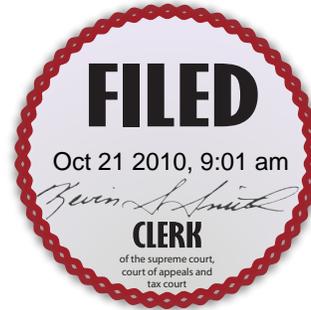


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KRISTINA BYERS-ESCOBEDO,)

Appellant-Defendant,)

vs.)

No. 71A05-1003-CR-208)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D02-0812-FB-167

October 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kristina Byers-Escobedo (“Mother”) appeals her conviction and sentence, following a jury trial, for class A felony neglect of a dependent.

We affirm.

ISSUES

1. Whether sufficient evidence supports Mother’s conviction.
2. Whether the trial court abused its discretion in admitting a photograph of two pieces of the victim’s fractured skull that had been removed during surgery into evidence.
3. Whether Mother received ineffective assistance of counsel.
4. Whether Mother’s sentence is inappropriate.

FACTS

Mother and Valentin Escobedo (“Father”) were married in 2003 and had two children: a son, O.E., who was born in August 2003, and a daughter, M.E., who was born in July 2006. When M.E. was first born, Mother and Father lived in Father’s parents’ house along with Father’s sister and her boyfriend.

During the evening on December 22, 2006, Father called Mother while she was at her job at an insurance company, where she worked from 3:00 p.m. to 11:00 p.m. Father told Mother that five-month-old M.E.’s left arm was swollen and that she was not moving it. Father told Mother that M.E. had been in her swing when he heard her cry out and then saw three-year-old O.E. run from the swing. Once Mother got home from work, she checked on M.E. as she slept. The following morning, Mother took M.E. to the Delpilar Medical and Urgent Care (“the Clinic”), where M.E. was a patient and had her well-child

visits. A nurse practitioner took an x-ray of M.E.'s swollen left arm, and the x-ray indicated that M.E.'s arm was not fractured. M.E. was diagnosed as having nursemaid's elbow, which is a "dislocation of the elbow from the ball and socket joint[.]" (Tr. 64). Dr. Frances Dwyer manipulated M.E.'s elbow back into place, put her arm in a sling, and told Mother to have M.E. rechecked later at the Clinic.

On January 2, 2007, Mother took M.E. to the Clinic and reported that M.E. suffered from chest congestion, breathing difficulties, and was still not moving her left elbow. Dr. Dwyer took an x-ray of M.E.'s elbow and saw a callous formation, indicating that there was a break in the bone. Dr. Dwyer then took a chest x-ray, which indicated that M.E.'s left eighth rib was also fractured. The x-rays indicated that the arm fracture was about one week old, while the fractured rib was a few weeks older. Because M.E. had broken bones at such a young age and was not yet capable of moving on her own, Dr. Dwyer became concerned about possible child abuse. Upon further examination, Dr. Dwyer found "a large bruise around the interior abdomen in the left upper quadrant" and "four resolving bruises" on M.E.'s back. *Id.* at 84. Dr. Dwyer diagnosed M.E. as having pneumonia and admitted her into St. Joseph Regional Medical Center ("St. Joe Med Center") where M.E.'s breathing could be monitored and an orthopedist could examine her elbow fracture.

While at the hospital, the orthopedist, Dr. Robert Clemency, examined M.E. and saw some bruising on her chest area. He also performed a skeletal survey of M.E. and found that she had a fractured left clavicle that was already in a healing stage. Given the fact that M.E. was only five and one-half months old and had three fractures in three parts

of her body that could not all be explained by a single fall, it was apparent to Dr. Clemency that child abuse was involved, and he contacted Child Protective Services, which is now known as the Department of Child Services (“DCS”).

On January 3, 2007, DCS case worker, Susan Cramer, was assigned to M.E.’s case upon DCS receiving a report that M.E. “had presented at her doctor’s office with broken bones that were not consistent with the explanation given.” *Id.* at 110. Cramer and a detective from the Family Violence Unit met with Mother and Father at the St. Joe Med Center. Cramer discussed with them the extent of M.E.’s injuries, told them that it was not likely that three-year-old O.E. had caused the injuries, and expressed the DCS’s concern that the injuries were the result of abuse at the hand of an adult. Mother did not have an explanation of how M.E. could have suffered all the fractures and told DCS that they were living in a house with Father’s family. DCS took M.E. into protective custody, opened up a case file, and placed her with her maternal grandmother in Shelbyville, Indiana.¹

After M.E.’s removal, Mother began investigating whether M.E. had osteogenesis imperfecta, or brittle bone disease. Mother obtained a referral from Dr. Dwyer to have M.E. examined at Riley Hospital. In April 2007, doctors at Riley examined M.E. and determined that she did not have brittle bone disease. Thereafter, in May 2007, Mother and Father moved out of Father’s parents’ house and into their own house.

