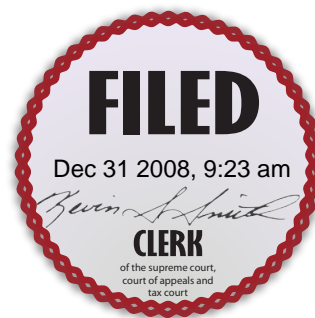


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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ABSALOM JULIUS, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 82A01-0805-CR-249  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE VANDERBURGH CIRCUIT COURT  
The Honorable David D. Kiely, Magistrate  
Cause No. 82C01-0701-FB-122

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**December 31, 2008**

**MEMORANDUM – NOT FOR PUBLICATION**

**MAY, Judge**

Absalom Julius was convicted of two counts of Class B felony rape<sup>1</sup> and two counts of Class B felony criminal deviate conduct<sup>2</sup> perpetrated against his former girlfriend, J.B. Concluding Julius' counsel was ineffective, we reverse and remand for a new trial.

### **FACTS AND PROCEDURAL HISTORY**

The bulk of the testimony at trial came from J.B., who described in detail her ten-month relationship with Julius. J.B., a single mother of five, was tutoring at the library to earn extra money. She first met Julius there, and she initially found him rude because he would talk on his cell phone in the library. At one point, she overheard him bidding on a car. She needed an inexpensive car for her son, who would soon be turning sixteen, and she decided to approach Julius because she thought he sounded knowledgeable.

J.B. testified that the first time she and Julius did anything “of consequence” together was taking a trip to Seymour. (Tr. at 102.) J.B. goes to Seymour regularly to check on her elderly parents, so she decided to ride along with Julius on one occasion when he happened to be making a trip there. During that trip, Julius bought her a necklace that cost \$1000. According to J.B., Julius “made sure always when he did buy things like that, that I knew how much it cost.” (*Id.* at 107.)

Early in the relationship, J.B. thought Julius was nice and educated. She was aware that Julius was wealthy, and he had her “star struck” because of “all the places he had been and the kind of money that he said he had and things he . . . owned.” (*Id.* at

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<sup>1</sup> Ind. Code § 35-42-4-1(a).

<sup>2</sup> Ind. Code § 35-42-4-2.

107-08.) However, she later came to think of him as “very arrogant.” (*Id.* at 103.) Julius “liked to show his . . . possessions,” and J.B. felt he “valued his money more than people.” (*Id.*) Julius wanted J.B.’s time and attention, and he had difficulty understanding that J.B. had to work and take care of her children. According to J.B., Julius “didn’t understand money restraints or time restraints because he had the luxury of both.” (*Id.* at 104.) J.B. knew Julius had inherited money, but she “didn’t know exactly what he did day in and day out. I knew that he didn’t do anything and that he wanted to be with me a lot.” (*Id.* at 103.) He never had the kind of job that required punching a clock. Nevertheless, J.B. was enticed by the possibility of providing a better life for her children: “Not that I was looking for somebody with income but he definitely would throw that at me with how he could make a difference in my life with the kids . . . and as a mom I want my . . . kids to be taken care of . . .” (*Id.*)

J.B. and Julius took a trip to St. Louis, which J.B. characterized as a “good trip.” (*Id.* at 108.) However, when they were in the hotel, Julius “was pretty aggressive with wanting anal sex and I didn’t want to do that because . . . it’s not a pleasant thing for me.” (*Id.*) J.B. told Julius she did not want to have anal sex, but

he, as usual, didn’t listen to my nos and said he would be gentle or easy or whatever, but after proceeding he wasn’t. He just rammed it in and of course I tore and started crying and then he backed out and said he was sorry and all this, but even at that he never acted like it was a big deal because he continued after that to still want anal sex all the time.

(*Id.*) J.B. admitted she

would give in every once in awhile . . . basically either me being drunk which he liked to get me drunk and you know, because when you do love somebody or you try to please them . . . but it was . . . never pleasant . . . I mean he knew that I did not want to do it, but I would give in.

(*Id.* at 109.)

Eventually, the relationship between J.B. and Julius became strained. J.B. “tried to break up with him about three, four different times because of head games that he’d play with me.” (*Id.* at 110.) However, Julius would apologize, and J.B. would give him another chance.

