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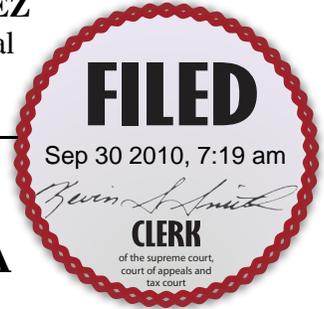
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**IN THE  
COURT OF APPEALS OF INDIANA**

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CRAIG BRITT,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 37A04-1001-CR-86

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APPEAL FROM THE JASPER CIRCUIT COURT  
The Honorable John D. Potter, Judge  
Cause No. 37C01-0807-FB-436

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**September 30, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Craig Britt was convicted of the battery of his girlfriend's infant son. Britt argues that he received ineffective assistance of counsel because trial counsel did not request an instruction on the accident defense, did not object to the admission of statements that he made to a police officer, and did not object to impermissible opinion testimony by a Department of Child Services ("DCS") case manager. He also argues that the trial court abused its discretion by admitting character evidence over his objection. Finally, he argues that there was insufficient evidence supporting his conviction. The State concedes that the case manager's testimony that he had substantiated abuse against Britt and failure to protect against his girlfriend was inadmissible; however, we conclude that Britt was not prejudiced due to the overwhelming evidence of his guilt. Finding no merit to his other arguments, we affirm.

## Facts and Procedural History

Britt lived with his girlfriend, Trisha Green, and her two young sons, T.B. and B. T.B. was born on June 3, 2008. Early on, T.B. suffered from nasal congestion, and he cried frequently. Britt would get "very agitated" and "upset" when T.B. cried, and he had difficulty consoling T.B. Tr. at 233.

When Green woke up on July 12, 2008, T.B. was "crying hysterically." *Id.* at 235. She went to the living room, where Britt was attempting to console T.B. Green could tell that Britt was "very upset, very agitated." *Id.* Green told him, "I'll take care of him, ... you go rest, do what you need to do to calm down." *Id.* Britt said, "I got [sic] this." *Id.* Green

attempted to grab T.B., but Britt was holding him very tightly. Green then prepared a bottle for T.B. and made another attempt to take T.B. from Britt. Britt refused to relinquish T.B. and knocked the bottle over, causing it to spill.

Green then went to the kitchen to prepare breakfast. While in the kitchen, she saw Britt drop T.B. onto the couch from a height of about one foot. Green quickly went to pick up T.B. before Britt could grab him again. Britt left the apartment, and Green was able to calm T.B. down. When T.B. fell asleep, Green placed him in his swing.

Later in the day, Britt returned. Britt was going to take Green and her children to her mother's house and then go to work. When Green took T.B. out of his swing, T.B. started wailing, and Green realized that he could not move one of his arms. Green and Britt then took T.B. to the emergency room at Jasper County Hospital.

Nurse Jane Risner examined T.B. She touched T.B.'s hand to see if he would grip her hand, and when he did, he started screaming. Nurse Risner also noticed bruises on T.B.'s body. She had T.B.'s arm x-rayed, and the x-ray revealed that there was a clean fracture all the way through the bone, which would require "a large amount of trauma." *Id.* at 216. Nurse Risner then decided to call the police department and DCS because "there was a child with a severe injury that [had] absolutely no explanation for how it happened." *Id.*

David Joslyn, a DCS case manager, came to the hospital, where he spoke to the police, the nurse, the doctor, Green, and Britt. According to Joslyn, Britt's demeanor was "very flat, he would look at the floor, wouldn't provide eye contact, and said very little." *Id.* at 303. Joslyn detained T.B., who was taken by ambulance to Riley Hospital for Children.

At Riley, T.B. was given a full skeletal scan. Dr. Tara Harris identified a “spiral fracture of [T.B.’s] right humerus,” i.e., a fracture winding around his upper arm bone. *Id.* at 273. The two pieces of bone were displaced, which takes “a significant amount of force.” *Id.* Harris was able to determine that the arm fracture had occurred within the past week, because the x-ray showed no sign of healing. Dr. Harris also identified three sets of fractures to T.B.’s ribs, one of which had occurred within the past week. She also found a compression fracture of one of his vertebrae, meaning that instead of having a normal shape like a hockey puck, the vertebra had been crushed into a wedge shape. A compression fracture would be caused by forcing the body forward. Dr. Harris described this as “an unusual fracture” that required “an extreme amount of force.” *Id.* at 277. T.B. also had corner fractures at the end of his femur (thigh bone), the top of the tibia (shin bone), and at the ankle. These fractures would have been caused by a forceful jerking of the leg, causing the ligaments to pull off the ends of the bones. Riley staff eliminated bone disease as a cause of the fractures. T.B. had a pattern bruise on the right side of his chest, which would be “unusual ... on any age child, but certainly on a five-week-old.” *Id.* at 273. T.B. had additional bruises and abrasions on his left wrist and left leg.

