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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2015AP1610-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GINGER M. BREITZMAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Page

Cases

Page

Page

Statutes

Other Authorities

STATE OF WISCONSIN

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ISSUES PRESENTED

1. Did the State present sufficient evidence at trial to support the jury's verdict finding Breitzman guilty of child neglect?

The circuit court answered: Yes (80:7-8).

2. Did the State present sufficient evidence to support the jury's verdict finding Breitzman guilty of disorderly conduct?

The circuit court answered: Yes (80:8-11).

3. Was trial counsel ineffective for failing to move to dismiss the disorderly conduct charge on grounds that it violated Breitzman's constitutional right to free speech?

The circuit court answered: No (80:11-16).

4. Was trial counsel ineffective for failing to object to the admission of other act evidence?

The circuit court answered: No (80:16-22).

5. Was trial counsel ineffective for giving an opening statement that Breitzman claims was contrary to her trial testimony?

The trial court answered: No (80:25-29).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE AND THE FACTS

The State will supplement Breitzman's statement of the case and statement of the facts as appropriate in its argument.

SUMMARY OF THE ARGUMENT

The State charged Breitzman with five offenses including two counts of child abuse, two counts of child neglect, and one count of disorderly conduct (17). The jury found Breitzman guilty of the charged offenses (20; 21; 22; 23; 24).

Breitzman moved for postconviction relief. She alleged that the State presented insufficient evidence to sustain the jury's verdict on the neglect charges and the disorderly conduct charge. She also alleged that trial counsel was ineffective for: (1) failing to move to dismiss the disorderly conduct charge on First Amendment grounds; (2) failing to object to the admission of other act evidence; and (3) giving an opening statement that Breitzman claims contradicted her anticipated testimony (53:1).

The circuit court granted Breitzman's motion with respect to one count of child neglect (Count 3). But it found the evidence sufficient to sustain Breitzman's conviction on the other child neglect charge (Count 4) and the disorderly conduct charge (62:1). The circuit court also denied Breitzman's claims of ineffective assistance of counsel (62:2).

As the State will demonstrate, the record supports the circuit court's decision finding that the State presented sufficient evidence on the remaining child neglect charge and the disorderly conduct charge (80:7-11). The circuit court also properly rejected Breitzman's ineffective assistance of counsel claims. It held that trial counsel was not ineffective: (1) for failing to move to dismiss the disorderly conduct charge on First Amendment grounds because Breitzman's profane language did not constitute protected speech (80:11-16); (2) for failing to object to the admission of the other act evidence because trial counsel and Breitzman intended to demonstrate that her son was motivated to make false and grandiose allegations against her (80:16-22); and (3) for giving an opening statement that Breitzman argued was inconsistent with her trial testimony

because trial counsel did not contradict Breitzman's testimony that she did not slap J.K. with respect to the charged incidents (80:25-29).

ARGUMENT

I. The State presented sufficient evidence that support the jury's verdicts finding Breitzman guilty of child neglect and disorderly conduct.

A. General legal principles related to a sufficiency of the evidence challenge.

A court reviews a challenge to the sufficiency of the evidence in the light most favorable to the conviction. A reviewing court should not reverse a conviction based upon the insufficiency of the evidence unless the evidence is "so lacking in probative value and force" that no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference may be drawn from the evidence, the reviewing court must adopt the inference that supports the verdict. *Id*. at 503-04. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id*. at 507. "Once the jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813.

B. Sufficient evidence supported the jury's guilty verdict finding that Breitzman neglected J.K.

Breitzman's child neglect conviction stemmed from an allegation that she refused to unlock her door for J.K., forcing him to wait outside for several hours on a cold,

winter day (2:4). She asserts that the State presented insufficient evidence to support her conviction for child neglect. Breitzman contends that her conduct failed to establish that it seriously endangered J.K.'s physical health. Breitzman's brief at 23-25.

The circuit court denied this claim. It noted testimony that Breitzman locked J.K. out of the house on a very cold day. Failure to provide shelter under these circumstances could certainly seriously endanger a child's physical health. Under the circumstances, the circuit court concluded that sufficient evidence supported Breitzman's conviction on the child neglect count. The record supports the circuit court's decision.

Contributing to the neglect of a child. Wisconsin Stat. § 948.21(1) prohibits child neglect. The circuit court used the standard jury instruction, Wis. JI-Criminal 2150 (2009), to instruct the jury. It told the jury that it had to find that (1) J.K. was under 18 years of age, and (2) Breitzman was a person responsible for J.K.'s welfare (73:81). With respect to the third element of intentionally contributing to J.K.'s neglect, the circuit court instructed the jury:

> And three, the defendant intentionally contributed to neglect of [J.K.]. The term intentionally contributed means that the defendant either had a purpose to contribute to neglect or was aware that her action or failure to take action was practically certain to cause that result.
>
> . . . .
>
> A child is neglected when a person responsible for the child's welfare fails for reasons other than poverty to provide necessary food, clothing, medical or dental care or shelter so as to seriously endanger [the] physical health of the child.

(73:81-82).

