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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR10-135

	Opinion Delivered January 26, 2011
TODD WAYNE HALL APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. CR-2007-1379-1]
V.	HONORABLE ROBIN GREEN, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was sentenced to six years' imprisonment following his conviction of committing second-degree battery by biting his five-year-old son's toes. On appeal, he argues that the evidence is insufficient to support his conviction; that the court erred in admitting evidence of similar crimes and acts committed by appellant; and that his rights under the federal constitution were violated by admission of his prior sworn testimony at a hearing to terminate his parental rights. We affirm.

A person commits second-degree battery if he knowingly and without legal justification causes physical injury to a person he knows to be less than twelve years of age. Ark. Code Ann. § 5-13-202(a)(4)(C) (Repl. 2006). When the sufficiency of the evidence is properly challenged on appeal, we must decide whether there is substantial evidence to support the verdict; substantial evidence is evidence that is of sufficient force and character

that it will, with reasonable certainty, compel a conclusion one way or another. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). In determining whether the evidence is substantial, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict. *Id.*

Viewed in that light, the record shows that the child suffered visible bruising, swelling, or marks associated with trauma to several toes on both of his feet. The boy testified that he was born in February 2000. He also said that, when he last lived with his father, his father would bite him on the fingers and toes, and that this hurt enough to cause him to cry. The child's foster parent said that he gave the boy a bath immediately after he was placed in foster care in February 2006 and that, while doing so, noticed that several of the boy's toes were discolored and appeared to be injured. Nurse Karen Weiler stated that she examined the boy at the Children's Advocacy Center in March 2006 and that, while performing a head-to-toe physical assessment, noticed that the boy's toes were seriously bruised and the nail heads were cracked. Upon inquiry, the boy told her that his father "bit his toes and it hurt." Nurse Weiler stated that the injuries that she observed and photographed were consistent with the sort of forcible trauma to his toes that the boy described to her. Doctor Dan Wheeden reviewed the photographs and opined that the boy's toes exhibited an unusual pattern of injuries that would require force comparable to hitting each toe with a hammer and that the injuries could have been produced by bites. He also stated that the injuries were not new, but had instead been incurred at least three to four weeks prior to the examination.

Appellant's testimony at an Arkansas Department of Human Services hearing in April 2007 was also admitted into evidence. During that hearing, appellant admitted to biting and bruising his infant daughter on the buttocks, legs, and arms because he was experiencing frustration with his in-laws. He stated that no one else was home when he began to bite the eleven-month-old infant on the buttocks and then "got carried away." Appellant also testified that he has bitten both his daughter and the present victim on more than one occasion since then because he was frustrated. He stated that the present victim was a difficult child who would not "get the point" when corrected. He admitted biting the boy and that, as a result, the boy cried.

Appellant argues that there is no evidence that he knowingly injured the boy or that the injuries described could have been caused by biting. We disagree. Since intent can rarely be proven by direct evidence, members of the jury are allowed to draw upon their common knowledge and experience to infer it from the circumstances. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003). Here, both Nurse Weiler and Dr. Wheeden testified that the injuries that they observed were consistent with bite marks. Furthermore, appellant admitted that he had, in the past, taken his frustrations out on both his infant daughter and the present victim by biting them. Nor do we agree with appellant's argument that the evidence was insufficient to show that the victim was known by appellant to be less than twelve years of age. The victim testified that he was born in the year 2000, and appellant testified that the victim was his son. Finally, despite appellant's admission that he lives in Arkansas and that

Arkansas authorities responded to the report of the battery and child abuse, he argues that there is no evidence that the battery took place in Arkansas. This argument fails because there was no evidence to show that the crime was committed elsewhere; in the absence of an affirmative showing that Arkansas lacks jurisdiction or venue, Arkansas is presumed to have jurisdiction. *Evans v. State*, 2010 Ark. 234. We hold that appellant's conviction is supported by substantial evidence.

Appellant's arguments based on Rules 403 and 404 of the Arkansas Rules of Evidence are likewise without merit. Evidence of other bad acts is not admissible to show a defendant's bad character or actions in conformity therewith, but it is admissible to show motive, intent, plan, or absence of mistake or accident. Ark. R. Evid. 404(b). Here, the evidence to which appellant objects, *i.e.*, his prior conviction for battery and his testimony in connection with the finding of child abuse for biting the toes of his daughter, showed that he had previously engaged in rather peculiar behavior similar to the crime in the case at bar. The State was required to show intent, and this evidence rebutted appellant's argument that he was merely playing with the boy and that any harm inflicted was accidental. With regard to Rule 403, there is no doubt that the evidence of the prior conviction was prejudicial but, in light of the circumstances, it was not unfairly so. Appellant has failed to show that the trial court abused its considerable discretion in admitting this evidence.

Appellant's final argument relating to constitutional issues is raised for the first time on appeal. Consequently, it is not properly before us, and we do not address it. *Young v. State*, 370 Ark. 147, 257 S.W.3d 870 (2007).

Affirmed.

GLADWIN and ABRAMSON, JJ., agree.