After the medical examination at Riley, Joslyn told Britt and Green that they had ten minutes to say good-bye to T.B. Green was “obviously upset,” but Britt “kind of blew it off as ... it won’t be any big deal.” *Id.* at 305. Joslyn “substantiated against both parents<sup>[1]</sup> –

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<sup>1</sup> Britt is not T.B.’s biological father, but he signed a paternity affidavit at the hospital when T.B. was born.

Craig Britt for the abuse, and the mother for failure to protect,” and he initiated a CHINS proceeding. *Id.* at 306.

Detective Matthew McAleer attended the CHINS hearing and felt that Britt seemed “emotionless.” *Id.* at 333. After the hearing, he interviewed Britt and Green separately. Green thought that Britt was responsible for the injuries. Britt claimed that he did not know who hurt T.B., but also stated that “he and Ms. Green are around him 24/7.” *Id.* at 337. Britt stated he would “vouch” that Green had not hurt T.B. *Id.* When asked what he thought a motive would be for hurting T.B., Britt stated that the person “probably got tired ... of the baby being fussy.” *Id.* at 338.

Up to this point, Detective McAleer considered the interview “non-accusatory,” and he felt that Britt was “overly nervous.” *Id.* at 339. Britt’s mouth seemed very dry, and he was having difficulty making eye contact. Detective McAleer then decided to shift to an interrogation style of questioning. He told Britt that he thought he had caused the injuries out of frustration with T.B.’s crying. Britt eventually stated that “he may have been too rough with [T.B.] at certain points.” *Id.* 342.

Detective McAleer decided to place Britt under arrest. Britt then asked Detective McAleer if he would help him if he gave more information. Britt said that he thought he needed counseling for his anger and then began offering explanations for how the injuries may have occurred. Britt explained the arm fracture by claiming that he had accidentally sat on T.B.’s arm on the morning of July 12. He stated that he may have caused the compression fracture by removing T.B. from the swing too quickly. He thought the rib fractures may have

occurred because “on occasions he had held [T.B.] too tightly out of anger, and squeezed him.” *Id.* at 345. He thought the leg fractures were caused by jerking T.B.’s legs when he was changing his diaper. Britt initially denied tossing T.B. onto the couch, but later admitted that he had, although he minimized the distance from which he had dropped him.

At the conclusion of the interview, Detective McAleer asked Britt if he would like to write a letter of apology to Green or T.B. Britt wrote a letter to T.B. that stated, “Daddy sorry for causing injuries toward you It was a accident. Daddy didn’t meant to hurt you. Daddy can’t wait to see you and tell you I’m sorry.” State’s Ex. 6 (errors in original).

Samantha Cotner, who had lived with Britt and Green until T.B. was about two weeks old, approached Detective McAleer with some concerns about what she felt was questionable handling of the children. Cotner stated that Britt “would always punish [B.] If [B.] was crying for no reason, he would tell him he would give him a reason to cry.” Tr. at 319. Britt would jerk B. and spank him forcefully. Green would pull B. toward her to get on eye level with B. when she wanted to tell him to stop doing something.

According to Cotner, Britt would “hold [T.B.] firmly; it was always a grip; kind of not to let anybody else take him. He would grab at his cheeks and pinch his cheeks.” *Id.* at 317. Britt would get very frustrated when T.B. cried and would say, “Why won’t he stop crying?” *Id.* at 318. Britt generally took charge of bathing and changing T.B., and Green did not handle him as much. Although Green would get a little frustrated with the crying, Cotner felt that Green was never aggressive toward the children.

