STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1610-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GINGER M. BREITZMAN,

Defendant-Appellant-Petitioner.

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

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

The State reframes the issues.[1]

1. Did Ginger M. Breitzman prove that her counsel was ineffective for failing to move to dismiss the disorderly conduct charge on free speech grounds because she failed to establish as a matter of settled law that she had a right to engage in profane conduct under circumstances that tended to cause or provoke a disturbance?

The circuit court concluded: No.

The court of appeals concluded: No.

2. Did Breitzman prove that her counsel was ineffective for not objecting to the admission of other acts evidence?

The circuit court concluded: No.

The court of appeals concluded: No.

3. Did Breitzman prove that her counsel was ineffective when he argued a theory of defense in his opening statement that Breitzman claims contradicted her anticipated testimony?

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[1] In her brief-in-chief, Breitzman raises her free speech claim as a separate issue apart from her claim of ineffective assistance of counsel. In the postconviction court and the court of appeals, she appropriately raised the free speech issue in the ineffective assistance framework because the issue was never raised before or during trial. Ineffective assistance of counsel remains the appropriate framework for this Court's review. Accordingly, the State presents its arguments within that framework.

The circuit court concluded: No.

The court of appeals concluded: No.

4. Did Breitzman prove that counsel's errors, if any, resulted in cumulative prejudice that undermined confidence in the outcome of her trial?

The circuit court concluded: No.

The court of appeals did not answer.

INTRODUCTION

A jury found Ginger Breitzman guilty of two counts of physical abuse of a child (intentionally causing bodily harm), neglecting a child, and disorderly conduct. Breitzman challenged her convictions on several grounds, including several claims of ineffective assistance of counsel. Both the circuit court and the court of appeals rejected Breitzman's claim that her counsel was ineffective for (a) failing to move to dismiss the disorderly conduct prosecution on free speech grounds, (b) failing to object to the admission of other acts evidence, and (c) arguing a theory of defense in his opening statement that was purportedly inconsistent with Breitzman's trial testimony.

Breitzman raises three distinct claims before this Court. First, Breitzman asks this Court to consider whether the profane language she directed at her son could not be prosecuted as disorderly conduct because it constituted protected speech under the First Amendment of the United States Constitution and Article I, Section 3 of the Wisconsin Constitution. Breitzman did not make this argument as a free-standing claim in the circuit court. Instead, she argued

that her counsel was ineffective for failing to challenge her disorderly conduct prosecution on free speech grounds. To the extent she raises a free speech challenge here, this Court should analyze it through the ineffective assistance of counsel rubric. Counsel performs deficiently only if he fails to make an argument based on settled law. There is no settled law holding that profane speech tending to cause or provoke a disturbance cannot be prosecuted as disorderly conduct in keeping with the First Amendment. Therefore, counsel's failure to raise a free speech challenge here did not constitute ineffective assistance. If this Court directly addresses this claim, Breitzman should not prevail because her profane conduct under circumstances that tended to cause or provoke a disturbance was not protected speech.

Second, counsel was not ineffective for failing to object to the admission of other acts evidence, including an uncharged incident in which Breitzman slapped her son J.K. Counsel's strategy not to object was not deficient as it was part of a reasonable trial strategy to portray J.K. as one who had made false and grandiose allegations against Breitzman.

Third, counsel was not ineffective for giving an opening statement that Breitzman asserts was inconsistent with her trial testimony. Counsel's opening statement, which included references to reasonable parental discipline, did not contradict Breitzman's testimony that she did not slap J.K. with respect to the charged offenses.

Finally, even if counsel performed deficiently, Breitzman has not shown cumulative prejudice, i.e., that is that counsel's errors caused prejudice sufficient to undermine confidence in the outcome of Breitzman's trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

STATEMENT OF THE CASE

I. Breitzman's trial.

The State tried Breitzman for five crimes including: two counts of physical abuse of a child—intentionally causing bodily harm, contrary to Wis. Stat. § 948.03(2)(b); child neglect resulting in bodily harm, contrary to Wis. Stat. § 948.21(1)(b); child neglect, contrary to Wis. Stat. § 938.21(1)(a); and disorderly conduct, contrary to Wis. Stat. § 947.01. (R.17; 71:9-10.) J.K., Breitzman's teenage son, was the victim. (R.71:28-29.) To prove the charges, the State relied primarily on his testimony.

