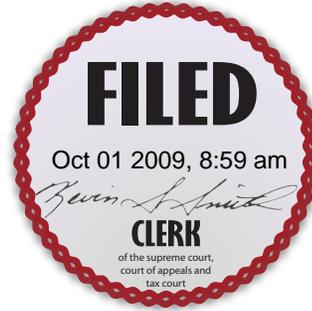


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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RANDALL CARR, )  
 )  
Appellant- Defendant, )  
 )  
vs. ) No. 29A02-0902-CR-131  
 )  
STATE OF INDIANA, )  
 )  
Appellee- Plaintiff, )

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable Wayne A. Sturtevant, Judge  
Cause No. 29D05-0706-FD-2607

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October 1, 2009

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Following a bifurcated jury trial, Randall Carr was found guilty of domestic battery as a Class A misdemeanor and domestic battery as a Class D felony. The trial court entered judgment of conviction and sentence only on the Class D felony charge, sentencing Carr to three years in the Indiana Department of Correction with two years suspended. Carr appeals, raising the issue of whether he received ineffective assistance of trial counsel. Concluding that Carr has not established his trial counsel was ineffective, we affirm.

### Facts and Procedural History

On the evening of June 7, 2007, Carr poked his wife, Shelley, in the face several times and hit her across the cheek while at their apartment in Arcadia, Indiana. Shelley left the apartment and was able to catch the attention of a passing police officer. Carr was arrested and charged with domestic battery, a Class A misdemeanor, and domestic battery with a prior conviction, a Class D felony.

A bifurcated jury trial was held on November 21 and 22, 2008. The State began its opening statement for the first phase of the trial by saying:

On the night of June 7th into the early morning hours of June 8, 2007, the Defendant, Randall Carr, was at home with his wife, Shelley Carr. They lived at West Main Street in Arcadia, Indiana, in the lower floor of a bank building that has been converted into apartments. That evening, early morning hours, they got into an argument, a very one-sided argument where Randall Carr began yelling at Shelley, and yelling, and yelling, getting more demonstrative, jabbing his finger in her face, until finally he took his hand and hit her underneath her left eye.

Transcript at 85. Carr's counsel did not object to the State's opening statement.

Shelley and the two officers who were involved in investigating the incident testified for the State. During cross-examination by Carr’s counsel, Shelley testified, “There’s been different incidences [sic] . . . .” Id. at 122. Carr’s counsel moved to strike the reference to any incident other than the June 7 incident. The trial court granted the motion, told Shelley she needed to confine her comments to the events of June 7, and admonished the jury to disregard her comments. Carr’s counsel then embarked on the following line of questioning:

Q: Did you show the officers an area of your upper chest?

A: I don’t think I did.

Q: Did you ever allege that you were injured in that area as well?

A: In the report [I made on June 7]?

Q: I’m just asking, do you allege that you were injured in that area?

A: On that night?

Q: On your chest. Yes, on that night.

A: Not on that night.

Q: Okay. So whatever the issues were with the chest, that has nothing to do with the incident in question we’re talking about here; is that correct?

A: No, sir, it doesn’t.

Id. at 124. Prior to beginning its redirect examination, the State requested a sidebar conference at which the State indicated it believed Carr had “opened the door to the marks on and discussion about what happened to her chest.” Id. at 128. The trial court agreed, and Carr’s counsel asked that his objection be noted. On re-direct, the State referenced “some discussions about photographs that were taken of your chest area” and asked, “[w]hat were those photographs of?” Id. at 131. Carr’s counsel objected but the trial court allowed Shelley to answer. Shelley testified that she had cigarette burns on her chest but they did not occur on the night in question.

During jury deliberations, the trial judge had to leave the bench temporarily.

Upon returning to the bench, the trial court made the following record:

As you were informed, I had to leave the building at approximately 5:30 and at that time I appointed . . . a local attorney to sit as pro tem to deal with any issues while I was gone. Apparently about six o'clock, a note was passed out from the jury, it reads as follows: "What happens if we all can't agree?" [The pro tem] decided to respond to that and send in a typed response which reads as follows: "The Court believes you have not exhausted all options in making a determination in this matter and believes it will be beneficial for you to continue your deliberations. Dinner has been ordered for you and will be provided shortly." And it was signed by [the pro tem].

\* \* \*

I wanted to bring the earlier question and [the pro tem's] response to that to your attention to allow you to make a record on that if you'd like. Any record that the defense would like to make on that response?

Id. at 229-30. Carr's counsel indicated that he did not wish to make a record on the jury question. The jury found Carr guilty of domestic battery, a Class A misdemeanor. Following testimony on the enhanced charge, the jury found Carr guilty of domestic battery, a Class D felony. The trial court entered judgment of conviction on domestic battery as a Class D felony and sentenced Carr to three years at the Department of Correction with two years suspended. Carr now appeals.