Britt was charged with battery as a class B felony.<sup>2</sup> At Britt's jury trial, the State presented evidence of the foregoing facts and also questioned Dr. Harris about Britt's proffered explanation for T.B.'s injuries. Dr. Harris stated that the spinal compression fracture could have been caused by forcefully removing T.B. from his swing if his body had been bent forward during the process. She explained that it would require a great amount of force: "As I mentioned, it would be a very violent compression; it would certainly not be something that would happen ... with the usual routine handling and pulling a baby out of a swing. It would be a movement that a ... reasonable caretaker would recognize was dangerous to the infant." *Id.* at 285. Dr. Harris also stated that the corner fractures could have been caused by jerking T.B.'s legs while changing his diaper, but "[a]gain, it would be a violent jerking. It wouldn't be just, you know, how ... a usual caretaker would move a baby's legs to change their diaper." *Id.* at 286. She further testified that the rib fractures could have been caused by squeezing T.B. too tightly. She also stated that sitting on T.B.'s arm, by itself, would not cause a spiral fracture: "That may be a component of it; it wouldn't be the whole story. The spiral fracture is caused by a twisting movement." *Id.* at 286.

The jury found Britt guilty as charged. He now appeals his conviction.

## **Discussion and Decision**

### ***I. Ineffective Assistance of Counsel Claims***

Three of the issues that Britt wishes to raise have not been preserved for appeal. Therefore, he argues that he received ineffective assistance of counsel. A defendant may

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<sup>2</sup> Ind. Code § 35-42-2-1(a)(4).

raise a claim of ineffective assistance of counsel on direct appeal; however, the defendant is foreclosed from subsequently relitigating that claim. *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *cert. denied*.

To prevail on a claim of ineffective assistance of counsel, Britt must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance so prejudiced him that he was denied a fair trial. *Coleman v. State*, 694 N.E.2d 269, 272 (Ind.1998) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). There is a strong presumption that counsel rendered adequate assistance. *Id.* "Evidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance." *Id.* at 273. "Counsel's performance is evaluated as a whole." *Lemond v. State*, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), *trans. denied*. To establish the prejudice prong of the test, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable." *Coleman*, 694 N.E.2d at 272.

#### ***A. Jury Instructions***

Britt argues that counsel was ineffective by not requesting an instruction on the accident defense. To prevail on this claim, Britt "must prove that he was entitled to the

defense and that he was prejudiced when the jury was not instructed on the defense.” *Potter v. State*, 684 N.E.2d 1127, 1135 (Ind. 1997).

A valid accident defense requires that: (1) The conduct must have been unintentional, or without unlawful intent or evil design on the part of the accused; (2) the act resulting in injury must not have been an unlawful act; and (3) the act must not have been done recklessly, carelessly or in wanton disregard of the consequences.

*Chambliss v. State*, 746 N.E.2d 73, 80 (Ind. 2001).

Britt attempts to distinguish his case from *Clemens v. State*, 610 N.E.2d 236 (Ind. 1993). Clemens was accused of murdering his son. At trial, several witnesses related Clemens’s claim that the child had died in a car accident. Clemens tendered an instruction on the accident defense, which the trial court refused to give to the jury. On appeal, our supreme court affirmed, finding that Clemens had not presented evidence to support his defense:

Appellant argues his traffic accident scenario, as related through the testimony of his wife, sister, mother, two policemen and a paramedic, amply suffices to support giving his instruction. It is true that a defendant is entitled to an instruction on any defense which has some foundation in the evidence. *Smith v. State* (1989), Ind., 547 N.E.2d 817. The situation in the case at bar, however, parallels that in the case of *Brown v. State* (1985), Ind., 485 N.E.2d 108, 111, in which Justice Shepard wrote:

“While a criminal defendant has the constitutional right not to testify at trial, the defendant has the burden of proof on any affirmative defense. In this case the appellant did not testify at trial or present other evidence to support his affirmative defenses. While defendants have the prerogative to choose the trial strategy deemed best for them, appellant cannot make exculpatory statements to a court appointed psychiatrist, present no evidence on his defense, preclude the State from cross-examining appellant’s assertions made through the psychiatrist, and then expect such self-serving statements to constitute substantive evidence for his tendered instructions.”

Here, where appellant never testified nor offered any evidence in his defense, and where all the medical evidence flatly concluded that Jerrel's death was no accident, we conclude as in *Brown, supra* that appellant's secondhand, self-serving explanation, even where reiterated through several different witnesses, does not constitute substantive evidence to support his tendered instruction.

*Id.* at 241.

