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ATTORNEY FOR APPELLANTS:

**DONALD J. FREW**  
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE:

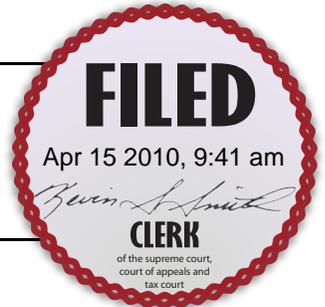
**MITCH GERBER**  
Indiana Department of Child Services  
Fort Wayne, Indiana

**ROBERT J. HENKE**  
Indiana Department of Child Services  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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In the Matter of D.J., J.J., N.J., and N.W., )  
Children in Need of Services, )  
)  
J.A., J.S., and W.W., the Alleged Fathers, )  
)  
Appellants-Respondents, )  
)  
vs. )  
)  
INDIANA DEPARTMENT OF CHILD SERVICES,)  
)  
Appellee-Plaintiff. )

No. 02A03-0912-JV-576

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Charles F. Pratt, Judge  
Cause Nos. 02D08-0903-JC-107, 108, 109, 110

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**April 15, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

J.A., J.S., and W.W. (“Fathers”) appeal the trial court’s Order on Fact-Finding Hearing in which the court adjudicated four minor children, D.J., J.J., N.J., and N.W. (“the children”), to be children in need of services (“CHINS”). The Fathers present the following issue for our review: whether the trial court committed fundamental error when it permitted a witness to testify while wearing a mask.

We affirm.

## FACTS AND PROCEDURAL HISTORY

On April 23, 2009, the Allen County Department of Child Services (“DCS”) filed an amended petition alleging the children to be CHINS. In particular, the DCS alleged that the children were each minor children of M.J. (“Mother”) and one of the alleged Fathers. The DCS alleged each child was a CHINS for the following reasons:

**Inability, Refusal or Neglect, I.C. 31-34-1-1:** The child’s physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal or neglect of the child’s parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision.

**Act or Omission causing Endangerment or Abuse, I.C. 31-34-1-2:** The child’s physical or mental health is seriously endangered due to injury by the act or omission of the Child’s parent, guardian, or custodian. Evidence that the illegal manufacture of a drug or controlled substance is occurring on the property where the child resides creates a rebuttable presumption that the child’s physical or mental condition is seriously endangered.

Appellant’s App. at 53. The DCS stated the following alleged facts in support of its petition: (1) on or about February 21, 2009, N.J., while in Mother’s care, “had marks on her right eye, a black right eye, and bruising around her right eye; (2) Father J.S. “has not provided material or financial support on a regular basis” for N.J. and has abandoned

both N.J. and J.J.; (3) Father J.A. has not provided material or financial support on a regular basis for D.J. and has abandoned D.J.; (4) Father W.W. has not provided material or financial support for N.W., “is unable or unwilling to provide care” for N.W., has abandoned N.W., and caused N.J.’s February 2009 injuries when he “used a belt to hit [N.J.] across her right eye to discipline her for knocking her TV off of her dresser for the second time.” Id. at 53-55.

On April 27, 2009, the court held a fact-finding hearing on the DCS’s petition. At that hearing, many of the DCS’s alleged facts were admitted by the parties, although Mother and Father W.W. denied the DCS’s contention that N.J.’s injuries would not have been ordinarily sustained but for the act or omission of a parent, guardian, or custodian. Thereafter, on July 8, the DCS filed a second amended petition, in which the DCS added an additional allegation pertaining to Mother’s July 2 arrest on “four counts of neglect of a dependent, felony possession of marijuana, and maintaining a common nuisance.” Id. at 108. The DCS also alleged that the children were each in the home with the discovered marijuana and two loaded handguns.

On July 13, the DCS filed a Motion for Witness to Attend Hearing and Witness’s Identity to Remain Confidential or Non-disclosed During Testimony. Pursuant to the motion, the DCS sought to call Detective Sandra Kerschner, who worked as an undercover narcotics detective for the Fort Wayne Police Department. The DCS stated that Detective Kerschner “is substantially involved in past, current, and future . . . investigation[s] in which [her] secret identity ensures that the public health, safety, and wellbeing is maintained,” and that her “facial identity must remain confidential and non-

disclosed due to ongoing investigations . . . .” Id. at 123-24. The DCS also stated that “the substance of the testimony has been provided previously to all relevant parties.” Id. at 124.

On July 14, 2009, the trial court held a second fact-finding hearing on the DCS’s petitions. Before Detective Kerschner began her testimony, counsel for the Fathers objected on the grounds that covering the witness’s face would unduly impair their ability to cross-examine the witness. The court overruled the objection and Detective Kerschner testified that marijuana and handguns were found at Mother’s home on July 2, 2009, which led to the criminal charges against Mother. See Transcript at 74-94.

Detective Kerschner’s testimony was corroborated by Mother’s own admissions. Specifically, in the DCS’s second amended petition, Mother admitted the following:

10. On or about July 2, 2009[, Mother] was arrested in or about her home due to four counts of neglect of a dependent, felony possession of marijuana, and maintaining a common nuisance.

11. On or about July 2, 2009, [the children] were in or about the home with [Mother].

12. On or about July 2, 2009, [the children] were upstairs in the home and police found marijuana and two handguns downstairs in the home on the person of an adult visitor.