Physical abuse of a child (nosebleed incident). Sometime between June and December 2012, J.K. was lying on his bed when Breitzman entered his bedroom. Breitzman angrily ordered J.K. to get up. (R.71:38.) When J.K. told Breitzman that he wanted to take a nap, Breitzman punched him in the nose. J.K.'s nose bled for at least three minutes and he felt pain for at least 40 minutes. (R.71:39.) J.K. also cried. (R.71:40.) Breitzman called J.K. a "retard" and "fuck face" during this incident. (R.71:43.)

Breitzman testified that J.K. noticed blood on his mattress when he woke up and turned on the light. She denied hitting him that night. (R.72:78.) J.K. acknowledged that he sometimes got bloody noses. (R.71:86.)

Physical abuse of a child (bruise on the face incident). Between June and December 2012, J.K. was sweeping the

floor while watching his three-year-old sister. Breitzman wanted J.K. to sweep the floor quickly while his sister ran around and threw things on the floor. J.K. was attempting to occupy her when Breitzman arrived and told J.K. that he was not sweeping correctly or fast enough. (R.71:40.) When J.K. said he had to turn on the television for his sister, Breitzman grabbed the broom from J.K. Anticipating that Breitzman was going to "smack or punch" him in the face, J.K. placed his hands in the air with his palms facing his face. (R.71:41.) Breitzman then struck J.K. on the left side of his face with a clenched fist. (R.71:41-42.) J.K.'s face was bruised. (R.71:42.) During this incident, Breitzman called J.K. a "piece of shit," told him he "never do[es] anything right," and said he acted like "the dog of the house." (R.71:44.)

In her testimony, Breitzman claimed that J.K. was not doing his chores and was "sass mouthing" her. (R.72:79.) She described J.K.'s sweeping as "half-ass[ed]." (R.73:33.) Breitzman admitted taking the broom from J.K., but denied slapping him. (R. 72:80.)

Later that evening, J.K. told Breitzman's friend, Daniel Percifield, that he bruised his face with a dumbbell. J.K. explained that he lied because he did not want Breitzman to get mad at him. (R.71:78.) Breitzman testified that she recalled seeing a bruise on J.K.'s cheekbone, which he told her was caused by a dumbbell. (R. 72:92.)

Child neglect (failing to provide medical care). In November 2012, J.K. was vomiting and had diarrhea. He noticed blood in the vomit and stool. J.K. remained ill for six to seven days. (R.71:45.) J.K. had never been that sick before and asked Breitzman to take him to the doctor. J.K. told her about the blood. Breitzman told him that since his father was not paying for health insurance, she would not take J.K. to

the doctor. (R.71:46.) J.K. shared his experience with his Facebook friends who told him how to take care of himself. (R.71:47.)

In her testimony, Breitzman denied that J.K.'s condition persisted for days. She claimed that bland food was available for J.K. to eat. When J.K. told her that he was "puking up blood," Breitzman believed that it was from his drinking fruit punch Gatorade. (R.72:96.)

Child neglect (failing to provide shelter). One day in the winter of 2012, J.K. arrived home from school at 3:30 p.m. The door was locked. J.K. knocked multiple times on the front and back doors and rang the doorbell. No one answered. (R.71:31.) J.K. knocked and rang the doorbell over a four-hour period. (R.71:32.) J.K. also knocked on an upstairs back porch door located on the floor where Breitzman sleeps. (R.71:33.) Again, no answer. J.K. used his cell phone to try to call Breitzman, but the battery drained after two hours. J.K. knocked on a neighbor's door, but no one was home. (R.71:34-35.) J.K. called a friend to see if he could go to his house. (R.71:35.)