Like Clemens, Britt exercised his right to not testify at trial. His explanation of T.B.'s injuries was presented through the testimony of Detective McAleer. Contrary to Britt's argument, Dr. Harris did not admit that the injuries could have been accidental. She stated that the injuries would require a substantial amount of force, such that an ordinary caretaker would realize that the baby was being harmed. She also described several of the injuries as unusual. Furthermore, Britt admitted that he sometimes squeezed T.B. too tightly when he was frustrated with T.B.'s crying. Thus, as in *Clemens*, Britt offered no evidence to support an accident defense, and the medical evidence did not support an accident defense. Therefore, we conclude that the failure to tender an accident instruction was not ineffective assistance of counsel.

### ***B. Statements to the Police***

Britt argues that Detective McAleer should not have been allowed to testify about the content of their interview because there was no video or audio recording of the interview. The only case that he cites in support is *Blanchard v. State*, which discusses when a transcript of a video or audio recording may be admitted as an exhibit. 802 N.E.2d 14, 30 (Ind. Ct. App. 2004). He cites no authority supporting his contention that the interview had to be recorded to be admissible. Therefore, his argument is waived. *See Davis v. State*, 835

N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (“A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.”), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8) (arguments must be supported by citations to authority or the record).

### *C. Joslyn’s Testimony*

Joslyn, the DCS case manager, testified that he had substantiated abuse against Britt and failure to protect against Green. Britt argues that trial counsel should have objected to this testimony on two grounds: (1) it was an impermissible opinion pursuant to Indiana Evidence Rule 704(b);<sup>3</sup> and (2) Joslyn was testifying as an expert, but no foundation was laid establishing him as an expert. The State concedes that, had trial counsel objected to Joslyn’s testimony as an impermissible opinion that Britt was guilty, the objection should have been sustained. The State argues, however, that Britt was not prejudiced in light of the overwhelming evidence of his guilt.

We agree. Green and Cotner testified that Britt would get upset with T.B.’s crying, that he had difficulty consoling T.B., and that he would hold T.B. very tightly or otherwise handle him roughly. Britt was frustrated with T.B.’s crying on the day that his injuries were discovered and the day that the arm fracture likely occurred. Several witnesses testified that Britt was hesitant to talk about T.B.’s injuries, that he avoided making eye contact, and that he did not seem very upset about T.B.’s injuries and his detention by DCS. Britt told

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<sup>3</sup> The rule states: “Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.” Ind. Evid. Rule 704(b).

Detective McAleer that a motive for hurting T.B. might be frustration with his crying. He eventually offered explanations for T.B.'s injuries, which for the most part were consistent with the medical evidence, although he downplayed the amount of force used and attempted to make the injuries sound like accidents. The medical evidence, however, showed that a substantial amount of force was used, such that Britt would have known that he was hurting T.B. Britt also wrote a letter to T.B. apologizing for hurting him.

Britt attempts to paint Green in a negative light and to suggest that she is an equally likely suspect. Green, however, was capable of consoling T.B. and did not become nearly as frustrated with him as Britt did. Britt handled T.B. more than Green did and sometimes refused to hand him over to Green. Although there was some evidence of Green being rough with B., there was no evidence that this roughness resulted in injuries or that she employed similar tactics with T.B. Several witnesses felt that Green was concerned about T.B.'s injuries and upset by his detention by DCS. Britt himself said that he would vouch that Green had not injured T.B. In light of the overwhelming evidence of his guilt, we conclude that Britt was not prejudiced by the erroneous admission of Joslyn's opinion.<sup>4</sup>

## ***II. Character Evidence***

At trial, Green testified that she saw Britt drop T.B. onto the couch from a distance of about a foot. The State did not attempt to prove that dropping T.B. in this manner caused any

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<sup>4</sup> In his argument concerning Joslyn's testimony, Britt also references the fundamental error standard. It is not clear whether he meant to make a separate argument that admission of the testimony was fundamental error; however, because we find that the evidence of his guilt is overwhelming, he cannot establish fundamental error or ineffective assistance of counsel. *See Sobolewski v. State*, 889 N.E.2d 849, 858 (Ind. Ct. App. 2008) (error is harmless, and not fundamental, when evidence of guilt is overwhelming), *trans. denied*.

of his injuries. Because this act was not the basis for the charges against him, Britt argued that it should have been excluded pursuant to Evidence Rule 404(b).

Evidence Rule 404(b) specifically bars the admission of evidence of other crimes, wrongs, or bad acts allegedly committed by the defendant to prove the defendant's character, and forbids the use of this kind of evidence to show that the defendant acted in a manner consistent with that character. *Oldham v. State*, 779 N.E.2d 1162, 1172 (Ind. Ct. App. 2002), *trans. denied*. However, the rule permits the admission of such evidence for

other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Ind. Evidence Rule 404(b). This rule is “designed to prevent the jury from assessing a defendant's present 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). Thus, in assessing the admissibility of evidence under Evidence Rule 404(b), the trial court must: (1) determine whether 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 (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. *Id.* at 221.