As an example of the “head games” Julius would play, J.B. described an incident when Julius took her phone. J.B. and Julius had taken a week-long trip to New York over the New Year holiday. After the trip, Julius thought J.B. was being distant, but J.B. felt she needed to spend time with her two-year-old son, B.B., because she had been gone for a week. J.B. agreed to meet Julius at a McDonald’s. When J.B. was getting ready to leave and trying to put B.B.’s coat on, Julius took her phone and left abruptly. J.B. began looking everywhere for her phone, and she became very upset because she had personal information on her phone and clients would contact her at that number. She thought Julius might have her phone because he had taken it before, but he insisted he did not have it. Julius wanted to come over to J.B.’s apartment and comfort her, “and of course his idea of comforting was sex.” (*Id.* at 115.) After they had sex, Julius told her he had her phone.

On January 19, 2007, J.B.’s family had a party at Chuck E. Cheese’s for B.B.’s third birthday, and Julius attended. J.B. testified her

daughters were irate that I was still with him because they knew how he was treating me and I had told him the night before that . . . I would give it one more try, but if he ever did anything like that to me again that we were done and that I never wanted to have anal sex again . . . he was always wanting that.

*(Id.* at 117.)

Cassandra, the mother of another child at the party, invited J.B. to go out after the party. J.B. had not “gone out with girlfriends forever” because Julius “definitely never wanted me to go out without him.” *(Id.* at 118.) J.B. testified she went out with family for her daughter’s twenty-first birthday, and Julius came and made a scene because he wanted J.B. to come with him. She agreed to go out with Cassandra, but she decided to not tell Julius, because he would show up or call her constantly.

However, Julius wanted J.B. to come with him after the party. According to J.B., Julius wanted to have sex “[c]onstantly, all the time.” *(Id.* at 121.) J.B. went to Julius’ apartment and had sex with him because she wanted to “get it over with because if I didn’t I knew he’d be calling me the rest of the night.” *(Id.* at 122.)

J.B. then met Cassandra at Ri Ra’s, and they talked for about twenty minutes. J.B. saw Darron Albin, with whom she was acquainted because his mother had been her kids’ kindergarten teacher. Albin and his friend, Mark Simmons, came over and started talking to J.B. and Cassandra. The four wanted to find a place with karaoke, so Albin drove them to Ginny’s. After they were done at Ginny’s, Albin took Cassandra and Simmons home, and then he took J.B. back to Ri Ra’s so she could get her car.

When they arrived at Ri Ra’s, J.B. and Albin sat in Albin’s vehicle and talked for a while. There was nothing romantic about their interaction. When J.B. exited the

vehicle, Julius approached. He was “irate,” and he was yelling and swearing. (*Id.* at 132.) He wanted to know who Albin was, and he told Albin he was J.B.’s fiancé.<sup>3</sup> J.B. was embarrassed and “didn’t want a scene,” so she urged Julius to get in her car so they could talk privately. (*Id.* at 133.)

Julius calmed down somewhat and got in J.B.’s car. She explained what happened, and she apologized to him because she does not

like to lie, and I . . . was afraid, you know, what he might do if he stayed angry at me. And he used to say, “You don’t want to get on the bad side of me, [”] and I always thought he was just running his mouth . . . and over exaggerating like I thought he did so many times. And I think I just . . . wanted to defuse the situation.

(*Id.* at 135-36.) She saw Albin was not leaving, and she thought Julius had calmed down, so she suggested they go to her place.

When they were at her apartment, Julius “became very aggressive and forced himself on” J.B. (*Id.* at 138.) He grabbed her and tore her clothes off. J.B. started to cry and tried to push him off, but “he was going to do what he was going to do.” (*Id.* at 142.) Julius forced his fingers into her rectum, and it hurt because there was no lubrication. She told Julius to stop and told him he was hurting her, but he put her legs over her head “and put all his weight on there . . . I could feel my tendons starting to give and I was crying and saying, ‘Stop, my legs can’t go that far.’” (*Id.* at 143.) J.B. testified Julius

was trying to teach me a lesson I’m sure of it. He felt in his mind that I had lied and he was trying to basically teach me a lesson that, you know, I was more of a possession than a person and that I was his and that I had to do what he wanted me to do.

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<sup>3</sup> It was stipulated at trial that Julius and J.B. were not engaged.

(*Id.* at 145-46.)

J.B. took Julius back to his car at Ri Ra's. Julius said he wanted breakfast and insisted that J.B. come with him. She agreed to go because she "knew that he was not going to take no for an answer and I assumed he would go right back to my apartment if I didn't do what he wanted me to do." (*Id.* at 150.) After making a stop at Julius' apartment and leaving J.B.'s car there, they drove together to IHOP to eat breakfast.

