MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gary A. Diana,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 9, 2021

Court of Appeals Case No. 20A-CR-1708

Appeal from the Vigo Superior Court

The Honorable Sarah K. Mullican, Judge

Trial Court Cause No. No. 84D03-1808-F6-2960

May, Judge.

[1] Gary A. Diana appeals following his convictions of Level 6 felony intimidation[1] and Class A misdemeanor possession of a controlled substance.[2] Diana raises three issues, which we reorder and restate as:

> I. Whether the search warrant authorizing search of Diana's home was supported by probable cause;
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> II. Whether the trial court erred in allowing evidence of an alleged prior bad act; and
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> III. Whether the State presented sufficient evidence to sustain Diana's conviction of intimidation.

We affirm.

Facts and Procedural History

[2] In 2018, Laura Nicoson and three other nurses from Great Lakes Caring, provided in-home care to Diana, who needed nursing care due to a wound on his foot. The in-home care required weekly redressing with bandages, and Nicoson visited Diana's home in Terre Haute several times to provide such care. Diana's home was heavily cluttered, and he displayed guns, handcuffs,

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[1] Ind. Code § 35-45-2-1 (2017).

[2] Ind. Code § 35-48-4-7 (2014).

leg irons, swords, and battle axes throughout his house. Diana also kept boxes of ammunition and knives laying around the house.

[3] On August 10, 2018, Nicoson had an appointment to provide treatment to Diana at his house. Diana was outside of his house when Nicoson arrived, so Diana and Nicoson walked into the house together for Nicoson to treat him. Diana pulled a shofar[3] out of a bucket laying on the hallway floor, and he asked Nicoson if she knew what the item was. Nicoson stated that she did not know what it was, and Diana told her that she "was a sinner and [she] was gonna go to Hell." (Tr. Vol. II at 73.) He also raised his voice and directed her to read the Bible and attend church. Diana put the shofar back into the bucket, and Diana and Nicoson went into Diana's bedroom. Diana grabbed a nearby pocketknife and put it in his pocket, then he sat down on his bed. Nicoson sat on a nearby chair and began treating Diana. Diana then called Nicoson a "goober," and he asked Nicoson if she knew what he did with "goobers." (*Id.* at 86.) Nicoson indicated that she did not know, and Diana said, "I shoot 'em. I have a gun in my pocket." (*Id.*) Diana also indicated that the gun was loaded. Nicoson believed Diana "was very serious and [she] was scared." (*Id.* at 87.) Nicoson finished changing Diana's bandages and left the house.

[3] A shofar is "a ram's horn blown as a wind instrument, sounded in Biblical times chiefly to communicate signals in battle and announce certain religious occasions and in modern times chiefly at synagogue services on Rosh Hashanah and Yom Kipper." "Shofar" Dictionary.com [https://perma.cc/93JG-GH7W].

[4] Nicoson then contacted Meloday Fasig, her immediate supervisor, and Tracy Walker, a regional director at Great Lakes Caring, and informed them about the incident with Diana. Walker relayed Nicoson's report to the company's vice president. Five days later, Walker accompanied a nurse on a subsequent visit to Diana's house and informed Diana that Great Lakes Caring would no longer provide care to him. After discharging Diana as a patient, Walker contacted the Vigo County Sheriff's Office and reported what she had heard about Nicoson's encounter with Diana. A detective followed up on this report and interviewed Nicoson. On August 16, 2018, the court authorized a search warrant for officers to search Diana's home for his person, firearms, ammunition, knives, swords, items that could be used to manufacture explosives, and indicia of residency. Officers from the Vigo County Sheriff's Office executed the search warrant on August 17, 2018, and they discovered an unlabeled prescription pill bottle in Diana's house. The pills were later identified as methadone.

[5] The State charged Diana with Level 6 felony intimidation and Class A misdemeanor possession of a controlled substance on August 22, 2018. On July 15, 2019, Diana filed a motion to suppress the evidence found during the search of his residence. He argued the search warrant was not supported by probable cause because the "alleged crime [was] committed by Defendant's voice," and the warrant "failed to state with any specificity any instrumentality of any crime as no instrumentality was involved in the accusation." (App. Vol. II at 180.) The trial court set a hearing on the motion on August 8, 2019, and

ordered the parties to submit post-hearing briefs. In its post-hearing brief, the State argued there was probable cause to conclude Diana intimidated Nicoson "and potentially did so while armed with weapons." (*Id*. at 185.) Thus, the State's argument continued, the search warrant was necessary to search Diana's property for weapons that could be used as evidence of intimidation. The trial court denied Diana's motion to suppress on August 20, 2019.

