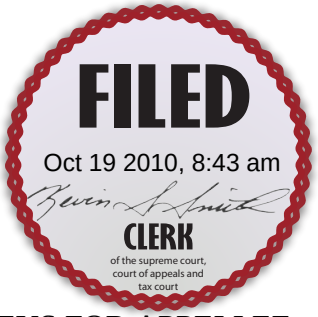

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IN THE
COURT OF APPEALS OF INDIANA

CARLA JOHNSON and MICHAEL JOHNSON,	)	
	)	
Appellants/Defendants,	)	
	)	
vs.	)	No. 49A05-0911-CR-651
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause Nos. 49G04-0802-FB-36883; 49G04-0802-FB-36889

October 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Carla Johnson appeals from her convictions for Class B felony Neglect of a Dependent[1] ("neglect") and Class B felony Battery.[2] Appellant/Defendant Michael Johnson appeals from conviction for Class B felony neglect. Carla and Michael contend that the charging information was deficient in failing to charge them with Class B felony neglect with sufficient specificity to guard against future prosecution based on the same conduct. Carla and Michael also contend that the State failed to produce sufficient evidence to sustain any of their convictions. We affirm.

FACTS

S.J. was born on July 24, 2006, to Carla and Michael. At some point prior to July 21, 2007, Rosie Beard, the Johnsons' daycare provider, noticed that S.J. had a swollen finger on his right hand and mentioned it to Carla. Carla took S.J. to the doctor after a delay of a couple of days. Beard was also concerned that S.J. was not attempting to crawl or stand up like other children his age, and she shared her concerns with the Johnsons. The "majority of the time" that Beard changed S.J.'s diaper, he was "screaming bloody murder" and would scream if one of his hips was touched. Tr. p. 502. One day when Michael came to collect S.J., Beard noticed that S.J. crawled to him on his elbows instead of his hands.

On July 21, 2007, the Johnsons took S.J. to the emergency room at Riley Children's Hospital in Indianapolis. S.J. had a swollen shoulder and lack of mobility in his arm. S.J.'s x-rays revealed multiple injuries in various stages of healing. Dr.

[1] Ind. Code § 35-46-1-4 (2007).

[2] Ind. Code § 35-42-2-1 (2007).

Matthew Wanner ultimately found irregularities caused by fractures in S.J.'s left shoulder, right forearm, scapula, left and right fingers, left and right humeruses, left and right tibias, and left and right femurs. Dr. Wanner found no evidence of a bone disorder that could have caused or contributed to the fractures and concluded that S.J.'s injuries were caused by non-accidental trauma.

Carla and Michael explained that S.J.'s shoulder had been injured on July 20, 2007, when his arm became caught between some boxes in the garage. Carla, however, told her sister-in-law that S.J.'s arm was injured when he grabbed a doorframe inside the house and told S.J.'s older sibling A.J. that S.J. was injured in a fall.

On February 11, 2008, the State charged both of the Johnsons with Class B felony neglect; Carla with Class B felony battery and Class D felony neglect; and Michael with two counts of Class D felony neglect. A jury found Carla guilty of Class B felony neglect and Class B felony battery and Michael guilty of Class B felony neglect. On October 16, 2009, the trial court sentenced Carla to an aggregate sentence of six years to be served on electronic monitoring and sentenced Michael to six years of incarceration, all suspended with three years suspended to probation.

DISCUSSION AND DECISION

I. Whether the Portion of the Charging Information Charging the Johnsons with Class B Felony is Deficient so as to Constitute Fundamental Error

The Johnsons were both charged with Class B felony neglect in Count I, which reads as follows:

> CARLA JOHNSON and MICHAEL JOHNSON, ON OR BETWEEN 07/24/2006 and 07/24/2007, having the care of [S.J.], a

> dependent ELEVEN (11) MONTHS OLD years [sic] of age, did knowingly place [S.J.] in a situation that did endanger the life or health of [S.J.], that is: FAILING TO SEEK MEDICAL TREATMENT FOR [S.J.], and that [S.J.] did suffer serious bodily injury as a result of this failure, that is: permanent or protracted impairment or loss of the function of a bodily member or organ and/or extreme pain[.]

Appellant's App. pp. 35-36.

The Johnsons contend that the above language does not adequately protect them from future prosecution for the same conduct that gave rise to the instant Class B felony neglect convictions. Having failed to object in the trial court on this basis, the Johnsons contend that the charging information constitutes fundamental error. Fundamental error is "error so egregious that reversal of a criminal conviction is required even if no objection to the error is registered at trial." *Hopkins v. State*, 782 N.E.2d 988, 991 (Ind. 2003). The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible. *Krumm v. State*, 793 N.E.2d 1170, 1181-82 (Ind. Ct. App. 2003). Fundamental error requires prejudice to the defendant. *Hopkins*, 782 N.E.2d at 991.

The Johnsons claim of fundamental error must fail, as they cannot establish that the instruction has prejudiced them. Even if the instruction is erroneous and leaves the Johnsons vulnerable to future convictions in violation of prohibitions against double jeopardy, those convictions have not yet occurred, and there is no indication that they ever will. In any event, "it is the record, not just the indictment or information, which provides protection from subsequent prosecutions for the same offense[.]" *Phillips v. State*, 499 N.E.2d 803, 805 (Ind. Ct. App. 1986). Should the State ever attempt to charge

the Johnsons in the future with crimes arising from the same conduct at issue here, they may rely on the record to advance a double jeopardy defense. *See Buzzard v. State*, 712 N.E.2d 547, 551-52 (Ind. Ct. App. 1999), *trans. denied*. The Johnsons have failed to establish that the charging information to Charge I constituted fundamental error.