As part of the proceedings with DCS, Mother and Father participated in supervised visitation with M.E. Mother and Father were also required to take a

¹ O.E. was not removed from the home and remained with Mother and Father.

polygraph test. DCS advised Mother that she had passed her polygraph test while Father had not and that there were concerns with the results of Father's test.²

On July 11, 2007, DCS returned M.E. to Mother. As a condition of M.E.'s return, Father was ordered not to live in the home. Father was, however, able to have supervised visitation. DCS kept M.E.'s case file open and conducted routine in-home visits. DCS also set up services for Mother and Father, including family counseling and parenting classes.

On September 9, 2007, Mother noticed that M.E., who was a little more than one year old, had some swelling in her mouth. Mother and Father took M.E. to St. Joe Med Center, and while checking in at the hospital, Mother informed the staff that Father was living at the same house with her and M.E. Upon determining that M.E. had swelling in her throat that could possibly constrict her airway, St. Joe Med Center transferred M.E. to Memorial Hospital, where Dr. David Sabato examined M.E., took an x-ray, and diagnosed M.E. as having a hematoma, or blood clot, in the soft tissue under her tongue and in the upper part of her neck. Dr. Sabato indicated that such an injury was "unusual" for a child of M.E.'s age, that it was not consistent with Mother's rationale that M.E. may have fallen while having a toy dinosaur in her mouth, and that "there was some suspicion that something wasn't quite right about this particular injury." *Id.* at 95.

On September 13, 2007, when DCS learned of the injury to M.E. and the possibility that Father might be living in the home with M.E., they removed M.E. from Mother's home and again placed her with her maternal grandmother in Shelbyville.

² During trial, the trial court advised the jury that they were to consider any testimony about the polygraphs only as it related to Mother's state of mind.

When DCS case worker, Tammy Reihl, questioned Mother about Father living in the home, Mother explained that she told the hospital personnel that Father lived with them “out of pride.” *Id.* at 166. DCS ordered Mother and Father to submit to psychiatric evaluations and continue with family counseling.

On November 21, 2007, DCS returned M.E. to Mother’s home with the continued condition that Father not live in the house with M.E. By January 16, 2008, Father was allowed to move back into the home. DCS continued to conduct routine in-home visits and eventually closed M.E.’s case file on June 11, 2008.

Two weeks later, around June 27, 2008, Father called Mother while she was at work and told her that M.E. had fallen out of her crib and was not moving her right arm. Mother checked M.E.’s arm when she got home from work and saw that M.E. could not extend her arm. Mother did not immediately seek medical treatment but instead asked Lesley Pemberton, one of her friends who was studying nursing, to look at M.E.’s arm. Pemberton told Mother that she needed to have M.E.’s arm x-rayed. Mother told Pemberton that she was going to take M.E. to a doctor in the Nappanee area because “she was scared that if [DCS] got wind about another injury or something that they would potentially investigate the situation again.” *Id.* at 273.

Rather than seeking treatment locally, on June 28, 2008, Mother drove M.E. 156 miles from South Bend to the emergency room at Hancock Regional Hospital in Greenfield, Indiana to have her right arm checked. Mother testified that she took M.E. to Hancock Regional Hospital because she was “scared that [DCS] would take [M.E.] away like they did before.” *Id.* at 705. There, Mother told the emergency room doctor that

M.E. had fallen out of her crib. The doctor examined and took an x-ray of M.E.'s arm. The doctor did not see a fracture and diagnosed her as having a dislocated elbow or nursemaid's elbow.

Later in the Summer of 2008, Father called Mother at work to tell her that M.E. had gotten her leg stuck in her crib and was dangling from the crib. Mother did not seek treatment for M.E.'s injured leg. Mother told M.E.'s babysitter, Lisa Rupert, that M.E. had injured her leg and was favoring it. When babysitting, Rupert noticed M.E. limping on her leg for approximately one week. Although M.E. was able to walk on her leg, Rupert ended up carrying M.E. because she did "not want to go far." *Id.* at 305.

In October 2008, Father again called Mother at work and reported that M.E. had tripped, fallen, and gotten a black eye. Before taking M.E. to the babysitter, Mother called Rupert to tell her about M.E.'s black eye. M.E.'s bruise was very visible and extended from her eye bridge to her nose and down to her cheek bone. One day, after M.E. had suffered the black eye, Rupert took M.E. with her on some errands, and four or five people commented on the condition of M.E.'s eye.

In November 2008, while babysitting M.E., Rupert noticed that M.E. was limping again, favoring one leg, and not wanting to walk. Upon Rupert's questions to Mother about M.E.'s limp, Mother said that she and Father had noticed it but thought that M.E. was doing it just to get attention and so that someone would carry her. At one point during this time period, M.E. was unable to stand and bear weight on her injured leg when Rupert was trying to put on M.E.'s shoes. Rupert informed Mother about M.E.'s inability to bear weight on her leg and told Mother that she needed to take M.E. to a

doctor to have it checked. Mother told Rupert that she would take M.E. to the doctor, but she did not.