The sufficiency of the evidence. The State presented sufficient evidence that supported the jury's guilty verdict that Breitzman was guilty of neglect of a child. The record shows that J.K. was a child at the time of the neglect. At the time of trial, J.K. testified that he was fifteen years old (71:28). The evidence also demonstrated that Breitzman was a person responsible for J.K.'s welfare. J.K. testified that Breitzman was his mother and that he lived with her during the period of the neglect (71:30-31).

The evidence also established that Breitzman neglected J.K. by failing to provide him shelter so as to seriously endanger J.K.'s physical health.

J.K. did not have a house key. He lost it between second and third grade and Breitzman refused to replace it (71:38; 72:106). Thus, J.K. depended on Breitzman to unlock the door and provide him with access to the shelter that she was responsible for providing to him.

During the winter of 2012, J.K. arrived home from school at 3:30 p.m. The door was locked. J.K. knocked multiple times and rang the door bell. No one answered the door (71:31). J.K. knocked on the back door and rang the door bell over a four-hour period (71:32). J.K. also went upstairs to a back porch door and knocked on the door with no answer. That door is located on the floor where Breitzman sleeps (71:33). J.K. also used his cell phone to try to call Breitzman, but the battery drained after two hours. J.K. went to a neighbor's house and knocked on the door. But they were not home (71:34-35, 84). J.K. called another friend to see if he could go to the friend's house (71:35).

J.K. acknowledged that he did not have a coat. He explained that it was 50 degrees when he left for school, but it was in the 30s when he got home (71:34, 84). J.K. explained that his hands and face started to get cold (71:36). He blew in his hands and placed them on his face. To stay warm, J.K. wrapped himself in the grill cover, shielding himself from the elements for two to three hours (71:34). He

would check the door every fifteen minutes to see if someone would answer it (71:36). At approximately 8:30 p.m., a light came on and Breitzman opened the door (71:37). Breitzman told J.K. that she had been asleep (71:37; 72:73).

Breitzman knew when J.K. returned home from school (73:39). Breitzman acknowledged it was her responsibility to make sure that J.K. could get into the house (73:39). But Breitzman locked the door to her residence, declined to give J.K. a key, and would not set an alarm to wake up and allow J.K. to come in after school (73:41-42).

In her testimony and on appeal, Breitzman argued that J.K. could have contacted several other people to help him out or he could have gone to a business, such as a gas station, to stay warm (72:74). Breitzman's brief at 24. But as the circuit court noted, J.K. did not have a duty to find shelter. That was Breitzman's responsibility (80:7-8).

Breitzman also suggests that while her behavior caused J.K. to become cold, the State failed to establish that Breitzman's conduct "seriously endangered" J.K.'s physical health. Breitzman's brief at 24. The State disagrees.

J.K. testified that when he got home, temperatures were "hitting lower than the 30's" and there was frost on the ground (71:84). As J.K. hid his body from the elements by seeking cover under a grill cover, J.K.'s body shivered from the cold. J.K. blew breath into his hands and placed his hands on his face in an attempt to keep warm (71:36). He remained outside, huddled under a grill cover for hours while Breitzman slept, oblivious to J.K.'s efforts to summon her by knocking on the door, ringing the door bell, or calling her.

In weighing the evidence, the jurors could certainly "take into account matters of [their] common knowledge and [their] observations and experience in the affairs of life" (73:86). Relying on their experience, the jurors could reasonably conclude that Breitzman's failure to open the

door and provide shelter to J.K., seriously endangered his safety. The State did not need to present an expert witness on the dangers of hypothermia from exposure in cold weather to prove serious endangerment. *Hypothermia*, Wikipedia, https://en.wikipedia.org/wiki/Hypothermia (last viewed January 29, 2016).

The State proved beyond a reasonable doubt that Breitzman neglected J.K. It requests this Court affirm Breitzman's conviction for child neglect.

C. Sufficient evidence supports the jury's verdict finding that Breitzman's profane language constituted disorderly conduct.

Breitzman also claims that the evidence in the record is insufficient to support the jury's verdict finding that Breitzman engaged in disorderly conduct. Breitzman contends that her use of profane language that included calling her son, J.K., a "retard," a "fuck face," and a "piece of shit" did not tend to cause or provoke a disturbance. Breitzman's brief at 25-26.

The circuit court properly rejected Breitzman's claim. It concluded that "ample testimony" established that Breitzman's profane words tended to cause or provoke a disturbance (80:9-11). The circuit court noted that J.K.'s subsequent response to the words by reporting it demonstrates that Breitzman's words caused a disturbance (80:10-11). The record supports the circuit court's decision.

Disorderly conduct. Wisconsin Stat. § 947.01 prohibits disorderly conduct. Here, the State alleged that Breitzman's use of profane language directed at her son in a private place occurred under circumstances that tended to cause or provoke a disturbance (17:2). The circuit court used the standard jury instruction, Wis. JI-Criminal 1900 (2012), to instruct the jury. The circuit court explained:

> Before you may find the defendant guilty of [disorderly conduct], the State must prove . . . that the following two elements were present:
>
> One, the defendant engaged in profane conduct.
>
> And two, the conduct of the defendant under the circumstances as they then existed tended to cause or provoke a disturbance.
>
> Disorderly conduct may include physical acts or language or both. The principles upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community. This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large but might disturb an oversensitive person.
>
> It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance under the circumstances as they then existed.
>
> You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant under the circumstances as they then existed tended to cause or provoke a disturbance.

