

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
D.P. MARSHALL JR., JUDGE

DIVISION IV

CACR07-927

2 April 2008

SHAWN ROBERT POLLY,  
v. APPELLANT

AN APPEAL FROM THE CRAWFORD  
COUNTY CIRCUIT COURT  
[CR-2006-124 (II)]

STATE OF ARKANSAS,  
  
APPELLEE

THE HONORABLE MICHAEL  
MEDLOCK, JUDGE  
  
AFFIRMED

A jury convicted Shawn Polly of the first-degree battery of D.R., a four-year-old boy. Polly's defense was that he injured the child accidentally. Polly was caring for D.R. and three other children. He told the police that he put D.R. to sleep on a pallet in the living room floor. Polly said that, later that night, he went to investigate a strange noise and tripped over the boy—whom he had forgotten was in the floor—and fell on him. When D.R. would not wake up, Polly called the boy's parents, who then took him to the hospital. The doctors there found that the child was seriously injured: he had abrasions on his face and torso; a bruised head, right arm, and back; a bleeding brain; retinal hemorrhages; and a damaged liver. The doctors suspected child abuse and alerted the police. Polly appeals his conviction, arguing that the court abused its discretion by admitting evidence that, several years ago, he allegedly injured his baby daughter.

At the trial, and over objection, Priscilla Polly (Shawn's ex-wife) testified that Polly

broke their baby daughter's leg in 1999. On cross-examination, she admitted that she had told the police then that she was the one who had accidentally broken the leg. That was a lie, she said, to persuade the doctors to let her retain custody of her daughters. Though there was some dispute about whether the baby had a bone disease that caused her leg to break easily and cleanly, Priscilla alleged that Polly had caused the injury.

Under Arkansas Rule of Evidence 404(b), evidence of Polly's prior bad acts was not admissible to prove that he acted in conformity with those acts as to D.R. But the evidence was admissible if it was independently relevant to a material issue in the case. *Simmons v. State*, 95 Ark. App. 114, 117, 234 S.W.3d 321, 324 (2006). As the circuit court recognized, whether Priscilla's testimony should have been admitted was a close question. The court said, "I think it's pretty far removed. I'm going to allow it, but I think it's pretty marginal. . . . I think you're stretching 404, . . . and it better be well connected."

We hold that no abuse of discretion occurred. *Branstetter v. State*, 346 Ark. 62, 74, 57 S.W.3d 105, 113 (2001). The evidence that Polly broke his daughter's leg was independently relevant here because Polly told the police and a medical social worker that he had accidentally injured D.R. Our supreme court has held that where children are concerned, evidence of physical injuries to other children in the home, or even to a child in another home, is probative of intent and the absence of mistake or accident. *Branstetter*, 346 Ark. at 73–74, 57 S.W.3d at 112–13. The material issue was whether D.R.'s injuries were accidental. Polly said that they were; under *Branstetter*, Priscilla's testimony that Polly had broken their daughter's leg several years ago was independently relevant evidence that D.R.'s injuries were not.

Affirmed.

HEFFLEY and BAKER, JJ., agree.