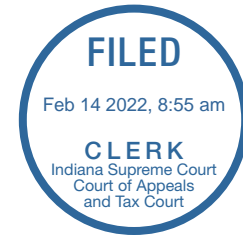


## MEMORANDUM DECISION

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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Michael J. Tunstall,  
*Appellant-Plaintiff,*

*v.*

State of Indiana,  
*Appellee-Defendant.*

February 14, 2022

Court of Appeals Case No.  
21A-CR-1744

Appeal from the Lake Superior  
Court

The Hon. Salvador Vasquez,  
Judge

Trial Court Cause No.  
45G01-2004-MR-11

**Bradford, Chief Judge.**

## Case Summary

[1] On April 16, 2020, Michael Tunstall was caring for five-year-old D.H., who was the son of his girlfriend, Katylynn Prack, while Prack was at work. While in Tunstall's care, D.H. suffered severe trauma to the brain and abdomen, causing his death. D.H. was also found to have bite marks on his body, and Tunstall admitting to having bitten him. The State charged Tunstall with, *inter alia*, murder and Level 5 felony battery of a child. At trial, the trial court admitted evidence over Tunstall's objection that, prior to his death, D.H. had suffered burns to his hands while in Tunstall's care and had later avoided him at a family dinner. A jury found Tunstall guilty as charged, and the trial court entered judgment of conviction on murder and Level 5 battery of a child and sentenced Tunstall to an aggregate term of fifty-five years of incarceration. Tunstall contends that the State produced insufficient evidence to sustain his convictions and that the trial court abused its discretion in admitting evidence of D.H.'s burns and his behavior at the family dinner. Because we reject Tunstall first contention and conclude that any error in the admission of the challenged evidence was harmless, we affirm.

## Facts and Procedural History

[2] In April of 2020, Tunstall had been dating Prack for about one year and would regularly stay with Prack and her two sons, five-year-old D.H. and two-year-old M.K., on weekends. Prack and her sons were living in a bedroom at the home of Prack's sister Ashley Pond and Pond's boyfriend in Schererville. Also living

in the house were Prack's sister Grace, who suffered from memory loss and delayed learning, and Pond's thirteen-year-old son, D.P.

[3] On April 16, 2020, Tunstall arrived at Prack's house around 10:00 a.m., and went with Prack and her children to look at a rental house in Merrillville, returning at around 1:00 p.m. Prack left for work shortly before 2:00 p.m. When Prack left, D.H. was still acting normally and was playful and happy. Pond and Grace were watching television in the living room while Tunstall and Prack's children were upstairs in Prack's bedroom. Pond, Grace, and D.P. did not hear anything happening upstairs until they heard a thump that they believed was D.H. falling out of his toddler bed. The three were not overly concerned, however, because D.H. fell out of his toddler bed at least once a week. Grace went upstairs, looked into Prack's room, and saw Tunstall placing D.H. into bed.

[4] Around 5:00 p.m., Tunstall came downstairs and went into Pond's office to smoke. Afterwards, Tunstall went back upstairs, but returned after about ten minutes. Tunstall told Pond that D.H. had started vomiting on himself. Tunstall claimed that he had unclothed D.H. and put him in the bathtub and that D.H. "wasn't responding." Tr. Vol. IV p. 244. Pond answered, "[w]hat the f[\*\*\*] do you mean he's not responding?" and quickly ran upstairs. Tr. Vol. IV p. 245. Pond found D.H. lying completely naked in the bathtub with his eyes closed, with no pulse, no signs of breathing, and light gray fingertips. Pond did not observe any water in the bathtub or water or vomit on D.H. After Pond repeatedly yelled at Tunstall to call 911, he eventually made the call.

Pond carried D.H. to Prack's bedroom and noticed that he was limp and cold. As Pond attempted to resuscitate D.H., she heard Tunstall say "that he should have known. It was all his fault. And she is never going to forgive him." Tr. Vol. V p. 4.

