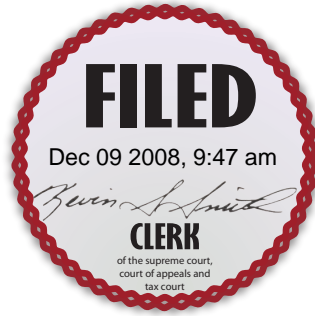


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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THOMAS SCOTT SMITHSON, )

Appellant-Defendant, )

vs. )

No. 22A04-0802-CR-91 )

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE FLOYD SUPERIOR COURT  
The Honorable Susan J. Orth, Judge  
Cause No. 22D01-0706-FA-426

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**December 9, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Thomas Scott Smithson (Smithson), appeals his conviction for attempted murder, a Class A felony, Ind. Code §§ 35-42-1-1 and 35-41-5-1, and criminal confinement, as a Class B felony, I.C. § 35-42-3-3(b)(2).

We affirm.

## ISSUES

Smithson raises two issues for our review, which we restate as:

- (1) Whether the trial court abused its discretion by admitting evidence of Smithson's prior bad acts; and
- (2) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that Smithson committed attempted murder.

## FACTS AND PROCEDURAL HISTORY

From March through June of 2007, Smithson had a relationship with Christina Scalf (Scalf). During the majority of this time he lived with Scalf in her apartment located in the Culbertson Manor apartments in New Albany, Indiana. At the end of May, 2007, Scalf noticed that \$1,100 was missing from her checking account. She reviewed the carbon copies of her checks and noticed that four checks had been written, payable to Smithson, with her signature forged at the bottom. Smithson moved out of Scalf's apartment and afterward Scalf confronted him about the thefts. A few weeks later, Scalf let Smithson move back in with her after he promised to pay her back.

On June 27, 2006, Scalf came home from work. She ate with Smithson and told him she was thinking about going to a bachelorette party with friends the next evening. Smithson sarcastically told her that she had better get her rest then and went into the living room while Scalf stayed in her room lying on the bed. Scalf talked on the phone with her cousin, and afterwards played a game on her phone. Smithson came into her room, grabbed a knife out of his pants pocket, snatched the phone out of Scalf's hands, and threw it into the hallway. He told Scalf that he was going to kill her.

Smithson pushed Scalf off of the bed and began hitting her with his fists. Scalf struggled with Smithson, and he dropped the knife on the floor. Smithson told Scalf to stay away from the window, and went to the kitchen and retrieved two more knives. Smithson went back into Scalf's bedroom and began choking her. Scalf bit Smithson's thumb, causing it to bleed. Smithson then began hitting her and slashing and stabbing her with the knives. Scalf sustained stabs and slashes on her arms and legs.

During the attack, Smithson repeatedly told Scalf that he was going to kill her. He explained that he was going to write to her daughter and explain that he killed her because she was having sexual relations with an African-American. The struggle went on for about three hours and Scalf lost a considerable amount of blood. She began feeling weak and eventually asked Smithson if she could sleep before he killed her. Smithson said, "yeah, I'll let you go to sleep before I finish killing you." (Transcript p. 339). Smithson left the room and, at that point, Scalf leaped out of the bedroom window and found another resident, who took her to a place where they called 911. The police arrived and arrested Smithson while he

was attempting to retrieve his mail. Smithson told the police that he had been in an altercation with Scalf, but stated that Scalf had threatened to stab herself and call the police.

On June 29, 2007, the State filed an Information charging Smithson with attempted murder, a Class A felony, I.C. §§ 35-42-1-1, 35-41-5-1; criminal confinement, as a Class B felony, I.C. § 35-42-3-3(b)(2); and domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3(a). On October 31, 2007, the State dismissed the charge of domestic battery. November 7 through 14, 2007, the trial court conducted a trial by jury. The jury found Smithson guilty of attempted murder and criminal confinement, as a Class B felony. On December 14, the trial court sentenced Smithson to fifty years for attempted murder and twenty years for criminal confinement, with the sentences to be served concurrently in the Department of Correction.

