redacted portion on the check said “counterfeit”. They might have inferred the redacted portion to have read “approved,” leading them to infer that Mallard used the Klink check as a template when making the forged Monaco check.

Because the Klink check presents relevant evidence of either a plan or scheme by Mallard to defraud the bank, or knowledge that the check was a forgery and was not substantially prejudicial, admission of this check was not against the logic, facts, and circumstances presented in the case and does not constitute an abuse of discretion. Therefore, we hold the trial court properly admitted the Klink check into evidence.¹

¹ Because we conclude the Klink check was properly admitted as substantive evidence, we need not address whether the check was also properly admitted as impeachment evidence. We note, however, that Mallard testified the Monaco check seemed legitimate to him, and the Klink check, similar as it was to the Monaco check, would tend to belie that assertion. “When a defendant attempts to prove a factual defense which justifies his actions, specific acts of conduct are admissible to rebut the defense.” Shanholt v. State, 448 N.E.2d 308, 318 (Ind. Ct. App. 1983).

II. Sufficiency of Evidence

A. Standard of Review

When reviewing a sufficiency of evidence claim, we will not disturb a conviction if substantive evidence of probative value establishes every material element of the offense beyond a reasonable doubt. Carter v. State, 634 N.E.2d 830, 834 (Ind. Ct. App. 1994). Our supreme court has further explained this standard of review:

[w]hen reviewing the sufficiency of evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder *could* find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnote, and citations omitted) (emphasis in original).

B. Evidence of Forgery

Mallard contends the State presented insufficient evidence to support his forgery conviction. To convict Mallard of forgery, the State had to prove beyond a reasonable doubt that he, with the intent to defraud, uttered a written instrument purportedly made by another person. Ind. Code § 35-43-5-2(b)(1). Uttering is the 1) offering of a forged instrument, 2) knowing it to be such, 3) with the representation that it is genuine, and 4) with the intent to defraud. Miller v. State, 693 N.E.2d 602, 604 (Ind. Ct. App. 1998).

Mallard argues that there was insufficient evidence to show that he knew the check was counterfeit.²

At trial, Miramontes testified that Mallard deposited the Monaco check in November of 2002 and that the check was later found to be counterfeit by Automatic Data Processing.³ This is substantial probative evidence that Mallard offered a forged instrument with the representation that it was genuine. Mallard himself testified that: 1) he could not recall the name of the businessman who bought the chess set and gave him the check; 2) he was unaware the check was more than double the applicable five percent sales tax; and 3) he did not know why he was paid with a check that resembled a payroll check. In addition, Mallard presented two checks within days of each other that shared virtually the same amount, account and bank routing numbers, font, and format. This is substantial evidence of probative value that Mallard uttered the Monaco check with knowledge that it was counterfeit and with the intent to defraud. Thus, it follows that sufficient evidence supports Mallard's forgery conviction.

Conclusion

We hold that the trial court did not abuse its discretion when it admitted the Klink check into evidence. Further, sufficient evidence supports Mallard's forgery conviction.

Affirmed.

NAJAM, J., and MAY, J., concur.

² Mallard also argues that there was "a significant lack of evidence to show . . . that [he] had prepared the instrument." Appellant's Brief at 4. However, the State was not required to show that Mallard prepared the check in order to convict.

³ Automatic Data Processing is the payroll service company used by Monaco.