[5] EMTs quickly arrived and took over efforts to resuscitate D.H. One responder noted that D.H. was blueish-gray, which indicated he had been without oxygen for some time. D.H. was transported by ambulance to St. Francis Hospital in Dyer. Police told those still at the house not to clean anything. Despite the direction, Grace observed Tunstall go upstairs and clean up some of the vomit. Tunstall also retrieved his night bag and removed most of his personal items from Prack's bedroom.

[6] Meanwhile, D.H. never regained a pulse and was pronounced dead at the hospital. An autopsy was performed the following morning, and the cause of death was determined to be loss of blood and injuries due to blunt force trauma to the head and torso, while the manner of death was determined to be homicide. The pathologist, Dr. Zhuo Wang, found "multiple area[s] of hematoma" on the head and a "massive area of punctuate hemorrhage" in the brain which would leave the brain unable to "control the internal organs." Tr. Vol. V pp. 169-70, 178. Dr. Wang also found that D.H.'s left lung had a rupture, both lungs had contusions, and more than 25% of D.H.'s total blood was in the left chest cavity. Dr. Wang observed that the brain and lung injuries were recent. While Dr. Wang observed no fractures during an x-ray and examination of the body, he observed several contusions in various states of

healing on D.H.'s head, chin, neck, lips, arm, leg, and foot. The injuries included apparent human bite marks.

[7] Tunstall was questioned by police the night of D.H.'s death and again the following morning. During the interviews, Tunstall admitted that he had had exclusive care of the children during the incident. Tunstall claimed D.H. "just started puking" around 5:30 p.m. when he woke him up from his nap. Ex. 44 at 23:12:20–25. Tunstall admitted to squeezing on D.H.'s stomach to force the vomit to "all come out." Ex. 44 at 23:42:39–43. Tunstall told the officer he took D.H. to the bathtub to clean him off, did not get a response from him, and went to get Pond. When confronted about the bite marks, Tunstall initially claimed he had been playing and joking that he would eat D.H.'s hands or feet. Tunstall said that he had "play" bitten D.H. that afternoon on his arms and "all over" and it was the only way he could get him "to react and have fun." Ex. 45 00:22:01-16; Tr. Vol. VI 127. Tunstall recalled D.H. was laughing but said "ow" when he was "probably" biting his arm. Ex. 45 00:22:48–23:30. With regard to the bite on the shoulder, he said "I didn't think I did it hard." Ex. 45 00:23:45–50. When shown a photograph of the bite marks, Tunstall responded that he had sharp teeth. Tunstall initially denied cleaning up after the death but admitted his cleaning efforts in his second interview.

[8] The State charged Tunstall with murder, Level 1 felony aggravated battery, and Level 5 felony battery on a child. Prior to trial, Tunstall sought and received an order in limine provisionally excluding evidence that D.H. had been treated for a burn requiring medical treatment that had occurred earlier while he was in

Tunstall's care. Tunstall argued that the evidence was irrelevant and that any probative value was outweighed by unfair prejudice.

[9] At trial, Prack testified, in response to defense questioning, that she had previously taken D.H. to the hospital "for emergency purposes" and had never observed Tunstall physically abuse D.H. Tr. Vol. IV p. 109. Defense counsel specifically asked Prack if she had "taken [D.H.] to the hospital before for emergency purposes [... a]t least twice" and "at least twice after falling down." Tr. Vol. IV 108. Tunstall also asked whether there had ever "been a time" when Prack observed Tunstall "seem to physically abuse" D.H. Tr. Vol. IV p. 110. Following this testimony, the State contended that Tunstall had opened the door to testimony about D.H. having been burned in Tunstall's care and receiving emergency treatment. Tunstall disagreed, again arguing the evidence was unfairly prejudicial. The trial court concluded that the evidence was admissible because Tunstall "to some limited extent" had opened the door. Tr. Vol. IV p. 125. Prack testified that she was aware that D.H. had previously suffered a burn mark on his hand and that she had taken him to the hospital to have the burn treated. When asked by the State if she knew in whose care D.H. had been at the time, Tunstall objected that the response would be hearsay. The court clarified that it was a yes or no question. Prack testified without further objection that "when [D.H.] got the burn mark, he was in [Tunstall's] care." Tr. Vol. IV p. 130. Prack remembered the injury having occurred in the November or December prior to D.H.'s death. On re-cross examination, Prack

further explained that she understood that the burn injury had occurred “while washing [D.H.’s] hands.” Tr. Vol. IV p. 131.