#### Discussion and Decision

Carr contends that his trial counsel was ineffective in three respects: 1) for failing to object to the State's opening statement; 2) for opening the door to evidence of other wrongs; and 3) for failing to object or make a record as to the trial court's response to the jury's question during deliberations.

## I. Standard of Review

When reviewing ineffective assistance of counsel claims, we use the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the first prong, the petitioner must establish that counsel's performance was deficient; that is, the performance fell below an objective standard of reasonableness, thereby denying the petitioner the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution. Terry v. State, 857 N.E.2d 396, 402-03 (Ind. Ct. App. 2006), trans. denied. We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions. Id. at 403. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. Under the second prong, the petitioner must demonstrate prejudice; that is, the petitioner must demonstrate a reasonable probability that the result of the trial would have been different if counsel had not made the errors. Id. If our confidence that the result would have been the same is undermined, we will find that a reasonable probability of a different result exists. Id.

We also note that Carr brings his claim of ineffective assistance of trial counsel on direct appeal. This is not prohibited; however, post-conviction proceedings are the preferred forum for adjudicating claims of ineffective assistance. Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998), cert. denied, 528 U.S. 861 (1999). This is because presenting ineffective assistance claims often requires the development of new facts not present in the trial record. Because Carr brings his claim on direct appeal, we have no testimony from his trial counsel which might explain his conduct at trial. "When the only

record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight.” Id. at 1216.

## II. Ineffective Assistance of Trial Counsel

### A. Opening Statement

As noted above, the State began its opening statement by saying, “On the night of June 7th . . . .” Carr contends it was prosecutorial misconduct for the State to fail to preface its opening statement with “the evidence will show” or similar words and that his trial counsel was ineffective for failing to object.

When a claim of ineffective assistance is based upon counsel’s failure to object at trial, the defendant must show that a proper objection, if made, would have been sustained and that he was prejudiced by the failure. Wrinkles v. State, 749 N.E.2d 1179, 1192 (Ind. 2001), cert. denied, 535 U.S. 1019 (2002). In reviewing a claim of prosecutorial misconduct, we first consider whether the prosecutor engaged in misconduct and we then consider all the circumstances of the case to determine whether such misconduct placed the defendant in a position of grave peril to which he should not have been subjected. Ratliff v. State, 741 N.E.2d 424, 428 (Ind. Ct. App. 2000), trans. denied. “Grave peril” is not measured by the degree of impropriety of the misconduct but by the probable persuasive effect of the misconduct on the jury’s decision and whether there were repeated examples of misconduct that would evince a deliberate attempt to unfairly prejudice the defendant. Id. at 429.

Carr seems to argue that the State’s opening statement violated Indiana Rule of Professional Conduct 3.4(e),<sup>1</sup> which provides that in trial, a lawyer shall not “allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused.” The purpose of an opening statement is to give the jury a preview of what the parties believe the evidence will establish “so that the jurors may better grasp the import of the testimony as it comes from the witness stand.” Montgomery Ward, Inc. v. Koepke, 585 N.E.2d 683, 687 (Ind. Ct. App. 1992). That the State did not preface its remarks with the statement, “The evidence will show,” does not make the State’s opening statement any less a summary of the expected evidence. Indeed, following the statements Carr claims are objectionable, the State continued: “You will hear from several witnesses today. . . . You will hear about what [the responding police] officers observed, about the alleged victim, Shelley, in this case, about the Defendant, Randall Carr. And you will hear testimony from Shelley Carr about what precisely transpired that night . . . .” Tr. at 85. The State’s opening statement did not imply personal knowledge or state a personal opinion; therefore, any objection to the opening statement would not have been sustained.

Moreover, even if the State’s remarks were improper, Carr was not placed in a position of grave peril. Opening statements are not evidence, McIntyre v. State, 717 N.E.2d 114, 123 (Ind. 1999), and the jury in this case was instructed that they may not be

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<sup>1</sup> Carr’s brief does not cite this rule and in fact cites case law concerning closing arguments rather than opening statements. The substance of Carr’s argument appears to implicate this rule, however.

taken as such, see Appendix of Appellant at 85 (preliminary instruction stating: “The trial of this case will proceed as follows: First, the attorneys will have an opportunity to make opening statements. These statements are not evidence and should be considered only as a preview of what the attorneys expect the evidence will be.”); id. at 93 (final instruction stating: “Statements made by counsel are not evidence.”). The evidence at trial supported each of the State’s statements. Therefore, any impropriety in the State’s opening statement would have had little or no effect on the jury’s decision, and trial counsel was not ineffective for failing to object to the State’s opening statement.