On December 2, 2008, Mother worked during the day. That evening, around 7:15 p.m., Mother left the house to go to the gym and a movie with some friends while Father stayed at home to take care of and make dinner for M.E. and O.E. When Mother left the house, M.E. was laughing and watching television with O.E. Around 10:30 p.m., as Mother was driving home from the movie theatre, she called Father to check on the children and to see if he wanted her to get him something to eat. Mother went to a drive-through restaurant, returned home, and was sitting in her car in the driveway when she received a phone call from Father. He told Mother that M.E. had vomited and that he needed help cleaning her up. When Mother walked into the house, Father was sitting on the sofa holding M.E., who was wearing only a diaper and was wrapped in a blanket. As Mother was stroking M.E.'s hair, she noticed that M.E. had a bump on her head and realized that M.E. was not waking up and she was unresponsive. Father then pointed out that M.E. had a scrape on her chin. When Mother asked what had happened, Father told her that he did not know. He said that he was in the living room when he heard M.E. throw up, went to check on her, and saw her lying there in her crib. He said that he tried to clean her up but she did not want to wake up. Mother saw that M.E.'s head had some swelling and told Father that they needed to take M.E. to the hospital.

Mother and Father took O.E. to Father's parents' house and then drove M.E. to the emergency room at St. Joe Med Center, where they arrived around 11:30 p.m. Upon arriving at the hospital, M.E. was limp and still unresponsive. She had swelling on her

head that continued to get larger. Mother was “crying uncontrollably” and “just kept repeating over and over [that M.E.] must have hit her head.” *Id.* at 403. Father had “no affect” and “no emotion” and “just kind of stood there.” *Id.* at 425. Mother told medical personnel that M.E. may have hit her head while falling inside her crib. Mother recounted to medical personnel Father’s explanation of hearing M.E. vomiting but then lied by telling them that she was in the house when M.E. was vomiting. However, Mother later told police that she had lied to hospital personnel about being in the house with Father because she was afraid they would blame Father for M.E.’s injuries due to her previous fractures and injuries and she wanted to protect Father.

Upon examining M.E., the emergency room doctor, Dr. Dejong, saw that the right side of M.E.’s head was swollen, indicating that she had pressure built up inside her brain. Dr. Dejong performed a CT scan, which indicated that M.E. had a skull fracture on the right side and a subdural hematoma. The skull fracture was “quite large,” measuring fourteen centimeters, and extended from the frontal region, through the parietal region, and into the temporal region. *Id.* at 533. M.E.’s head injury was extremely severe and was indicative of a high-speed or high-velocity impact such as a car crash. Dr. Dejong intubated M.E. and contacted a neurosurgeon at Memorial Hospital, where M.E. could be transferred for emergency surgery to release the pressure on her brain. Dr. Dejong told Mother and Father that M.E.’s condition was grave and that she needed to be transferred immediately to Memorial Hospital, which had a pediatric intensive care unit (PICU).

Once at Memorial Hospital emergency room, Mother again told medical personnel that she was present when M.E. was vomiting. Specifically, Mother told the PICU nurse that she put M.E. to bed that night, heard a noise, went back into the bedroom to check on M.E., and saw that she had vomited and had some marks on her face that were not there before she put her to bed.

A neurosurgeon, Dr. Stephen Smith, performed emergency surgery on M.E. and removed a portion of her skull to accommodate the brain swelling. While in the surgery waiting room, Dr. Matthew Gullone told Mother and Father that M.E.'s skull was fractured from back to front, that her brain was swollen outside of her skull, and that she had some bruising on her face. In response to the questions about how this could have occurred, Mother again said she was at the house at the time of M.E.'s injury and explained that they heard a noise and that Father went to check on M.E. and found her lying in her crib with vomit on her. When the doctor explained to Mother that M.E. could not have sustained such a skull fracture or brain injury from what Mother described, Mother stuck to her story and continued to say that she did not know what happened.

After surgery, M.E. was placed on a breathing machine and transferred to the PICU. While in the PICU, doctors performed additional CT scans and x-rays of M.E. to check for additional injuries. The tests revealed that M.E. had several old rib fractures on the right side, an old fracture on her right humerus, as well as old fractures on both legs around her knees. A physical examination of M.E. also revealed that she had several newer bruises on and around her face, a small bruise on the left side of her face that was

at least a couple days old, as well as some bruises in a later state of healing on her back, in her labial area, and on the right side of her chest.

Because M.E.'s head injury was "suspicious"—in that Mother and Father's story that M.E. had been sleeping in her bed did not match up with the severity of her head injury—St. Joseph police officers were called in to investigate. *Id.* at 346. DCS was also called in as part of the investigation and placed M.E. in protective custody.

On December 3, 2008, around 2:30 p.m., Mother went, accompanied by her attorney, Bill Stanley, to the St. Joseph Police Department to speak with homicide detectives James Taylor and Brian Young. At the beginning of the interview, Detective Taylor read Mother her *Miranda* rights and informed her that the room where they were conducting the interview contained an audio and video recorder that ran at all times. During the interview, there were a couple of times where Detective Taylor left the interview room and Mother spoke with her attorney. Some of Mother's conversations with her attorney were recorded.