[10] Tiffany Nudi, Pond’s boyfriend’s stepmother, testified that she had regularly visited the household for Sunday dinners and had been familiar with D.H. During a Sunday dinner a few weeks before D.H.’s death, Nudi observed that D.H. had not wanted to eat dinner and “did not want to be near [Tunstall] at all.” Tr. Vol. V p. 81. Tunstall objected to this evidence based on “402 and 403.” Tr. Vol. V p. 81. Nudi testified that she had stood next to D.H. “and tried to help him eat a little bit and kind of distract him so he wouldn’t get in trouble[.]” Tr. Vol. V p. 82. When D.H. “eventually [...] just wasn’t having it anymore,” Nudi “swooped him” up and took him to sit with her in a recliner. Tr. Vol. V p. 82. Nudi testified that when Tunstall approached, D.H. “grabbed [Nudi’s] wrist and brought it across his body like as to protect himself[.]” Tr. Vol. V p. 82. Tunstall raised a general objection after this testimony, and the trial court sustained the objection finding “the last comment [...] is rather speculative without foundation[.]” Tr. Vol. V p. 82. The court did not specifically strike the testimony or otherwise admonish the jury. The jury found Tunstall guilty as charged, and the trial court, after entering judgment of conviction for murder and battery on a child, sentenced Tunstall to an aggregate term of fifty-five years of incarceration.

## Discussion and Decision

## I. Sufficiency of the Evidence

[11] Tunstall contends that the State failed to produce sufficient evidence to sustain his convictions for battery on a child and murder. When evaluating a challenge to the sufficiency of the evidence to support a conviction, we do not “reweigh the evidence or judge the credibility of the witnesses,” nor do we intrude within the factfinder’s “exclusive province to weigh conflicting evidence.” *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001). Rather, a conviction will be affirmed unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000). The evidence need not exclude every reasonable hypothesis of innocence, but instead, “the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Pickens v. State*, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001). When we are confronted with conflicting evidence, we must consider it “most favorably to the [factfinder’s] ruling.” *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005).

### A. Battery of a Child

[12] In order to convict Tunstall of Level 5 felony battery of a child, the State was required to prove that he had touched D.H. in a rude, insolent, or angry manner resulting in bodily injury while he was at least eighteen years old and D.H. was less than fourteen. *See* Ind. Code § 35-42-2-1(c), -(g)(5)(B). Here, the touching alleged was biting, and Tunstall contends that the State presented insufficient evidence to establish that he had bitten D.H. or that the biting had resulted in bodily injury. Tunstall’s identity as the person who had bitten D.H.



was established by the freshness of his injuries and his own admissions.

“Identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom.” *Cherry v. State*, 57 N.E.3d 867, 877 (Ind. Ct. App. 2016), *trans. denied*. During the autopsy, Dr. Wang observed several contusions in various states of healing on D.H. including apparent human bite marks. Dr. Wang described the bite on the shoulder as recent. When Tunstall was asked about the bite marks, he admitted that he had “play” bitten D.H. that afternoon on his arms and “all over” and that biting was the only way he could get him “to react and have fun.” Ex. 45 00:22:01-16. When shown a photograph of the bite mark injury, Tunstall responded that he had sharp teeth. D.H.’s other caretakers denied ever biting him. This evidence allowed the jury to find that Tunstall was the person who had bitten D.H.

