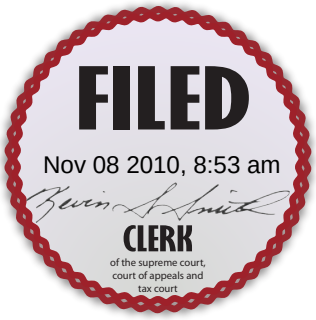

ATTORNEYS FOR APPELLANT:

MICHAEL J. ANDREOLI
JEFFREY S. JACOB
Andreoli & Jacob
Zionsville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BRANTON HOMSHER,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 54A01-1003-CR-116
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0803-FB-38

November 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Branton Homsher appeals from his convictions of and sentences for Class B felony Aggravated Battery[1] and Class B felony Neglect of a Dependant ("neglect").[2] Homsher raises the following issues:

I. Whether the trial court abused its discretion in denying his motion to correct error on the basis that it failed to investigate alleged improper communication between jurors and protestors congregated outside the courthouse;

II. Whether Homsher received ineffective assistance of trial counsel;

III. Whether the State produced sufficient evidence to sustain Homsher's convictions; and

IV. Whether the trial court abused its discretion in sentencing Homsher.

We affirm.

FACTS AND PROCEDURAL HISTORY

Branton Homsher and Elizabeth Rusk moved in together early in 2006, and M.H., their second child together, was born on January 5, 2008. On February 28, 2008, the babysitter that had been arranged to look after the children that day was unable to come, so Homsher assumed responsibility for M.H. and her brother when Rusk left for work at approximately 5 a.m. M.H. was well when Rusk left. Soon after Rusk returned at approximately 1:45 p.m., she noticed a bruise on the top of the sleeping M.H.'s head that had not been there when she left and that M.H. was wearing different clothing. At approximately 2 p.m., after Homsher left for work, Rusk picked M.H. up to feed her and

[1] Ind. Code § 35-42-2-1.5 (2007).

[2] Ind. Code § 35-46-1-4 (2007).

noticed "bruises on the left side of her head and [that] the back of her head was bashed in." Tr. p. 161.

As it happens, M.H. had sustained multiple fractures to both sides of her skull; subarachnoid hemorrhaging; contusions to both frontal and temporal lobes; bilateral anterior frontal and anterior temporal subdural hematomas; retinal hemorrhaging; three subacute, healing rib fractures; and bruising on her head and face. Dr. Scott Pirkle of St. Claire Medical Center in Crawfordsville, who was working in the emergency room on February 28, 2008, examined M.H. at approximately 3:15 p.m. and noticed that her head was "probably at least twice the size of a normal infant's head from the massive edema or swelling[.]" Tr. p. 288. Dr. Pirkle noted that M.H. was deteriorating "rapidly" and estimated that her injuries had occurred within the previous twelve hours "at the outside[.]" Tr. p. 305. Doctors at the Riley Children's Hospital in Indianapolis, to which M.H. was eventually brought, were concerned for her life. According to Dr. Jody Smith of Riley, M.H.'s injuries were caused by "shaking and impact" and were non-accidental. State's Ex. 0 p. 21. M.H. had to have a permanent shunt installed to divert spinal fluid to her abdomen and remains at risk for seizure disorder. As of December 11, 2009, twenty-three-month-old M.H. was developmentally delayed by approximately one year, undergoing weekly speech and physical therapy, and developmental therapy every two months.

On March 5, 2008, the State charged Homsher with Class B felony battery, Class B felony aggravated battery, and Class B felony neglect. On September 29, 2009, Homsher's jury trial began.

During jury selection, the following exchange took place:

[Homsher's Counsel]: The court may have mentioned that there are apparently going to be some demonstrators in the area instigated by someone. Did any of you see that as you came in? I think they got here late. Are you all ready for that such that if you get talked to and identified and challenged that you're willing and able to brush that off and go about your business? Is there anyone who feels they might be bothered be that that, they're going to be uncomfortable by being spotlighted perhaps and put on the spot. Is that something you can see happening?

