ATTORNEYS FOR APPELLANT:

ELIZABETH GABIG
Marion County Public Defender

SUZY ST. JOHN
Graduate Certified Legal Intern
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

DAMON WILLIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0905-CR-247
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kimberly J. Brown, Judge
The Honorable Israel Nunez-Cruz, Master Commissioner
Cause No. 49G16-0902-CM-23309

December 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a bench trial, Damon Willis appeals his conviction for battery[1] as a Class B misdemeanor, raising two issues, which we restate as:

I. Whether the trial court abused its discretion when it admitted evidence; and

II. Whether the evidence was sufficient to convict Willis of battery.

We affirm.

FACTS AND PROCEDURAL HISTORY

In February 2009, Willis was nineteen years of age and a senior at Lawrence North High School ("Lawrence North") in Indianapolis. C.C., then sixteen years of age, also attended Lawrence North. She and Willis met during a class in November 2008 and began dating, which continued through sometime in January 2009, when the relationship ended.

On February 5, 2009, C.C. left her lunch period with another student and began walking up the stairs. She encountered Willis on the stairs, and the two exchanged words. C.C. "kept trying to walk away," and Willis was "back peddling" up the stairs in front of her. *Tr*. at 12. The discussion continued into the hallway, and "when [C.C.] tried to get away for good," Willis grabbed C.C.'s left arm, pulling her toward him. *Id*. at 13. According to C.C., Willis also put his hand on her neck/throat and pushed her against the wall. C.C. pushed Willis's arm away from her, and as she began to walk away from Willis, he firmly "poked" the back of her head. *Id*. at 14. Later in the day, C.C. telephoned her mother, who came to

[1] *See* Ind. Code § 35-42-2-1.

school. C.C. and Willis separately spoke to the security officer on duty, Officer Brady Mullikan, who prepared a written report.

The State charged Willis with Class B misdemeanor battery. During the bench trial, the State presented evidence regarding Willis's conduct toward C.C. after she had terminated the relationship. Willis objected to the line of questioning on the basis that the evidence should be excluded under Indiana Evidence Rule 404(b). The trial court overruled the objection, finding that the evidence was not 404(b) character evidence. Willis posed another 404(b) objection when the State presented evidence that, later in the school day on the day in question, Willis passed by C.C.'s classroom door and mouthed the words, "I'm not done with you." *Tr*. at 17. Again, the trial court overruled the objection.

At the conclusion of the State's evidence, Willis moved for a directed verdict, which the trial court denied. Ultimately, the trial court convicted Willis of Class B misdemeanor battery. He now appeals.

DISCUSSION AND DECISION

I. Evidence Rule 404(b) Evidence

Willis asserts that the trial court erroneously admitted character evidence in violation of Indiana Evidence Rule 404(b), which provides:

> 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[.]

Evidence Rule 404(b) is meant to prevent the State from punishing people for their character. *Bassett v. State*, 795 N.E.2d 1050, 1053 (Ind. 2003). Rule 404(b) evidence is excluded when

it is introduced to prove the "forbidden inference" that the defendant had a criminal propensity and therefore engaged in the charged conduct. *Goldsberry v. State*, 821 N.E.2d 447, 455 (Ind. Ct. App. 2005); *Sanders v. State*, 724 N.E.2d 1127, 1130-31 (Ind. Ct. App. 2000). However, evidence of uncharged misconduct that is probative of the defendant's motive and "inextricably bound up" with the charged crime is properly admissible under Evidence Rule 404(b). *Sanders*, 724 N.E.2d at 1131.

In assessing the admissibility of 404(b) evidence, a trial court must undertake a two-step analysis. It must: (1) determine 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) balance the probative value of the evidence against its prejudicial effect. *Goldsberry*, 821 N.E.2d at 455 (citing *Wilson v. State*, 765 N.E.2d 1265, 1270 (Ind. 2002)). Hence, if the evidence bears on some issue other than criminal propensity and clears the balancing hurdle of Indiana Evidence Rule 403, it is admissible. *Gillespie v. State*, 832 N.E.2d 1112, 1117 (Ind. Ct. App. 2005). We review a trial court's decision to admit such evidence for an abuse of discretion. *Goldsberry*, 821 N.E.2d at 454. In reviewing the decision, we consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id*.

Willis argues that the trial court erred when it allowed into evidence certain portions of C.C.'s testimony that, he maintains, constitute impermissible character evidence, which should have been excluded under Evidence Rule 404(b). The disputed testimony can be divided into two parts: (1) C.C.'s description of Willis's conduct toward her following their

break-up in January, but before the February 5, 2009 incident (prior conduct), and (2) her observation of him later in the day at school on February 5, 2009 (subsequent conduct). We address each in turn.

A. Prior Conduct

During trial, the State asked C.C. when she ended the relationship with Willis and his response to her doing so. She replied that she broke up with him in January 2009 and that Willis "didn't like it" and "wouldn't leave [her] alone." *Tr*. at 9. When C.C. began to explain Willis's conduct in that regard, Willis objected to the questioning, asserting that it constituted prior bad acts and uncharged conduct, was irrelevant to the day in question, and that it was offered to prove the impermissible inference that he committed the battery. The State responded that it was relevant to show his motive. The trial court overruled the objection, finding that it was not 404(b) character evidence. C.C. then completed her testimony, by acknowledging that Willis sent her "calls and text messages." *Id*. at 9-10.