J.K. acknowledged that he did not have a coat. He explained that it was 50 degrees when he went to school, but in the 30s when he got home. (R.71:34, 84.) To stay warm, J.K. wrapped himself in a grill cover, shielding himself from the elements for two to three hours. (R.71:34.) Still, his body shivered from the cold. To warm his hands and face, J.K. blew breath into his hands and placed his hands on his face in an attempt to keep warm. (R.71:36.) J.K. checked the door every fifteen minutes to see if someone would answer. (R.71:36.) At approximately 8:30 p.m., a light came on and Breitzman opened the door. (R.71:37.) Breitzman told J.K. that she had been asleep. (R.71:37; 72:73.)

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

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

J.K. testified that Breitzman told him that he "always mess[es] things up," that he was a "retard," a "fuck face," and a "piece of shit." (R.71:49.) J.K. told Breitzman that he got the popcorn from a friend at school. She responded that it was not from school and that J.K. was hoarding food. (R.71:49.) Breitzman told him that she was calling the police and directed J.K. to gather his belongings because she intended to kick him out of her house. (R.71:51.) J.K. stated that he felt "worthless," when Breitzman called him a "piece of shit" and "fuck face." (R.71:50.) When J.K. told Breitzman to stop calling him names, Breitzman replied, "I don't give a fuck." (R.71:50.)

When Breitzman first came home, J.K. was on the phone with his friend, D.M. (R.71:49.) D.M. stated that J.K. seemed a "little bit scared" and sounded "a little bit different" after Breitzman's arrival. (R.72:21.) D.M. heard Breitzman call J.K. "really mean names" and said "fuck a lot." (R.72:22.) D.M. stated that Breitzman yelled at J.K., who was not "yelling back at her." (*Id.*) When J.K. told Breitzman that he

got the popcorn from a friend at school, she called him a liar and accused him of stealing his sister's money. (*Id.*)

The call terminated, but J.K. called D.M. back crying ten minutes later. (R.71:51.) D.M. stated "I've never heard him cry before. He was always just a normal teenager, and it was just really different." (R.72:23.) On December 5, 2012, J.K. told additional people what had happened at his house the day before. (R.71:48.)

Breitzman testified that she called J.K. a "piece of shit" and a "fuck face," but insisted that she only used the latter term one time. (R.72:98.) Percifield testified that he had heard Breitzman call J.K. a "fuck face" more than a couple of times as well as a "piece of shit," a "pig," "retard," "useless," and "worthless." (R.73:55.) Breitzman acknowledged it was inappropriate to call someone a "fuck face" when one is angry or disappointed with another's conduct. (R.72:100.)

Other incidents. J.K. testified about other incidents. In November 2012, Breitzman yelled at J.K., calling him a "dog" after he ate her boyfriend's leftovers. (R.71:54.) J.K. text messaged Breitzman. He explained to her that the leftovers were getting old and asked her to stop calling him names. (R.71:55.)

J.K. also explained that he did not get free lunches through school because Breitzman did not fill out the necessary forms. (R.71:57.) Because Breitzman believed that J.K. overate, she placed a lock on the refrigerator. (R.71:58.) Breitzman claimed that J.K. refused to eat breakfast. (R.72:85.)

On cross-examination, J.K. described another incident that resulted in a bloody nose. Breitzman was driving the car

and J.K. was seated in the passenger seat when Breitzman struck J.K. with the back of her hand. (R.71:87-88.) J.K. explained that he was singing a song that his kindergarten teacher taught him. Breitzman claimed she taught him the song. When J.K. disagreed, Breitzman struck him. (R.71:92.) In her testimony, Breitzman acknowledged striking J.K. with the back of her hand in the car. (R.72:81.) Breitzman admitted that she had slapped J.K. on other occasions when he had become defiant, but she could not recall the circumstances. (R.72:90.)

Breitzman claimed that J.K. had made up allegations about her for attention-seeking purposes. (R.73:32.) Further, she asserted that J.K. had started lying to her, talking back, becoming belligerent, and not telling her where he was within the past year. (R.72:83.)

The jury's verdict. The jury found Breitzman guilty on all counts. (R.75.)

II. The postconviction proceedings.

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 claimed that her 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. (R.53:1.)