\* \* \*

14. On or about July 2, 2009[,] and [at] all relevant times thereafter[, Mother] was unable to provide care and supervision for [the children] due to [Mother] being incarcerated at the Allen County Jail.

Appellant’s App. at 107-08, 157.

On August 31, the court entered its order in which it adjudicated the children to be CHINS under Indiana Code Sections 31-34-1-1 and 31-34-1-2. In addition to the

parents' various admissions, the court also found that the DCS had established, by a preponderance of the evidence, that Mother was unable to provide independent, stable, or drug-free housing and environment for the children and that Father W.W. had struck N.J. across her face with a belt. This appeal ensued.

### **DISCUSSION AND DECISION**

Indiana Code Sections 31-34-1-1 and 31-34-1-2 provide the relevant elements that the DCS must prove by a preponderance of the evidence to have the children determined to be CHINS. Under Section 31-34-1-1, a child is considered to be in need of services if the child is under eighteen years of age; the child needs care, treatment, or rehabilitation that the child is not receiving and is unlikely to be provided or accepted without the coercive intervention of the court; and the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision. Under Section 31-34-1-2, a child is considered to be in need of services if the child is under eighteen years of age; the child needs care, treatment, or rehabilitation that the child is not receiving and is unlikely to be provided or accepted without the coercive intervention of the court; and the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parents, guardian, or custodian.

On appeal, Fathers do not suggest that the DCS failed to prove any of the statutorily required elements by a preponderance of the evidence. Rather, they argue only that they were denied basic due process when the trial court permitted Detective

Kerschner to testify while wearing a mask. Specifically, the whole of Fathers' argument on appeal consists of the following statements:

Appellant[s] respectfully contend[] the due process rights of a parent in a CHINS proceeding are violated when the DCS is permitted to have a witness testify in open court while wearing a mask. . . . Appellant[s] contend[] that allowing a witness to wear a mask in open court impairs the ability to effectively cross examine a witness because it impairs the trial counsel's ability to gage [sic] the responses and reaction of a witness to both cross examination (as well as direct) testimony. Further, Appellant[s] contend[] that a witness wearing a mask impairs the finder[-]of[-]fact's ability to identify a witness, determine the veracity (or lack thereof) of the witness's responses, and impairs the ability to accurately discern the character and nature of the witness's testimony.

Appellants' Br. at 5-6. The Fathers then suggest that, although their trial counsel objected to the witness's testimony, the trial court committed fundamental error when it overruled that objection and permitted the testimony.

As an initial matter, the Fathers misunderstand the doctrine of fundamental error. "One of the cornerstones of our litigation process has been the contemporaneous objection rule." Stewart v. State, 567 N.E.2d 171, 174 (Ind. Ct. App. 1991), trans. denied. With that in mind, this court has held that:

[T]he doctrine of fundamental error exists as the exception to that rule since it permits consideration on appeal of errors to which no objection was made at trial. . . . The mere fact that error occurred and that it was prejudicial will not suffice. That, after all, is the ordinary rule for reversal on appeal when the contemporaneous objection has been made. Rather the error must be one such that the defendant could not possibly have had a fair trial or such that this court is left with the conviction that the verdict or sentence is clearly wrong or of such dubious validity that justice cannot permit it to stand.

Id. That is, the fundamental error doctrine is available as a means for appellate review only when no contemporaneous objection to the purported error has been made before the trial court.

Here, Fathers' trial counsel did raise a contemporaneous objection to the admission of Detective Kerschner's testimony. Accordingly, the proper standard of review of the court's decision to admit that testimony is an abuse of discretion standard. A trial court is allowed to control the conduct of cross examination, and only a clear abuse of discretion will permit reversal. Parker v. State, 773 N.E.2d 867, 869 (Ind. Ct. App. 2002), trans. denied. To show an abuse of discretion on the part of the trial court in controlling the scope of cross examination, a party must show how he or she was prejudiced by the trial court's actions. Thompson v. State, 555 N.E.2d 1301, 1303 (Ind. Ct. App. 1990), trans. denied.

Under either standard of review, however, the paucity of Fathers' argument on appeal does not demonstrate reversible error. Fathers have not demonstrated how their ability to effectively cross examine the witness was infringed simply because the witness's face was covered. Rather, Fathers merely allege they were prejudiced by the testimony of the masked witness, without more. Fathers do not point to any facts in the record to corroborate this contention or cite to any case law for support. Thus, Fathers have waived their argument. See Ind. Appellate Rule 46(A)(8)(a).

Fathers' waiver notwithstanding, in both the DCS's motion and at the fact-finding hearing, the DCS asserted that it was necessary for the witness's appearance to be concealed due to the nature of her employment as an undercover narcotics officer.

Further, Fathers were given the opportunity to cross examine the witness after she had been placed under oath. And, most significantly, Detective Kerschner's testimony was largely cumulative to Mother's admissions. Thus, even without Detective Kerschner's testimony, there was sufficient evidence in the record for the trial court to find that the children were CHINS.

Accordingly, Fathers cannot demonstrate that the trial court's admission of the detective's testimony was prejudicial. Fathers have not shown that the trial court abused its discretion in the admission of that testimony. Neither did the trial court's decision render a fair trial impossible. See, e.g., Baird v. State, 688 N.E.2d 911, 917 (Ind. 1997) (holding that an error is "fundamental" if it is so prejudicial to the rights of a defendant that it makes a fair trial impossible). Thus, we affirm the court's adjudication that the children are CHINS.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.