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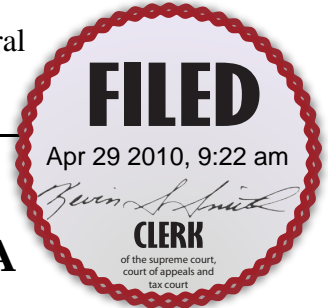
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**IN THE
COURT OF APPEALS OF INDIANA**



BYRON JAMES,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0910-CR-1016

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0903-FB-30326

April 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Byron James appeals from his conviction after a jury trial of Domestic Battery¹ as a class D felony. James presents the following restated issues for our review:

1. Did the trial court abuse its discretion by admitting evidence of prior bad acts?
2. Did the trial court improperly limit James's ability to impeach the complaining witness's testimony with extrinsic evidence?

We affirm.

The facts most favorable to the jury's verdict reveal that James and Rose Morgan had dated since 1999 when James was thirty-seven years old and Morgan was thirteen years old. In March 2009 James and Morgan were living together in Indianapolis with their two children, who were both under the age of five, when Morgan told James that she wanted to terminate her relationship with him. The two argued for hours during which time James drank brandy and vodka and accused Morgan of being unfaithful.

In an effort to diffuse the situation, Morgan told James that she needed to prepare the children for bed and proceeded to bathe her daughter. Once finished, the little girl, clad only in a bath towel, ran into her parents' bedroom to speak with her father. Morgan, who had been molested as a child, saw James begin to hug his daughter. This sight, which reminded Morgan of an incident of molestation from her past, prompted her to walk into the bedroom and strike James on the head with an open hand.

James grabbed Morgan by her arms and forced her toward the children's bedroom. While their daughter watched from the doorway, James shoved Morgan into the railing of

¹ Ind. Code § 35-42-2-1.3(b) (West, Westlaw, through end of 2009 1st Special Sess.).

their son's bed, breaking the bed and causing Morgan pain and scratches. He grabbed Morgan and violently shook her. James, whose fingernails were long, took hold of Morgan's left breast and twisted it in such a manner that Morgan believed he was going to rip it off. Morgan received a large gash on her breast.

The melee lasted until James fell asleep the next morning. Morgan went to school at Youth Build Indy and was overheard talking about the incident by a school employee who then alerted the authorities. Morgan left her home with the children and went to the Julian Center.

James was charged with nine offenses stemming from his attack on Morgan. The State filed a notice of intent to offer Indiana Evidence Rule 404(b) evidence of prior incidents of physical assaults by James upon Morgan and threats made by him to her. James filed a discovery request for Morgan's medical records seeking information about mental or emotional conditions. James was allowed to discover two pages of Morgan's medical records. The State filed a motion in limine seeking to prohibit James from referring to Morgan's mental health diagnosis at trial until a sufficient foundation was laid. The trial court granted the State's motion prior to trial subject to reevaluation on the issue of admissibility for purposes of impeachment.

James testified at trial and gave a differing version of the events that transpired. James acknowledged a history of violence between the two but contended that he was defending himself and the children from Morgan.

At the conclusion of the trial, the jury found James guilty of felony and misdemeanor domestic battery. Due to double jeopardy concerns the trial court sentenced James for the class D felony domestic battery conviction only and ordered James to serve 545 days executed. James now appeals.

1.

James contends that the trial court committed reversible error by allowing Morgan to testify about prior incidents of threats or physical assaults by James against her. James claims that the evidence is inadmissible under Evidence Rule 404(b) as evidence of prior bad acts. Evidence Rule 404(b) states:

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....

“The rationale underlying this rule is that the jury is precluded from making the forbidden inference that the defendant has a criminal propensity and therefore engaged in the charged conduct.” *Gillespie v. State*, 832 N.E.2d 1112, 1117 (Ind. Ct. App. 2005).

