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IN THE
COURT OF APPEALS OF INDIANA

THERON L. BAILEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0810-CR-917
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0703-FA-54

June 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Theron L. Bailey ("Bailey") appeals nine convictions, including Attempted Murder, challenging the trial court's admission of evidence regarding two previous convictions, pursuant to Indiana Rule of Evidence 404(b). The dispositive issue is whether the trial court committed fundamental error in admitting this evidence. We affirm.[1]

Facts and Procedural History

Bailey had been in a relationship with Rita Underwood ("Underwood"), but a no-contact order was issued prohibiting him from contacting her. She was working at a diner and residing in an apartment one floor above the diner. Her son, Christopher Sherron ("Sherron"), frequently stayed with her because she was frightened of Bailey.

On the night of March 3, 2007, Underwood was in her apartment with her other son, Dustin Cox ("Cox"). Cox saw Bailey walking toward the apartment. Underwood hid behind the front door. When Bailey arrived and asked for her, Cox told him that she might be in the bedroom. As Bailey moved toward the bedroom, Underwood exited her apartment and entered the diner. Bailey continued to search for her and entered the diner. Underwood soon exited the restaurant, followed by Bailey and Jesse Henry ("Henry"). As these events were occurring, Sherron had returned home from an errand. Bailey and Underwood argued in the parking lot, as Henry and her two sons looked on. Bailey pointed a handgun at Henry, and

[1] The Appellant's original appendix included a presentence report reproduced on white paper and containing the complete Social Security Number of a living person. Pursuant to Indiana Administrative Rule 9(G), Indiana Trial Rule 5(G), and Indiana Appellate Rule 9(J), the appellant was ordered to provide a revised appendix correcting these errors.

everyone stepped back. Bailey and Underwood struggled briefly, while the others encouraged him to put the gun away. Underwood walked back into the diner. Bailey opened the door and shot her in the back of the head. Underwood sustained brain damage that, among other things, required her to re-learn how to talk and to walk.

Bailey then pointed the gun at Cox and Sherron and asked whether they wanted to die. Bailey left the diner's parking lot.

That night, Charles Teegarden ("Teegarden"), who had worked with Bailey, was in a Veterans of Foreign Wars hall, a block away from the diner. Bailey entered the hall and asked him for a ride; Teegarden responded that he would do so after finishing a game of pool. Not satisfied, Bailey drew his gun, pointed it at Teegarden, and stated that he would shoot Teegarden if he did not immediately help him flee. Teegarden managed to extricate himself from the situation. Bailey left the hall.

He then approached a pub, where he found James Johnson ("Johnson") talking outside on his cell phone. Bailey pressed his gun into Johnson's chest, and told Johnson that he would shoot him in the head, as he had done to Underwood, if Johnson did not agree to drive him where he wanted to go. Johnson drove Bailey to a trailer court.

The State charged Bailey with thirteen counts, including Attempted Murder, Kidnapping, Criminal Confinement, Invasion of Privacy, Carrying a Handgun without a License, two counts of Intimidation, and six counts of Pointing a Firearm. The Invasion-of-Privacy count alleged that Bailey violated one of the conditions of his probation for a previous conviction, namely that he "have no contact with the victim in [the previous] case,

Rita Underwood." Exhibit 76. The probation order covered the date on which Underwood was shot.

As Bailey made clear in his opening statement, his defense to Attempted Murder was that his handgun fired accidentally. Outside the presence of the jury, the State argued that Bailey's opening statement had opened the door to evidence of prior bad acts. The trial court concluded that it would "allow evidence of prior acts of violence by the Defendant against the alleged victim, Rita Underwood, and Rita Underwood only." Appendix at 23.

The jury found Bailey guilty as charged on counts one through twelve; Bailey pled guilty to count thirteen. The trial court entered thirteen judgments of conviction. Cognizant of Double Jeopardy concerns, the trial court later vacated four of the thirteen convictions. Bailey now appeals the remaining nine convictions: Attempted Murder, a Class A felony,[2] Kidnapping, a Class A felony,[3] Invasion of Privacy, as a Class A misdemeanor,[4] Carrying a Handgun without a License, as a Class C felony,[5] two counts of Intimidation, Class C felonies,[6] and three counts of Pointing a Firearm at another Person, Class D felonies.[7]

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[2] Ind. Code §§ 35-41-5-1 and 35-42-1-1.

[3] Ind. Code § 35-42-3-2.

[4] Ind. Code § 35-46-1-15.1.

[5] Ind. Code §§ 35-47-2-1 and –23.

[6] Ind. Code § 35-45-2-1.

[7] Ind. Code § 35-47-4-3.

Discussion and Decision

Bailey argues that the trial court committed fundamental error in admitting evidence regarding his other crimes, wrongs, or acts, pursuant to Indiana Rule of Evidence 404(b).

> 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.

Ind. Evidence Rule 404(b) (emphasis added). This rule exists to avoid the risk of a jury drawing "the forbidden inference that the defendant's character is such that she has a propensity to engage in conduct of the sort charged, and that she acted in conformity with that character on the occasion at issue in the charge." Garland v. State, 788 N.E.2d 425, 429 (Ind. 2003).

In considering the admissibility of such evidence, the trial court must "determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act," and "balance the probative value of the evidence against its prejudicial effect," pursuant to Indiana Rule of Evidence 403. Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003).

Our Supreme Court has held that the trial court may admit such evidence where the State seeks to rebut the defendant's direct examination testimony. Saylor v. State, 765 N.E.2d 535, 552 (Ind. 2002), death sentence revised by 808 N.E.2d 646, (Ind. 2004).