(73:83-84).

The sufficiency of the evidence in support of the disorderly conduct conviction. Breitzman does not dispute that she used profane language with J.K. Breitzman's brief at 25-26. She cannot. The phrases "fuck face" and "piece of shit" rise to the level of profane language because they constitute vulgar or course language. The American Heritage Dictionary of the English Language 1400 (4th ed. 2000).

Breitzman's real complaint is that her conduct did not tend to cause or provoke a disturbance. Breitzman's brief at 26. The record undermines Breitzman's claim.

On December 4, 2012, J.K. prepared in the microwave a bag of popcorn that West Allis Police Sergeant Marla Martin gave him (71:49; 73:57). J.K. burned the popcorn in the microwave and threw it out. When his mother came home approximately thirty minutes later, she looked in the garbage, saw the burnt popcorn, and smelled it in the microwave (71:49).

Breitzman told J.K. that he "always mess[es] things up," that he was a "retard," a "fuck face," and a "piece of shit" (71:49). When asked, J.K. told Breitzman that he got the popcorn from a friend at school. She told J.K. that it was not from school and that he was hoarding food (71:49). Breitzman directed J.K. to gather his belongings because she intended to kick him out of her house (71:51).

J.K. stated that he felt "worthless," when Breitzman called him a "piece of shit" and "fuck face" (71:50). When J.K. told Breitzman to stop calling him names, Breitzman replied, "I don't give a fuck" (71:50).

J.K. was not the only witness to the conversation. J.K. was speaking with his friend D.M. on the phone when Breitzman entered the home (71:49). D.M. confirmed that he was speaking to J.K. on December 4, 2012, when Breitzman came home. D.M. stated that J.K. seemed a "little bit scared" and sounded "a little bit different" (72:21). D.M. heard Breitzman call J.K. "really mean names" and said "fuck a lot" (72:22). D.M. heard J.K. state that he got the popcorn from school and Breitzman also accused J.K. of being a liar and stealing his sister's money (72:23).

J.K. then called D.M. ten minutes later (71:51). When J.K. called D.M. back, J.K. was crying. D.M. stated "I've never heard him cry before. He was always just a normal teenager, and it was just really different" (72:23). J.K. also

told other people what was happening at his house on December 5, 2012 (71:48).

Breitzman admitted that she called J.K. a "piece of shit" and a "fuck face," but insisted that she only used the later term one time (72:98). Daniel Percifield, Breitzman's long time friend, heard Breitzman call J.K. a "fuck face" more than a couple times. Breitzman also called him a "piece of shit," a "pig," and "worthless" (73:55). Breitzman acknowledged it was inappropriate to call someone a "fuck face" when one is angry or disappointed with another's conduct (72:100).

Breitzman suggests that merely calling J.K. a "fuck face" and a "piece of shit," while berating him to the point of him feeling "worthless" was merely "impolite and insensitive." Breitzman's brief at 26. To be sure, under some circumstances, the use of such profane language may not tend to provoke a disturbance. See Wis. JI-Criminal 1900 (2012) ("What is proper under one set of circumstances may be improper under other circumstances."). But Breitzman ignores the circumstances here that made her conduct disorderly. Breitzman did not use these words in jest or as terms of endearment, but rather used them to belittle and humiliate her son. She disregards the effect of her conduct on J.K. J.K. cried, something his friend D.M. had never previously witnessed. Breitzman's emotionally abusive language toward her son also prompted him to report her conduct (71:48).

The circuit court noted that Breitzman's conduct had an effect on J.K. It prompted him to report the conduct and emotionally affected him. Under the circumstances, the circuit court correctly concluded that the jury had sufficient evidence from which to conclude that Breitzman's profane language tended to provoke a disturbance. It properly denied Breitzman's challenge to the sufficiency of the evidence for the disorderly conduct conviction (80:10-11).

II. Breitzman received effective assistance of trial counsel.

Breitzman alleges that her trial counsel was ineffective for: (1) failing to raise a constitutional challenge to the application of the disorderly conduct charge; (2) failing to object to the admission of other act evidence during the trial; and (3) for making an opening statement that she contends was inconsistent with Breitzman's trial testimony. Breitzman's brief at 26-38.

As the State will demonstrate below, the circuit court properly rejected each of Breitzman's three claims (80:11-31).

A. General legal principles guiding review of claims of ineffective assistance of counsel.

The United States Constitution's Sixth Amendment right of counsel and its counterpart under article I, § 7 of the Wisconsin Constitution encompass a criminal defendant's right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 226-36, 548 N.W.2d 69 (1996). The Sixth Amendment right to counsel protects a criminal defendant's fundamental right to a fair trial. *Strickland,* 466 U.S. at 684-86.