[Prospective Juror] DRAKE: How would they know that we were the jurors though?

[Homsher's Counsel]: Well, for all I know they're in the audience. What if they do and someone comes up and wants to talk to you about the case, not necessarily asks you what's going on that would definitely be improper.

[Prospective Juror] DRAKE: I wouldn't tell them anything

[Homsher's Counsel]: My hypothetical is maybe haranguing might be a hard word, but they'd be talking to you or preaching to you. Can you just walk away?

Tr. pp. 67-68.

During trial, the following exchange took place during a recess:

COURT: Mr. Hopkins, why don't you have a seat there. It wasn't clear to me when Mrs. Weliever came back and reported this last time after what you'd said where you were on this. As far as your wife having worked with Ms. Rusk and your step-daughter having had a t-shirt. Nobody has any objection to that as long as your [sic] okay with continuing and because of that contact you don't have any preconceived notion or anything like that, but then the message you sent back was a little confusing and I just wanted to ask you to explain that if you would.

JUROR HOPKINS: The way I feel about it is he has admitted to placing the baby in the pack and play on a pillow. Didn't he also admit he did it with some authority, placing it hard in there, something.

COURT: That's for you as a juror to decide.

> JUROR HOPKINS: What it amounts to is I don't like child abuse at all of any kind. If that's the way it was if he did use force to put it in the pack and play it can't be good.
>
> COURT: My question for you is you've heard only as Paul Harvey says you've only heard part of the story and there's more and the question is can you keep your mind open until you've heard everything and not jump to a conclusion before we finish the trial?
>
> JUROR HOPKINS: I doubt it. I just don't go for it. I got it in my head, so probably not no.
>
> [Homsher's Counsel]: We would ask that he be excused.
>
> COURT: Okay. We'll excuse you then. Okay. That takes care of that.

Tr. pp. 176-77.

The jury found Homsher guilty as charged. On December 11, 2009, the trial court sentenced Homsher to fifteen years of incarceration for aggravated battery and ten years for neglect, both sentences to be served consecutively with all of the neglect suspended to probation.[3] The trial court found, as aggravating circumstances, that the extent of M.H.'s injuries was greater than necessary to prove the crimes for which Homsher stood convicted, M.H.'s tender age, that the crimes were committed in the presence of M.H.'s sibling, Homsher's violation of his position of trust, and that M.H. suffered from shaken baby syndrome. The trial court found, as mitigating circumstances, Homsher's lack of a previous history of violence, anger management issues, abusive behavior, criminal or juvenile history, disciplinary issues in school or jail, and substance abuse and that his character is typically reported to be that of a helpful and caring person. The trial court found that the aggravating circumstances outweighed the mitigating.

[3] The trial court did not impose a sentence for Homsher's battery conviction, as it concluded that it was "incorporated into and subsumed by" the aggravated battery conviction. Appellant's App. p. 10.

On January 11, 2010, Homsher filed a motion to correct error, alleging that improper communication with jurors occurred during trial, he received ineffective assistance of trial counsel, and the trial court abused its discretion in sentencing him. Attached to the motion were several affidavits regarding protesters who gathered near the courthouse during Homsher's trial and who, *inter alia*, allegedly exhorted passersby to "Honk for Baby [M.H.]" and "Honk to Convict the Monster[.]" Appellant's App. p. 96. Some of the affiants averred that honking was audible in the courtroom during Homsher's trial. On January 26, 2010, the State moved to strike Homsher's affidavits and opposed his motion to correct error. On February 3, 2010, Homsher filed amended versions of most of the original affidavits. On February 4, 2010, the trial court granted the State's motion to strike the affidavits and denied Homsher's motion to correct error and, on February 24, 2010, denied Homsher's motion to reconsider.