Furthermore, evidence of other crimes, wrongs, or acts is admissible if "necessary for the jury to understand the relationships between the victim, various witnesses, and the defendant." Wilson v. State, 765 N.E.2d 1265, 1270-71 (Ind. 2002).

We review for an abuse of discretion the trial court's rulings on the admission of evidence. Id. at 1270. However, because he did not make a contemporaneous objection at trial, Bailey acknowledges that he must establish that the admission of evidence constituted fundamental error. Appellant's Brief at 4. Under this standard, we may reverse only "when there has been a 'blatant violation of basic principles' that denies a defendant 'fundamental due process.'" Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003) (quoting Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)).

In two sentences, Bailey asserts that the State failed to give him reasonable notice of its intent to introduce evidence of other crimes, wrongs, or acts. The State, he writes, "had not disclosed their intention in their Discovery Responses." Appellant's Br. at 6. However, he fails to support this assertion with citation to the record. See Ind. Appellate Rule 46(A)(8)(a). The Chronological Case Summary indicated that the State filed five notices of discovery compliance, none of which appear in the Appellant's Appendix. On August 18, 2008, the first day of trial, Bailey filed and the trial court heard argument on his Motion in Limine. During that conference, the prosecutor stated that he had discussed the matter with Bailey's attorney. Transcript at 5. Also during that conference, the prosecutor stated, "as we have set out in the Notice of Intent . . . we believe each of those two (2) [previous convictions] would, uh, uh, necessarily be outside, uh, any, uh, order that the Court might,

uh, issue granting [Bailey's Motion in Limine]." Id. Based upon this record, Bailey has simply failed to support his assertion that the State did not comply with the disclosure provision of Indiana Rule of Evidence 404(b).

Bailey challenges the admission of evidence regarding two previous convictions. In cross-examining Bailey, the State first addressed the conviction for which Bailey was on probation at the time of the instant events:

> Q: That's not the first time that you've told the authorities that your injuring her physically was an accident is it?
>
> A: Yes it is.
>
> Q: Oh it is? Do you remember that case that you were on probation for when this happened?
>
> A: Yes.
>
> Q: Okay. Tell the jury what had happened in that case that led to your conviction.

Tr. at 608. Bailey then testified that he slapped Underwood. When the State asked Bailey whether he had told the judge in the previous case that he had punched Underwood in the nose, Bailey testified that he had said that only because his attorney had advised him to do so, in order to avoid incarceration.

The State then asked Bailey about a second previous conviction. Bailey's attorney acknowledged the admissibility of the fact of the previous conviction, but objected to the admission of details regarding Bailey's conduct. The State argued that it was rebutting Bailey's defense that shooting Underwood was accidental. The trial court overruled Bailey's

objection, and the State proceeded with its questions:

Q: Police were called by Rita. When they got there she was out front crying wasn't she? Her arm was bleeding, her finger was bleeding, you remember that?

A: No.

Q: She had blood on her pants? On her pants leg you re, [sic] does that help refresh your recollection?

A: No not really.

Q: You were there at that time weren't you?

A: That was my apartment.

Q: Okay. In fact, you had thrown a candle holder at her and struck her in the arm and then you pushed her on the couch and grabbed hold of her around the neck didn't you?

A: I don't remember that.

. . .

Q: And you talked to the police, didn't you?

A: Yes I did.

Q: You told the police that she must've had an accident. Right? Isn't . . .

A: That's what's on the report. I don't remember that conversation. I don't remember saying that exact words no.

Q: . . . You told the police nothing had happened, didn't you? You told the police Rita must've fallen in order to get that cut on her didn't you? And then later . . . you went into court and you admitted that you had in fact hit her with that candle holder, pushed her down on the couch and grabbed her around the neck and you were guilty of that, didn't you?

A: Yes I guess I did.

Q: Did you do that because somebody told you to?

A: It was part of the sentence yes.

Id. at 613-14.

As the State alleged that Bailey searched for Underwood at her apartment and her place of work, violated a court order in contacting her, argued with her, struggled with her, shot her in the back of the head, and threatened her two sons, Bailey's previous criminal conduct against Underwood was admissible for purposes of helping the jury understand the nature of the relationships among Bailey, Underwood, and her two sons. See Wilson, 765 N.E.2d at 1270-71. Furthermore, Bailey's opening statement and direct-examination testimony made clear that his main defense to the Attempted Murder charge was that he did not intend to shoot Underwood. Thus, the challenged evidence was also admissible for purposes of rebutting the defendant's theory of the case. See Saylor, 765 N.E.2d at 552. Accordingly, Bailey has failed to establish that the admission of evidence regarding two previous convictions constituted fundamental error.

Bailey presents a second issue of whether his trial counsel was ineffective for not objecting to the admission of the above-referenced evidence. However, the failure to object to admissible evidence does not render trial counsel ineffective.

> Counsel cannot be faulted for failing to make an objection which had no hope of success and which might have the adverse effect before the jury of emphasizing the admissibility of appellant's statement. Failure to object to admissible evidence does not constitute ineffective assistance of counsel; a defendant must show that had a proper objection been made the court would have had no choice but to sustain it.

Garrett v. State, 602 N.E.2d 139, 141 (Ind. 1992). See also Bieghler v. State, 690 N.E.2d 188, 198 (Ind. 1997) (holding that trial counsel was not ineffective for failing to object to admissible evidence), cert. denied, 525 U.S. 1021 (1998). Because the challenged evidence was admissible, as discussed above, we conclude that Bailey's trial counsel was not ineffective for failing to object to its admission.

Conclusion

The trial court did not commit fundamental error in admitting evidence regarding two previous convictions. Bailey's trial counsel was not ineffective.

Affirmed.

DARDEN, J., and ROBB, J., concur.