



Christopher Naas (“Naas”) was convicted in the Porter Superior Court of Class A felony battery. On appeal, he raises two issues for our review:

- I. Whether the trial court properly denied Naas’s motion for continuance; and,
- II. Whether the trial court properly admitted evidence that Naas had previously shaken the victim, causing his head to strike the fireplace, the floor, and a coffee table.

We affirm.

### **Facts and Procedural History**

On the morning of February 27, 2004, the Porter County 911 dispatcher received a call from Naas that an eighteen-month-old child had ceased breathing. The dispatcher could hear the child’s labored breathing in the background. Porter County Deputy Michael Spicer (“Deputy Spicer”) arrived at the house to find Naas pushing on the stomach of P.M. P.M. was unconscious and unresponsive at the time, and Deputy Spicer began performing CPR on the child. Five to ten minutes later, EMS personnel arrived and took over P.M.’s care.

The EMS personnel noticed that P.M. had cuts and bruises all over his body. Deputy Spicer also observed blood on a blanket, bed sheets, pants lying on the bed, and the onesie that P.M. had been wearing. P.M. was taken to the hospital and eventually airlifted to the University of Chicago. However, P.M. did not survive his injuries, and it was later determined that the cause of his death was blunt force trauma to the head.

Naas told Deputy Spicer that he was the fiancé of P.M.’s mother. Naas claimed that before P.M. had difficulty breathing, he had fallen out of his bed and landed on some toys. Naas repeated this same story to a detective at the hospital where P.M. was

treated. However, his story changed the next morning when he was questioned by Commander Mike Jenkins and Detective Jeffrey Biggs. Naas gave a statement where he admitted to regularly disciplining P.M. by shaking him for five to fifteen seconds. He described an incident the previous December where he had shaken P.M., causing him to strike his head on some bricks surrounding the fireplace. Ex. Vol., State's Ex. 17. He also recalled that he had shaken P.M. in September 2003, causing P.M.'s head to strike the floor. Id. Naas also recounted that he had shaken P.M. in August of 2003, resulting in P.M.'s head striking a coffee table. Id.

Naas then said that on the morning of February 27th, he had been swinging P.M. when P.M. struck his head on a coffee table. After hitting his head, P.M. had vomited, and Naas had shaken P.M. in frustration until P.M.'s head snapped backwards. Naas then said he dropped P.M. from a height of two feet onto his bed. P.M. bounced off his bed, his head striking toys on the floor. Soon after Naas noticed that P.M. was having trouble breathing.

Naas gave a second statement on March 1, 2004, where he again repeated the past episodes of shaking and recounted the same events of February 27th. The State charged Naas with Class A felony battery on March 1, 2004. On August 9, 2004, Naas filed a motion to continue the jury trial, which was granted. Again on November 1, 2004, Naas requested a continuance, which was granted. Naas filed a subsequent motion to continue on January 30, 2006, alleging that he needed more time to obtain an expert witness. The trial court granted this motion and set the jury trial for June 19, 2006. Naas's last motion to continue, filed on May 22, 2006, was denied.

The trial court conducted a jury trial on June 19-22, 2006, and the jury found Naas guilty. The trial court then held a sentencing hearing on August 4, 2006, and sentenced Naas to the presumptive term of thirty years. Naas now appeals. Additional facts will be provided as necessary.

### **I. Motion for Continuance**

First, Naas contends that the trial court erred in denying his last motion for continuance. He specifically claims that the trial court abused its discretion because he was unable to hire an expert witness to assist his counsel in understanding and interpreting the medical evidence.

