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**IN THE
COURT OF APPEALS OF INDIANA**

LESTER SMITH,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0805-CR-429
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0601-CR-6155

September 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Lester Smith appeals his conviction for Murder,¹ a felony, claiming that the trial court erred in admitting evidence of his alleged prior acts of violence that he committed against the child victim in violation of Indiana Evidence Rule 404(b) (Rule 404(b)). Smith also argues that the evidence was insufficient to support the conviction because the State's case against him was merely circumstantial. Finding no error, we affirm the judgment of the trial court.

FACTS

In November and December of 2005, Smith was living in an Indianapolis apartment with his girlfriend, Brandy Strader. Strader's one-year-old daughter, A'aniah, also lived intermittently with them.

Several individuals cared for A'aniah during those two months, including her aunt, Chelcie Croom, Chelcie's father, Montez Croom, a godmother, Tonya Matthews, and Tonya's teenage daughter, Mahogany Matthews. Chelcie often babysat for A'aniah when Strader was at work. On one occasion, when Smith had A'aniah in his arms, the baby started to cry for Chelcie. However, when Chelcie attempted to take A'aniah, Smith grabbed the baby's arm "real hard." Tr. p. 62, 64, 81. Another time, when Strader was braiding Chelcie's hair, she was concerned when Smith referred to A'aniah as a "ni**er baby," and a "monster baby." Id. at 65-66, 70-71. Smith did not like A'aniah's father and the two had engaged in a prior physical altercation at some point. Chelcie also noticed that A'aniah cried whenever Smith was nearby. However, she also observed that

¹ Ind. Code § 35-42-1-1.

A'aniah seemed calm and content when Strader was holding her as long as Smith was not present.

Chelcie was A'aniah's primary caregiver from Thanksgiving 2005 until the first part of December. Montez also cared for the baby when Chelcie was at school. Montez observed that A'aniah seemed "terrified" when Smith visited the Crooms, and she would often "grab on" to Montez and "not let go." Tr. p. 113. Others also saw A'aniah scream and cry when Smith was present. On one occasion, Smith brought milk over to the Crooms for A'aniah. Montez noticed that the milk was clumped and "spoiled" like it had "been sitting for months, like a sponge." Id. at 129. When A'aniah was returned to Smith and Strader in December, there were no marks or bruises on her body and she did not appear to be ill.

The Matthews also helped baby sit for A'aniah. Sometimes, Strader would drop A'aniah off for a couple of days or up to one week at a time. Tonya saw A'aniah on Thanksgiving of 2005, and A'aniah stayed with the Matthews from December 11 to December 13. Smith dropped A'aniah off on December 11 and according to Mahogany, there was nothing about A'aniah that seemed unusual. A'aniah vomited a couple of times during the middle of the night, but Mahogany believed that A'aniah otherwise acted normally. Two days later, Mahogany bathed A'aniah and observed no bruises, scratches, or other injuries on the baby.

Sometime during the afternoon of December 14, 2005, the Matthews returned A'aniah to Strader and Smith. At approximately 4:00 p.m., Strader left for work. Thereafter, at 9:30 p.m., Smith telephoned Strader and told her that A'aniah had fallen

and hit her head. Although Strader told Smith not to let the baby sleep, Smith explained that A'aniah had fallen asleep shortly after she fell.

Smith picked Strader up from work at midnight and A'aniah was sleeping in the vehicle. After returning home, Strader put A'aniah to bed. At approximately 9:00 the next morning, Smith and Strader checked on A'aniah as she slept and determined that she was still breathing. Later that day, Smith spoke to Tonya and told her that A'aniah had fallen and had hit her head on a counter and was sleeping. Smith also told Tonya that A'aniah's injuries included a "little hole in her head," but was otherwise "okay." Id. at 243.

At approximately 3:00 p.m. that day, Strader again checked on A'aniah. At that time, Strader noticed that A'aniah's face was cold. In response, Strader screamed, told Smith to try and wake A'aniah, and called the police.

Indianapolis Police Officer Michael Schollmeier was on patrol at the apartment complex responding to another unrelated call when he heard the dispatch regarding a deceased infant. When Officer Schollmeier arrived at the residence, Strader emerged from the front door, crying. The two went inside, and Strader directed Officer Schollmeier to the bedroom. After Officer Schollmeier determined that A'aniah was deceased, he noticed significant scars on her face and that her body was cold to the touch. Smith was standing next to the crib and appeared "calm and collected." Id. at 35, 45.

