



## Case Summary

B.B.-L. challenges her convictions for neglect of a dependent, a Class C felony, and criminal Recklessness, a Class A misdemeanor. We reverse and remand.

### Issues<sup>1</sup>

We address two of the issues B.-L. raises on appeal, which are:

1. whether the trial court abused its discretion by excluding accident reconstruction evidence;
2. whether the trial court erred by excluding 404(b) evidence related to Tom Link.

### Facts

The evidence most favorable to the convictions reveals that Christopher Link is the son of B.-L. and Tom Link, who are divorced. At the time of the incident at issue here, Christopher was a sixteen year-old high school student with muscular dystrophy and was confined to a wheelchair.

On February 18, 2004, B.-L. picked Christopher up from school to transport him to a doctor's appointment. On the way to the appointment, B.-L. became angry with Christopher because he had not done something she asked him to do. She then threatened to punish him and, while the van was stopped at a red light, removed Christopher's chest strap and lap tray. B.-L. then began driving quickly and swerving between lanes and cars and came to an abrupt stop at a red light, causing Christopher to fall forward out of his wheelchair and strike his knees and head on the floor of the van. When Christopher and

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<sup>1</sup> B.-L. also challenges the appropriateness of her sentence pursuant to Indiana Appellate Rule 7(B). Because we reverse, we do not address this issue.

B.-L. arrived at the hospital for his appointment, B.-L. picked him up and put him back in his wheelchair.

The next day, Christopher was admitted to the hospital with pneumonia. Four days later, he was released from the hospital and went to stay with Tom, who had joint custody of Christopher. That same day, Christopher told his father what had happened in B.-L.'s van earlier that week. Tom contacted the police and took Christopher to the doctor. X-rays of Christopher's legs revealed fractures in both of his knees.

On October 20, 2004, the State charged B.-L. with Class C felony neglect of a dependent, Class D felony neglect of a dependent, and criminal recklessness. On February 2, 2005, the State filed a notice of its intent to introduce 404(b) evidence related to prior acts by B.-L. Following a hearing on April 1, 2005, the trial court ruled that such evidence would be admissible to establish motive, intent, and the relationship between the parties. At her trial, B.-L. properly preserved objections to some, but not all, of that evidence. B.-L. herself notes in her appellate brief: "During trial, B.-L. objected to the introduction of some, but hardly any, of the specific 404(b) evidence . . . B.-L. made an additional attempt to preserve the pre-trial ruling on the 404(b) evidence through an inartful and untimely offer to prove made close to the conclusion of trial." Appellant's Br. p. 21 n.8.

On May 11, 2005, the State filed a motion to exclude evidence related to a reconstruction of the accident at issue. The trial court held a hearing related to that motion on July 15, 2005, and granted the State's motion at a hearing on July 28, 2005. The basis for the trial court's ruling in that regard was, "that . . . it would be confusing to

the jury and there doesn't appear to be enough similarity between what is being offered as evidence and what actually happened . . . the relevancy of that evidence is not evident to the Court.” Tr. July 28, 2005 hearing p. 10. B.-L. preserved this issue for appeal by making a timely offer to prove during her trial.

On May 16, 2005, B.-L. filed a notice of her intent to introduce evidence of other crimes, wrongs, or acts committed by Tom. On July 7, 2005, B.-L. filed another notice of her intent to introduce character evidence related to Tom's “knowledge, motive, intent, preparation, plan, identity, and/or absence of mistake.” App. p. 204. The trial court denied B.-L.'s May 16, 2005 notice at the July 28, 2005 hearing because her evidence consisted merely of allegations of crimes and not actual convictions. At the same hearing, the trial court also denied B.-L.'s July 7, 2005 request to introduce evidence of Tom's character, stating:

[I]t appears to me that the evidence that your [sic] seeking to introduce is evidence that . . . [Tom] is alleged to have done something to this child and that [he] then turns around and points the finger at the mom, and that's the same thing that happened here . . . and if that is in fact the argument and the allegation that we didn't do this, he did it, and he's trying to deflect, then it's clearly inadmissible 404 evidence.

Tr. July 28, 2005 hearing pp. 48-49. It seems that B.-L. tried to make an offer to prove regarding this evidence related to Tom during her trial but that she was cut short by the trial court.

On August 18, 2005, a jury found B.-L. guilty of Class C felony neglect and criminal recklessness. The trial court sentenced her to a total of four years in the department of correction on September 19, 2005. She now appeals her convictions.

## Analysis

### *I. Exclusion of Reconstruction Evidence*

The first issue B.-L. raises, and the one we find dispositive, is whether the trial court abused its discretion by excluding the reconstruction evidence that B.-L. sought to introduce. We review questions regarding a trial court's admission of evidence for an abuse of discretion. Purvis v. State, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005), trans. denied. A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it. Lyles v. State, 834 N.E.2d 1035, 1046 (Ind. Ct. App. 2005), trans. denied.