Although Willis urges that this evidence was highly prejudicial to him and should have been excluded, we are not persuaded. First, C.C. did not elaborate or otherwise describe the calls or text messages, their frequency, or content; she merely stated that he sent some. Second, C.C. also testified, without objection, that Willis "didn't like" the fact that she had ended the relationship and that he "wouldn't leave [her] alone." *Id*. at 9. Later in her testimony, C.C. described Willis as "angry" on the day in question, and explained they were in a "heated argument" on the stairway and in the hall. *Id*. at 16. Willis did not object or attempt to exclude the testimony, which effectively established the same thing, namely that

Willis was mad about the break-up. Lastly, the State's explanation, that Willis's response to the break-up was relevant to proving motive for the battery, was reasonable. Hostility is "a paradigmatic motive for committing a crime," *Hicks v. State*, 690 N.E.2d 215, 222 (Ind. 1997) (quotation omitted), and evidence of motive is always relevant in the proof of a crime. *Wilson v. State*, 765 N.E.2d 1265, 1270 (Ind. 2002). For all these reasons, the trial court did not err when it admitted the evidence that Willis sent calls and texts to C.C. following the termination of their relationship.

B. Subsequent Conduct

As mentioned, Willis also challenges the trial court's decision to admit evidence that, later in the school day on February 5, 2009, C.C. observed Willis walk past her classroom door and mouth to her the words, "I'm not done with you," which frightened her. *Tr*. at 17. Willis objected on the grounds that whether she was scared after the incident was not relevant, and the evidence was inadmissible under Evidence Rule 404(b). The State responded that the evidence was relevant to "painting the full picture of what happened." *Id*. The trial court overruled Willis's objection.

On appeal, Willis urges that with this evidence the State was attempting to prove the forbidden inference that because Willis threatened C.C. later in the day with angry words, his touching of C.C.'s arm earlier in the day likewise must have been in an angry manner. *Appellant's Br*. at 10. However, the trial court apparently was not persuaded that the evidence was, in fact, offered for that purpose. We agree. The evidence that Willis uttered what effectively was a threat toward C.C. subsequent to the incident, but on the same day that

they had engaged in a "heated argument," was relevant to the issue of motive. The fact that it occurred subsequent to the battery does not make it irrelevant to that offense. *See Howard v. State*, 761 N.E.2d 449, 453 (Ind. Ct. App. 2002) (discovery in January 1996 of cash with narcotics odor was relevant to charged offense of conspiracy to commit dealing for acts committed in 1994-95), *trans. denied*; *Hazelwood v. State*, 609 N.E.2d 10, 16 (Ind. Ct. App. 1993) (recognizing that evidence of defendant's acts committed both before and after charged crime are admissible if offered to prove exception to Evid. R. 404(b), such as motive, intent, or plan), *trans. denied*. Here, the challenged testimony was not evidence of a crime committed on another day, in another place, and offered to prove the "forbidden inference" that Willis is a person who commits crimes. Rather, the evidence consisted of Willis's remarks mouthed through a classroom door on the same day, at the same school, and to the same victim, and it was relevant to the charged conduct of battery upon C.C. The trial court did not abuse its discretion when it admitted the evidence.

II. Sufficiency of the Evidence

Willis next asserts that the evidence was not sufficient to support his conviction for battery. When reviewing a challenge to the sufficiency of the evidence, this court will neither reweigh evidence nor judge witness credibility, and we respect the jury's exclusive province to weigh conflicting evidence. *Fleming v. State*, 833 N.E.2d 84, 88 (Ind. Ct. App. 2005) (quotation omitted). Considering only the evidence that supports the conviction, along with the reasonable inferences to be drawn therefrom, we determine whether there is

substantial evidence of probative value from which a reasonable trier of fact could have concluded that the defendant was guilty of the charged crime beyond a reasonable doubt. *Id*.

To obtain the Class B misdemeanor battery conviction here, the State was required to prove beyond a reasonable doubt that Willis knowingly or intentionally touched C.C. in a rude, insolent, or angry manner. Ind. Code § 35-42-2-1. Willis admits that he intentionally grabbed C.C.'s arm during an argument, pushed her near the wall, and poked her head as she walked away from him, but he maintains that there is insufficient evidence to establish that he did so in a rude, insolent, or angry manner. We disagree; the evidence is sufficient to establish that the manner in which Willis touched C.C. indeed was rude, angry, or insolent.

Willis and C.C. had been in a romantic relationship, she ended it, and he was not happy about it. On the day in question, they engaged in what C.C. characterized as a "heated argument." *Tr*. at 16. At trial, Willis conceded that they were "not getting along at the time." *Id*. at 37. C.C. testified that Willis was "angry" during the incident. *Id*. at 16. She attempted to "get away" from him, but was not successful. *Id*. at 13. He grabbed her arm and pushed her against the wall. C.C. further testified that at one point he had his hand on her throat or neck for a few seconds. Although Willis disputes this, the trier of fact is responsible for judging the credibility of witnesses and determines whom to believe. *Fleming*, 833 N.E.2d at 88. C.C. also testified that it was "very uncomfortable" when Willis grabbed her arm and when he had his hand on her neck. *Tr*. at 15. After she freed herself from his grasp, Willis firmly poked C.C. in the back of the head as she walked away. Based

on Willis's actions and the surrounding circumstances, a reasonable inference is that Willis's manner of touching C.C. was angry, rude, or insolent.[2]

Affirmed.

NAJAM, J., and BARNES, J., concur.

[2] Willis argues that his touching of C.C. was "playful roughhousing between teenaged ex-flames who were used to having physical contact with one another" and this "familiar, playful, affectionate manner" supports his theory that he did not touch C.C. in a rude, insolent, or angry manner. *Reply Br.* at 3. C.C.'s testimony at trial was that she attempted to avoid him and get away from him, and that eventually she terminated the conversation, but not before he had her by the arm and even by the throat against a hallway wall. We find Willis's suggestion that such behavior is acceptable or expected is not only meritless, but also disconcerting.