II. Whether the State Produced Sufficient Evidence to Sustain the Johnsons' Convictions

Our standard of review for challenges to the sufficiency of the evidence supporting a criminal conviction is well-settled:

> In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the [finding of guilt] and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable [finder of fact] could have found Defendant guilty beyond a reasonable doubt.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted).

A. The Johnsons' Neglect Convictions

In order the convict the Johnsons of Class B felony neglect, the State was required to establish that they knowingly or intentionally placed S.J. in a situation that endangered his life or health and resulted in serious bodily injury. *See* Ind. Code § 35-46-1-4(a)(1); -4(b)(2). The Johnsons contend only that the State failed to prove that they knew or should have known that S.J. required medical attention that they failed to seek.

> Under the dependent neglect statute, the level of culpability required for knowing behavior "is that level where the accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation." *Armour v. State*, 479 N.E.2d 1294, 1297 (Ind. 1985) (applying Ind. Code § 35-41-2-2). Proof of this subjective awareness requires resort to inferential reasoning to ascertain the defendant's mental state. *Barrett v. State*, 675 N.E.2d 1112, 1116 (Ind. Ct. App. 1996);

> *Kellogg v. State*, 636 N.E.2d 1262, 1265 (Ind. Ct. App. 1994); *Hill v. State*, 535 N.E.2d 153, 154 (Ind. Ct. App. 1989). When there are symptoms from which the average layperson would have detected a serious problem necessitating medical attention, it is reasonable for the jury to infer that the defendant knowingly neglected the dependent. *Hill*, 535 N.E.2d at 155. Also, in the context of care of a dependent, we have said that "'[n]eglect is the want of reasonable care–that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind....'" *White v. State*, 547 N.E.2d 831, 836 (Ind. 1989) (quoting *Eaglen v. State*, 249 Ind. 144, 150, 231 N.E.2d 147, 150 (1967)).

Mitchell v. State, 726 N.E.2d 1228, 1240 (Ind. 2000), *abrogated on other grounds by Beattie v. State*, 924 N.E.2d 643, 647 (Ind. 2010).

While we recognize that the Johnsons finally did seek medical treatment for S.J. following his final shoulder injury, we nonetheless conclude that the State produced sufficient evidence to establish that their failure to do so previously constituted knowingly placing him in a dangerous situation. Beard testified that S.J. usually screamed "bloody murder" when she changed his diaper or when his hip was touched; the jury was free to infer that he also did so when his parents changed him or touched his hip. S.J. was apparently feeling extreme pain when he should not have been, indicating the presence of some sort of injury. Beard also told the Johnsons that S.J. had a swollen finger (which turned out to be fractured) and that he did not attempt to crawl or stand up like other children his age. The jury was free to infer that the Johnsons noticed these things as well. Finally, the jury was free to infer that Michael witnessed S.J. crawl to him on his elbows instead of his hands, which is unnatural and a clear indication of hand injury. Taken together, the above constitutes evidence from which a reasonable layperson would conclude that S.J. required medical care, even before his final shoulder

injury, but did not receive it due to the inaction of his parents. The State produced sufficient evidence to sustain the Johnsons' neglect convictions.

B. Carla's Battery Conviction

In order to convict Carla of Class B felony battery, the State was required to prove that she knowingly or intentionally touched S.J. in a rude, insolent, or angry manner resulting in serious bodily injury and that she was over the age of eighteen and S.J. under the age of fourteen. Ind. Code § 35-42-2-1(a). Carla contends only the State failed to establish that she touched S.J. in a rude, insolent, or angry manner given that S.J. was not exclusively under her control.

Multiple doctors testified that S.J.'s injuries were the result of non-accidental trauma, which is inconsistent with all of the various explanations that Carla offered for S.J.'s injuries. Carla and Michael claimed that S.J.'s arm got caught between boxes in the garage while Carla also claimed that the injury was the result of S.J. grabbing an interior door frame or a fall. The jury was entitled to disbelieve all three versions and, indeed, infer deception from the fact that three versions even existed. Moreover, Carla admitted that S.J. was in her care when he sustained the shoulder injury that finally led the Johnsons to seek medical care. The jury was entitled to believe Carla's admission that S.J. was in her care when he was injured but disbelieve all of her explanations as to how. Carla notes that S.J. could have been injured while in Beard's care, but this is a possibility that the jury rejected and which we will not disturb. In light of Carla's admission that S.J. was in her care when he was injured, a lack of evidence that Beard did anything that might have caused the injuries, and the overwhelming evidence that S.J.'s

injuries were the result of non-accidental trauma, we conclude that there is sufficient evidence to sustain Carla's battery conviction. *See, e.g.*, *Wright v. State*, 818 N.E.2d 540, 548 (Ind. Ct. App. 2004) ("In light of Wright's admissions that he was Ma.W.'s primary caregiver, that they had few visitors, and that his wife never injured Ma.W., in conjunction with the State's evidence that Ma.W.'s fractures were the result of non-accidental trauma that had occurred on more than one occasion and Wright's inability to locate the family friend or uncle who supposedly caused Ma.W.'s fractured femur, we hold that there was sufficient evidence to sustain Wright's convictions on these counts."), *vacated on different grounds and summarily affirmed on relevant grounds by Wright v. State*, 829 N.E.2d 928, 930 (Ind. 2005). Carla's argument is nothing more than an invitation to reweigh the evidence, which we will not do.

We affirm the judgment of the trial court.

DARDEN, J., and BROWN, J., concur.