A defendant alleging ineffective assistance of trial counsel must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Id.* at 687. If a court concludes that a defendant has not established one prong of the test, the court need not address the other prong. *Id*. at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all of the circumstances. *Id*. at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the

wide range of professionally competent assistance." *Id.* at 690. In assessing the reasonableness of counsel's performance, a reviewing court should be "highly deferential," making "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. A court should presume that counsel rendered adequate assistance. *Id.* at 690; s*ee also State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 ("[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate") (citation omitted).

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Carter*, 324 Wis. 2d 640, ¶ 37. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Stated another way, a defendant must show that trial counsel's errors were so serious that the defendant was deprived of a fair trial and reliable outcome. *Strickland*, 466 U.S. at 687.

Legal standards applicable to ineffective assistance claims based on a failure to investigate. "[C]ounsel has a duty to make reasonable investigations or to make a strategic decision that makes further investigation unnecessary." *State v. Domke*, 2011 WI 95, ¶ 52, 337 Wis. 2d 268, 805 N.W.2d 364 (citation and internal quotation marks omitted). Counsel must either reasonably investigate the law and facts or make a reasonable strategic decision that makes any further investigation unnecessary. *Id.* ¶ 41.

A defendant's own statements or actions may influence whether trial counsel's actions were reasonable. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691. When a defendant makes a decision, a court will not find that trial counsel's advice prejudiced the defendant. *See State v. Oswald*, 2000 WI App 3, ¶ 50 n.7, 232 Wis. 2d 103, 606 N.W.2d 238.

Standard of review. A claim of ineffective assistance of counsel is a mixed question of law and fact. *Carter*, 324 Wis. 2d 640, ¶ 19. While this Court must uphold the circuit court's findings of fact unless clearly erroneous, the ultimate determination of whether counsel's assistance was ineffective presents a legal question which this Court reviews de novo. *Id.*

B. Trial counsel's failure to raise a constitutional right to free speech challenge to the application of the disorderly conduct statute does not constitute ineffective assistance.

Breitzman asserts that her attorney was ineffective for failing to move to dismiss the disorderly conduct charge against her on the grounds that its application violated her constitutional rights under the First Amendment and Article I, § 3 of the Wisconsin Constitution. Breitzman's brief at 27. Breitzman's argument fails on two grounds. First, trial counsel is not ineffective for failing to argue a point of unsettled law. Second, even if trial counsel had raised the constitutional challenge, Breitzman was not prejudiced because she would not have prevailed.

1. Trial counsel is not ineffective for failing to raise an argument on a point of unsettled law.

A criminal defense attorney "is not required to object and argue a point of law that is unsettled." *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Accordingly, "ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *Id*. at 85. Thus, the issue is not whether Breitzman would have prevailed on a motion to dismiss, but whether her trial counsel's failure to raise the motion "fell below an objective standard of reasonableness as measured against prevailing professional norms." *State v. Van Buren*, 2008 WI App 26, ¶ 19, 307 Wis. 2d 447, 746 N.W.2d 545.

While Breitzman advances a legal argument in support of her claim that her profane language constituted protected speech, she implicitly concedes that the case law does not clearly address circumstances present in her case. Breitzman suggests that publication may be warranted "to develop the case law concerning a First Amendment challenge to a disorderly conduct charge for statements made to a family member in the privacy of one's home." Breitzman's brief at 2.

Breitzman's request for a published decision developing the case law constitutes implicit recognition that Breitzman's claim rests on an unsettled area of the law. And under the circumstances, her trial counsel's failure to raise the motion to dismiss did not fall below the objective standard of reasonableness guiding ineffective assistance of counsel claims.

2. Trial counsel's failure to move to dismiss the disorderly conduct charge on constitutional grounds was not ineffective because Breitzman would not have prevailed.

Trial counsel was not ineffective for declining to raise a constitutional challenge because Breitzman's conduct did not constitute protected speech.

Standard of Review. An appellate court independently reviews constitutional challenges to statutes. A statute generally enjoys the presumption of constitutionality. The party challenging the statute must overcome the presumption of constitutionality with proof beyond a reasonable doubt. When a statute implicates First Amendment rights, the State has the burden to prove that the statute is constitutional beyond a reasonable doubt. *State v. Baron*, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34.

To determine which party bears the burden, a court must decide whether the statute regulates speech or conduct alone. If the statute regulates neither speech nor expressive conduct, the statute does not implicate the First Amendment and First Amendment analysis would not apply. *Id.* ¶¶ 14, 16.

Here, Breitzman merely assumes that because she has raised a First Amendment claim, the burden is on the State to establish Wis. Stat. § 947.01's constitutionality as applied to her case. The State disagrees. Wisconsin courts have long recognized that the disorderly conduct statute regulates conduct, not the content of speech.

Wisconsin Stat. § 947.01 does not infringe on protected speech. The Wisconsin Supreme Court has concluded that "the disorderly conduct statute does not infringe on speech that is protected under the First Amendment because the statute sanctions only categories of speech that have been

traditionally regarded as beyond the protection of the First Amendment." *In re A. S.*, 2001 WI 48, ¶ 16, 243 Wis. 2d 173, 626 N.W.2d 712. The supreme court previously recognized that by its very nature, certain speech may constitute a breach of the peace.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, ***the profane,*** the libelous, and the insulting, or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that *such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution,* and its punishment as a criminal act would raise no question under that instrument.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (emphasis added and footnotes omitted); *State v. Zwicker*, 41 Wis. 2d 497, 510, 164 N.W.2d 512 (1969).

