MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Brian A. Karle
Ball Eggleston, PC
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

Daylon L. Welliver
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Philip Certain,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

May 3, 2023

Court of Appeals Case No. 22A-CR-1745

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-2007-F3-19

Memorandum Decision by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case summary

[1] Philip Certain appeals his conviction for level 6 felony domestic battery in the presence of a minor, asserting that the trial court abused its discretion in admitting evidence that he previously battered the same victim. Finding no abuse of discretion, we affirm.

Facts and Procedural History

[2] On July 30, 2020, the State filed a seven-count charging information against Certain regarding events that occurred on or about July 18. Count 1 alleged that he criminally confined his former girlfriend C.C. while armed with a handgun; Count 2 alleged that he intimidated C.C. while armed with a handgun; Count 3 alleged that he criminally confined C.C. by using a vehicle; Count 4 alleged that he committed domestic battery against C.C., "who is a family or household member,"[1] by knowingly or intentionally touching her "in a rude, insolent, or angry manner … in the physical presence of a child less than 16 years of age, knowing that the child was present and might be able to see or hear the offense"; Count 5 alleged that he kidnapped C.C.; Count 6 alleged that he carried a handgun without a license; and Count 7, an enhancement of Count 6, alleged that he carried a handgun without a license with a prior felony

[1] Indiana Code Section 35-31.5-2-128(a) provides in pertinent part that "[a]n individual is a 'family or household member' of another person if the individual: … is dating or has dated the other person [or] is or was engaged in a sexual relationship with the other person[.]"

conviction within fifteen years. Appellant's App. Vol. 2 at 21. The State also alleged that Certain was a habitual offender.

[3] In September 2021, the State filed a notice "of its intent to offer extrinsic act evidence pursuant to [Indiana Evidence Rule 404(b)] …. of prior acts of domestic violence perpetuated by [Certain] against Victim [C.C.]" in White County in March 2018, which resulted in the filing of criminal charges against Certain that were later dropped. *Id*. at 100. Certain filed a motion in limine requesting the exclusion of such evidence and a "further response" to the State's notice. *Id*. at 122, 140. The State filed an additional submission in support of its 404(b) notice, asserting in relevant part that the evidence was admissible to show the hostile nature of the parties' relationship *Id*. at 152. After a hearing on pretrial motions, the trial court ruled that evidence of the prior incident would be admissible at trial, finding in pertinent part that the incident was "close enough in time to be probative of the relationship between [Certain] and [C.C.]" and his hostility toward her, and that the incident's "probative value outweighs any prejudice claimed by [Certain]." *Id*. at 169-70.

[4] A three-day jury trial began on April 5, 2022. C.C. was the State's first witness. She testified that in July 2020, she and Certain "were trying to work things out, but [they] were not together." Tr. Vol. 2 at 73. She stated that on July 18, she was outside her Lafayette home with two of her teenage children, M.H. and Z.H., and her neighbor Rachael Smith when Certain drove up in a pickup truck and "told [her] to get in the truck." *Id*. at 76. C.C. told Certain that she did not want to, but he "grabbed [her] and pulled [her] off the porch" and put her in the

passenger's side of the truck. *Id*. According to C.C., Certain entered the driver's side of the truck and locked the doors. He pulled a gun from his hip, cocked it, and "put it on [her] side and on [her] neck." *Id*. at 79. Certain told C.C. that "if [she] didn't go with him that he would burn down the house with [her] and everybody in it." *Id*. Certain talked to and yelled at C.C. "and then eventually finally let [her] out of the truck" and drove off. *Id*. at 80. Afterward, police responded to an unrelated incident at the residence, but C.C. did not tell them at that time "what happened" with Certain because he had threatened to burn down the house. *Id*. at 83, 88. C.C. texted Smith, who "got ahold of a family member or a friend that she knew and they got ahold of the cops" regarding Certain's actions. *Id*. at 83. Police again went to the residence, and C.C. told them what Certain had done.

[5] After eliciting the foregoing testimony regarding the July 2020 incident, the deputy prosecutor asked C.C., "And how would you describe your relationship with [Certain]?" *Id*. at 84. C.C. replied, "At the time it was very rocky, abusive." *Id*. Certain did not object to this statement. The prosecutor then stated, "So I'd like to talk about a specific incident from March of 2018. Do you know what I'm talking about?" *Id*. C.C. replied, "Yes, I do." *Id*. Over Certain's objection, C.C. testified that during the March 2018 incident, Certain aimed a gun at her, fired the gun, and "ended up pushing [her] down on the ground in [her] bathroom." *Id*. at 85. He threatened to kill her and told her to tell law enforcement that someone else assaulted her. Certain "ended up holding [C.C.] at his house in Lafayette with his mom, where [C.C.] did not get to testify." *Id*.

at 86. The prosecutor asked, "And, ultimately, that was the end of the case. Is that fair to say?" *Id*. C.C. replied, "Yeah." *Id*. C.C. then testified that after Certain was arrested for the July 2020 incident, she had multiple "video visits" with him, during which "[h]e'd ask [her] not to testify against him[.]" *Id*. at 90. C.C. said that she went "to the prosecutors with [Certain's] mother's girlfriend and tried to drop the charges because he asked [her] to." *Id*. at 101.