When they returned to Julius' apartment, Julius told her she needed to come in and sleep because she was too tired to drive. She went inside because she did not anticipate that Julius would want to have sex again. However, Julius forced himself on her once more. They had vaginal sex, and Julius also forced his penis "so deep down inside my throat that I couldn't breathe." (*Id.* at 154.) He then started sucking on her neck and was leaving marks. J.B. testified, "[I]n my head I'm thinking he's trying to mark me and he was saying, 'You're mine and I want everybody to know you're mine.'" (*Id.*)

J.B. was on her period, and they both became bloody during intercourse. Afterwards, they showered together, and then J.B. fell asleep "out of pure exhaustion." (*Id.* at 158.) When she woke up, Julius wanted her to come with him to the mall because he wanted to return the presents she and her children had purchased for him for Christmas. J.B. agreed to go with him because she wanted to get away from him in a "safe way" and "in the least abrasive way possible." (*Id.* at 161.)

While at the mall, J.B. wore her jacket zipped up so people could not see the marks on her neck. She tried to act like nothing was wrong because she did not "want to involve other people in my problems." (*Id.* at 166.) They first went to return a ring J.B.

had purchased for Julius. She had believed the ring had real diamond chips in it, but he knew they were fake and wanted her to buy him a more expensive ring. J.B. testified she had bought the ring

because I wanted to give something a little special, and I don't know a lot about jewelry, he knows everything about jewelry supposedly, and he only buys real expensive stuff. . . . I thought maybe that would make a difference because he was always kind of questioning my love for him or devotion.

*(Id. at 161.)*

Julius then recognized a man working at Zales, Harold Yates. They went into Zales and talked to Yates for about fifteen minutes. Then they went to return a belt. At that point, J.B. managed to separate herself from Julius, and she hid in the dressing room in another store. She called her ex-husband, Ron, and asked him to pick her up.

Ron arrived and took J.B. to get her car at Julius' apartment. She then had him follow her to her apartment, where she quickly gathered some clothes and personal items. She was afraid Julius would show up there, so she went to her daughter J.K.'s house because Julius did not know where J.K. lived. J.K. took some pictures of J.B.'s injuries. Then J.B. decided to stay with her friend Rhea in Nashville.

J.B. initially did not call the police because she was

just afraid and wanting to get away from [Julius]. I think because I knew we had had sex before even though I know consciously that . . . no means no, at the same time I guess I felt like because we'd had sexual activities that I didn't look at [it] as rape yet . . . . [F]inally I did tell my friend, Rhea, what happened. She goes, "You know you've been raped." And [I] said, "Yeah, but I've had sex with him before." She said, "It doesn't matter . . . ."

*(Id. at 169.)*



When she returned from Nashville, she reported what happened to the police and petitioned for a protective order against Julius. Her petition was admitted into evidence at Julius' trial.

In response to a question from the jury, J.B. testified she did not immediately seek rape counseling:

[A]gain I just kept thinking that I could just deal with this, to keep in-house. I didn't want to involve people. I wanted, you know, to try to keep it to a minimal damage, but after a period of time I did because I was not getting over things as . . . I thought I would . . . .

(*Id.* at 278.) She testified she had started counseling in April, and was still in counseling at the time of the trial in October.

The State also called Rhea, Albin, J.K., and Ron. They testified primarily to J.B.'s and Julius' demeanor. Julius did not testify or present any evidence.

The jury found Julius guilty of all charges. On December 19, 2007, Julius filed a motion to correct error, in which he argued he received ineffective assistance of counsel. A hearing was held on March 14, 2008, at which trial counsel was questioned concerning his reasoning for not objecting to certain pieces of evidence, for not calling Yates as a witness, and for not questioning J.B. about phone calls she made to Julius on the date of the alleged offenses. Julius' motion was denied on April 16, 2008.

## **DISCUSSION AND DECISION**

Julius argues trial counsel was ineffective because he did not object to numerous portions of J.B.'s testimony and statements made by the prosecutor, did not call Yates as

a witness, and did not cross-examine J.B. about calls she made to Julius the day of the alleged offenses. We evaluate claims of ineffective assistance of counsel using the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Coleman v. State*, 694 N.E.2d 269, 272 (Ind. 1998).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (i) defense counsel's representation fell below an objective standard of reasonableness and (ii) there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation.

*Troutman v. State*, 730 N.E.2d 149, 154 (Ind. 2000).