[13] The State’s evidence also allowed the jury to find that the biting had caused bodily injury. “[B]odily injury” is defined as “any impairment of physical condition, including physical pain.” Ind. Code § 35-31.5-2-29. “[N]o particular level of pain is required to rise to the level of impairment of physical condition [to show bodily injury]; rather, physical pain is an impairment of physical condition.” *Smith v. State*, 167 N.E.3d 378, 382 (Ind. Ct. App. 2021). Thus, “any degree of physical pain may constitute a bodily injury[.]” *Bailey v. State*, 979 N.E.2d 133, 142 (Ind. 2012). Also, “a bruise is a physical impairment, and, thus, constitutes bodily injury.” *Tucker v. State*, 725 N.E.2d 894, 898 (Ind. Ct. App. 2000), *trans. denied*. Here, the bruises and abrasions from the bites established that bodily injury occurred. Also, Tunstall admitted that at one

point D.H. had said “ow” when he was “probably” biting his arm, a clear indication that Tunstall had bitten D.H. and that he had felt pain. Ex. 45 00:22:48–23:30. With regard to the bite on D.H.’s shoulder, Tunstall initially said “I didn’t think I did it hard” but later explained the abrasions were due to him having sharp teeth. Ex. 45 00:23:45–50. Tunstall’s admissions and the evidence of injury are sufficient to support the jury’s conclusion that he committed battery on a child by biting D.H.

## **B. Murder**

[14] In order to convict Tunstall of that crime, the State was required to establish that he had knowingly or intentionally killed D.H. *See* Ind. Code § 35-42-1-1(A)(1). To put it bluntly, the jury heard evidence that a healthy D.H. was left in the exclusive care of Tunstall and had suffered fatal trauma at the hands of another person while in that care, leading to the reasonable, if not almost inescapable, inference that Tunstall had caused the trauma. While no witness testified to having seen Tunstall inflict the trauma upon D.H., nor did Tunstall admit to doing so, a murder conviction may be sustained on circumstantial evidence alone. *See Sallee v. State*, 51 N.E.3d 130, 134 (Ind. 2016). D.H. had been acting normally and was playful and happy before being placed in Tunstall’s care. At some point during that care, however, D.H. suffered extensive and fatal injuries. Dr. Wang found “extensive punctuate hemorrhages involving the cerebrum” which looked like a “fresh” semi-circle of separate injuries to the head. Ex. 39, 43; Tr. Vol. V 172. Inside D.H.’s brain, Dr. Wang found “[e]xtensive hemorrhagic tears and gliding contusion” and a

“deep cerebral contusion of basal ganglia consistent with traumatic diffuse axonal injury.” Ex. 43. According to Dr. Wang, this injury would have rendered D.H.’s brain dysfunctional, unable to control organs, and likely caused him to fall into a coma. Dr. Wang also found damage to the D.H.’s brain stem that would have caused D.H. to lose control of his bowels “very rapidly.” Tr. Vol. VI p. 32. D.H. also suffered extensive contusions in both lungs, including a rupture in the lower left lobe, which caused more than 25% of his blood to pool in his chest, which would have also caused loss of consciousness and shock. Finally, Dr. Wang identified the manner of death as homicide. Based on evidence of the severity and freshness of the injuries and Dr. Wang’s conclusion that they were inflicted by another person, the jury could reasonably infer that Tunstall had intentionally killed D.H. *See, e.g., Forrest v. State*, 757 N.E.2d 1003, 1006 (Ind. 2001) (finding sufficient evidence for murder where child suffered severe blunt force injury at or near the time of his death while in the defendant’s exclusive care and had been normal ten minutes earlier).

[15] Moreover, evidence of Tunstall’s behavior around the time of and after D.H.’s death supports a reasonable inference that he was the person who had caused it. When Tunstall first told Pond that D.H. needed help, D.H. was already completely naked in the bathtub with his eyes closed, had no pulse, showed no signs of breathing, had light gray fingertips, and was already cold to the touch, despite Tunstall telling Pond that he had very recently been vomiting. As Pond attempted to resuscitate D.H., Tunstall said that “[i]t was all his fault. And she

is never going to forgive him.” Tr. Vol. V p. 4. Tunstall hesitated before complying with Pond’s direction to call 911, disobeyed police instructions not to clean up the evidence, initially lied about his cleaning efforts, removed his possessions from Prack’s residence, and eventually admitted to biting D.H. Additionally, although Tunstall claimed that he had undressed D.H. in the bathroom, his clothing was found in the bedroom, and while Tunstall also claimed that he had placed D.H. in the bathtub to clean him, Pond did not observe any water.