Application of the disorderly conduct statute to speech is permissible because it is not directed at its content, but controlling its harmful effects. *In re A.S.*, 243 Wis. 2d 173, ¶ 15. Even the application of the disorderly conduct statute "to speech alone is permissible under appropriate circumstances." *Id*. ¶ 17. "When speech is not an essential part of any exposition of ideas, when it is utterly devoid of social value, and when it can cause or provoke a disturbance, the disorderly conduct statute can be applicable." *Id*.

Breitzman directed a profanity laced tirade at J.K. for burning popcorn in the microwave. Calling J.K. a "fuck face" and a "piece of shit" is not a communication of information that the constitution safeguards (71:50-51). Breitzman's utterances lacked any social value.

Breitzman asserts that her words were not disorderly because they did not create a possibility that the words would disrupt the community's peace or safety. Breitzman's brief at 30. The disorderly conduct statute extends to private places, not just public spaces. And profane words used within the privacy of a home may tend to cause or provoke a disturbance that may never spill into a public place. That Breitzman's words did not prompt J.K. to physically act out does not mean that they did not "tend" to cause or provoke a disturbance.

Here, Breitzman's profane words tended to cause or provoke a disturbance. When J.K. asked Breitzman to stop calling him names, Breitzman responded, "I don't give a fuck" (71:50). Breitzman directed J.K. to grab his belongings out of his room as she would be calling the police (71:50-51). Breitzman's words disturbed J.K., causing him to feel worthless (71:50). His friend, D.M., who overheard Breitzman's verbal assault, said that J.K. cried when they spoke a short time later (72:22-23). Breitzman's conduct so disturbed J.K. that it prompted him to report her to authorities (71:48). Although Breitzman's words did not result in physical violence, they clearly had a harmful effect.

Breitzman has failed to demonstrate that her trial counsel's performance fell below an objective standard of representation. She has not established that the law was well-settled in her favor. Counsel recognized that the disorderly conduct statute is interpreted under fairly broad parameters (77:7). Trial counsel's performance was simply not deficient for failing to move to dismiss the charge.

Further, trial counsel's failure to file a motion to dismiss did not prejudice Breitzman because she does not have a right to engage in disorderly conduct through the use of profane language. The circuit court properly denied this claim (80:15-16).

C. Trial counsel was not ineffective for failing to object to the admission of other act evidence.

Breitzman argues that trial counsel's failure to file a motion to exclude other act evidence[1] and failure to object to the admission of other act evidence constituted deficient performance. Breitzman's brief at 32. The circuit court rejected this claim, finding that trial counsel's performance was not deficient in light of theory of defense (80:24). It also found that even if error occurred, it did not prejudice Breitzman's defense (80:31).

1. Ineffective assistance claims and trial strategy.

Trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." *State v. Maloney,* 2004 WI App. 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. As this court has explained:

> Generally, trial strategy decisions reasonably based in law and fact do not constitute ineffective assistance of counsel. Defense counsel may select a particular defense from available alternative defenses and is not required to present the jury with alternatives inconsistent with the chosen defense. Even if, in hindsight, selecting a particular defense appears to have been unwise, counsel's decision does not constitute deficient performance if it was reasonably founded on the facts and law under the circumstances existing at the time the decision was made.

State v. Snider, 2003 WI App 172, ¶ 22, 266 Wis. 2d 830, 668 N.W.2d 784 (citations omitted).

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[1] Trial counsel actually moved in limine for an order prohibiting a witness "to testify on any subject or alleged facts unless such testimony directly pertains to either the charge of physical harm to the child J.K. or neglect causing bodily harm to the child J.K." (13). While the motion did not specifically refer to "other act evidence," the evidence he sought to exclude would certainly include "other act evidence."

2. Trial counsel's performance was not deficient for failing to object to the admission of other act evidence.

Trial counsel was not deficient for failing to object to the admission of certain evidence. The record demonstrates that trial counsel, in consultation with Breitzman, made strategic decisions consistent with a strategy not to object to the admission of other act evidence.

At the postconviction hearing, trial counsel testified that he intended to portray Breitzman as a struggling mother doing her best under the circumstances (77:8).[2] Trial counsel noted that J.K. and his mother had a good relationship that soured (77:21). Breitzman attributed this to J.K.'s involvement with a girlfriend and J.K.'s father's refusal to have any contact with him (72:76).

While Breitzman's life had remained constant, J.K. started telling other people that things were bad (77:22). Breitzman told trial counsel that J.K. had exaggerated events, twisting them into an argument that something had happened. Breitzman told trial counsel that J.K. was lying and had become rebellious (77:9).

Trial counsel explained that he did not object to J.K.'s allegations about Breitzman's other bad behavior because they intended to show that J.K. had so aggrandized his complaints that he would lose credibility (77:15-16). As part of their trial strategy, trial counsel sought to paint J.K. as a child who made false or grandiose allegations against Breitzman (77:20).