That same day, around 5:30 p.m., M.E. was pronounced brain dead. M.E. was then taken into surgery so that some of her organs could be procured for transplantation purposes. Doctors were able to take and use M.E.'s heart and kidneys but they deemed her liver unfit for transplantation because it was damaged by scar tissue from a previous injury that would have been traumatic in nature or caused by a blunt force impact. A later autopsy of M.E. indicated that she had healing bruises of four of her right ribs. The autopsy also indicated that M.E.'s death was from a cranial cerebral trauma and that the manner of death was homicide.

The State ultimately charged Mother with class A felony neglect of a dependent. A jury trial was held from January 25-29, 2010. During the testimony from the forensic pathologist, Dr. Joseph Prahlow, the State moved to introduce into evidence Exhibit 11, which is a photograph depicting two pieces of M.E.'s fractured skull that were removed from M.E. during surgery and that were lying on a table next to a ruler. Mother objected to the admission of Exhibit 11, arguing that it was prejudicial and was cumulative of Dr. Oranu and Dr. Smith's testimony. The trial court overruled the objection and admitted the photograph into evidence. In doing so, the trial court specifically ruled that the photograph helped to illustrate one of the doctor's testimony about the linear aspect of the fracture as well as the length of the fracture.

During trial, various doctors discussed M.E.'s injuries and treatment while referring to State's Exhibits 2-10, 12, and 15-18, which contained photographs of some of M.E.'s injuries. When the State moved to introduce these exhibits, Mother's counsel stated that there was no objection. Mother's counsel also stated that there was no objection to admissibility of State's Exhibit 74, the videotape of the police interview with Mother.

Mother testified during the jury trial and stated that she had questioned Father about how closely he was watching M.E. but that she did not think that he was intentionally hurting her. Mother also testified that although she was aware that DCS had alleged that Father had abused M.E. and that M.E. had sustained several injuries while in Father's presence, she continued to allow Father to be around M.E. The jury found

Mother guilty as charged. The trial court sentenced Mother to the advisory sentence of thirty years executed in the Department of Correction.

DECISION

1. Sufficiency of Evidence

Mother argues that the evidence was insufficient to support her conviction.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

To convict Mother of class A felony neglect of a dependent as charged, the State was required to prove beyond a reasonable doubt that Mother, who was at least eighteen years old, having the care of M.E., knowingly placed M.E. in a situation that endangered her life or health and resulted in the death of M.E., who was less than fourteen years of age. *See* Ind. Code § 35-46-1-4; App. at 19.

Mother contends the evidence is insufficient to show that she knowingly placed M.E. in a dangerous situation that resulted in her death. Indiana Code section 35-41-2-2(b) provides that “[a] person engages in conduct ‘knowingly’ if, when [s]he engages in the conduct, [s]he is aware of a high probability that [s]he is doing so.” Our Indiana

Supreme Court has further explained that “knowingly” within the context of the child neglect statute “is that level where the accused must have been subjectively aware of a high probability that [s]he placed the dependent in a dangerous situation.” *Armour v. State*, 479 N.E.2d 1294, 1297 (Ind. 1985). Because such a finding requires resort to inferential reasoning to ascertain the defendant’s mental state, we must look to all the surrounding circumstances of a case to determine if a guilty verdict is proper. *Scruggs v. State*, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008), *reh’g denied, trans. denied*.

Here, the evidence reveals that M.E., during her short two-year lifetime, had sustained a series of multiple injuries that seemed to have always occurred while she was in Father’s care. First, while five-month-old M.E. was in Father’s care, she sustained a left arm injury that was later determined to be fractured. When this fracture was diagnosed, doctors also discovered that M.E. had a prior fractured eighth rib and a fractured clavicle. As a result of these fractures, doctors suspected abuse and contacted DCS. Susan Cramer, the DCS case worker assigned to M.E.’s case, met with Mother and Father, discussed with them the extent of M.E.’s injuries, told them that it was not likely that three-year-old O.E. had caused the injuries, and expressed DCS’s concern that the injuries were the result of abuse at the hand of an adult. Mother and Father submitted to a polygraph exam, and Mother was told that Father did not pass his test. Mother testified that she was aware that DCS had alleged that Father was the one who had injured M.E. Indeed, DCS returned M.E. to Mother’s custody upon the specific condition that Father not live in the house with them. Mother also testified that after M.E. was first injured,

one of her friends asked Mother if she thought that Father could have injured M.E., and Mother stated that she did not think so.

Not long after DCS returned M.E. to Mother's care, allowed Father to return to the house, and closed M.E.'s case file, then almost two-year-old M.E. sustained another arm injury while in Father's care. Father told Mother that M.E. injured her arm when she fell out of the crib. Despite the fact that M.E. could not extend her arm, Mother did not immediately seek medical treatment because she was afraid DCS would investigate again. After a friend told Mother she needed to get an x-ray of M.E.'s arm, Mother refused to take M.E. to a South Bend hospital and chose instead to drive 156 miles to a Greenfield hospital to have M.E.'s arm checked.