[16] Tunstall contends that his medical expert’s testimony regarding D.H.’s likely cause of death as “homicidal asphyxiation” rendered the State’s evidence insufficient to sustain his conviction for murder. This, however, is merely an invitation to reweigh the evidence, which we will not do. *See Alkhalidi*, 753 N.E.2d at 627. In any event, even if the jury had believed this testimony, it would hardly exonerate Tunstall, providing, at best, an alternate cause of death by inflicted trauma. The State produced sufficient evidence to sustain Tunstall’s convictions for Level 5 felony battery of a child and murder.

## II. Admission of Evidence

[17] Tunstall contends that the trial court abused its discretion in admitting testimony that, in the months before his death, D.H. had suffered burns on his hands while in Tunstall’s care and had seemed to avoid Tunstall during a family dinner. A trial court has broad discretion in ruling on the admissibility of evidence. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We will reverse a trial court’s ruling on the admissibility of evidence only when it

constitutes an abuse of discretion. *Id.* An abuse of discretion occurs only where the trial court’s ruling is clearly against the logic and effect of the facts and circumstances and the error affects the party’s substantial rights. *Clark v. State*, 994 N.E.2d 252, 260 (Ind. 2013).

[18] We need not address the merits of Tunstall’s evidentiary challenges, however, as it is well-settled that “[e]rrors in the admission of evidence are to be disregarded as harmless unless they affect the substantial rights of the defendant.” *Goudy v. State*, 689 N.E.2d 686, 694 (Ind. 1997). “The erroneous admission of evidence is harmless error where a guilty finding is supported by substantial independent evidence of guilt.” *Bates v. State*, 495 N.E.2d 176, 178 (Ind. 1986). “However, reversal is warranted if the record as a whole reveals that the improper evidence was likely to have had a prejudicial impact on the average juror such that it contributed to the verdict.” *Sundling v. State*, 679 N.E.2d 988, 994 (Ind. Ct. App. 1997).

[19] In light of the overwhelming evidence of Tunstall’s guilt and the relatively inconsequential nature of the challenged evidence, we have little hesitation in concluding that any error that might have occurred in its admission can only be considered harmless. As mentioned, the jury heard testimony that a seemingly happy and healthy D.H. had been left in Tunstall’s exclusive care and had suffered fatal trauma at the hands of another while in that care, very compelling evidence that Tunstall had been the person responsible for the trauma. Tunstall also admitted that he had bitten D.H. causing him to exclaim, “ow[,]” substantial evidence supporting his battery of a child conviction. Evidence of

Tunstall's behavior following D.H.'s death, including lying about his actions, disregarding police instructions not to disturb evidence, and apparently waiting before seeking help, also likely played a significant part in the jury's guilty verdicts.

[20] As for the potential impact of evidence that D.H. had suffered burns on his hands while in Tunstall's care, there is no indication in the admitted evidence that the burns had been the result of intentional abuse, as opposed to an accident, so its impact on the jury was almost certainly slight. Likewise, the evidence that D.H. had seemed to want to avoid Tunstall at a family dinner was unlikely to have influenced the jury to any great degree, as, again, there was nothing in the admitted evidence suggesting that D.H.'s seeming desire to avoid Tunstall had been the result of intentional abuse. While this evidence could be considered consistent with intentional abuse prior to D.H.'s death, it is just as consistent with many more innocuous things, such as an accident or D.H. simply disliking Tunstall for reasons having nothing to do with abuse. We conclude that any error in the admission of the evidence challenged by Tunstall can only be considered harmless.

[21] The judgment of the trial court is affirmed.

Crone, J., and Tavitas, J., concur.