Trial counsel also believed that dealing with the uncharged allegations would provide a context for J.K.'s

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[2] In its decision denying Breitzman's postconviction claims, the circuit court made credibility findings. It found trial counsel's discussion regarding strategy as credible. It also did not believe Breitzman's testimony (80:20).

conduct (77:21). This strategy included pursuing a defense based on reasonable discipline (77:24). Breitzman agreed with this strategy (77:20). Breitzman acknowledged that as part of the trial strategy, she would portray J.K. as rebellious, defiant, and untruthful (77:51). The goal was to have Breitzman take the stand and explain what actually happened when she was attempting to deal with J.K.'s rebelliousness (77:16). Breitzman herself conceded that the trial strategy that trial counsel and she agreed to a strategy of the "whole truth [coming] out" (77:44).

Trial counsel faced challenges in navigating through this defense. Breitzman admitted slapping J.K. in the car. She also stated that it was possible that she may have slapped him at times in the past (77:9). Breitzman was aware that prior uncharged incidents, including the slapping incident in the car, might arise at trial (77:46, 52). Breitzman discussed with her trial counsel how to address this other conduct should it arise. She would acknowledge it, but explain that it was reasonable under the circumstances (77:53).

Breitzman also told trial counsel that she believed that the car slapping incident formed the basis for J.K.'s animus against her (77:10, 29).[3] It provided a basis for J.K. to allege other misconduct against Breitzman, including the incident when J.K. claimed he was originally injured by a dumbbell, but later asserted that Breitzman had struck him (77:10).

Breitzman told trial counsel that J.K. had exaggerated the two incidents that triggered the child abuse charges. Both involved adversarial and tense moments between Breitzman and J.K. (77:25). Breitzman indicated that she did not intend to assert a physical discipline defense to either charge (77:45). Instead, they intended to demonstrate that J.K. was untruthful about them.

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[3] The jury did not actually learn about the car slapping incident until J.K. volunteered information about it during cross-examination when trial counsel questioned J.K. about frequent nose bleeds (71:87).

With respect to the first alleged abuse incident, J.K. testified that he wanted to take a nap and was lying on his bed. Breitzman entered the bedroom and told J.K. to get up (71:38). J.K. stated that it was dark, but he could feel Breitzman's knuckle as it struck his nose. J.K. claims that his nose started to bleed (71:39). Breitzman denied striking J.K. She stated that J.K. told her that he woke up, turned the light on, discovered that he was bleeding, and got blood on his mattress (72:78). In support of her defense that she did not strike J.K. in the bedroom, trial counsel extensively questioned J.K. about his nose bleeds. J.K. readily conceded that he was prone to nose bleeds (71:85-87). This line of questioning supported Breitzman's theory of defense that J.K. was fabricating claims to make her look bad.

With respect to the second alleged abuse incident involving the broom (Count 2), J.K. stated that Breitzman told him that he was not sweeping correctly. She grabbed the broom from him and hit him with the back of her hand causing a bruise (71:40-42). Breitzman acknowledged taking the broom away and sending him to his room, but denied physically disciplining J.K. (77:45). Breitzman claimed that J.K. told her, and later her friend Percifield, that he injured himself when a dumbbell fell on his face (72:92-93). J.K. acknowledged telling Percifield that he injured himself with a dumbbell (71:78). But J.K. later told authorities that Breitzman had struck him (71:82).

The defense acknowledged that the prior conduct had occurred and that it provided an explanation as to why J.K. fabricated the charged incidents against Breitzman. The circuit court found:

> This was part of the theory of the defense to show all of these crazy things that J.K. said that didn't make sense and that he was making it up and that only when his mom threatened to call the police did he talk to the counselor and start[ ] bringing all these things up . . . if they could knock down J.K.'s credibility, that was the goal and that was the strategy.

(80:24). The circuit court found that trial counsel discussed this trial strategy with Breitzman and she agreed to it. The circuit court determined that this was an adequate trial strategy (80:23). Under the circumstances, trial counsel's performance was not deficient.

3. Trial counsel's failure to object to testimony about prior incidents did not prejudice Breitzman.

Breitzman intended to testify at trial (77:8). Breitzman also knew that prior incidents in which she slapped J.K. would likely arise at trial (77:46). By denying that the physical contact occurred during the charged incidents, Breitzman would have opened the door to the admission of evidence of prior slapping incidents.

Wisconsin Stat. § 904.04(2)(a) permits the introduction of other acts evidence. Courts apply a three-step analysis to determine the admissibility of "other acts." *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). Evidence of Breitzman's prior acts of striking J.K. were admissible for proper purposes. It demonstrated that Breitzman intended to strike J.K. with respect to the charged incidents and that her contact with J.K. was not an accident. In addition, evidence of the prior physical contact incident was properly admitted to provide the context of the case and to establish J.K.'s credibility. *See State v. Hunt*, 2003 WI 81, ¶¶ 58, 59, 263 Wis. 2d 1, 666 N.W.2d 771. The evidence was logically relevant and it was not unduly prejudicial in the context of the case.