[6] On cross-examination, C.C. acknowledged that she had written a letter to the judge in Certain's White County case asking for the charges to be dismissed and stating that she did not believe that Certain was a threat to her and that they were "engaged and planning to be married[.]" *Id*. at 105. She also acknowledged that she "could have" texted Certain "nude" or "partially nude pictures" of herself after the July 2020 incident,[2] that she "continue[d] to have sex with him after July 18th[,]" and that she had exposed her "genitalia" to him during their "video visits" after his arrest. *Id*. at 105, 106.

[7] C.C.'s fifteen-year-old son M.H. testified that on July 18, 2020, Certain "was driving to [C.C.'s] house, and he got out of his truck, and then he came up and picked [C.C.] up and she didn't want to go. So [C.C.] held onto a fence, and he dragged her off the fence[,]" picked her up "with both his arms around her chest[,]" and put her in his truck. *Id*. at 161. He stated that he could not see inside the truck because the windows were tinted and that he could not hear

[2] The question posed to C.C. refers to "July of 2018," Tr. Vol. 2 at 105, but the context indicates that this was either a scrivener's error or a slip of the tongue.

anything. He further stated that when C.C. got out of the truck, she acted "[f]rightened." *Id*. at 164. C.C.'s fourteen-year-old son Z.H. testified that he saw Certain "drag" C.C. off the porch and into his truck, that he could see only "a little bit" inside the truck, that he heard Certain "yelling[,]" and that when C.C. got out of the truck, she looked "[s]cared." *Id*. at 175, 177, 178. C.C.'s neighbor Smith testified that she saw Certain drag C.C. into his truck, that she heard Certain yell at C.C., that she heard the "click" of Certain "cocking [a] gun[,]" and that when C.C. got out of the truck, she told Smith to "call the police." *Id*. at 191, 192.

[8] Certain testified that he served "[a] few months" in jail for the March 2018 incident and resumed his relationship with C.C. because he "forgave her for what she had done." Tr. Vol. 3 at 66. He also testified that on July 18, 2020, he had been "arguing" with C.C. "about whether or not she was going on a trip with [him]" to Indianapolis. *Id*. at 73. He stated that he drove to her home and

> yelled for her to come here. She didn't come here. I […] exited my vehicle and walked up just talking to her. But, when she was getting up, she grabbed the rail and sure – she's got weak knees. So she was grabbing – she was grabbing – then I leaned over, I grabbed a hold of her and helped lift her up. She told me to get the hell off of her. So I – I let her go at that point.

Id. at 75. According to Certain, C.C. then "walked with [him] and got in the passenger's side of the truck[,]" where they talked for "[t]en, max fifteen minutes." *Id*. at 75, 76. He denied having a gun in the truck or doing "anything to harm [C.C.] in the truck" or "prevent her from getting out of the truck[.]" *Id*.

at 76. He claimed that she "got mad and stormed out of the truck" and told him to "go F [himself]." *Id.* at 77-78. He also claimed that he "had sex with" C.C. "[t]he very next day." *Id.* at 73. On cross-examination, Certain denied pointing a gun at C.C. in March 2018. *Id.* at 81. And when asked whether he had told C.C. "not to go to court on [him]" for the July 2020 incident, Certain replied, "I told her to take care of it. I didn't tell her not to go to court on me." *Id.* at 98.

[9] At the close of evidence, the jury was instructed to determine Certain's culpability on the first six counts in the charging information. The jury found Certain guilty of level 6 felony domestic battery in the presence of a minor as charged in Count 4 and not guilty of the crimes charged in Counts 1, 2, and 6, and it was unable to reach a unanimous verdict on Counts 3 and 5, for which the court declared a mistrial. The court ultimately dismissed Counts 3, 5, and 7. Certain admitted to being a habitual offender, and the court imposed a six-year executed sentence. Certain now appeals his domestic battery conviction.

Discussion and Decision

[10] Certain does not challenge the sufficiency of the evidence supporting his conviction. But he does argue that the trial court erred in admitting evidence regarding the March 2018 incident, claiming that it should have been excluded pursuant to Indiana Evidence Rule 404(b). "The appellate standard of review for the admissibility of evidence is well established." *Singh v. State*, 203 N.E.3d 1116, 1121 (Ind. Ct. App. 2023).

> The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal. We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *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. (emphasis added) (citations and quotation marks omitted).[3] "We will uphold the trial court's ruling on the admission of evidence during trial if it is sustainable on any legal theory supported by the record, even if the trial court did not use that theory." *Tinker v. State*, 129 N.E.3d 251, 255 (Ind. Ct. App. 2019), *trans. denied*.