[6] The trial court held a jury trial on February 25 and 26, 2020. Prior to trial, the trial court granted Diana's motion in limine prohibiting "[a]ny reference to any prior bad act of Defendant." (*Id*. at 196.) During its opening statement, the State mentioned there was a "process that all of the Defendant's nurses had to follow every time they provided care at his home, because the Defendant had told them that if they called (sic) – if they didn't call, and if they just knocked on his door, he would shoot right through the door." (Tr. Vol. II at 42.) Diana objected on the basis that the State violated a motion in limine against commenting on or presenting evidence of previous bad acts. Diana also moved for a mistrial. After hearing argument outside the presence of the jury, the trial court overruled Diana's objection and denied his motion for a mistrial. Nicoson testified at trial:

> [State:] And so in these other instances where you had gone to the residence to provide treatment, um, were you – was there a routine that you were instructed to follow um, in going to his house?
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> [Nicoson:] So whenever I would – any resi (sic.) – any patient that we took care of I have – you'd always have to call ahead and

> make a scheduled appointment. The first time that I made a scheduled appointment with Mr. Diana um, he told me that if I didn't call first and I just went up and knocked on the door he would shoot me.

(*Id*. at 60.) Diana raised the same objection to this testimony as he did to the State's comments during opening statements, and the trial court overruled his objection.

[7] The jury returned guilty verdicts on both counts. The court originally set Diana's sentencing hearing for April 13, 2020, but pursuant to orders of our Indiana Supreme Court related to the 2020 coronavirus pandemic, the hearing did not occur until August 17, 2020. The court imposed a 365-day sentence, awarded Diana credit for time spent in pre-trial confinement, and suspended the remainder of his sentence.

Discussion and Decision

I. Probable Cause to Support Warrant

[8] Diana contends the search warrant authorizing officers to search his house was not supported by probable cause and, therefore, evidence of the methadone pills officers found while executing the search warrant should not have been admitted. While Diana filed a motion to suppress before trial, it was denied, and he proceeded to trial and objected to admission of the evidence at trial. In such a circumstance, we review the trial court's decision to admit the evidence at trial rather than its denial of the motion to suppress. *Clark v. State*, 994

N.E.2d 252, 259 (Ind. 2013). We generally review a trial court's decision to admit evidence for an abuse of discretion, but we review questions regarding the constitutionality of a search or seizure de novo. *Holloway v. State*, 69 N.E.3d 924, 929 (Ind. Ct. App. 2017), *trans. denied*.

[9] A magistrate may issue a search warrant only if probable cause exists that authorities will find contraband or evidence of a crime in a particular place. *Carter v. State*, 105 N.E.3d 1121, 1127-28 (Ind. Ct. App. 2018), *trans. denied*. When reviewing a probable cause determination, we assess whether the information presented to the magistrate "presents facts, together with reasonable inferences, demonstrating a sufficient nexus between the suspected criminal activity and the specific place to be searched." *Id*. at 1128. Probable cause is not a high bar for the State to clear. *Albrecht v. State*, 159 N.E.3d 1004, 1015 (Ind. Ct. App. 2020). It simply requires the State to demonstrate a "fair probability" contraband or evidence of a crime will be found in a particular place. *Id*. Probable cause does not require the State to make a prima facie showing or prove the existence of contraband or evidence of a crime in a particular place. *Id*.

[10] Diana argues "[o]nce Nicoson reported the threat to police, they had all the evidence they needed to believe Diana had committed felony intimidation. There was nothing to be found in Diana's house that constituted fruits or instrumentalities of the threat[.]" (Appellant's Br. at 21.) However, meaning and credence can be derived both from the words used and the context in which those words are uttered. *See Scott v. State*, 139 N.E.3d 1148, 1158 (Ind. Ct. App.

2020) (holding defendant's statements to domestic violence victim that he could not help her care for her children until his case was dismissed supported obstruction of justice conviction), *trans. denied*. Diana made the threat in his house. The threat involved use of a gun, and Diana told Nicoson he had a loaded gun in his pocket.

[11] As the State explains, evidence that Diana "possessed the means of carrying out his threat" is "relevant in establishing both the nature of his statement as a true threat and the extent to which that threat would have placed Nicoson in fear." (Appellee's Br. at 22.) The presence of guns, ammunition, and other weaponry inside Diana's house also corroborates information Nicoson and Walker relayed to law enforcement and supports their credibility. Therefore, probable cause supported the warrant authorizing police to search Diana's home because there was a sufficient nexus connecting Diana's house to the State's intimidation investigation. *See McGrew v. State*, 673 N.E.2d 787, 793 (Ind. Ct. App. 1996) (holding sufficient nexus existed when the court issued a search warrant authorizing officers to look for piece of corroborating evidence even though the item searched for was not contraband or an instrumentality of the crime), *trans. granted*, *aff'd in relevant part*, 682 N.E.2d 1289, 1292 (Ind. 1997).