B.-L. argues that the details of the reconstruction she sought to introduce at her jury trial were substantially similar to the incident at issue here. We agree.

At the July 15, 2005 hearing on the State's motion to exclude B.-L.'s reconstruction evidence, Walter Stout and David Smith testified regarding the details of reconstructions they performed in February 2004.<sup>2</sup> Stout testified that the details of the accident upon which he relied for the reconstruction came from Christopher's deposition

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<sup>2</sup> Stout testified that he has experience in, among other things, investigating fatal accidents; developing and implementing defensive driving training courses, traffic ordinances, drivers' education courses, traffic safety manuals, chemical tests for intoxication; working as a traffic engineer; installing and maintaining traffic signals, signs, and pavement markings. Based on his curriculum vitae, the State stipulated that Stout qualified as an expert in these areas. The State did not stipulate that Stout qualified as an expert in accident reconstruction. Similarly, the State stipulated to Smith's "experience as outlined in his resume," but does not seem to have stipulated to his expertise in the area of accident reconstruction. Tr. July 15, 2005 hearing p. 80. The State's protestations to Stout and Smith's testimony and the reconstruction evidence—at trial and on appeal—do not focus on the witnesses' expert qualifications or lack thereof but, instead, on the similarity between the accident at issue and the reconstruction. Because neither party makes arguments regarding Stout and Smith's expert qualifications, and because the trial court did not exclude this evidence on the grounds that the witnesses were not experts, we will assume both were qualified experts as provided by the Indiana Evidence Rules. Similarly, we need not determine whether Stout or Smith properly testified as a lay witness pursuant to Indiana Evidence Rule 701.

testimony. Stout and Smith conducted the reconstruction using the same van and wheelchair that were involved in the incident and planned the reconstruction according to the speed limit and traffic patterns of the streets and intersection where the incident occurred.

Regarding the details of the reconstruction, Stout testified:

The purpose of our reconstruction or re-enactment was to show what the reaction would be of the wheelchair occupant in its proper position in the van that was involved. We did that with the passenger ... the front passenger seat in a forward position as far as it would go and then also we did the second runs with the seat back as far as it would go. The right front passenger seat. And by using the various speeds of twenty-five (25), thirty (30), thirty-five (35) and forty (40) miles per hour, we were able to record by video tape as well as visual observation, the reaction and movement of both the wheelchair and the occupant on a sudden, full brake stop, so that the wheels locked up and skidded. Observing that taking place at the various speeds, the reaction basically was the same. The wheelchair moved forward when the front seat was as far as it would go and of course the occupant of the wheelchair moved forward at the same time. And in all of the runs that we made, both with the front seat forward and front seat backward, as far as it would go, it resulted in that it would be impossible for the occupant of a wheelchair, regardless of the size and the physical handicap or condition, for that person to be thrown forward an[d] ejected out of the wheelchair. There just absolutely is no room that would allow that to take place and then for the occupant to come to final rest position laying face down, sprawled out on the floor of the car, it could not happen. It ... even if the occupant would be thrown to its left or right, there's just no way that it would be ejected out of that chair.

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The reason for it is there's just simply no room between the chair ... the front of the chair and the seat of the automobile,

that a body could get down into the area of the floor of the vehicle. It just absolutely is not possible.

Tr. July 15, 2005 hearing p. 51-52.

Stout further testified that in order for a person to unfasten the wheelchair's chest restraint and lap tray, "that person would have to leave the driver's seat to reach the necessary buckles and releases, or the tray." Id. at 64. Stout conceded that such actions "might be possible" from the driver's seat but that the task would be very difficult and would require two hands. Id. at 35.

Smith testified that, even though he believes it may have been possible for Christopher to fall from his wheelchair before the chair slid to the front of the van, he does not believe that there would have been space for Christopher to have fallen "clear to the floor." Id. at 75.

The gist of the State's argument is that B.-L.'s reconstruction evidence was not precise enough. This position is supported by testimony from William Hathaway, a police officer employed by the Ft. Wayne Police Department. At the July 15, 2005 hearing on the State's motion to exclude, Officer Hathaway echoed the State's objections to the reconstruction evidence citing "Too many variables." Id. at 104.

Specifically, the State argues that there is no evidence of how fast B.-L.'s van was traveling or how forcefully she applied the brake at the time of the incident. The State further argues that the subjects used in the reconstruction were not sufficiently similar to Christopher because they were "able-bodied" and did not have muscular dystrophy and because, unlike Christopher, they participated in the reconstruction knowing that the van

would come to an abrupt stop. Appellee's Br. p. 6. As such, the State contends that, unlike the handicapped, unaware Christopher, the test subjects could have braced themselves for the stop in a way that Christopher was physically incapable of doing or was not prepared to do. The trial court, too, determined that there existed too many variables in the reconstruction evidence, that the evidence would confuse the jury, and that it was not relevant.