Following an evidentiary hearing in which both Breitzman and her counsel testified (R.77), the circuit court granted Breitzman's motion for a judgment of acquittal on the

charge of child neglect resulting in bodily harm (Count Three) on the ground of insufficient evidence. But it found the evidence sufficient to sustain Breitzman's conviction on the other child neglect charge (Count Four) and the disorderly conduct charge (Count Five) (R.62:1). The circuit court also denied Breitzman's claims of ineffective assistance of counsel. (R.62:2.)

III. The court of appeals' decision.

On appeal, Breitzman challenged the sufficiency of the evidence to support her convictions for child neglect (the failure to provide shelter incident) and disorderly conduct. *State v. Ginger M. Breitzman*, Case No. 2015AP1610-CR, 2016 WL 4275591, ¶ 11 (Dist. I, Wis. Ct. App., August 16, 2016). The court of appeals found the evidence sufficient to sustain Breitzman's child neglect conviction. *Id*. ¶¶ 13-15. The court of appeals also found the evidence sufficient to sustain her conviction for disorderly conduct. It concluded that the State proved that Breitzman's conduct was profane and that it tended to cause or provoke a breach of the peace. *Id*. ¶¶ 16-18.

Breitzman also argued that her counsel was ineffective because (1) counsel should have moved to dismiss the disorderly conduct charge on the ground that the charge violated her right to free speech; (2) counsel failed to object to other acts evidence; and (3) counsel argued a theory of defense that contradicted her testimony. *Id*. ¶ 19. The court of appeals concluded that counsel was not ineffective for failing to move to dismiss the disorderly conduct charge. *Id*. ¶ 22. Second, it determined that counsel's decision not to object was a matter of trial strategy; therefore, counsel was not ineffective on this ground. *Id*. ¶ 23. Finally, the theory of defense reasonable parental discipline, was not contrary to Breitzman's

testimony because the testimony that counsel elicited addressed these issues. *Id*. ¶¶ 24-25.

STANDARD OF REVIEW

Ineffective of counsel claims. A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. This Court will uphold the circuit court's factual findings unless they are clearly erroneous. "[T]he circumstances of the case and the counsel's conduct and strategy" are considered findings of fact. *State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 848 N.W.2d 786. Whether counsel's performance was ineffective presents a legal question that this Court reviews independently, benefiting from the circuit court's and court of appeals' analysis. *Id*.

Constitutional challenges to a prosecution. Whether the First Amendment of the United States Constitution and Article I, Section 3 of the Wisconsin Constitution prohibits the State from prosecuting Breitzman for disorderly conduct presents a legal question that this Court reviews independently. *In re A.S.*, 2001 WI 48, ¶ 19, 243 Wis. 2d 173, 626 N.W.2d 712.[2]

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[2] Breitzman suggests that because content-based restrictions on speech are presumed invalid, the State should bear the burden of showing their constitutionality. (Breitzman's Br. 15, citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)). However, this standard does not apply to sec. 947.01(1), which, as this Court has determined, is "aimed at proscribing conduct" rather than "circumscribing the content of speech directly." *In re A.S.*, 2001 WI 48, ¶ 13, 243 Wis. 2d 173, 626 N.W.2d 712.

ARGUMENT

I. Breitzman's counsel was not ineffective for failing to raise a free speech challenge to the disorderly conduct charge because she has not demonstrated as a matter of settled law that she has a right to engage in profane conduct that tends to cause or provoke a disturbance.

A. General legal principles.

1. Ineffective assistance of counsel.

A criminal defendant has the 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). A defendant alleging ineffective assistance of trial counsel has the burden of proving both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687. If the defendant fails to establish one prong of the test, the court need not address the other. *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 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. To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *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.

Trial counsel can never be ineffective for declining to make an argument that controlling legal authority does not support. "[I]neffective 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." *State v. Lemberger*, 2017 WI 39, ¶ 33, __ Wis. 2d ___, __ N.W.2d __ (citations omitted). Thus, counsel's "failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *Id.* Counsel is simply "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).