Thereafter, Strader and Smith were transported to the homicide division at the police department. Two other detectives entered the residence and noticed that it was dirty and unkempt. They also observed that there was no baby food or diapers.

While at the police station, Smith told Detective Jesse Beavers that A'aniah was sitting on a counter as he was washing the dishes. According to Smith, A'aniah fell from the counter at some point and hit her head on the oven door.

The next day, Detective Tom Tudor attended A'aniah's autopsy, where Drs. Cattelier, Laskey, and Carter were present. According to Dr. Joy Carter, who was the chief forensic pathologist for the Marion County Coroner's Office, A'aniah suffered numerous injuries to the head, skin, brain, and abdomen. Dr. Carter also observed that A'aniah had sustained bruising on the arms, legs, back, and head, and determined that A'aniah's injuries were inconsistent with a "single-blow cause." Tr. p. 156. Rather, Dr. Carter concluded that A'aniah's injuries were indicative of multiple blows. Tr. p. 156. The bruises on A'aniah's lower jaw and behind her right ear showed discoloration, which indicated that a substantial degree of force had been applied. Thus, Dr. Carter concluded that A'aniah's injuries were not consistent with those that would have been sustained in a fall. Additional photographs taken during the forensic examination showed evidence of abdominal bruising, including bruises to the liver, the interior of the abdominal wall, and the tissue that supports the intestines. Dr. Carter also noticed that A'aniah had sustained injuries to her eye and cheek that were consistent with adult human bite marks.

In evaluating the number and severity of injuries that A'aniah sustained, Dr. Carter further concluded that they were not consistent with "accidental" trauma. Id. at 174-75. She also determined that the force exerted in the infliction of the injuries was excessive, and were not consistent with those of a fall. Thus, A'aniah's death was ruled a homicide.

Detective Tudor eliminated Strader as a suspect in the homicide in light of the timelines that were set forth in the pathology reports, the results of the autopsy, the fact that Strader had been at work on December 14, and that she was away from the residence from 4:00 p.m. until midnight that day. However, Detective Tudor believed that Smith's version of the events was "obviously a lie" in the wake of the forensic reports and examination. Id. at 373.

As a result of the incident, Strader was charged with neglect of a dependent, a class A felony. Smith was charged with murder, battery, a class A felony, and neglect of a dependent, a class A felony. On February 1, 2006, the State filed a "Notice of Intent to Offer Evidence Pursuant to [Indiana Evidence Rule] 404(b)." Appellant's App. p. 36. In particular, the State sought to offer evidence of the occasion when Smith forcibly grabbed A'aniah's arm when she tried to stay away from Smith. The State maintained that such evidence of Smith's prior hostility toward A'aniah was admissible to show "motive, intent, and absence of accident." Id.

At a hearing on the State's motion that commenced on November 7, 2007, the prosecutor also stated that he intended to introduce evidence of the behavior that A'aniah exhibited toward Smith and that Smith had referred to A'aniah as a "ni**er baby" and "monster baby." Tr. p. 4. The prosecutor argued that such evidence was relevant to show "motive," because it established the nature of the relationship between Smith and A'aniah. Id. at 7-8. The trial court declined to rule on the motion.

Strader and Smith were tried together. At the bench trial that commenced on November 8, 2007, the trial court acknowledged Strader and Smith's objections that the

evidence constituted improper character evidence under Rule 404(b) and determined that A'aniah's conduct in Smith's presence was admissible. The trial court also ruled that Smith's acts of grabbing A'aniah were admissible on the issue of intent. Finally, the trial court determined that Smith's "name calling" of A'aniah was admissible and was not the type of evidence that required exclusion under Rule 404(b).

Following the State's presentation of evidence, the trial court granted Strader's motion for involuntary dismissal pursuant to Indiana Trial Rule 41(B). At the conclusion of the trial, Smith was acquitted of neglect of a dependent and found guilty of murder and battery. On January 11, 2008, the trial court sentenced Smith to fifty-five years of incarceration for A'aniah's murder. The trial court merged the battery count and imposed no sentence on that offense. Smith now appeals.

DISCUSSION AND DECISION

I. Admissibility of Evidence

Smith contends that the trial court erred in admitting his alleged prior acts of violence against A'aniah and his reference to her as a "ni**er baby" and a "monster baby" into evidence at trial. Appellant's Br. p. 7. Specifically, Smith argues that he was denied a fair trial because the admission of that evidence violated the provisions of Rule 404(b) because it was only offered to establish his propensity to commit the charged act and it was not relevant to prove motive, intent, or lack of accident.