Courts do not favor continuances to allow more time to prepare for trial and should grant such motions only where good cause is shown and it is in the interests of justice. Timm v. State, 644 N.E.2d 1235, 1237 (Ind. 1994). When, as here, a motion for continuance is based on non-statutory grounds, the decision to grant or deny the motion is within the discretion of the trial court. Arhelger v. State, 714 N.E.2d 659, 667 (Ind. Ct. App. 1999). We will not disturb the trial court's decision absent a clear demonstration that the trial court abused that discretion. Wells v. State, 848 N.E.2d 1133, 1143 (Ind. Ct. App. 2006), trans. denied. An abuse of discretion occurs when the ruling is against the logic and effect of the facts and circumstances before the trial court or when the record demonstrates prejudice resulting from the denial. Flake v. State, 767 N.E.2d 1004, 1008 (Ind. Ct. App. 2002). Additionally, for a denial of a continuance to constitute reversible error, the defendant must demonstrate that she was

prejudiced by the denial. Macklin v. State, 701 N.E.2d 1247, 1250 (Ind. Ct. App. 1998).

Naas petitioned the court on January 30, 2006, for a continuance of the February 27th trial. At this time, Naas stated that he needed time to obtain an expert witness. He took no steps to do so until March, when he applied for funds from a 401K to hire an attorney. At a pre-trial conference on May 22, 2006, Naas again petitioned the court to continue the jury trial scheduled for June 19th, stating that he had not yet acquired funds from his 401K to hire an expert witness. Motion for Continuance Tr. p. 5. Naas admitted that he had known for quite some time that he needed to obtain an expert witness. Id. at 8. However, he did not apply to remove money from his account until two months after the trial court had granted his first motion for continuance.

At the hearing on Naas's motion to continue, Naas's counsel stated:

The case is somewhat old and I have made no secret of the fact to Mr. Naas that I need money to hire an expert witness. This involves death of a child less than two years old. An autopsy was performed at the Cook County Medical Examiner's Office. They made certain findings as a result of that autopsy. It is outside my area of expertise. I don't know enough about autopsies on infants to adequately cross-examine the Cook County medical examiner, or their designate . . . . I estimate—and it's only an estimate based on my past experience—that he's going to need about \$5,000. I have told him that, since the time of the last continuance of the trial, that he needs that.

Id. at 9

Under these facts and circumstances, the trial court's denial of Naas's motion for continuance was not an abuse of discretion. As the trial court noted, this case had been pending for more than two years. The trial court had granted Naas's first motion for continuance in January of 2006 on the grounds that he needed to obtain an expert

witness; however, Naas delayed in trying to acquire funds to hire an expert witness for at least two months after this motion was granted.

We also find it relevant that the autopsy report is dated as having taken place on February 29, 2004. Ex. Vol, State's Ex. 18. Therefore, Naas had more than two years from the time of the creation of this report to the date of his trial, which began on June 19, 2006, to obtain an expert witness. Any prejudice that may have inured to Naas was caused by his own delay in hiring an expert witness to help his counsel review the autopsy report. Therefore, we cannot say that the trial court abused its discretion in denying Naas's motion for a continuance.

## **II. Rule of Evidence 404(b)**

Naas contends that trial court permitted admission of his statements regarding prior shakings of P.M. contrary to Indiana Evidence Rule 404(b), and that, even if admissible, its probative value was substantially outweighed by its prejudicial effect in violation of Evidence Rule 403. Indiana Evidence Rule 404(b) (2007) 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 proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The well-established rationale behind Evidence Rule 404(b) is that the jury is precluded from making 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).

To decide whether character evidence is admissible under Rule 404(b), the trial court must: (1) 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 (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. Hauk v. State, 729 N.E.2d 994, 1001 (Ind. 2000); Monegan v. State, 721 N.E.2d 243, 248 (Ind. 1999). A decision by the trial court to admit evidence will be reversed only upon a showing of a manifest abuse of discretion that resulted in the denial of a fair trial. Larry v. State, 716 N.E.2d 79, 81 (Ind. Ct. App. 1999).

In the opening statement, Naas's defense attorney set the tone of Naas's defense by stating:

[T]he commander of the sheriff's department detective bureau [ ] swore under oath that Christopher Naas did knowingly or intentionally touch [P.M.] in a rude, insolent or angry manner resulting in death, to wit: Did violently shake and strike the child's head on a table. They are saying that what happened to [P.M.] was not an accident, that [Naas] must have taken this child and smashed his head into the table . . . Ladies and Gentlemen, I would ask you to keep an open mind until you hear all the evidence and I am quite convinced that you will find that [Naas] is not the cause of this child's death. Remember, please, that if it was an accident, it is not a crime.