DISCUSSION AND DECISION

I. Whether the Trial Court Abused its Discretion in Denying Homsher's Motion to Correct Error

Homsher's motion to correct error was based on his contention that there was improper communication with the members of the jury, specifically, that they must have had contact with protesters outside the courthouse. As an initial matter, we note that Homsher's argument on this claim depends largely on the affidavits attached to his motion to correct error. Homsher, however, has made no argument regarding the trial court's grant of the State's motion to strike the affidavits, and we will therefore not consider them in resolving this or any other issue.

Homsher contends that the trial court should have acted on its own to determine the prejudicial effect of the protestors on the jury. Homsher did not raise this issue in the trial court and is essentially making a claim of fundamental error on appeal, although not precisely stated in those terms. 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.

> Article I, § 13, of the Indiana Constitution guarantees a defendant's right to an impartial jury; therefore, a biased juror must be dismissed. Ind. Trial Rule 47(B) provides in part, "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury returns its verdict, become or are found to be unable or disqualified to perform their duties." Trial courts have broad discretion in determining whether to replace a juror with an alternate, and we will only reverse such determinations where we find them to be arbitrary, capricious or an abuse of discretion. *Harris v. State*, 659 N.E.2d 522, 525 (Ind. 1995) (citing *Campbell v. State*, 500 N.E.2d 174, 181 (Ind. 1986); *Woolston v. State*, 453 N.E.2d 965, 968 (Ind. 1983), *reh'g denied*).
>
> In cases alleging juror misconduct involving out-of-court communications with unauthorized persons, a rebuttable presumption of prejudice exists. *Timm v. State*, 644 N.E.2d 1235, 1237 (Ind. 1994); *Fox v. State*, 560 N.E.2d 648, 653 (Ind. 1990) (collecting cases). Such misconduct must be based on proof, by a preponderance of the evidence, that an extra-judicial contact or communication occurred and that it pertained to a matter pending before the jury. *Currin v. State*, 497 N.E.2d 1045, 1046 (Ind. 1986).

May v. State, 716 N.E.2d 419, 421 (Ind. 1999). "'Efforts by spectators at a trial to intimidate judge, jury, or witnesses violate the most elementary principles of a fair trial.'"

Lambert v. State, 743 N.E.2d 719, 733 (Ind. 2001) (quoting *Smith v. Farley*, 59 F.3d 659, 664 (7th Cir. 1995)).

While we would be most troubled by any evidence that the protestors attempted (or succeeded) to communicate with or intimidate the jurors, or that any juror engaged in misconduct, there is no evidence whatsoever that any of this happened. The trial record establishes, at most, that the jurors were aware that there would be protesters outside the courthouse, but there is no evidence that any juror ever saw or heard any protestors, much less had any contact with them. Portions of the record relied upon by Homsher do not establish juror contact, as he implies they do. The exchange during voir dire that referred to protesters outside the courthouse is not evidence that any juror had any contact with them. As previously mentioned, this establishes, at most, that the jurors were aware of the protesters. Juror Hopkins's exchange with the trial court and subsequent removal from the jury similarly does not establish that the jury was poisoned by the protesters. To the extent that Juror Hopkins was biased against Homsher, the record indicates that was influenced by his strong negative feelings about child abuse, rather than the fact that his wife worked with Rusk or that his step-daughter had an un-described t-shirt. Again, there is no evidence that Juror Hopkins had any contact with any protestors.

Moreover, Homsher points to no evidence that any of the jurors, even if we assume that they were exposed to the protestors, were improperly influenced by them. The Indiana Supreme Court has long maintained "that 'jurors need not be absolutely insulated from all extraneous influences regarding the case and that such exposure, without a showing of influence, will not require a new trial.'" *Caruthers v. State*, 926

N.E.2d 1016, 1021 (Ind. 2010) (quoting *Lindsey v. State*, 260 Ind. 351, 357, 295 N.E.2d 819, 823 (1973)). By failing to show that any jury members were either exposed to or influenced by the protestors, Homsher has failed to establish error, much less fundamental error.