In resolving this issue, we initially observe that the decision to admit or exclude evidence is within the sound discretion of the trial court and will only be reversed upon a manifest abuse of that discretion that results in the denial of a fair trial. Dearman v. State,

743 N.E.2d 757, 759 (Ind. 2001). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id.

Rule 404(b) provides that

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 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.

Evid. R. 404(b). In deciding whether the challenged evidence is admissible, it must be determined whether 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. The trial court should then balance the probative value of the evidence against its prejudicial effect. Gillespie v. State, 832 N.E.2d 1112, 1117 (Ind. Ct. App. 2005). The rationale underlying Rule 404(b) is that the fact finder is precluded from making the "forbidden inference" that the defendant has a criminal propensity and therefore engaged in the charged conduct. Id.

We further note that evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ind. Evid. Rule 401. However, the trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of

cumulative evidence. Ind. Evid. Rule 403. As a result, consideration of the admissibility of evidence under Rule 404(b) necessarily includes the relevancy test of Evidence Rule 401 and the balancing test of Evidence Rule 403. Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). The trial court has wide latitude in weighing the probative value of evidence against the potentially prejudicial effects of its admission, and we review the determination reached by the trial court as a result of the balancing test under Evidence Rule 403 for an abuse of discretion. Id.

This court has observed that evidence of uncharged misconduct that is probative of the defendant's motive and which is "inextricably bound up" with the charged crime is properly admissible under Rule 404(b). Brown v. State, 747 N.E.2d 66, 68 (Ind. Ct. App. 2001). Moreover, a defendant's prior bad acts are usually admissible to show the relationship between the defendant and the victim. Ross v. State, 676 N.E.2d 339, 346 (Ind. 1996). And where the abuse of a child is at issue in a case, prior bad acts are admissible to show the relationship between the parties. Thompson v. State, 625 N.E.2d 1322, 1324 (Ind. Ct. App. 1993). Finally, we note that although Rule 404(b) allows for the admission of specific instances of prior misconduct to prove motive, intent, identity, or the absence of mistake, that list is not exhaustive. Thompson v. State, 690 N.E.2d 224, 233 (Ind. 1997).

As noted above, Smith waived his right to a jury trial. In instances where the trial court is the fact finder, it is presumed that the judge will disregard inadmissible and irrelevant evidence in determining whether the defendant committed the charged crime. Shanks v. State, 640 N.E.2d 734, 736 (Ind. Ct. App. 1994). Any alleged harm that may

have arisen from an evidentiary error is lessened—if not totally annulled—when the trial is conducted by the court sitting without a jury. Id.

In this case, Smith told police officers that A'aniah's injuries on the day of her death resulted from an accidental fall from a kitchen counter. Ex. 52. When A'aniah allegedly injured her forehead, Strader was at work and Smith was the only person who had contact with A'aniah. Ex. 52. In light of Smith's contention that the injury was accidental, he is claiming that there was no intent on his part to injure A'aniah. Therefore, evidence showing Smith's intent to harm A'aniah was probative to rebut the claim that her death was accidental pursuant to Rule 404(b).

The evidence also established that another man was A'aniah's father and that Smith believed that the man was a "monster." Tr. p. 473. Moreover, Smith had been involved in a physical altercation with A'aniah's father on a prior occasion. Tr. p. 473, 508. Therefore, the evidence of Smith's prior hostile acts toward A'aniah was admissible to prove his motivation to harm her in light of these circumstances. Additionally, Smith's prior acts of violence toward A'aniah were probative to show that his version of the events that resulted in A'aniah's death is likely untrue, and that her injuries were not accidental. And the instances where Smith grabbed A'aniah's arm are relevant to establish the relationship between the two. Thompson, 625 N.E.2d at 1324. In light of these circumstances, the evidence regarding Smith's prior uncharged acts of violence and aggression that he displayed toward A'aniah was not admitted merely to show that Smith had the propensity to commit the offense of murder. Instead, the evidence was admitted

to establish Smith's motive, intent, the nature of his relationship with A'aniah, and to rebut his claim that A'aniah's death was accidental.