Because Breitzman insisted on testifying and denying the physical contact in the charged incidents, trial counsel could reasonably conclude that the circuit court would have permitted the State to explore the prior incidents that Breitzman admitted. Breitzman was not prejudiced by trial counsel's decision to not seek to exclude evidence that the circuit court would likely have admitted.

Further, through a proper jury instruction, the circuit court also minimized the risk of unfair prejudice from the admission of evidence related to the car slapping incident. Tracking the other act instruction, Wis. JI-Criminal 275 (2003), the circuit court explained that the other incident was admitted for purposes of demonstrating Breitzman's intent and to provide a context or background necessary to a complete presentation of the evidence (73:88-89). *See Hunt*, 263 Wis. 2d 1, ¶¶ 58, 59 (other act evidence admitted to show the context of the crime, provide a complete explanation of the case, and establish the credibility of victims and witnesses). It also admonished the jury not to use the other act incident for an improper purpose. *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399 (a jury is presumed to follow admonitory instructions).

The circuit court's other act instruction also incorporated another feature that reinforced Breitzman's defense and minimized prejudice to her case. It instructed the jury regarding reasonable parental discipline (73:89). That language supported Breitzman's claim that she acted appropriately when she slapped J.K. in the car (77:51-52).

4. Failure to object to evidence about prior use of profane language was not deficient and did not prejudice Breitzman.

Breitzman contends that her trial counsel was ineffective for not objecting to testimony that Breitzman had used profane language toward J.K. on other occasions. Breitzman's brief at 33. She denied calling J.K. a "piece of shit" or "fuck face" on other occasions (72:98). The State could question Breitzman about other incidents for the purpose of undermining her credibility. Wis. Stat. § 906.08(2).

In addition, Breitzman's prior use of profane language toward her son would have been admissible under Wis. Stat. § 904.04(2)(a). Her prior act of directing profane language at J.K. demonstrates that her conduct was not an accident and

was part of the context of the case. Under the circumstances, trial counsel was not deficient for failing to object when Breitzman's own witness, Percifield, testified that Breitzman had used similar language on previous occasions (73:54-55). Further, any failure to object did not prejudice Breitzman, because she admitted using the language at the time of the charged offense (73:22-23).

5. Failure to object to evidence of other incidents involving failure to provide care was not deficient and did not prejudice Breitzman.

Breitzman also contends that trial counsel should have objected to the admission of other evidence related to her failure to provide care for her child. Breitzman's brief at 32-34. The State charged Breitzman with child neglect for failing to provide care for J.K. after he complained about vomiting and defecating blood (2:1, 6; 71:20). Breitzman asserted that J.K. was not sick as long as he claimed. She also provided bland food such as crackers and Gatorade to him. According to Breitzman, the Gatorade's red color explained why his vomit had blood in it (72:96-97).

Breitzman's strategy was to demonstrate that J.K. exaggerated his complaints about the care she provided him and he did everything he could to portray her in a bad light (77:9). In an effort to challenge J.K.'s credibility, trial counsel contrasted J.K.'s claims with Breitzman's testimony.

J.K. claimed that he was kicked off the football team because he did not have a medical excuse for missing a week of practice (71:75). According to Breitzman, J.K. did not tell her that he needed a note until it was too late. In addition, she said that J.K. was spending time with his girlfriend rather than going to practice (72:87).

J.K. claimed that he had untreated eye problems, but he conceded that he progressed through school with assistance from his teachers (71:103). Breitzman noted that she had obtained eyeglasses and eye patches for J.K.

previously, but that J.K. would not wear them (72:93-94). In addition, Breitzman no longer had insurance that included optical coverage (72:95).

J.K. claimed that Breitzman refused to sign him up for school lunches (71:57). Breitzman countered by explaining that she re-signed the school lunch form after it was filled out incorrectly, but that J.K. lost it. She repeatedly asked J.K. to bring her a new one (72:108).

In response to claims that he was not being fed, trial counsel elicited testimony from J.K. that he was one of the bigger lineman on his football team and that no coach had said he appeared underfed (71:67). In fact, Breitzman regularly reminded J.K. to eat breakfast, but he declined (72:85). Breitzman expressed concerns about J.K.'s dietary habits and wanted J.K. to think before he ate (72:109).

Through her testimony, Breitzman sought to present an alternative, reasonable explanation for J.K.'s claims. By demonstrating that J.K. was generally prone to exaggeration and fabrication, Breitzman and her trial counsel sought to undermine J.K.'s credibility with respect to the charged offenses. That their strategy failed did not render it unreasonable. Under the circumstances, trial counsel's decision not to object to the admission of evidence about other events was not objectively unreasonable. His performance was not deficient. And it did not prejudice Breitzman's defense.

D. Trial counsel's opening statement was not ineffective because it did not undermine Breitzman's testimony that she did not strike J.K.

Breitzman asserts that trial counsel was ineffective for outlining a theory of defense, i.e., reasonable parental discipline, that was inconsistent with Breitzman's trial testimony that she did not strike J.K. as alleged in the information. Breitzman's brief at 26-37.