II. Whether Homsher Received Effective Assistance of Trial Counsel

Homsher contends that he received ineffective assistance of trial counsel in several respects. We review claims of ineffective assistance of counsel based upon the principles enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> [A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). Because an inability to satisfy either prong of this test is fatal to an ineffective assistance claim, this court need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999).

A. Failure to Request Mistrial or Voir Dire Jury

Homsher contends that his trial counsel was ineffective for failing to more rigorously investigate the possibility of jury pollution during voir dire or following Juror Hopkins's removal. Following Homsher's trial counsel's mention of the possible

presence of protesters during voir dire, however, there is no indication that any of the prospective jurors had had any contact with the protesters or, more importantly, would have been susceptible to improper influence if they were to. In other words, the exchange during voir dire did not indicate that there was anything to investigate. Moreover, as previously mentioned, Juror Hopkins gave no indication that his bias against Homsher was due to any exposure to or influence by any protestors. Again, Juror Hopkins said nothing to give anyone any reason to believe that the question of improper influence of the jurors by protesters required further investigation. Homsher has failed to establish prejudice in this regard.

B. Failure to Investigate

Although Homsher argues that his trial counsel was ineffective for failing to more fully investigate the State's medical witnesses and the bases for their opinions as well as Rusk's alleged history of mental illness, he does not explain how doing so would have likely produced a different result at trial. Homsher has failed to argue, much less establish, how he was prejudiced by his trial counsel's alleged failure to investigate more thoroughly.

C. Failure to Seek a Change of Venue

Homsher contends that his trial counsel was ineffective for failing to ask for a change of venue to another county.

> A defendant is entitled to a change of venue upon a showing that jurors are unable to disregard preconceived notions of guilt and render a verdict based on the evidence. *See, e.g.*, *Bradley v. State*, 649 N.E.2d 100, 108 (Ind. 1995), *reh'g denied*. Disposing of a motion for a change is within the sound discretion of the trial court. *Linthicum v. State*, 511 N.E.2d 1026,

> 1031 (Ind. 1987). The decision to seek a change of venue is generally a matter of trial strategy that we will not second-guess on collateral attack. *Wood v. State*, 512 N.E.2d 1094, 1098 (Ind. 1987); *Allen v. State*, 498 N.E.2d 1214, 1216-17 (Ind. 1986); *Bieghler v. State*, 481 N.E.2d 78, 97 (Ind. 1985). In evaluating claims of ineffective assistance for failure to seek a change of venue, our decisions have found counsel's handling of a case competent where there was insufficient evidence to conclude the defendant could not have received a fair trial in the county in which the case was tried.

State v. Moore, 678 N.E.2d 1258, 1262 (Ind. 1997). As a general rule, claims of this type, as is Homsher's, are based on alleged prejudice caused by negative pretrial publicity. *Id*. Here, there is simply no evidence that any member of the jury was exposed to or influenced by any pretrial publicity.[4] The trial court would not have had any legal basis to grant a request for a change of venue, so Homsher's trial counsel was not ineffective for failing to make one.

III. Whether the State Produced Sufficient Evidence to Sustain Homsher's Aggravated Battery Conviction[5]

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).

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[4] As with some of his other claims, Homsher bases this claim on averments contained in the affidavits attached to his motion to correct error, the striking of which he has not challenged on appeal.

[5] Although Homsher claims to challenge his neglect conviction, his specific challenges do not implicate the elements of Class B felony neglect.

In order to convict Homsher of Class B felony aggravated battery, the State was required to prove that he knowingly or intentionally inflicted injury on M.H. that created a substantial risk of death or protracted loss or impairment of a bodily member or organ. Ind. Code § 35-42-2-1.5. Homsher contends that the State failed to produce sufficient evidence to establish that he acted knowingly or intentionally or that M.H.'s injuries occurred while she was in his care.