We further note that Smith's name-calling was relevant to establish the nature of the relationship between him and A'aniah. Id. Even more compelling, we cannot say that Smith's statements amounted to a prior bad "act" within the meaning of Rule 404(b). Put another way, what Smith said is at issue with regard to the name-calling incidents—not what he did. Therefore, the trial court properly determined that there was no violation of Rule 404(b) in admitting those statements.

Finally, we cannot say that the admission of this evidence was more prejudicial than probative and should have been excluded. As noted above, Smith was found guilty after a bench trial. And, even assuming solely for the sake of argument that such evidence was improperly admitted, it is presumed that the judge disregarded inadmissible and irrelevant evidence in determining whether Smith committed the charged crime. Shanks, 640 N.E.2d at 736. Thus, for all of these reasons, we conclude that the trial court properly admitted the evidence that Smith challenged under Rule 404(b).

II. Sufficiency of the Evidence

Smith next argues that the evidence was insufficient to support his conviction for murder. Specifically, Smith claims that the conviction must be set aside because the State's case against him was only circumstantial and it was established that "multiple persons had access to A'aniah immediately preceding her death." Appellant's Br. p. 14.

When reviewing sufficiency of the evidence claims, we consider only the probative evidence and reasonable inferences most favorable to the verdict. Drane v.

State, 867 N.E.2d 144, 146 (Ind. 2007). Moreover, it is the fact finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. Id. Thus, the fact finder is free to believe whomever it chooses. Klaff v. State, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). We will affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. Id.

We also note that where circumstantial evidence alone is used to establish guilt, the question for the reviewing court is whether reasonable minds could reach the inferences drawn by the fact finder; if so, there is sufficient evidence. Id. at 274-75. Furthermore, we need not determine whether the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence, but rather whether inferences may be reasonably drawn from that evidence which supports the verdict beyond a reasonable doubt. Id. at 275.

In this case, the evidence showed that no injuries were visible on A'aniah up to, and including, the date that she was returned to Strader and Smith on December 14, 2005. Tr. p. 292-93, 296. The Crooms testified that A'aniah did not show any signs of injury or harm when they stopped caring for her in early December. Id. at 127-28. When the Crooms took A'aniah to the Matthews, there was no indication that A'aniah was hurt. Moreover, Mahogany testified that she bathed A'aniah and saw no injuries or bruising. Id. at 296. The Matthews saw no signs of bruising on A'aniah when they returned her to Smith and Strader. Moreover, Strader testified that when she checked on A'aniah on

the morning of December 15, 2005, she was breathing and appeared to be normal. Id. at 483.

When considering this testimony, it is apparent that the two individuals who could have caused A'aniah's injuries were Strader and Smith. However, it was established that Smith was alone with A'aniah the entire evening of December 14, 2005. Ex. 45-46. And it was shown that Strader was at work that evening. Ex. 46, 52.

The evidence further demonstrated that Smith was not a loving caregiver of A'aniah. As noted above, Montez Croom testified that when Smith delivered some milk for the baby, it had spoiled. Id. at 129. Additionally, a number of witnesses testified that A'aniah was terrified when she was alone with Smith. Id. at 67-68, 75, 92, 113, 248, 297. Montez testified that A'aniah would "cling to him" when Smith was present. Id. at 113. Chelcie testified that Strader seemed "protective" of the baby, and the detectives observed that Strader was distraught and crying when she learned of A'aniah's death. Id. at 32, 89-90, 434.

Finally, we note that Smith's version of the events is wholly inconsistent with the testimony of the State's witnesses and the medical evidence that was presented at trial. Indeed, Smith's explanation about A'aniah's forehead wound did not comport with the pathology reports and the forensic examiner's conclusions. Tr. p. 134. Thus, if Smith's self-serving testimony was to be believed, then the fact finder would necessarily have rejected all of the expert medical testimony regarding A'aniah's injuries. In other words, either A'aniah had, as Smith testified, only one visible injury on the day of her death, or, as Dr. Carter testified, A'aniah's body was riddled with significant injuries. Dr. Carter

had performed over five thousand forensic examinations, and she testified that A'aniah's death could not have been caused by a fall. Id. at 137, 174-75. Finally, as noted above, only Smith was present when A'aniah was injured.

When considering this evidence, we conclude that the trial court, as the fact finder, could have found Smith guilty of A'aniah's murder beyond a reasonable doubt. In essence, Smith's arguments amount to a request for us to judge the credibility of the witnesses and reweigh the evidence, which we cannot do.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.