Furthermore, there were various times when M.E. was injured and Mother did not seek medical treatment for M.E.'s injuries. In the Summer of 2008, M.E. sustained yet another injury while in Father's care. This time she suffered a leg injury, which Father told Mother had occurred when M.E. got her leg stuck in the crib. Mother did not seek treatment for M.E.'s injured leg despite the fact that M.E. was limping and favoring one leg. In October 2008, M.E. got a black eye while in Father's care. Father told Mother that M.E. had tripped, fallen, and gotten a black eye. Then, in November 2008, which was just one month before M.E.'s fatal injury, M.E. was again limping, favoring one leg, and not wanting to walk. M.E.'s babysitter questioned Mother about M.E.'s limp, and Mother said that she and Father had noticed it but thought that M.E. was doing it just to get attention. The babysitter told Mother that M.E. was unable to bear weight on her leg and that she needed to take M.E. to a doctor to have it checked. Mother told the

babysitter that she would take M.E. to the doctor, but she did not. Tests conducted at the time of M.E.'s fatal head injury later revealed that M.E. had fractures on both legs around or under her knees, and a doctor testified that these injuries to her legs would have been painful and caused her to limp.

M.E.'s last injury while in Father's care ultimately led to her death. On December 2, 2008, Mother left M.E. in Father's care for a few hours. When Mother left the house, M.E. was laughing and talking, and when she returned, M.E. was unresponsive and had a bump on her head and a scrape on her chin. Father told Mother that M.E. had just thrown up. Upon arriving at the hospital, Mother told medical personnel that M.E. may have hit her head while falling inside her crib, and she further lied by telling them that she was in the house when M.E. was vomiting. Mother admitted to the police, and later testified at trial, that she lied to hospital personnel about being in the house with Father because she thought they would blame Father for M.E.'s injuries due to M.E.'s previous fractures and injuries and she wanted to protect Father.

Mother was aware that M.E. had been injured multiple times while in Father's care. Mother testified that she questioned Father as to how closely he was watching M.E. Mother knew that DCS had alleged that Father had abused M.E. Additionally, some of Mother's friends had also expressed concerns about Father and M.E.'s numerous injuries. Nevertheless, Mother repeatedly left M.E. in Father's care. When M.E. continued to get injured, Mother protected Father from any type of scrutiny by taking M.E. outside the area for treatment; not taking M.E. for treatment; and lying to medical personnel.

There is evidence from which the jury could have reasonably inferred that Mother was subjectively aware of a high probability that she was placing M.E. in a dangerous situation by leaving her alone with Father. Although Mother testified that she did not think that Father was abusing M.E., she also testified that she was concerned about his care of M.E. Despite M.E.'s multiple incidents of injuries while in Father's care, allegations by DCS that Father had abused M.E., and statements by her friends expressing concern about whether Father had injured M.E., Mother continued to leave M.E. alone with Father, ultimately resulting in the injury which killed M.E. We conclude that a jury could reasonably have drawn inferences from the evidence that Mother knowingly placed M.E. in a dangerous situation that resulted in her death. The evidence was sufficient to convict M.E. of class A felony neglect of a dependent, and we will not reweigh the evidence. Accordingly, we affirm Mother's conviction.

2. Admission of Evidence

Mother argues that the trial court erred in admitting Exhibit 11 into evidence over her objection.

Our Indiana Supreme Court has explained our standard of review for a challenge to the admission of evidence as follows:

Because the admission and exclusion of evidence falls within the sound discretion of the trial court, this Court reviews the admission of photographic evidence only for abuse of discretion. Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Evid. R. 403[.] Even gory and revolting photographs may be admissible as long as they are relevant to some material issue or show scenes that a witness could describe orally. Photographs, even those gruesome in nature, are admissible if they act as interpretative aids for the jury and have strong probative value.

Corbett v. State, 764 N.E.2d 622, 627 (Ind. 2002) (case citations and internal quotation marks omitted).

At trial, the State moved to admit Exhibit 11—a photograph depicting two pieces of M.E.’s fractured skull that were removed during surgery—into evidence. Mother objected to the admission of Exhibit 11, arguing that it was prejudicial. When overruling Mother’s objection, the trial court specifically ruled that the photograph helped to illustrate one of the doctor’s testimony about the linear aspect of the fracture as well as the length of the fracture. On appeal, Mother contends the photograph was prejudicial and had no probative value.³

Here, the photograph was not especially gruesome as it merely depicts two pieces of M.E.’s skull removed during the surgery and does not reveal any brain matter. Furthermore, the photograph of skull pieces also helped to illustrate testimony from various doctors about the nature and length of the fracture. Generally, photographs that depict a victim’s injuries or demonstrate the testimony of a witness are admissible. *Ward v. State*, 903 N.E.2d 946, 958 (Ind. 2009), *adhered to on reh’g*, 908 N.E.2d 946 (Ind. 2009), *cert. denied*, 130 S.Ct. 2030 (2010). Because Mother has not demonstrated that the photograph was unduly prejudicial, we conclude that the photo was properly admitted.