II. Admission of Evidence

[12] Diana also argues the trial court erred in admitting into evidence testimony that he instructed nurses to call him before knocking on his door because he would shoot people who unexpectedly knock on his door. We review a trial court's decision on the admission or exclusion of evidence for an abuse of discretion.

Mack v. State, 23 N.E.3d 742, 750 (Ind. Ct. App. 2014), *trans. denied*. "A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court or if the court misapplies the law." *Id*. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable, and relevant evidence is admissible unless prohibited. Ind. R. Evid. 401 & 402. Indiana Rule of Evidence 404(b) provides:

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

(emphases in original). Rule 404(b) is "designed to prevent the jury from assessing a defendant's guilt on the basis of his past propensities, the so-called 'forbidden inference.'" *Hicks v. State*, 690 N.E.2d 215, 218-19 (Ind. 1997).

[13] A defendant's prior threats and statements may be subject to exclusion under Rule of Evidence 404(b). *See Elliot v. State*, 630 N.E.2d 202, 204 (Ind. 1994), *reh'g denied*. However, background information about the relationship between the defendant and the victim is often relevant. *Id*. As long as the information's probative value outweighs the danger of unfair prejudice, it will frequently enable the jury to better understand the factual basis for a lawsuit. *State Farm Mut. Auto. Ins. Co. v. Earl*, 33 N.E.3d 337, 342 (Ind. 2015). For instance, "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 v. State*, 805 N.E.2d 401, 408 (Ind. Ct. App. 2004). Diana's statement about shooting people who unexpectedly knock on his door demonstrated the nature of the relationship between Diana and Nicoson and was pertinent to whether Diana intended to put Nicoson in fear when he threatened her. Therefore, we hold the trial court did not err in admitting Diana's directive to his nurses to call before knocking on his door because that evidence was highly probative. *See Ely v. State*, 655 N.E.2d 372, 376 (Ind. Ct. App. 1995) (holding information about relationship between defendant and victim was relevant to why defendant targeted victim).

III. Sufficiency of the Evidence

[14] Diana further contends the State put forth insufficient evidence to support his intimidation conviction. Our standard of review regarding sufficiency of the evidence is well-settled:

> We neither reweigh the evidence nor judge the credibility of the witnesses. *Adetokunbo v. State*, 29 N.E.3d 1277, 1280 (Ind. Ct. App. 2015). We consider only the probative evidence and reasonable inferences supporting the trial court's decision. *Id*. "A conviction will be affirmed if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Id*. at 1280-81.

Wolf v. State, 76 N.E.3d 911, 915 (Ind. Ct. App. 2017). Because it is the jury's responsibility to weigh evidence and determine credibility, "the uncorroborated testimony of a single witness can be sufficient to sustain a conviction on appeal[.]" *Morris v. State*, 114 N.E.3d 531, 536 (Ind. Ct. App. 2018), *trans. denied*. Indiana Code section 35-45-2-1 provides that it is a Level 6 felony for a person to communicate a threat to commit a forcible felony to another person with the intent that the other person be placed in fear of retaliation for a prior lawful act. A forcible felony is "a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being." Ind. Code § 35-31.5-2-138.

[15] Here, the State put forth sufficient evidence through Nicoson's testimony to sustain Diana's intimidation conviction. Nicoson testified that Diana threatened to shoot her. She also testified that she interpreted his threat to be serious and that she was scared. While Diana argues the State did not prove his threat was in retaliation for a prior lawful act, the jury could make such a reasonable inference from Nicoson's testimony. Nicoson explained that during one of her previous visits to Diana's house, Diana voiced disapproval of her

lifestyle because she lived with a man while unmarried. Diana also criticized Nicoson for not being able to recognize his shofar. Nicoson further testified that Diana called her a "goober[4]" before saying he shot "goobers." (Tr. Vol. II at 86.) Cohabitating while unmarried, unfamiliarity with religious items, and being silly are all lawful acts. *See* Ind. Const. Art. 1, § 3 ("No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."). Therefore, we hold the State presented sufficient evidence that Diana threatened Nicoson in retaliation for a prior lawful act. *See Leggs v. State*, 966 N.E.2d 204, 208 (Ind. Ct. App. 2012) (holding threat was in retaliation for prior lawful act based on the defendant's perception of the victim's feelings towards him).

Conclusion

[16] The warrant authorizing the search of Diana's home was supported by probable cause. The trial court did not abuse its discretion in admitting evidence that Diana directed Nicoson to call before knocking on his door so that he would not shoot her when she knocked, and the State presented sufficient evidence to support Nicoson's conviction of intimidation. Therefore, we affirm the judgment of the trial court.

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[4] Diana testified that he did call Nicoson a "goober," which he described as a substitute word for "silly person," but he denied threatening her. (Tr. Vol. II at 173.)

[17] Affirmed.

Kirsch, J., and Bradford, C.J., concur.