1. Deficient Performance

We presume counsel's performance met the objective standard of reasonableness; to prevail, Julius must rebut this presumption with strong and convincing evidence. *Coleman*, 694 N.E.2d at 272-73. "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference." *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied* 783 N.E.2d 699 (Ind. 2002). "Evidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance." *Coleman*, 694 N.E.2d at 273.

Julius has identified forty-three statements by J.B. or the prosecutor to which he believes trial counsel should have objected. (*See* Appellant's Br. at 11-16) (chart summarizing objectionable statements and trial counsel's reason for not objecting). Trial counsel's overall strategy was to show J.B. consented to the sex acts that formed the basis of the criminal charges. Pursuant to this strategy, trial counsel declined to object to much of J.B.'s testimony concerning the nature of her relationship with Julius, such as her

description of the St. Louis trip, because it showed she had previously consented to anal sex even though she was reluctant to do so. In a related vein, trial counsel did not object to testimony about Julius' wealth because he believed it showed J.B. was consenting because she was interested in Julius' money. This is a strategic decision we will not second-guess.

Nevertheless, we are troubled that trial counsel did not object to *any* character evidence.<sup>4</sup> J.B.'s testimony was permeated with character evidence and other inadmissible evidence that did not reasonably fit within trial counsel's strategy of showing consent. J.B.'s testimony went far beyond showing her interest in Julius' money and painted Julius as an arrogant man who liked to flaunt his wealth. (*See* Tr. at 103) (Julius "liked to show his . . . possessions" and "valued his money more than people."); (*Id.* at 103-04) (Julius "didn't do anything" and never had to punch a clock); (*Id.* at 104) (Julius did not understand J.B. having to work and take care of children; he "didn't understand money restraints or time restraints because he had the luxury of both."); (*Id.* at 165) (Julius owned a Rolls Royce and he "likes to show his stuff.").

J.B. testified to other negative traits and bad acts. J.B. testified he made her feel bad for not spending more money on him; "[t]hat's the kind of arrogance and stuff, it was always about what he wanted. He never put himself aside for anybody else." (*Id.* at 152-53.) Perhaps less inflammatory, but still painting Julius in a negative light, was her

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<sup>4</sup> At one point, J.B. testified Julius once purchased eleven pairs of the same pants in different colors and he had so many clothes he could not fit them in his closet. Trial counsel did object at that point but did not ask for the testimony to be stricken or request an admonition. The prosecutor moved on to a new line of questioning, but comments about Julius' wealth continued to surface, and the prosecutor mentioned the purchase of eleven pairs of pants in his closing argument.

testimony that Julius is “very flamboyant” and “talks loud and he wants everybody to know that he’s important.” (*Id.* at 164-65.) She also testified Julius took her phone and caused a scene at her daughter’s twenty-first birthday party. According to J.B., Julius showed up to that party because he did not want her to go out without him, and this story tended to confirm her account of Julius calling her, leaving notes on her car, and showing up at Ri Ra’s on the night of the alleged offenses.

In addition to character evidence, J.B. was permitted to speculate about Julius’ mental state.<sup>5</sup> (*See id.* at 145-46) (“He felt in his mind that I had lied and he was trying to basically teach me a lesson that . . . I was more of a possession than a person and that I was his and that I had to do what he wanted me to do.”); (*Id.* at 154) (J.B. speculates Julius was making marks on her neck to say, “You’re mine and I want everybody to know you’re mine.”). J.B. also testified her “daughters were irate that I was still with him because they knew how he was treating me.” (*Id.* at 117.) This was hearsay<sup>6</sup> and bolstered her testimony by implying other people would agree with her testimony about Julius’ character.

The prosecutor highlighted most of this testimony in his closing argument, and he made character a central part of his argument. The prosecutor began his argument by discussing J.B.’s character. He characterized J.B. as a “responsible person, she’s always worked in her adult life.” (*Id.* at 292.) He then began comparing J.B. and Julius:

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<sup>5</sup> Ind. Evidence Rule 602 provides, “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” The State does not argue this evidence was admissible.

<sup>6</sup> Ind. Evid. R. 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” The State does not argue this evidence was admissible.