“The admission of evidence is a determination entrusted to the discretion of the trial court.” *Wilhelmus v. State*, 824 N.E.2d 405, 414 (Ind. Ct. App. 2005). “We will reverse a trial court's decision only when the court's action is clearly against the logic and effect of the facts and circumstances before the court.” *Id.*

The evidence showed that, on the morning of July 12, 2008, Green woke up and found that T.B. was crying. Britt was holding him tightly and refused to hand him over to Green. Britt eventually dropped T.B. on the couch, at which point Green picked him up and was able to calm him down. Green then placed him in his swing. Green first noticed that T.B. was unable to move his arm when she took him out of his swing. She did not notice the injury to his arm before because T.B. had been wrapped tightly in a blanket. Dr. Harris testified that the arm injury would have been very painful because the two pieces of bone were displaced and would shift if someone touched T.B.'s arm. Dr. Harris testified that the fracture was recent: "There is no sign of healing. So this is less than a week old, and since we have a history that he had a new onset of pain and swelling, tenderness in that area, then that's consistent with it happening that day, or the day he came to the hospital." Tr. at 275. Britt also told Detective McAleer that the injury occurred on the morning of July 12.

The State was required to prove that Britt knowingly or intentionally touched T.B. in a rude, insolent, or angry manner. *See* Ind. Code § 34-42-2-1 (defining battery). Dropping T.B. on the couch tends to show that Britt was angry or extremely frustrated with T.B. on the morning that the arm fracture most likely occurred. Therefore, this evidence is relevant to the elements that the State had to prove and was not offered merely to show conformity. Therefore, we conclude that the trial court did not abuse its discretion by admitting the evidence. Even if we were to find error, as explained above, the evidence of Britt's guilt was overwhelming, and the error would have been harmless.

### ***III. Sufficiency of the Evidence***

Britt argues that there is insufficient evidence to support his conviction.<sup>5</sup>

When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. We look to the evidence and the reasonable inferences therefrom that support the verdict. The conviction will be affirmed if evidence of probative value exists from which a jury could find the defendant guilty beyond a reasonable doubt.

*McClendon v. State*, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996) (citations omitted).

Britt first argues that, without his admissions to the police, there is not sufficient evidence to show that he is the person who injured T.B. As discussed above, Britt has not demonstrated that this evidence was inadmissible; therefore, his argument fails.

Britt next argues that the evidence is insufficient because none of the witnesses identified him in court. We addressed a similar argument in *Broecker v. State*:

Broecker also contends that the evidence was insufficient to convict him as a matter of law because no in-court identification was made.... [I]t has long been the rule that a defendant may be identified by name. *State v. Schroepel* (1959), 240 Ind. 185, 162 N.E.2d 683. There is no need for a witness to point to the defendant and say, ‘that is the man.’ *Preston v. State* (1972), 259 Ind. 353, 287 N.E.2d 347; *Stevenson v. State* (1974), Ind. App. 318 N.E.2d 573. There is no claim that defendant is not the same person as Dennis Wayne Broecker, or that he is not the person who was apprehended inside the service station in question. Absent such a claim, there is no basis for an allegation of error in the identification procedure.

168 Ind. App. 231, 238, 342 N.E.2d 886, 890 (Ind. Ct. App. 1976).

In Britt’s case, the prosecutor represented that Green had identified Britt; however, the transcript does not reflect whether Green actually did so. At a minimum, Green identified

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<sup>5</sup> Britt also argues that the trial court should have granted his motion for a directed verdict. However, if the evidence is sufficient to sustain a conviction, a motion for a directed verdict is properly denied. *Dilworth v. State*, 425 N.E.2d 149, 150 (Ind. 1981). Therefore, we will consider these arguments together.

him by name, and the record reflects that several other witnesses could see Britt in the courtroom. Britt presented no argument that he is not the same Craig Britt who lived with Green and her children and was charged with battering T.B. Therefore, we conclude that there was sufficient evidence supporting his conviction. *See Shields v. State*, 490 N.E.2d 292, 295 (Ind. 1986) (sufficient evidence of identity where witness said she saw Shields in the courtroom and described his appearance, although the record did not explicitly show that she had identified the defendant). Therefore, we affirm his conviction.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.