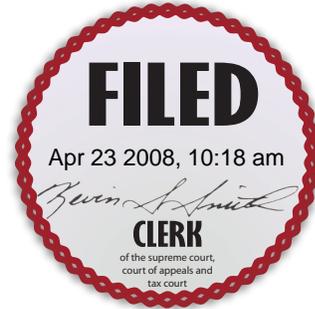


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JASON A. NICELY,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 02A03-0712-CR-554

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No. 02D04-0704-FC-94

April 23, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Jason A. Nicely appeals his convictions, following a jury trial, of Forgery as a Class C Felony¹ and Receiving Stolen Property as a Class D Felony.² On appeal, Nicely contends that the trial court abused its discretion by admitting certain testimony over his hearsay objection. Concluding that the trial court did not abuse its discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 7, 2007, Nicely entered a Check\$mart (“store”) in Fort Wayne and presented a check to store manager Jamie Barton. Nicely informed Barton that the check was partial payment for a roofing contract he had with Dwight Bell and requested that she cash the check. The check was made payable to Nicely on an account from Pacesetter Bank in the name of Dwight and Patricia Bell in the amount of \$3000.00. Nicely endorsed the check and, upon Barton’s request, provided his social security number.

Due to the check’s value, Barton contacted Pacesetter Bank to verify that there were sufficient funds in the maker’s account to cover the check. Barton also attempted to contact the Bells to verify the authenticity of the check. When Barton was unable to reach the Bells at their home phone number, Nicely provided her with a cell phone number at which he claimed she could reach the Bells.

¹ Ind. Code § 35-43-5-2 (2006).

² Ind. Code § 35-43-4-2(b) (2006).

Barton called the cell phone number and asked to speak to Dwight Bell. A male answered, telling Barton, “Yeah, that’s my grandpa, let me get him.” Tr. p. 111. Barton testified that moments later, a male voice which Barton stated appeared to be the same individual’s, altered to sound older, told Barton that he had written a \$3000.00 check to Nicely. When Barton inquired about the check number, the individual told Barton he would have to look in his checkbook and that he would call her back. Shortly after the call ended, a young man entered the store and spoke quietly with Nicely before exiting the store. Moments later, Barton received a call from an individual claiming to be Dwight Bell notifying her that he could not find his checkbook. After this call ended, the same young man re-entered the store and again spoke to Nicely. Barton called the police. When the police arrived, the young man quickly left the store. Nicely provided officers with his identification but refused to share his friend’s identity because “he did not want to get him in trouble.” Tr. p. 166. Nicely later informed a detective that he was “in the middle” and that “he was only trying to help a friend out.” Tr. p. 172.

The State charged Nicely with class C felony forgery and class D felony receiving stolen property. At trial, Dwight and Patricia Bell testified that they had never met Nicely, much less contracted with him to complete roofing work, and that Nicely had not had permission to take, possess, or cash a check from their checkbook. At the conclusion of trial, the jury found Nicely guilty as charged. At sentencing, the trial court sentenced Nicely to an executed term of four years. This appeal follows.

DISCUSSION AND DECISION

Nicely contends that the trial court abused its discretion by admitting alleged hearsay into evidence over his objection. Specifically, Nicely argues that Barton's testimony regarding her phone conversation with the alleged Mr. Bell was hearsay and was thus inadmissible. The State counters by arguing that Barton's testimony was not hearsay.

It is well-settled in Indiana that the admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for an abuse of discretion. *Mathis v. State*, 859 N.E.2d 1275, 1279 (Ind. Ct. App. 2007). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* We will sustain the trial court's ruling if it can be done on any legal ground apparent in the record. *Angleton v. State*, 686 N.E.2d 803, 809 (Ind. 1997).

"The Indiana Rules of Evidence define hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." *Montgomery v. State*, 694 N.E.2d 1137, 1140 (Ind. 1998). Hearsay is generally not admissible. *Id.* However, "statements not admitted to prove the truth of the matter asserted do not run afoul of the hearsay rule—they are not hearsay." *Angleton*, 686 N.E.2d at 809. An out-of-court statement introduced to explain why a particular course of action was taken is not hearsay because it is not offered to prove the truth of the matter asserted. *See Goodson v. State*, 747 N.E.2d 1181, 1185 (Ind. Ct. App. 2001), *trans. denied*. However, the non-hearsay purpose of these statements

must be relevant and their probative value cannot be substantially outweighed by the danger of unfair prejudice. *Anderson v. State*, 718 N.E.2d 1101, 1103 (Ind. 1999).

Barton testified at trial about the events which occurred at the store on April 7, 2007. During her testimony, Barton described her interaction with Nicely as well as the steps she took to verify the authenticity of the check. During Barton's testimony, the following exchange occurred:

Barton: I called that phone number and somebody answered the phone and I asked for Dwight and they said, "Yeah, that's my grandpa, let me get him." And I heard him say, "Grandpa." And then the same person with a different tone of voice trying to sound like an older man got on the ...

Appellant: Your Honor, I'm going to object to that. That's all hearsay.

State: Actually Judge, it's not being offered for the truth of the matter asserted, it's actually going ...

Appellant: Then it's not relevant.

State: Well, actually, if I may finish, Your Honor, it is not being offered for the truth of the matter asserted. It is however, relevant as it will end up describing why it is that she takes the next step she does. So it is relevant and it's not hearsay.

Appellant: I think he's clearly offering it for the truth of the matter, Your Honor, so on that basis I object as hearing. There's no foundation.

State: Actually, Judge, it's not being offered for the truth ...

Court: I'll overrule the objection.

State: Thank you.

Tr. p. 111-12. Upon review of the challenged testimony, we note that Barton's testimony that the person she was talking to had altered his voice to sound older was not an out-of-court statement because it merely described Barton's observation that the individual on the other end of the line was the same person with a changed tone of voice. Because this portion of Barton's testimony contained no out-of-court statement, it is not hearsay. However, to the extent that Nicely's objection relies upon Barton's testimony that the

individual on the other end of the line said, “Yeah, that’s my grandpa, let me get him” and “Grandpa,” we must determine whether this statement was offered to prove the truth of the matter asserted and if not, whether the probative value of the admission of this statement outweighs the danger of unfair prejudice. *See Anderson*, 718 N.E.2d at 1103.

This exchange demonstrates that the purpose of this testimony was not to prove that Barton spoke to an individual who claimed to be Dwight Bell, but rather to establish that Barton’s conversations with the individual coincided with the young man exiting and re-entering the store to speak to Nicely. Barton’s testimony also demonstrates that Barton was skeptical of the authenticity of the check, and that her skepticism led her to take additional steps to verify the authenticity of the check prior to cashing it. Barton’s testimony described her interactions with and observations of Nicely. It also established that she carried on subsequent telephone conversations with the individual who claimed to be Dwight Bell and an individual from Mr. Bell’s bank. Because Barton’s testimony regarding her conversation with the individual claiming to be Dwight Bell was not offered for the proof of the matters asserted, we conclude that Barton’s statements were not hearsay. *Angleton*, 686 N.E.2d at 809. Furthermore, we are unable to see how Nicely could have been prejudiced by Barton’s testimony regarding the identity of the individual’s grandfather and note that Nicely himself has failed to allege any prejudice. As such, we conclude that the trial court did not abuse its discretion by admitting Barton’s testimony over Nicely’s hearsay objection. *Id.*

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.