Now, we've all been at the library and he's sitting on his cell phone talking in a normal tone of voice so everybody else in the library can hear and she's there trying to tutor kids and . . . she thought he was rude. She thought he was rude, showy, he was talking loud negotiating a car deal in the middle of the library on a cell phone while other people were there reading, being quiet and tutoring. Now, not that that matters, *but I just wanted to explain the differences in the personalities between [J.B.] and [Julius]. . . .* Once a week regardless of how . . . little money she makes, regardless of the fact she has responsibilities for five children, especially a young one, she travels that road up to Seymour, her own gas money, her own time and her busy schedule working two jobs and caring for five children to take care of her parents. Her dad is at home. She makes sure he's okay, checks and makes sure he has groceries. Mom's in a nursing home, she goes and visits mom in the nursing home on an average one time a week. Now, this is [J.B.] This is J.B. over here, mother, hard worker, gets along with her ex-husband, doesn't want to push the envelope, doesn't want to create any problems, takes care of elderly parents and on her schedule she fits all of this in. *Now, let's contrast that with [Julius].* She didn't know what he did for a living. He invested, she said he was an entrepreneur, he inherited some money. She said he really didn't do anything. She said he doesn't understand money or time constraints. He doesn't have to work for money, doesn't have to be anyplace, he doesn't have any responsibilities. She said, "If I shop I pinch pennies. If he goes shopping he buys eleven pairs of pants, the same pant, but in . . . eleven different colors." "How many do these come in, all eleven of them." Now that doesn't make him a bad person. That doesn't mean that he's guilty of any crime. All it does is it tells you the personalities of the two individuals involved here. We have one responsible person and one person who is a ne'er do well. One person who is what they call the idle rich. He can do whatever he wants, if he wants to go to Paris for the week he can. If he wants to take off to California for three weeks he can.

(*Id.* at 293-96) (emphases added). Although the prosecutor hedged his comments by saying the character evidence did not matter and did not make Julius guilty of the offenses, he made a point of contrasting Julius' and J.B.'s characters and discussed their character at length.

Later in the prosecutor's closing argument, he called attention to the fact that Julius had objected to the admission of the handwritten statement J.B. gave to the police:

She gave to the police an eleven page police statement in her own handwriting. And out of all those pages, . . . he read a little excerpt from the handwritten statement that she said was out of character, [out] of context, and I moved to have the whole thing admitted so you all could read the whole thing and see what the whole paragraph said, not just part of a sentence. And that was objected to and you aren't going to get to see that, but she said it was out of context.

(*Id.* at 341.) Similar comments have been found “deplorable” and “improper” conduct for a prosecutor. See *Splunge v. State*, 641 N.E.2d 628, 630-31 (Ind. 1994) (Prosecutor stated “defense counsel does not want the jury to know the truth.”), *superseded by rule on other grounds*. Trial counsel’s reason for not objecting to this comment was that he felt the jury “had heard every word” of the statement. (Tr. at 489.) However, the jury did not know this because it did not see the statement.

For some of the statements highlighted above, trial counsel had no apparent rationale for declining to object. He testified he believed some of these statements were not prejudicial; however, they all portrayed Julius negatively and did not fit with defense counsel’s strategy of showing consent.

Trial counsel also believed some of the testimony made J.B. look “petty” and less credible, like she was “grasping at straws” and “trying to prove her point in . . . ways she can’t otherwise prove it.” (*Id.* at 467, 478.) While counsel is generally in a better position to evaluate the likely impact of a witness on the jury, we believe trial counsel’s failure to object to any character evidence cannot be characterized as strategy or isolated mistakes.<sup>7</sup> J.B. testified repeatedly and without contradiction to Julius’ negative character traits and bad acts. At no point did the jury receive any instruction on the

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<sup>7</sup> To the extent trial counsel was concerned about objecting too often in front of the jury, we note a motion *in limine* might have eliminated some of that concern.

purposes for which character evidence may and may not be considered. We find it difficult to believe the jury, uninstructed on the law, overlooked numerous instances of inadmissible evidence, especially when that evidence was emphasized in the prosecutor's closing argument.

We need not discuss each statement Julius asserts is inadmissible and should have been objected to, nor do we need to address his claims that trial counsel should have called Yates and cross-examined J.B. about phone calls she made to Julius. The evidence highlighted above is sufficient to persuade us trial counsel's performance fell below the objective standard of reasonableness. *See Messer v. State*, 509 N.E.2d 249, 252-53 (Ind. Ct. App. 1987) (finding deficient performance where trial counsel failed to object to prosecutor's emphasis on inadmissible evidence in closing argument).