Our assessment of the admissibility of evidence under Evidence Rule 404(b) includes (1) a determination of whether the evidence of other crimes, wrongs, or acts is relevant to the matter at issue other than the defendant’s propensity to commit the charged act; and (2) a balancing of the probative value of the evidence against its prejudicial effect under Evidence Rule 403. *Gillespie v. State*, 832 N.E.2d 1112. If the evidence bears on some issue other than a criminal propensity and clears the balance test of Evid. R. 403, it is admissible. *Id.* Furthermore, evidence of motive is always relevant in the proof of a crime. *Ross v. State*,

676 N.E.2d 339 (Ind. 1996). A defendant's prior bad acts are also usually admissible to show the relationship between the defendant and the victim. *Id.*

Here, James argued that Morgan was the aggressor in the altercation. The State sought to introduce evidence of a recent pattern of conflict and hostility between James and Morgan that was evidence of James's motive to commit domestic battery against Morgan. In summary, her testimony illustrated a pattern of Morgan's occasional desire to terminate the relationship, which then prompted James to accuse her of infidelity, which then escalated to physical assaults by James on Morgan. We conclude that the evidence does bear on an issue other than criminal propensity as it bears on the issue of James's motive to commit domestic battery as opposed to merely defending himself.

Morgan's testimony about the prior altercations was not overly detailed. In fact the testimony illustrated James's hostility toward Morgan arising from his fear of her infidelity. That hostility escalated whenever Morgan broached the subject of terminating their relationship. The evidence was not overly prejudicial to James and he was able to cross-examine Morgan about those incidents and elicit testimony about incidents between the two instigated by Morgan.

The State also notes that James placed his intent at issue when he argued that Morgan assaulted him over a prolonged period of time during the incident at issue and that the injuries to Morgan came about through his attempts at self-defense and defense of his daughter. Evidence of prior bad acts against the same victim may become admissible if the defendant goes beyond simply denying his culpability for the offense and offers a theory of

particular contrary intent such as self-defense. *Evans v. State*, 727 N.E.2d 1072 (Ind. 2000). Such was the case here.

The trial court also gave the jury a limiting instruction regarding the proper use of the evidence of prior bad acts. The trial court instructed the jury that it was not to consider the 404(b) evidence as proof of James's character or that he committed the instant offense. A jury is presumed to have followed the trial court's instruction. *Pruitt v. State*, 622 N.E.2d 469 (Ind. 1993). We find that the trial court did not err by admitting the evidence of prior bad acts.

Assuming, *arguendo*, that the trial court erred by admitting the evidence of prior bad acts, that error is harmless in light of the substantial evidence of James's guilt. Morgan's testimony was corroborated by evidence found at the scene and by her physical injuries. In light of the strength of the State's case and the limiting instruction given to the jury, any error would be harmless. *Turben v. State*, 726 N.E.2d 1245 (Ind. 2000). James has failed to demonstrate the existence of reversible error.

2.

James asserts that the trial court erred by limiting his ability to impeach Morgan with extrinsic evidence of her medical records. Through discovery James was able to obtain evidence that Morgan had asthma, bipolar disorder, and chronic post-traumatic stress disorder. The State filed a motion in limine to prohibit the defense from referring to Morgan's mental health diagnosis unless James could lay a foundation that the evidence was probative of Morgan's ability to perceive and recall the events of the date of the offenses.

Prior to trial, the trial court granted the State's motion but stated that it would allow impeachment through the use of the medical records if James could lay a foundation that Morgan's mental health played a part in the altercation, thus rendering the evidence relevant.

"The essential purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine the witnesses against him." *Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006). Nonetheless, this right is subject to reasonable limitations placed at the discretion of the trial judge. *Smith v. State*, 721 N.E.2d 213 (Ind. 1999). "[T]rial judges retain wide latitude . . . to impose reasonable limits . . . based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 219.

When the trial court granted James's motion in limine regarding Morgan's mental health records, the trial court indicated that the matter could be revisited to determine if James had developed a proper foundation for the admission of the evidence. More specifically, James would have to establish that Morgan's mental health diagnosis had a bearing on her ability to perceive or remember the events that led to the instant charges against James. James did not make that showing.

Additionally, impeachment on collateral matters is impermissible. *Shriner v. State*, 829 N.E.2d 612 (Ind. Ct. App. 2005). In deciding if a matter is collateral, the inquiry is whether the evidence is admissible for any purpose independent of the contradiction of the witness. *Id.* Here, James sought to impeach Morgan with her medical records to show that she was untruthful when she stated that she had never been treated for mental health issues

other than depression. There was no foundational showing that Morgan's mental health diagnosis affected her ability to perceive or remember the events leading to the filing of charges against James. The trial court did not abuse its discretion by limiting James's right to cross-examine Morgan on this collateral issue.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.