Dr. Smith, however, testified that S.H.'s injuries were caused by non-accidental shaking and impact, from which the jury was free to conclude that they were intentionally caused. Moreover, there is sufficient evidence from which the jury could have inferred that Homsher was the person who caused them. Rusk testified that S.H. was well when she left for work at approximately 5:00 a.m. on February 28, 2008, but that S.H.'s head was bruised and "bashed in" when she returned. It is undisputed that S.H. was exclusively in Homsher's care when Rusk was at work. Moreover, witness estimates as to the timing of S.H.'s injuries certainly do not tend to exonerate Homsher, as he suggests they do. Although Dr. Roberta Hibbard testified that S.H.'s injuries could have occurred up to forty-eight hours before she arrived at St. Claire Medical Center, she also testified that they could have been inflicted two hours before she arrived. Dr. Pirkle testified that S.H.'s condition was rapidly deteriorating when he saw her and that her injuries had occurred, at most, twelve hours before arrival at the medical center. The conclusion that S.H.'s injuries occurred while in Homsher's exclusive care is consistent with either estimate. The State produced sufficient evidence to sustain Homsher's convictions. *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). Homsher's argument is nothing more than an invitation to reweigh the evidence, which we will not do.

IV. Whether the Trial Court Abused its Discretion in Sentencing Homsher

Homsher's offenses were committed after the April 25, 2005, revisions to Indiana's sentencing scheme. Under the current sentencing scheme, "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on other grounds on reh'g*, 875 N.E.2d 218 (Ind. 2008). We review the sentence for an abuse of discretion. *Id*. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." *Id*.

A trial court abuses its discretion if it (1) fails "to enter a sentencing statement at all[,]" (2) enters "a sentencing statement that explains reasons for imposing a sentence–including a finding of aggravating and mitigating factors if any–but the record does not support the reasons," (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or (4) considers reasons that

"are improper as a matter of law." *Id*. at 490-91. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id*. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found is not subject to review for abuse of discretion. *Id*. We may review both oral and written statements in order to identify the findings of the trial court. *See McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

Homsher contends that the trial court improperly considered S.H.'s tender age to be aggravating, as the age of the victim was an element of the Class B felony battery charge. S.H.'s age, however, was *not* an element of either of the crimes for which Homsher was actually sentenced, Class B felony neglect and aggravated battery. Homsher also contends that the trial court improperly found it aggravating that S.H.'s injuries were greater than needed to establish aggravated battery. Under the facts of this case, Homsher could only have been found guilty of causing the protracted impairment of function of S.H.'s brain. *See* Ind. Code § 35-42-2-1.5(2). The evidence establishes, however, that Homsher has caused *permanent* damage to S.H.'s brain, which does, in fact, go beyond what the State was required to prove. Finally, Homsher contends that the trial court abused its discretion in finding it aggravating that S.H. had been a victim of shaken baby syndrome. Homsher, however, limits this argument to his Class B felony battery charge, for which he has not been sentenced. The trial court did not abuse its discretion in finding aggravating circumstances.

Homsher also contends that the trial court abused its discretion in failing to give the results of a polygraph examination mitigating weight. Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), *trans. denied*. We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. *Id.* However, if the record clearly supports a significant mitigating circumstance not found by the trial court, we are left with the reasonable belief that the trial court improperly overlooked the circumstance. *Mover v. State*, 796 N.E.2d 309, 313 (Ind. Ct. App. 2003). Homsher has not established that the trial court abused its discretion in this regard. Homsher has not provided this court with any documentation regarding the polygraph exam, but the record indicates that the trial court did consider the examination and rejected it as mitigating because the results were ambiguous. Based on the record before us, the results of the polygraph examination are of debatable nature, weight, and significance, and the trial court therefore did not abuse its discretion in failing to find them mitigating.

We affirm the judgment of the trial court.

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