³ Mother also argues that the photograph of the skull fracture was not relevant under Evidence Rule 401. Because Mother did not raise a relevancy argument at trial, she has now waived any such argument on appeal. See *White v. State*, 772 N.E.2d 408, 411 (Ind. 2002) (explaining that a defendant may not object on one ground at trial and raise a different ground on appeal).

3. Ineffective Assistance of Counsel

Mother argues that she received ineffective assistance of both pre-trial counsel and trial counsel.⁴

We evaluate claims concerning denial of the Sixth Amendment right to effective assistance of counsel using the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). A defendant must first show that his counsel's performance fell below an objective standard of reasonableness, and, second, that the deficiencies in the counsel's performance were prejudicial to the defense. *Id.* As to counsel's performance, we presume that counsel provided adequate representation. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference." *Id.* Furthermore, a defendant must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003). As to prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the

⁴ We pause to note the procedural effect of Mother bringing her claims of ineffective assistance of trial counsel on direct appeal. While this practice is not prohibited, a post-conviction proceeding is generally the preferred forum for adjudicating claims of ineffective assistance of counsel because the presentation of such claims often requires the development of new facts not present in the trial record. *See McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999); *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998), *reh'g denied, cert. denied*, 528 U.S. 861 (1999). If a defendant chooses to raise a claim of ineffective assistance of counsel on direct appeal, "the issue will be foreclosed from collateral review." *Woods*, 701 N.E.2d at 1220. This rule should "likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal." *Id.* When a claim of ineffective assistance of counsel is based solely on the trial record, as it is on direct appeal, "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[.]" and "[i]t is no surprise that such claims almost always fail." *Id.* at 1216 (quoting *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991), *cert. denied*, 500 U.S. 927 (1991)).

result of the proceeding would have been different.” *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability arises when there is a ‘probability sufficient to undermine confidence in the outcome.’” *Id.* (quoting *Strickland*, 466 U.S. at 694).

A. *Pre-trial Counsel*

Mother argues she received ineffective assistance of pre-trial counsel. On December 3, 2008, at approximately 2:30 p.m., Mother and her attorney, Bill Stanley, went to the St. Joseph Police Department to speak with Detectives Taylor and Young. Mother spoke with the detectives for approximately two hours. Later that same day, around 5:30 p.m., M.E. was pronounced brain dead. Two days later, on December 5, the State charged Mother with neglect of a dependent.

Mother contends that her pre-trial counsel was ineffective because he allowed her to speak with police prior to interviewing her and encouraged her to tell police the truth. The State argues that Mother cannot raise such ineffective assistance of counsel claim because her right to counsel had not yet attached. We agree with the State.

“It is well settled that the Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against defendant.” *Little v. State*, 475 N.E.2d 677, 683 (Ind. 1985); *see also Sweeney v. State*, 886 N.E.2d 1, 8 (Ind. Ct. App. 2008), *trans. denied, cert. denied*, 129 S.Ct. 506 (2008). “Adversarial proceedings against a defendant commence by way of filing a formal charge, indictment, information or arraignment.” *Wright v. State*, 593 N.E.2d 1192, 1199 (Ind. 1992). “[B]efore proceedings are initiated a suspect in a criminal investigation has no

constitutional right to the assistance of counsel.”” *Sweeney*, 886 N.E.2d at 8 (quoting *Davis v. United States*, 512 U.S. 452, 457 (1994)); *see also Sweeney v. State*, 704 N.E.2d 86, 106 (Ind. 1998). Consequently, where a defendant’s right to counsel has not attached, neither does his right to effective assistance of counsel. *Sweeney*, 704 N.E.2d at 106.

Here, Mother, in the presence of her attorney, spoke to police before the State had filed any neglect of a dependent charge against her. Thus, her right to counsel and her right to effective assistance of counsel had not attached. *See Sweeney*, 704 N.E.2d at 106. Accordingly, she cannot now assert a claim of ineffective assistance of pre-trial counsel.

B. *Trial Counsel*

Mother argues that trial counsel, Michael Tuszynski,⁵ was ineffective for: (1) failing to object to the portions of State’s Exhibit 74 that contained the videotaped conversations between Mother and Attorney Stanley and the opinion of Detective Taylor; and (2) failing to object to the admission of the photographs of M.E.’s injuries.

i. Recorded Police Statement

Mother contends that trial counsel should have objected to portions of State’s Exhibit 74, which was the videotape of the police interview with Mother on December 3, 2008. Despite the fact that Mother’s pre-trial attorney was sitting in the interview room when the detective told them that all conversations in the room were audiotaped and videotaped, Mother contends that her pre-trial counsel was unaware that his conversations with Mother were recorded. She first argues that her trial counsel was

⁵ Attorney Tuszynski and Attorney Stanley are partners at the same law firm.

ineffective for failing to object to or redact the portion of the recorded police interview that contains the conversation between Mother and her pre-trial attorney.

“Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference.” *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh’g denied, cert. denied*, 537 U.S. 839 (2002). “A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* When a defendant bases an ineffective assistance of counsel claim on counsel’s failure to object at trial, the defendant must show that a proper objection, if made, would have been sustained. *Jackson v. State*, 683 N.E.2d 560, 563 (Ind. 1997).

Here, Mother does not specify the proper objection trial counsel should have made to Exhibit 74. Assuming that she contends that trial counsel should have made an objection based on attorney-client privilege, she cannot show that such an objection would have necessarily been sustained. Our review of the record in this case reveals that Mother’s trial counsel and the prosecutor did redact a portion of the videotape at issue. While neither Mother nor the State mention this redaction, it is clear from viewing the videotape that ten minutes were redacted from the videotape. *See* Ex. 74 (noting skip in time from 15:38:27 to 15:48:30). Furthermore, a review of the transcript indicates that when the prosecutors and Mother’s attorney were discussing juror questions with the trial judge, they explained that the videotape had been redacted due to an “Attorney/client privilege issue” and that they had “agreed to edit” a portion of the recording where Mother’s pre-trial counsel had asked to speak to Mother while alone and unrecorded.

(Tr. 651). Counsel also agreed to a stipulation that was read to the jury that no inferences or conclusion should be drawn from the manner in which the tape was presented. (*See* Tr. 654-55).

Not only does the record indicate that Mother's pre-trial counsel was aware that all conversations in the room were being recorded, it also indicates that trial counsel was aware of any potential issues with the videotape but apparently made a trial strategy decision by not having the State redact the portions of the videotape that Mother now challenges. Based on the record before us, Mother has not met her burden of showing that trial counsel was ineffective.

Mother also contends that her trial counsel was ineffective for failing to object to the portion of the recorded interview that contained Detective Taylor's opinion and speculation. The record reveals that trial counsel agreed to a stipulation that instructed the jury about the use of such statements in Exhibit 74:

The defendant gave a statement to the police in this case. While giving her statement, others were present and may have expressed opinions or conclusions in response to and in conjunction with the defendant's testimony. You are free to consider the defendant's statement as you would any other witnesses's [sic] testimony. The opinions and conclusions made by others to the defendant as she was giving her statement are not testimony and may only be considered in the context for which the defendant was testifying.

(Tr. 518-19). Again, the record before us makes clear that trial counsel made a tactical decision regarding Exhibit 74, and Mother has not met her burden of proving that her trial counsel's strategy equated to deficient performance.

ii. Photographs of Injuries

Mother also contends that her trial counsel rendered ineffective assistance of counsel by failing to object to multiple photographs of M.E.'s injuries, specifically State's Exhibits 2-10, 12, and 15-18. Mother contends that if counsel would have objected to the photographs based on relevancy and prejudice, then the trial court would have sustained the objection. We cannot agree.

Generally, photographs that depict a victim's injuries or demonstrate the testimony of a witness are admissible. *Ward*, 903 N.E.2d at 958. During trial, various doctors discussed M.E.'s injuries and treatment while referring to State's Exhibits 2-10, 12, and 15-18. Because Mother has not shown that an objection to the photographs would have been sustained, she has not met her burden of showing that trial counsel's performance was deficient.⁶

Indeed, we assess counsel's performance based on facts that are known at the time and not through hindsight. *Shanabarger v. State*, 846 N.E.2d 702, 709 (Ind. Ct. App. 2006), *trans. denied*. When considering whether counsel's performance was deficient, "the question is not whether the attorney could--or even should--have done something

⁶ As part of Mother's contention that trial counsel was ineffective for failing to object to the photographs, she points to the trial court's comments to the prosecutor reminding him to avoid the prolonged viewing of the photographs of M.E.'s injuries and the trial court's acknowledgment that Mother was upset by viewing the photographs. Mother contends that these comments reveal that the jury could have been emotionally swayed by viewing the photographs. We note, however, that both of these comments were made outside the presence of the jury—one during a sidebar and the other while the jury was out of the courtroom—and the fact that a photograph may possibly be disturbing does not necessarily mean that it is inadmissible. *See Pruitt v. State*, 834 N.E.2d 90, 118 (Ind. 2005) (finding that although a photograph of the victim was disturbing to some jurors, the trial court was within its discretion when admitting it into evidence), *reh'g denied, cert. denied*, 548 U.S. 910 (2006).

more[.]” rather “the inquiry must focus on what the attorney actually did[.]” *Reed*, 866 N.E.2d at 769.

Here, the record suggests that Mother’s counsel’s decision not to object to the photographs was strategic and was a means of helping streamline the issues during this five-day trial. Prior to trial, the State and Mother’s counsel discussed with the trial judge the photographs that would be potentially admitted into evidence. They discussed the fact that Mother’s counsel would be objecting to Exhibit 11, but Mother’s counsel explained the following in regard to the other photographs:

I should just say briefly for the record, with respect to the foundational issues . . . , I, of course, had the opportunity to review the discovery materials provided by the [S]tate and speak with several of the witnesses prior to trial, and I have a firm belief that there is nothing inadmissible with respect to the information, whether it be testimonial, whether it be illustrative or documentary, and it really did I think sort of streamline the issues for the trial any way by eliminating the need for several of the foundational witnesses which I have a firm belief the state could produce a foundation. I’ve discussed that with [Mother].

