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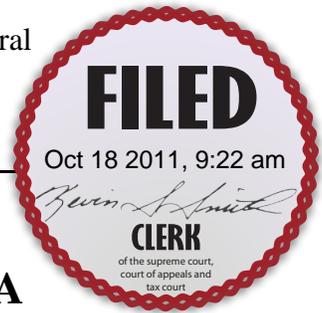
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**IN THE
COURT OF APPEALS OF INDIANA**

JOAQUIN STARKS)

Appellant-Defendant,)

vs.)

No. 82A01-1006-CR-266

STATE OF INDIANA)

Appellee-Plaintiff.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Kelli E. Fink, Magistrate
Cause No. 82C01-0802-MR-232

October 18, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Joaquin Starks (Starks), appeals his conviction for murder, a felony, Ind. Code § 35-42-1-1.

We affirm.

ISSUE

Starks raises one issue for our review, which we restate as: Whether the trial court abused its discretion when it permitted the State to introduce evidence of Starks' prior bad acts under Indiana Evidence Rule 404(b).

FACTS AND PROCEDURAL HISTORY

Starks and Ida Jefferson (Jefferson) had a prior relationship. Jefferson moved in with Starks' cousin Tammie Funches (Funches) after Jefferson's relationship with Starks ended. Funches lived in an apartment complex located in Vanderburgh County, Indiana.

Prior to the shooting on February 29, 2008, Starks told others that Jefferson had taken his wallet. Starks later separately told Funches and another friend that Starks would kill Jefferson if Jefferson failed to return the wallet. On February 27, 2008, Starks filed a police report with the Evansville Police Department alleging that Jefferson stole his wallet.

On February 29, 2008, Jefferson and Funches returned to their apartment around 3:30 a.m. Starks emerged from a door of the apartment complex with a firearm and fired a shot toward Funches. Starks then shot Jefferson several times, finally walking over to Jefferson and shooting her in the back of the head. Jefferson died as a result. Funches identified Starks as the assailant.

On February 29, 2009, the State filed an Information charging Starks with murder, I.C. § 35-42-1-1. On May 6, 2009, Starks was tried, but the trial ended in a mistrial on May 8, 2009. After the matter was set for retrial, on August 7, 2009, Starks filed a motion in limine to exclude “[a]ny reference to any prior or existing criminal charges against [him] concerning the victim or any other person whether they resulted in a conviction or not.” On September 11, 2009, the State submitted notice that it intended to introduce into evidence Starks’ July 25, 2006 Class A misdemeanor conviction for domestic battery against Jefferson.

On October 1, 2009, the trial court ruled that Starks’ 2006 domestic battery conviction was admissible under Evid.R. 404(b) to show: (1) Starks’ motive; (2) Starks relationship with Jefferson; and, (3) the hostility involved in Starks and Jefferson’s relationship. The trial court further ruled that the probative value of Starks’ 2006 domestic battery conviction outweighed any prejudicial effect. However, the trial court limited evidence regarding the prior conviction to the charging information and docket sheet.

On October 7, 2009, a second jury trial was conducted. The State offered Starks’ 2006 domestic battery conviction into evidence as State’s Exhibit No. 1 at the close of its case-in-chief. Starks’ counsel objected and argued that the 2006 domestic battery conviction was “remote in time from the incident in question. So it doesn’t show motive. And [] I think also it has a tendency to cause my [] client to be looked at in a different light [] considering that it’s not an impeachable offense. And so I believe it’s inadmissible and [] . . . that’s my objection.” (Transcript pp. 683-84). The trial court admitted the 2006 prior conviction over Starks’ objection, but admonished the jury with the following instruction:

[Y]ou are instructed that evidence of crimes or other bad acts, other than the charged offense, is generally inadmissible as proof of the guilt of the defendant and cannot be considered as evidence that the defendant acted in conformity with these prior acts. Meaning, they are not being offered and should not be considered as evidence that the defendant is a bad person or a criminal. The purpose of this evidence is to give you some background into the relationship of the parties and the evidence is also presented as evidence of the defendant's motive. This evidence should be considered for these limited purposes only.

(Tr. pp. 684-85).

During its closing argument, the State referred to Starks' 2006 domestic battery conviction and stated as follows:

When you review the documents when you deliberate you can look at State's Exhibit No. 1 [. . .] Defendant pled guilty on or about May the 11th 2006, Joaquin M. Starks did knowingly or intentionally touch Ida Jefferson, a person who is or was living as if the spouse of said Joaquin M. Starks, in a rude, insolent, or angry manner by striking and kicking the said Ida Jefferson, which did thereby result in bodily injury to the said Ida Jefferson. The fact that the defendant battered Ida on a previous occasion by itself does not prove that he murdered her, but it shows that he is capable of striking her and that he is capable of causing injury to her. He has done it in the past.

(Tr. pp. 884-85). Starks raised no objection to the State's closing argument.

On October 9, 2009, the jury found Starks guilty as charged. On December 4, 2009, during a sentencing hearing, the trial court sentenced Starks to an executed sentence of sixty years. On January 8, 2010, Starks filed a motion to correct error, arguing that his 2006 domestic battery conviction was erroneously admitted into evidence. On May 3, 2010, the trial court denied Starks' motion to correct error.

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

DISCUSSION AND DECISION

Starks asserts that the trial court abused its discretion by admitting evidence of his 2006 domestic battery conviction.