#### B. Jury Deliberations

In order to more fully discuss Carr’s allegations of ineffective assistance with regard to his counsel’s cross-examination of Shelly, we first address his claim regarding ineffective assistance during jury deliberations. During jury deliberations, a judge pro tempore took the bench for a short time while the presiding judge had to be absent from the courthouse. While the judge pro tempore was on the bench, the jury sent a note asking “What happens if we all can’t agree?” Tr. at 229. Without informing the parties of the jury’s question or bringing them into court to consult about the appropriate response, the judge pro tempore sent back a note telling the jury to continue deliberating. Approximately ninety minutes later, the presiding judge returned and called the parties into court to advise them of a second note the jury had sent requesting a transcript of the entire trial. He also notified them of the earlier note and response and asked if either party would like to make a record regarding that exchange. Carr’s counsel replied, “None.” Id. at 230.

Carr contends that the jury's question indicated it had reached an impasse and his trial counsel was ineffective for failing to object to or otherwise make a record on the trial court's failure to follow the procedure in Jury Rule 28. Jury Rule 28 provides:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

(Emphasis added.) An "impasse" has been defined as "a position from which there is no escape, a deadlock." Litherland v. McDonnell, 796 N.E.2d 1237, 1242 (Ind. Ct. App. 2003) (quoting The New Shorter Oxford English Dictionary 1318 (Thumb Index ed. 1993)), trans. denied. Our supreme court has noted, however, that "[a] question is not an impasse." Ronco v. State, 862 N.E.2d 257, 260 (Ind. 2007). Jury Rule 28 confers discretionary authority on the trial court to conduct "further proceedings" to "facilitate and assist jurors in the deliberative process." Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002). However, such authority is only conferred in the case of a true impasse. Here, the jury's question did not indicate that it was at the point at which it could not agree on a verdict; the question only inquired as to the ramifications of failing to agree and use of the procedure in Jury Rule 28 would have been premature. See Perry v. State, 867 N.E.2d 638, 643 (Ind. Ct. App. 2007) (holding that jury note asking what would happen if the jury could not come to a unanimous decision did not indicate deadlock and trial court erroneously determined on the basis of that question that the jury had reached an impasse), trans. denied. Therefore, counsel was not ineffective for failing to object to the trial court's response on the basis of Jury Rule 28.

Carr argues in the alternative that if the jury question did not indicate an impasse and trigger Jury Rule 28, then the question should have been dealt with according to the common law protection which applies whenever jurors request any type of additional guidance from the court. Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1998).<sup>2</sup> “[W]hen jurors request additional guidance from the court, the proper procedure is for the judge to notify the parties so they may be present in court before the judge communicates with the jury, and the parties should be informed of his proposed response to the jury.” Moffatt v. State, 542 N.E.2d 971, 974 (Ind. 1989). When this procedure is not followed, any communication between the judge and jury is a forbidden ex parte communication creating a presumption of error. Bouye, 699 N.E.2d at 628. However, such presumption is rebuttable and does not constitute per se grounds for reversal. Id.

The State concedes that the judge pro tempore should have informed the parties of the jury’s question and his proposed response. See Brief of Appellee at 9. However, the judge pro tempore merely informed the jury that it should keep deliberating. Similar instructions given in the parties’ absence have been held harmless. See Nichols v. State, 591 N.E.2d 134, 138 (Ind. 1992) (when jury sent out a note indicating it was unable to reach a verdict on one count, trial court’s response that “your meal is on the way, keep deliberating” without notifying the parties was harmless); see also Lott v. State, 690 N.E.2d 204, 210 (Ind. 1997) (when jury indicated it was unable to reach a verdict on one count, trial court’s “unadorned communications with the jury” to continue deliberating

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<sup>2</sup> The statutory protection embodied in Indiana Code section 34-36-1-6 is triggered “when the jury interrupts its deliberations to review evidence not commended to it by the trial court at the beginning of its deliberations.” Powell v. State, 644 N.E.2d 855, 858 (Ind. 1994). As the jury question at issue did not explicitly indicate a disagreement about the evidence or a point of law relating to the case, see Ronco, 862 N.E.2d at 260 (trial court was required by Indiana Code section 34-36-1-6 to respond to jury’s question regarding one of the final instructions), the statutory protection is inapplicable here.

did not result in harm or prejudice). Because the trial court's error was harmless, there was no prejudice to Carr and trial counsel was not ineffective for failing to make a record objecting to the trial court's handling of the jury's question.

