IN THE COURT OF APPEALS OF IOWA

No. 7-122 / 95-2038

JUN 26 1997

CLERK SUPREME COURT

000687

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALFRED JEROME LEE, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

Defendant appeals from judgment and sentence entered, following a bench trial, for child endangerment, in violation of Iowa Code section 726.6(1)(b) (1993).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman and Tricia A. Johnston, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, John P. Sarcone, County Attorney, and Melodee Hanes, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

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STREIT, J.

Defendant appeals from judgment and sentence entered, following a bench trial, for child endangerment, in violation of Iowa Code section 726.6(1)(b) (1993). Defendant contends the trial court erred in admitting evidence of the victim's prior rib fractures because it was evidence of prior bad acts in violation of Iowa Rule of Evidence 404(b).

Alfred Jerome Lee, Jr., was charged with child endangerment after his three-month-old daughter, Whitney, died from a seizure caused by head injuries. The State alleged Lee violently shook Whitney causing her death. Lee waived his right to a jury trial.

At the bench trial, evidence showed Lee called 911 after Whitney stopped breathing on June 4, 1995. With the help of the 911 operator, Lee attempted to resuscitate her. Lee was given various instructions, including to "thump" the baby's feet, to turn the baby over and, while protecting her head, to pat between her shoulders. Paramedics resuscitated Whitney. Whitney was hospitalized until June 9, 1995. She was released to a foster family, but died the next day.

Expert testimony was presented that Whitney died of shaken baby syndrome. She had a subdural hematoma and retinal hemorrhages. Whitney had some older injuries, including healing rib fractures, which occurred approximately one month prior to her death.

At the close of the State's evidence, Lee objected to the evidence presented regarding the older rib fractures arguing the State failed to present evidence showing Lee caused those injuries and the evidence was an attempt to show prior bad acts in violation of Iowa Rule of Evidence 404(b). The State did not resist Lee's request the objection proceed the testimony, but urged the evidence should not be stricken because the evidence was "part and parcel of the medical diagnosis" and not offered to show prior bad acts. The court overruled the objection stating, "the evidence will only be viewed with an eye toward what are the new injuries for which the defendant is arguably on trial for, and the old injuries are older injuries, ancient injuries, the defendant is not on trial for that." It further clarified it was not using the evidence "to somehow prejudice the defendant for any prior acts which may or may not have occurred."

Lee did not present any evidence, but apparently his defense was the injuries were caused by the vigorous resuscitation efforts. The court ultimately found Lee guilty as charged. It sentenced him to a term of imprisonment not to exceed ten years. Lee appeals.

Evidentiary matters are generally within the trial court's discretion. The court reviews for errors of law. The trial court's decision will not be overturned unless there has been an abuse of discretion. *See State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992).

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Defendant claims the evidence of an older healing subdural hematoma and older healing rib fractures which were not linked by evidence to defendant or the cause of death should not have been admitted because of relevancy. In *State v. Hilleshiem,* 305 N.W.2d 710, 714 (Iowa 1981), the defendant was convicted of second-degree murder arising from the death of a two-year-old daughter of the woman defendant lived with. The defendant sought to exclude evidence of prior bruises based on relevancy.

The Supreme Court found the evidence plainly relevant in determining the child's condition for diagnosis, treatment, and cause of death. *Id.* at 714. It was also relevant in weighing the physician's testimony because the jury was entitled to know the child's entire condition, therefore giving the jury a complete view of the child's actual condition at death. *Id.*

As in *Hillshiem*, the defendant here asserts the State offered the evidence of prior injuries in an attempt to introduce prior wrongs. We see little or no distinction between the cases and find "the prior injuries were circumstantial evidence bearing on the defendant's relationship with [the child] and the credibility of his version of the occurrence which led to her death." *Id.* The defendant asserted the injuries Whitney suffered were from the resuscitation efforts by him and emergency medical personnel. The evidence of the prior injuries tends to refute that claim.

In light of the judge's ruling the evidence would only be used for the limited purpose of determining the injuries Whitney received June 4, we find no merit in defendant's contention the evidence of prior injuries was inadmissible.

AFFIRMED.