On appeal, B.-L. relies on our opinion in Allen v. State, 813 N.E.2d. 349 (Ind. Ct. App. 2004), trans. denied and posits that any irregularities in the reconstruction evidence go to the weight of that evidence and not the admissibility. In Allen, a witness identified the defendant after claiming to have passed him while the two drove through an intersection. See id. at 364. At trial, Allen sought to introduce reconstruction evidence indicating that the identifying witness's observation could not have been made as she described. See id. at 365. In recreating the conditions surrounding the identification, Allen's expert witness "interpreted and duplicated the setting, using [the witness's] four pretrial statements to recreate the episode." Id. The State objected to the evidence arguing that the jury would be misled and that the reconstruction omitted variables testified to by the identifying witness, and the trial court excluded the reconstruction evidence. Id. On appeal, we concluded that the trial court abused its discretion by doing so. Id. at 366.

We defined reconstructive evidence as "evidence offered to recreate conditions substantially similar to those existing at the time of the issue being litigated." Id. at 364 (citation omitted). We continued:

Whether the conditions present at the time of the incident in question have been sufficiently duplicated is of critical concern for the admission of reconstructive evidence. However, it is not essential that the conditions be precisely reproduced in all their details, and any departure goes to the weight rather than the admissibility of the evidence.

Id.

Allen's reconstruction evidence was based on facts detailed by the identifying witness. The reconstruction made use of mid-sized vehicles similar to those described by the identifying witness. Those vehicles were then driven through the same intersection in which the witness claimed to have seen Allen, and the observations from the vehicles were videotaped. Id. at 365. We distinguished Allen's evidence from "those cases where random hypothetical questions were posed to a witness, none of which were based upon facts in evidence," and implicitly concluded that Allen's reconstruction evidence was "close enough." Id. We held that the exclusion of Allen's reconstruction evidence was an abuse of the trial court's discretion. We reach the same result here.

In this case, B.-L.'s reconstruction relied on details provided by Christopher during his deposition. Stout and Smith used the same van and wheelchair that were involved in the February 18, 2004 incident. They selected test subjects similar to Christopher in height and weight. Their tests took into account the traffic patterns particular to the streets and intersection along and through which B.-L. drove that day, and, based on the thirty mile per hour speed limit for the street on which the incident occurred they performed the reconstruction several times at varying speeds. The details of the reconstruction are substantially similar to the details of the actual incident.

Although there are clearly some variables unaccounted for—namely the precise speed at which B.-L. was driving, the rate of her deceleration at the intersection, and the manner in which a person with muscular dystrophy would have moved during the incident—these uncertainties must be weighed by the jury. They do not impact the admissibility of the evidence. We conclude that the trial court abused its discretion by excluding B.-L.’s reconstruction evidence on the grounds that it was confusing and too dissimilar from the actual incident.

We similarly conclude that the trial court’s exclusion of the reconstruction evidence because it lacked relevance was an abuse of discretion. Indiana Evidence Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” B.-L. contends that the reconstruction evidence illustrated “that the accident and injury could not have occurred as Christopher testified.” Appellant’s Br. p. 12. The probability that Christopher sustained his injuries in the manner asserted by the State is certainly a fact that could have affected the jury’s determination of B.-L.’s guilt. The reconstruction evidence was relevant.

For the foregoing reasons, we conclude that the trial court abused its discretion by excluding B.-L.’s reconstruction evidence. We further conclude that the trial court’s error was not harmless because its probable impact on the jury, in light of all the evidence in the case, was not so minor that B.-L.’s substantial rights were not affected. See Banks v. State, 839 N.E.2d 794, 797 (Ind. Ct. App. 2005). The State does not contend otherwise.

B.-L. and Christopher were the only two people who witnessed the incident at issue. At trial, B.-L. testified and denied the allegations against her. B.-L. further testified that, while she and Christopher were driving to his doctor's appointment, she missed a turn and had to tap her brakes. Immediately afterward, Christopher told her that his legs hurt but also said that they did not hurt "because of what just happened right now" but because he had hurt his legs at school. Tr. August 15-18, 2005 trial p. 708.

B.-L.'s testimony that Christopher's injuries were the result of some other accident was partially corroborated by testimony from her friend Peggy Marshland. Marshland testified that on the evening of the incident, she visited B.-L. and Christopher at their home and that Christopher communicated to her that his legs hurt. Marshland stated that she noticed his knees were swollen and that he had indentations above his knees. She further stated that Christopher told her that he had run into a table and that "he's been running into tables and so forth." Id. at 576.