I. *Waiver*

Before considering Starks' argument on the admissibility of 404(b) evidence, we must consider whether Starks has waived his claim by failing to object during the State's closing argument. A failure to object to statements made during opening or closing arguments results in waiver on appeal. *Gasaway v. State*, 547 N.E.2d 898, 900 (Ind. Ct. App. 1989), *reh'g denied, trans. denied*.

We find that Starks has waived his objection to the admission of 404(b) evidence by failing to object to the State's reference to such evidence during its closing argument, and thus deem his challenge to the State's comments during closing argument as waived. Starks maintains that the State's comments during closing argument show that the 2006 domestic battery conviction was admitted for a reason different than those enumerated by the trial court, i.e., motive, Starks and Jefferson's prior relationship, and the hostility between Starks and Jefferson. Yet, Starks' counsel did not object to the State's comments. Starks cannot now use his waived objection to the State's closing argument to collaterally attack the trial court's admission of Starks' prior conviction into evidence.

II. *Evidence Rule 404(b)*

Notwithstanding our conclusion that Starks waived his challenge to the admission of his 2006 domestic battery conviction, we will address his assertions that the trial court improperly admitted the prior conviction because such evidence was not used to prove

motive, was remote in time to the date of the murder, and had a prejudicial effect upon the jury.

The trial court has sound discretion to admit or exclude evidence, and we will reverse only when an abuse of that discretion occurs. *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004). An abuse of discretion occurs when the trial court determines an issue in a manner that is “clearly against the logic and effect of the facts and circumstances.” *Id.*

Evid. R. 404(b) provides that while evidence of a person’s other crimes, wrongs, or acts may not be used to prove that a person acted in conformity with such other crimes, wrongs, or acts, such evidence may be admissible for other purposes, including proof of motive. In *Hicks v. State*, 690 N.E.2d 215, 221 (Ind. 1997), our supreme court provided the standard to assess admissions of 404(b) evidence. We employ a two-prong test to determine whether 1) the evidence is “relevant to a matter at issue other than the defendant’s propensity to commit the charged act”; and, 2) whether the probative value of such evidence outweighs any prejudicial effect its admission may have. *Id.* Regarding the first prong of the *Hicks* standard, we recognized in *Iqbal* 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.” *Iqbal*, 805 N.E.2d at 408.

On appeal, Starks acknowledges that the State “properly argued and characterized” Starks’ 2006 domestic battery conviction during the State’s opening argument when the State remarked that the “prior battery conviction indicates [Starks] and [Jefferson] had a volatile

relationship for a number of years.” (Appellant’s Br. p. 9). Starks also acknowledges that the evidence showed that Starks “was capable of physically assaulting” Jefferson. (Appellant’s Br. p. 5). Further, the State offered additional evidence at trial to show that Starks and Jefferson had problems in their relationship. Based upon the foregoing, we cannot say that the trial court abused its discretion in admitting Starks’ 2006 domestic battery conviction. The record contains evidence of the relationship between Starks and Jefferson, which in turn was used by the State to show Starks’ motive for the murder.

Starks also objected that the 2006 conviction was too remote in time from the murder to be considered as proof of his motive. In *Spencer v. State*, 703 N.E.2d 1053, 1056 (Ind. 1999), our supreme court instructed that “[t]he probative value of [404(b)] evidence may lose force, however, if too much time has elapsed between the prior acts and the crime charged.” The *Spencer* court recognized that evidence of prior acts older than three years before a murder were too remote in time to be probative, yet a prior act two years prior to a murder was probative, especially since such prior act was similar to the type of murder involved. *Id.* We note that Starks’ acts underlying his 2006 conviction occurred less than two years prior to Jefferson’s murder. Therefore, we find Starks’ prior conviction probative of the conflict or hostility that existed in Starks and Jefferson’s relationship.

Finally, Starks’ counsel objected at trial that admission of Starks’ prior conviction could “cause his client to be seen in a different light.” We interpret this contention to mean that admission of Starks’ prior conviction would unduly prejudice the jury against Starks. In *Embry v. State*, 923 N.E.2d 1, 10 (Ind. Ct. App. 2010), *trans. denied*, we found it significant

that the trial court issued a limiting instruction and admonishment to the jury that 404(b) evidence of prior domestic violence cannot be considered proof that the defendant committed a crime similar to the 404(b) acts. This action by the trial court supported a finding that the trial court had not abused its discretion by admitting such 404(b) evidence. *Id.* Likewise, here, while the trial court overruled Starks' objection to the 404(b) evidence, it issued a limiting instruction and admonishment to the jury regarding the 404(b) evidence. As the jury is presumed to have followed the trial court's instructions, and since Starks has not provided any evidence overcoming this presumption, we cannot say that the trial court's admission of the 404(b) evidence was an abuse of discretion. *See Tormoehlen v. State*, 848 N.E.2d 326, 332 (Ind. Ct. App. 2006), *trans. denied*.¹

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by admitting Starks' 2006 domestic battery conviction pursuant to Indiana Evidence Rule 404(b).

Affirmed.

NAJAM, J. and MAY, J. concur

¹ Although not discussed by Starks, we note that the admission of 404(b) evidence, even if erroneous, would be harmless as it did not affect Starks' substantial rights. *See* Ind. Trial Rule 61. The State presented substantial independent evidence of Starks' guilt, including 1) Starks' prior threats to kill Jefferson, and 2) Funches' eyewitness testimony of the shooting. As such, we are satisfied that there is no substantial likelihood that the challenged evidence contributed to Starks' conviction. *See Deloney v. State*, 938 N.E.2d 724, 730 (Ind. Ct. App. 2010), *trans. denied*.