Smithson now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Admission of Evidence*

Smithson first argues that the trial court committed reversible error when it admitted certain evidence. Specifically, Smithson contends that evidence of him stealing from Scalf should have not been admitted because it violated Indiana Evidence Rule 404(b), in spite of the fact that he failed to lodge an objection at trial.

Indiana Evidence Rule 404(b) prohibits evidence of other crimes, wrongs, or acts by stating as follows:

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.

When a defendant objects to the admission of evidence on the grounds that it would violate Rule 404(b), the following test is applied: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant'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. *Charlton v. State*, 705 N.E.2d 1045, 1049 (Ind. 1998). On appeal, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* However, Smithson failed to object when the evidence of his prior bad act was presented as evidence, and to preserve an error in the admission of evidence a specific and timely objection must be made before the trial court. *Tate v. State*, 835 N.E.2d 499, 505 (Ind. Ct. App. 2005), *trans. denied*.

Smithson contends that the trial court's admission of this evidence constituted fundamental error, and, therefore, our review is permissible as an exception to the waiver rule. Fundamental error is a substantial, blatant violation of basic principles rendering the trial unfair and depriving the defendant of fundamental due process. *Id.* To qualify as fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Id.* As such, the fundamental error exception to the waiver rule is

extremely narrow and available only when the record reveals clearly blatant violations of basic and elementary principles of due process, and the harm or potential for harm cannot be denied. *Id.* Thus, we will review Smithson's claim that admission of the evidence of his prior bad acts ruined his chance at a fair trial.

Smithson supposes that the State advanced the evidence that he had stolen and forged Scalf's checks for the purpose of proving motive. The State also entered evidence of a separate motive as well: Smithson's statement to Scalf that he was killing her because she was "a n\*\*\*\*r loving whore." (Tr. p. 324). He contends that because the State presented evidence of another motive, the evidence of his thefts and forgeries was superfluous. However, Smithson has not presented any authority which would prevent the State from advancing multiple theories of motive to the jury. General experience tells us that people are often motivated by multiple influences. One of the permissible reasons for presenting evidence of prior bad acts is to prove motive. *See* Evid. R. 404(b). Therefore, it is likely that the trial court would have ruled the evidence of Smithson's thefts and forgeries admissible even if Smithson had lodged an appropriate objection, and would not have abused its discretion by doing so. Thus, the admission of Smithson's thefts and forgeries could not have been fundamental error.

## II. *Sufficiency of the Evidence*

Smithson contends that the evidence was insufficient to prove that he committed attempted murder beyond a reasonable doubt. Specifically, Smithson argues that he only slashed and stabbed Scalf on her appendages and had plenty of opportunity to kill Scalf if he

chose to, but did not, and, therefore, there was no evidence that he intended to kill Scalf or took a substantial step towards doing so.

Our standard of review with regard to sufficiency claims is well settled. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

In order to prove that Smithson attempted to kill Scalf, the State was required to prove beyond a reasonable doubt that Smithson, “with the intent to kill [Scalf], engaged in conduct which was a substantial step toward such killing.” *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991). The evidence most favorable to the verdict was that Smithson told Scalf repeatedly that he was going to kill her, and he attacked her with a knife. This evidence sufficiently supports the jury’s finding that Smithson acted with an intent to kill and took a substantial step towards such killing. We could speculate as to why Smithson did not follow through completely with his threats to kill in spite of ample opportunity to do so, but speculation is not our role on review. *See Robinson v. State*, 724 N.E.2d 628, 636 (Ind. Ct. App. 2000), *trans. denied*. Thus, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Smithson attempted to kill Scalf.

## CONCLUSION

Based on the foregoing, we conclude that the trial court did not commit fundamental error by admitting evidence of Smithson's thefts and forgeries and that the State presented sufficient evidence to prove beyond a reasonable doubt that Smithson committed attempted murder.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.