Finally, B.-L. also presented testimony from radiologist Dr. Fouad Halaby. Looking at the X-rays taken of Christopher's legs taken a few days after the incident, Dr. Halaby testified that, in his opinion, the fracture to Christopher's right knee was between two and four weeks old—and he theorized that it was closer to four weeks old—at the time the X-rays were taken. Dr. Halaby further testified that the fracture to Christopher's right knee had already begun to heal and "didn't happen in the last three (3) days." Id. at 627. Dr. Halaby's testimony contradicted the testimony from the radiologists called by the State.

Clearly, B.-L. presented evidence that indicated Christopher had sustained his injuries in some way other than that to which he testified. However, B.-L.’s testimony was the only evidence directly contradicting Christopher’s account of the incident, and the reconstruction evidence was the only evidence establishing that Christopher could not have been injured in the manner set forth by the State. See Allen, 813 N.E.2d at 366. As such, that evidence was critical to B.-L.’s defense. See id. Accordingly, we reverse B.-L.’s convictions and remand for further proceedings consistent with this decision.

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

In an effort to assist the parties and the trial court in the event of a retrial, we briefly address what we view as the more complex of her two contentions based on Indiana Evidence Rule 404(b).<sup>3</sup> B.-L. argues that the trial court abused its discretion by not admitting her proposed evidence of Tom’s prior bad acts.

Indiana Evidence Rule 404(b) governs the admission of character evidence and 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 . . . .” The traditional purpose of that rule has been to protect a defendant from being convicted based on unrelated prior bad acts. Garland v. State, 788 N.E.2d 425, 428 (Ind. 2003). More recently, however, “[u]nder what has come to be called ‘reverse 404(b),’ courts have held that ‘a defendant

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<sup>3</sup> As we noted in our statement of the facts, there is some uncertainty as to what evidence of B.-L.’s own prior bad acts she objected to at trial. Because of this uncertainty, we do not address B.-L.’s contention that the admission of this evidence was either an abuse of discretion or fundamental error.

can introduce evidence of someone else’s conduct if it tends to negate the defendant’s guilt.” Id. at 430 (citations omitted).

Garland is helpful in understanding the application of Indiana Evidence Rule 404(b) to persons other than the defendant in a criminal case. In Garland, the defendant was charged with conspiracy to commit murder, and the State alleged that Garland aided, induced, or caused one of two other people to murder David Garland (“David”). Id. at 428. In an attempt to rebut the State’s theory of her accomplice liability and motive, Garland sought to introduce evidence indicating that James Lloyd had killed David, that he had acted alone, and that he had a motive for committing the crime. Id. Garland claimed that Lloyd and David had been involved in illegal dealings that went awry and that when David asked Lloyd for money he had previously paid Lloyd, Lloyd became angry and killed him. Id.

To buttress her theory and distance herself from the crime, Garland sought to introduce testimony from Stephen Joseph that he, like David, had been involved in an illegal enterprise with Lloyd, had angered Lloyd by requesting his money back, and that Lloyd subsequently threatened to “put a bullet in his head.” Id. (citation omitted).

On appeal, Garland argued that Joseph’s testimony regarding Lloyd’s prior bad acts should have been admitted because the facts of the Lloyd/Joseph and Lloyd/David encounters were “so strikingly similar that one can say with reasonable certainty that Mr. Lloyd committed both offenses.” Id. at 431 (citation omitted). Our supreme court rejected Garland’s assertion because Joseph’s and David’s encounters with Lloyd did not parallel each other closely enough. Id.

The Garland court cautioned that a similarity between the facts surrounding the men’s encounters with Lloyd was not enough; the test instead, “is whether the crimes are strikingly similar.” Id. The court then observed that Lloyd’s purported interactions with Joseph and David—the issuance of a threat and murder, respectively—did not constitute parallel crimes. Id. The court further observed that although Garland’s theory that David angered Lloyd would have provided Lloyd with a motive to kill David, Joseph’s angering Lloyd would not have provided Lloyd with a motive to kill David.

In essence, the Garland court held that reverse 404(b) evidence may be admissible where, with regard to resolving the ultimate question of a defendant’s guilt that evidence suggests that someone else had the motive, intent, level of preparation, plan, knowledge, identity, or absence of mistake or accident necessary to commit the crime for which the defendant is being tried. See Ind. Evidence Rule 404(b). In the event of a new trial, the trial court should be guided primarily by Garland in determining the admissibility of that evidence.

### **Conclusion**

The reconstruction evidence proposed by B.-L. bore sufficient similarity to the accident at issue, was relevant, and was critical to B.-L.’s defense. As such, the trial court abused its discretion by not admitting it. That error affected B.-L.’s substantial rights. We reverse and remand for further proceedings.

Reversed and remanded.

SULLIVAN, J., and ROBB, J., concur.