Jury Trial Tr. pp. 25-26. Again in closing arguments, Naas's defense counsel argued that Naas had accidentally caused P.M. to strike his head on the coffee table.

What evidence have you been presented that Christopher Naas knowingly or intentionally took that child and struck its head, in a criminal manner, as opposed to an accident[?] There is none.

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And if you would, just look at page eight. “The 18-month-old white, male, toddler, [P.M.] died of cerebral injuries due to blunt trauma.” And that has to be as a result of this man’s actions. It cannot be as a result of an accident. It has to be an intentional battery. If it is an accident, no crime, no A, no B, no D. If it’s negligence, let’s assume that he shouldn’t have been doing what he was doing with an 18-month old child, that’s negligence. That’s not intentional.

Id. at 438, 446.

If a defendant alleges a contrary intent in opening statement or presentation of his own case, the State may then offer evidence of prior crimes or acts “to the extent genuinely relevant to prove the defendant’s intent at the time of the charged offense,” if the probative value outweighs the prejudicial effect. Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993). Naas clearly fostered the impression throughout the trial that he was playfully swinging P.M., when he accidentally struck P.M.’s head on the coffee table. To refute his claim of “accident,” the State sought to submit his statements about past instances where he purposely shook P.M. to discipline him, causing P.M. to strike his head on the fireplace, on the floor, and on the coffee table. “[E]vidence of prior physical altercations between parties is admissible to prove lack of mistake or accident.” Goldsberry, 821 N.E.2d at 456. See also Brown v. State, 659 N.E.2d 652 (Ind. Ct. App. 1995), trans. denied (holding that evidence of prior batteries was proper to refute defendant’s claim that he accidentally shot his ex-girlfriend).

In Iqbal v. State, 805 N.E.2d 401, 408 (Ind. Ct. App. 2004), we noted: “Numerous cases have held that where a relationship between parties is characterized by frequent conflict, evidence of the defendant’s prior assaults and confrontations with the victim may be admitted to show the relationship between the parties and motive for

committing the crime.” Accordingly, Iqbal’s prior assault of the murder victim was relevant to show the nature of their relationship and the “absence of mistake.” Id. Likewise, we conclude that Naas clearly put his intent at issue, opening the door to evidence of Naas’s relationship with P.M., wherein Naas regularly disciplined P.M. by shaking him and sometimes striking his head on other objects.

The trial court applied the Rule 403 balancing analysis and concluded that the probative value of the evidence outweighed the danger of unfair prejudice to Naas. We accept the trial court’s determination that evidence of Naas’s prior physical attacks on P.M. was probative to refute the impression that he had fostered before the jury that P.M. accidentally hit his head while Naas was playfully swinging him.

Notwithstanding our finding of no error, had the evidence in fact been improperly admitted, the error would have been harmless. Even the improper admission of evidence is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court that there is no substantial likelihood that the challenged evidence contributed to the conviction. Winbush v. State, 776 N.E.2d 1219, 1221 (Ind. Ct. App. 2002), trans. denied. Here, the State submitted Naas’s own statement that he had swung P.M. and that P.M.’s head struck the coffee table. Naas also admitted that he became frustrated when P.M. vomited and that Naas shook him until his head snapped back. Naas then said he dropped him onto his bed, causing P.M. to bounce out of the bed and onto some toys. From this evidence alone, the jury could conclude that Naas had touched P.M. in a rude, insolent, or angry manner. Consequently, Naas’s conviction is supported by substantial independent

evidence of guilt. We are satisfied that there is no substantial likelihood that the challenged evidence contributed to his conviction.

### **Conclusion**

The trial court did not abuse its discretion in denying Naas's last motion for a continuance. The admission of evidence about Naas's previous physical attacks on P.M. was not erroneously admitted where such evidence was used to refute Naas's defense that he accidentally struck P.M.'s head on the coffee table.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.