The circuit court denied the claim. It did not find that trial counsel's opening statement contradicted Breitzman's subsequent testimony. The opening was vague and did not focus on the specifics of the charges. Instead, trial counsel presented a picture of the defense that the defense stuck to throughout the trial (80:29). The record supports the circuit court's decision.

In his opening statement, trial counsel did not concede that Breitzman had slapped her son. Instead, he told the jury that they had to determine whether each of the elements of each offense had been proven (71:24). Trial counsel also introduced the theory of defense. He portrayed Breitzman as a parent attempting to do her best to provide structure and discipline to J.K., who had become increasingly difficult to deal with (71:25).

Trial counsel noted that J.K. had been a relatively compliant child, but that something had happened in the past year to aggravate the relationship between him and Breitzman (71:25). Trial counsel pointed out that J.K. had started dating and had become more independent (71:24). Trial counsel suggested that Breitzman's conduct fell within the bounds of reasonable parental discipline (71:24-25).

Trial counsel also asked the jury to consider the circumstances and whether Breitzman intentionally engaged in conduct that violated the law, including actions related to the intentional infliction of pain (71:26). He concluded by telling the jury that Breitzman was "just a struggling parent" and that the State would not be able to meet its burden beyond a reasonable doubt (71:27).

As the circuit court noted, trial counsel's opening statement did not contradict Breitzman's subsequent testimony that she denied hitting J.K. with respect to the two charged incidents (80:29). In fact, trial counsel's opening was consistent with the theory of defense to which Breitzman agreed.

Breitzman's admissions that she had struck J.K. on other occasions (77:23) also required trial counsel to proceed deftly in opening and avoid the suggestion that Breitzman had never struck her child. Breitzman herself was aware that prior uncharged incidents, including the slapping incident in the car, might arise (77:52). She discussed with her trial counsel how this would be addressed and she would acknowledge the conduct, but explain it was reasonable (77:53). Based on this information, trial counsel's more generalized opening statement avoided any suggestion that Breitzman never engaged in intentional physical contact with her son. The opening provided a context for the jury to understand Breitzman's other conduct should the evidence find its way into the record.

Trial counsel's opening statement was consistent with a reasonable trial strategy to portray J.K. as someone who was rebellious and untruthful. Breitzman concurred with this strategy (77:8-9, 51-52). Under the circumstances, trial counsel's opening statement simply did not rise to the level of deficient performance because it did not contradict Breitzman's anticipated testimony.

But even if trial counsel's opening statement was deficient, it did not prejudice Breitzman. She argues that the prosecutor's closing statement reference to trial counsel's opening statement demonstrates prejudice. But Breitzman notes only one occasion where this happened. Breitzman's brief at 38. The prosecutor's fleeting reference to trial counsel's opening statement occurred during his rebuttal (74:33). Instead, the prosecutor's closing argument focused on the facts that supported the conviction for each count (74:5-19).

In addition, the circuit court's instructions also cautioned the jury regarding the purpose of opening and closing statements. Before the parties gave their opening statements, the circuit court cautioned the jury that the opening statements were not evidence (71:18). In closing, it also reminded the jury that the attorney's arguments, conclusions, and opinions were not evidence. It directed the

jury to draw its own conclusions from the evidence and to "decide upon [its] verdict according to the evidence under the instructions given [it] by the court" (73:86). A jury is presumed to follow admonitory instructions. *Marinez*, 331 Wis. 2d 568, ¶ 41.

Even if trial counsel's opening statement constituted deficient performance, Breitzman has failed to demonstrate that the error was so serious that it deprived her of a fair trial and reliable outcome. Based on this record, trial counsel's opening statement did not prejudice Breitzman.

E. Trial counsel's performance did not prejudice Breitzman's defense.

Breitzman also claims that trial counsel committed a series of deficiencies that, taken together, prejudiced her defense. Breitzman's brief at 36-38.

Under the doctrine of "cumulative prejudice," a defendant who suffers multiple instances of deficient performance may rely on the aggregate effect of those deficiencies to establish the prejudice necessary to sustain a claim of ineffective assistance of counsel. *State v. Thiel*, 2003 WI 111, ¶¶ 59-60, 264 Wis. 2d 571, 665 N.W.2d 305. To establish cumulative prejudice, "each alleged error must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness . . . . " *Id.* ¶ 61. In most cases, trial counsel's errors "will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." *Id.*

As discussed in the preceding sections, trial counsel's performance was not deficient because it did not fall below an objective standard of reasonableness. Under the circumstances, Breitzman cannot demonstrate cumulative prejudice.

The evidence with respect to each count, as outlined in Breitzman's brief, remains compelling. Breitzman's brief at

3-6. Breitzman presented an alternative explanation for each charged allegation that J.K. made against her. Breitzman sought to portray herself as a responsible parent dealing with a rebellious child who fabricated claims against her. That the jury rejected her defense, implicitly finding her not credible, does not mean that her trial counsel performed deficiently or that his performance in anyway prejudiced her.

CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm Breitzman's judgments of conviction.

Dated this 16th day of February, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,123 words.

Dated this 16th day of February, 2016.

_____
Donald V. Latorraca
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of February, 2016.

_____
Donald V. Latorraca
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