## 2. Prejudice

To establish the prejudice prong of the *Strickland* test, Julius must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sims*, 771 N.E.2d at 741. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable." *Coleman*, 694 N.E.2d at 272. The State argues Julius has not shown he was prejudiced by trial counsel's performance either because the character evidence was

admissible or because J.B.'s testimony, without the evidence Julius now challenges, was sufficient to sustain a conviction.<sup>8</sup>

Ind. Evidence Rule 404 provides:

**(a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of the accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of the victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of a witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

**(b) Other Crimes, Wrongs, or Acts.** 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The State argues much of the evidence that Julius claims should have been objected to on Evid. R. 404 grounds would be admissible to show his motive. The State argues his motive was "that he was controlling and dominant throughout the relationship, up until and including the last day." (Appellee's Br. at 27-28.) We have previously held

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<sup>8</sup> The State also argues we should assume there is no prejudice because Julius has not raised the available issue of fundamental error in the admission of the evidence. We disagree. Fundamental error is analyzed differently from ineffective assistance of counsel, and Julius may choose which issues he wishes to pursue on appeal. Moreover, Julius would not have to make a fundamental error argument if trial counsel had objected to the evidence; any evidence that would have been admitted over his objection would have been reviewed for abuse of discretion.



that evidence of controlling behavior is admissible when it relates to a motive such as hostility. *See, e.g., Smith v. State*, 891 N.E.2d 163, 171-72 (Ind. Ct. App. 2008) (evidence of controlling behavior admissible in murder trial because some of the evidence demonstrated hostility and other evidence related to State's theory that Smith had a financial motive for killing his wife), *trans. denied*. The State cites no authority to the effect that controlling behavior is itself a "motive." Rather, the State's proffered motive appears to be describing Julius' character rather than his motive. *See Malinski v. State*, 794 N.E.2d 1071, 1082 (Ind. 2003) ("Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness. 'Character evidence' is evidence regarding someone's personality traits.").

Even if we recognized the State's suggested motive, the jury was not instructed to consider the evidence only as evidence of motive. The quantity and frequency of the evidence of character and bad acts, the prosecutor's emphasis on that evidence, and the absence of a limiting instruction undermine our confidence that the jury relied only on properly admitted evidence in reaching its verdict.

The State also argues Julius cannot show prejudice because J.B.'s testimony was sufficient to sustain his convictions. That J.B.'s testimony would suffice to sustain his convictions on appeal, however, does not tell us what the jury likely would have done if it had not been inundated with character evidence. J.B. was the only witness to testify to the elements of the offenses, and we cannot say with certainty the jury would have believed her if character evidence had not featured so prominently in the trial. There is a

reasonable probability the outcome would be different if the jury had not heard that evidence.

Nevertheless, we address the issue of sufficiency to determine whether Julius may be retried. Julius argues the evidence was insufficient because J.B.'s testimony was inherently improbable.

Our standard of review for a sufficiency of the evidence claim is well settled. We will not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Reasonable doubt is a doubt which arises from the evidence, the lack of evidence, or a conflict in the evidence.

We will not impinge upon the jury's resolution with regard to the credibility of witnesses unless confronted with testimony of inherent improbability, or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. A conviction will be overturned only where a victim's testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it.

*Cox v. State*, 780 N.E.2d 1150, 1154 (Ind. Ct. App. 2002) (citations omitted).

Julius argues J.B.'s testimony was inherently improbable because it is not believable that she would have eaten breakfast, taken a nap, showered, and went shopping with him if he had raped and sodomized her. J.B. explained she was afraid of further angering Julius, she was afraid Julius would follow her, and she wanted to get away from him in the least abrasive way possible. She also testified she was not initially sure the acts constituted rape because she had previously had consensual sex with Julius. J.B.'s testimony was not inherently improbable or incredibly dubious. The jury heard Julius' argument that a rape victim would not behave as J.B. did, and it was entitled to

instead believe J.B.'s explanation for her actions. *Dishmon v. State*, 770 N.E.2d 855, 858 (Ind. Ct. App. 2002) (jury entitled to determine which version of incident to credit), *trans. denied* 783 N.E.2d 694 (Ind. 2002).

J.B. testified to the elements of rape and criminal deviate conduct, and her testimony would be sufficient to sustain the convictions. *See Mishler v. State*, 894 N.E.2d 1095, 1103 (Ind. Ct. App. 2008) (uncorroborated testimony of single witness sufficient to sustain conviction). Therefore, Julius may be retried. *See Specht v. State*, 838 N.E.2d 1081, 1094 (Ind. Ct. App. 2005) (double jeopardy does not bar retrial when there was sufficient evidence to support a conviction), *trans. denied* 855 N.E.2d 998 (Ind. 2006). The case is reversed and remanded for new trial.

Reversed and remanded.

ROBB, J., and NAJAM, J., concur.