[11] Evidence Rule 404(b) reads as follows:

> **(b) Crimes, Wrongs, or Other Acts.**
>
> (1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity,

[3] Certain criticizes the State for basing its statement of facts and argument on the premise that he possessed a firearm during the July 2020 incident, even though he was acquitted of the firearm-related charges. But we must evaluate the trial court's evidentiary ruling in light of the facts and circumstances before it at the time of the ruling; at that point, the firearm-related charges were still in play, and there was testimony in the record that Certain possessed a firearm and threatened C.C. with it.

> absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
>
> > (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
> >
> > (B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

"Rule 404(b)'s list of permissible purposes is illustrative but not exhaustive." *Davis v. State*, 186 N.E.3d 1203, 1210 (Ind. Ct. App. 2022), *trans. denied*.

[12] "Evidence Rule 404(b) is designed to prevent the jury from making the 'forbidden inference' that prior wrongful conduct suggests present guilt." *Laird v. State*, 103 N.E.3d 1171, 1176 (Ind. Ct. App. 2018) (quoting *Halliburton v. State*, 1 N.E.3d 670, 681 (Ind. 2013)), *trans. denied*.

> In assessing the admissibility of evidence under Evidence Rule 404(b), the trial court must first determine that 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 then balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403.

Id. Evidence Rule 403 provides, "The court may exclude relevant evidence if its probative value is *substantially* outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." (Emphasis added.) "The effect of Rule 404(b) is that evidence is excluded only when it is introduced to

prove the forbidden inference of demonstrating the defendant's propensity to commit the charged crime." *Laird*, 103 N.E.3d at 1177.

[13] Our supreme court has stated that "[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). As indicated in the State's additional 404(b) pretrial submission, that is precisely one of the purposes for which the prosecutor sought to offer the evidence regarding the March 2018 incident: to show the hostile/abusive nature of the relationship between Certain and C.C. The State points out that during trial, Certain attempted to portray his relationship with C.C. as "normal" both before and after the July 2020 incident. *See* Tr. Vol. 2 at 61, 65 (opening statement: "Yes, there was a relationship between Philip Certain and [C.C.] This had been a several-year relationship. There may have been periods in there where they weren't together, they were kind of together, and they were off and on, you know, but recently they had been somewhat on, somewhat off. They'd been to a hotel the week before, had sex, did all the stuff normal relationships do.… The important point here about what the relationship with [C.C.] and Philip is, that it didn't end on July 18th when she says he pulled a gun on her in the car. They continued to talk. They continue to text. They continued to see each other."). Clearly, the evidence regarding the March 2018 incident was relevant to rebut this false impression. *See Jackson v. State*, 728 N.E.2d 147, 151-52 (Ind. 2000) (holding that trial court did not abuse its discretion in admitting evidence of prior battery to rebut defendant's "contention that he had always loved his [murdered] wife"); Ind.

Evidence Rule 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

[14] In a similar vein, the evidence regarding the March 2018 incident, during which Certain pointed a gun at C.C. and threatened to kill her, was also relevant both to provide an explanation for why C.C. did not report the July 2020 incident to the police the first time they were dispatched to her home and to rebut Certain's attack on C.C.'s credibility. Certain emphasized the delay during opening statement, Tr. Vol. 2 at 65-66, questioned both C.C. and the responding officer about it, *id*. at 109, 121-22, 240-44, and brought it up again in closing argument. *See* Tr. Vol. 3 at 143 ("And if you look at Philip's statement from the jail call when they're talking, he says you [C.C.] didn't call the police for a long time. It gave you time to get your story straight."). In sum, the evidence of the March 2018 incident was relevant to matters at issue other than Certain's propensity to commit the charged domestic battery, and thus it was not excludable under Evidence Rule 404(b).

[15] As for the balancing considerations under Evidence Rule 403, Certain characterizes the probative value of the March 2018 evidence as minimal, largely because of the amount of time that elapsed between that incident and the July 2020 incident. Our supreme court has specifically stated that "remoteness in time [does] not render 404(b) evidence per se inadmissible." *Hicks v. State*, 690 N.E.2d 215, 222 (Ind. 1997). Rather, the admissibility of a prior incident "hinges on relevance, not a litmus test based on an isolated

factor—remoteness, similarity, or anything else—that may bear on relevance." *Id*. at 220. Here, the evidence regarding the March 2018 incident was particularly relevant to the contested factual issues concerning the nature of the parties' relationship and the parties' credibility. Certain also contends that the March 2018 evidence was unfairly prejudicial because it involved charged criminal conduct. But again, this fact does not render 404(b) evidence per se inadmissible, and we note that the jury heard (and saw) evidence that those charges were later dropped. Certain has failed to establish that the considerable probative value of the March 2018 evidence was substantially outweighed by the danger of any unfair prejudice. Consequently, we conclude that the trial court did not abuse its discretion in admitting it. Certain's conviction is affirmed.

[16] Affirmed.

Robb, J., and Kenworthy, J,. concur.