### C. Cross-Examination

Carr next contends that his trial counsel was ineffective for opening the door to testimony about prior domestic incidents between Carr and Shelley. Indiana Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

In determining whether evidence is admissible under Rule 404(b), the trial court must first determine that the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act and then balance the probative value of the evidence against its prejudicial effect. Spencer v. State, 703 N.E.2d 1053, 1055-56 (Ind. 1999); see also Ind. Evidence Rule 403. Otherwise inadmissible evidence may be admitted, however, if the defendant has "opened the door." Ortiz v. State, 741 N.E.2d 1203, 1208 (Ind. 2001). Carr argues that the evidence would not have been admissible under Rule 404(b) but for his counsel opening the door. He acknowledges that the improper admission of evidence is subject to harmless error analysis, but argues that because the jury "indicat[ed] an initial impasse on the issue of guilt . . . it cannot be said with any degree of reliability that the improper evidence of character and prior bad acts did not contribute to the verdict of guilty." Brief of Appellant at 11.

The State argues that even if the evidence was inadmissible,<sup>3</sup> Carr suffered no prejudice by his counsel allegedly opening the door to its admission. Although Carr’s counsel should not have asked the question which the trial court ultimately found opened the door,<sup>4</sup> we cannot say admission of that testimony was so prejudicial as to undermine our confidence in the outcome of the trial. See Terry, 857 N.E.2d at 403. As we held above, the jury did not indicate an impasse during its deliberations, and we thus decline Carr’s invitation to consider the jury’s question as adding to the probability that the result of the trial would have been different absent that evidence. In being convicted of domestic battery, Carr was found to have “knowingly or intentionally touch[ed] [his spouse] in a rude, insolent, or angry manner that result[ed] in bodily injury to [his spouse] . . . .” Ind. Code § 35-42-2-1.3(a)(1). Shelley and Carr both testified that on the night in question, they were arguing in their apartment and Carr sat facing Shelley in a chair he placed directly in front of where Shelley was sitting. Shelley testified that while Carr was sitting there, “he shoved his finger in the left side of my face . . . and pushed on my face really hard with his finger.” Tr. at 94. Shelley testified that later, Carr hit her on the left side of her face. Her face felt hot and “tight around my eye.” Id. at 101. Both officers

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<sup>3</sup> The State first argues that the other act evidence was “likely admissible to show the relationship between the parties.” See Brief of Appellee at 7. Although it is true our courts have held that a defendant’s prior bad acts are usually admissible to show the relationship between the defendant and the victim, see Ross v. State, 676 N.E.2d 339, 346 (Ind. 1996), Carr’s and Shelley’s relationship was not at issue, as both acknowledged they were fighting at the time of the alleged battery. However, because we can resolve an ineffective assistance claim by analyzing the prejudice prong alone, see Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002), we need not determine whether the evidence was in fact admissible.

<sup>4</sup> At the sidebar prior to the State’s redirect, Carr’s counsel explained his question by stating, “Judge, she was just alleging injury at the time. This goes to her credibility. And she’s testified it had nothing to do with this event whatsoever.” Tr. at 128. It is unclear to what Carr’s counsel is referring, as Shelley did not reference any other injuries than those to her face during her testimony on direct. He may have been referring to the written statement Shelley provided to the police; however, that statement was not addressed during the State’s direct examination of Shelley nor was it introduced into evidence during the trial. If counsel was trying to impeach Shelley’s testimony, he did not go about it in a proper way.

who responded to the scene testified that they noticed redness on Shelley's left cheek below her eye. Officer Amos also testified the left side of Shelley's face was swollen and that he could still see the redness when he left the scene approximately two hours after arriving. Photographs taken at the scene and introduced into evidence at trial show redness on Shelley's left cheek. Given that Carr acknowledged he and Shelley were in an argument and that the officers' testimony and photographic evidence showed Shelley's left cheek was red and swollen in the aftermath of the argument, we are convinced no reasonable trier of fact would have been so prejudiced by the other act evidence<sup>5</sup> as to be persuaded of Carr's guilt by anything other than the strong evidence that Carr battered Shelley on the night in question. Therefore, Carr has failed to establish that trial counsel was ineffective in opening the door to evidence of other acts.

### Conclusion

Carr has failed to establish that his trial counsel was ineffective in representing him. His conviction is affirmed.

Affirmed.

DARDEN, J, and MATHIAS, J., concur.

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<sup>5</sup> We also note that Shelley's testimony did not specifically link the injuries to her chest to Carr. As for several other instances in which Shelley referenced prior incidents, see tr. at 101 (Shelley, on direct examination: "Q: Before this incident, did you have any redness or swelling under that left eye right there? A: On other occasions."); id. at 125 (Shelley, on cross-examination by Carr's counsel: "A: I was very unhappy with the decisions he made for our life. Q: And what were those decisions? A: The abuse. Q: You're talking about the abuse that we have discussed here tonight; is that correct? A: That's one of them."), the references were vague accounts of other acts and again, were not likely to persuade the jury of Carr's guilt in the face of Shelley's testimony and the other evidence regarding the June 8, 2007 incident.