(Tr. 16).

Also, when the State moved to introduce Exhibits 15-18, Mother’s counsel stated, “If I could just make a quick record. I had the opportunity to review exhibits 15 through 25, prior to trial. I have no objection. For the record, I’ve had the opportunity to review these with my client prior to trial, as well.” *Id.* at 467. Mother’s counsel also specifically stated that there was no objection to the Exhibits 2-10 and 12. Because counsel is afforded “considerable discretion in choosing strategy and tactics,” we cannot say that counsel’s decision not to object to the photographs constituted deficient performance.

4. Inappropriate Sentence

Mother argues that the advisory thirty-year sentence for her class A felony neglect of a dependent conviction is inappropriate because she had no criminal record and she was not likely to reoffend.⁷

We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Regarding the nature of Mother's offense, the evidence reveals that Mother was aware that M.E. suffered multiple injuries, including fractures, while in Father's care. M.E.'s injuries were extensive to the point that DCS removed her from Mother's care. According to Mother, she questioned Father as to how closely he was watching M.E., but she continued to leave her in Father's care. Mother also attempted to protect Father and avoid further DCS involvement by either taking M.E. for treatment in a faraway hospital or not taking M.E. for treatment at all.

⁷ Mother also contends that the trial court should have given her lack of criminal history more mitigating weight. Pursuant to *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), the relative weight or value assigned to mitigators is not subject to our review for abuse of discretion. Thus, we cannot address Mother's contention about the weight of this mitigator.

Mother also refers to Indiana Constitution Article I, § 18 and suggests that her sentence is not aimed at rehabilitation and does not reflect the principles of reformation contained in Indiana Constitution Article I, § 18. Our Indiana Supreme Court has explained that this section "applies only to the penal code as a whole, not to individual sentences." *Henson v. State*, 707 N.E.2d 792, 796 (Ind. 1999). To the extent Mother attempts to apply Section 18 to the specific circumstances of her case, her claim is not cognizable. See *Ratliff v. Cohn*, 693 N.E.2d 530, 542 (Ind. 1998) ("[s]uch particularized, individual applications are not reviewable under Article 1, Section 18 because Section 18 applies to the penal code *as a whole* and does not protect fact-specific challenges"), *reh'g denied*.

During the sentencing hearing, the trial court extensively reviewed the nature of the offense by going through M.E.'s multiple and ongoing injuries as well as Mother's "very deliberate actions and inactions." (Tr. 971). The trial court especially noted the troubling aspect of the "breadth and nature of the injuries that that little girl [M.E.] endured from the time she was returned to [Mother] and the [DCS] closed out its case in June of 2008, until her death" in conjunction with the youthful age of M.E., which made her totally dependent on Mother and the choices she made. *Id.* at 975.

Turning to Mother's character, the record reveals that Mother did not have a criminal history, was college educated, and had a steady employment history. At the same time, Mother's character is also revealed by her actions and inactions when dealing with M.E.'s injuries. Both aspects were discussed in detail by the trial court during sentencing. The trial court recognized Mother's contention that she acted to protect her family but pointed out that Mother did "not protect[] the one person too young and too vulnerable to protect herself." *Id.* at 976. Mother apparently wrote a letter to the trial court and attached it to the presentence investigation report, and she had numerous people submit letters of support to the trial court on her behalf. While Mother has not included a copy of the presentence investigation report or any of the letters in her Appellant's Appendix, the sentencing transcript reveals that these were read and considered by the trial court. Indeed, prior to imposing Mother's sentence, the trial judge stated that she had "spent hours trying to decide what to do, reviewing [her] notes, reviewing the letters, reviewing everything[.]" *Id.* at 977. The sentencing transcript reveals that the trial judge thoughtfully considered Mother's character and the nature of the offense, which it found

to be particularly disturbing. During the sentencing hearing, the trial judge reiterated that she had “spent a lot of time thinking about [Mother’s] case” and explained to Mother that the trial judge’s “job [was] to decide what the appropriate sentence should be, based on the conviction . . . entered following the determination of the jury that [Mother] w[as] guilty of the class A felony neglect[.]” *Id.* at 969-70. Here, the trial court determined the appropriate sentence to be the advisory term of thirty years.

While Mother’s lack of criminal history is certainly a factor of some import in regard to her character, so too are her actions and inactions—which resulted in ongoing and extremely serious injuries during her young daughter’s short lifetime—factors that cannot be ignored when reviewing her character and nature of the offense. Given the nature of the offense, character of the offender, and the record before us, we conclude that the advisory thirty-year sentence imposed by the trial court was not inappropriate.

Affirmed.

BRADFORD, J., and BROWN, J., concur.