2. The disorderly conduct statute and the First Amendment.

The present case raises two questions about Wis. Stat. § 947.01(1), the disorderly conduct statute. First, does the statute reach profane language spoken inside a private home? Second, does a disorderly-conduct charge based on such language violate the First Amendment?

The first question is easily answered. The statute prohibits a person, whether "in a public or private place," from engaging in "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01(1); *State v. Schwebke*, 2002 WI 55, ¶ 30, 253 Wis. 2d 1, 644 N.W.2d 666.

Section 947.01(1) extends to domestic disputes. Because the statute extends to conduct that occurs in a private place, it is not limited to "disruptions or disturbances that implicate the public directly." *Id*. What sec. 947.01(1) does require is that "when the conduct tends to cause or provoke a disturbance that is personal or private in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community." *Id*. ¶ 31. Mere "personal annoyance" is not enough. *Id.* ¶ 30. This Court has recognized that the State has an interest in regulating conduct in domestic disputes that may occur on a private level because "such conduct affects the overall safety and order in the community." *Id*. ¶ 31. Accordingly, sec. 947.01(1) reaches domestic disputes even when "the conduct apparently [does] not involve a threat to disturb the public at large." *Id*. ¶ 29.

The second question presented here is whether a disorderly-conduct charge based on constitutionally unprotected speech violates the First Amendment. There is no controlling authority that directly answers this question. Breitzman cites no case law on point, and the State has found none.

Application of the disorderly conduct statute may result in an "*incidental* limitation on the content of speech." *A. S.*, 243 Wis. 2d 173, ¶ 13 (emphasis added). But section 947.01(1) "is aimed at proscribing conduct in terms of the results that could be reasonably expected therefrom. . . . [It] is not aimed at circumscribing the content of speech directly." *Id*. (citation omitted). This Court has held 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." *Id.* ¶ 16.

The U.S. Supreme Court classifies certain types of speech as falling outside the First Amendment's protections, including "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." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis added) (footnotes omitted). Prosecuting these types of utterances does not "raise any Constitutional problem" because they are not an "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." *Id.* "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Id*.[3]

Chaplinksy has repeatedly guided this Court in considering First Amendment challenges to disorderly conduct prosecutions. In *State v. Zwicker*, 41 Wis. 2d 497, 164 N.W.2d 512 (1969), this Court cited *Chaplinsky* to support its conclusion that the First Amendment does not preclude disorderly conduct charges in cases incidentally affecting constitutionally unprotected speech. *Zwicker*, 41 Wis. 2d at 510. *In re A.S.*, this Court again cited *Chaplinsky* to explain that sec. 947.01(1)'s incidental application to certain types of speech is permissible because it is not directed at its content,

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[3] Historically, profanity has not been considered protected speech. The Supreme Court has observed that a majority of the States that ratified the Constitution "gave no absolute protection for every utterance" and that all the ratifying States "made either blasphemy or profanity, or both, statutory crimes." *Roth v. United States*, 354 U.S. 476, 482 (1957). Based on this history, "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Id* at 483.

but at controlling its harmful effects. *A.S.*, 243 Wis. 2d 173, ¶ 15. "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.* ¶ 17. And in *In re Douglas D.*, 2001 WI 47, ¶ 17, 243 Wis. 2d 204, 626 N.W.2d 725, this Court cited *Chaplinsky* for the proposition that "'the right of free speech is not absolute at all times and under all circumstances.'" *Douglas D.*, 243 Wis. 2d 204, ¶ 17 (quoting *Chaplinsky*, 315 U.S. at 571).

B. Trial counsel's failure to raise a free speech challenge to Breitzman's prosecution for disorderly conduct did not constitute ineffective assistance of counsel.

1. Counsel did not perform deficiently by failing to challenge the disorderly conduct charge on free speech grounds because the issue was not one of settled law.

The issue before this Court is not whether Breitzman would have prevailed on a motion to dismiss the disorderly conduct charge on free speech grounds, but whether her counsel's failure to raise the issue "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. The answer to that question is straightforward: counsel did not perform deficiently.

Counsel is not ineffective for failing to raise an argument (even one that might have been successful) premised on a novel legal analysis or unsettled law. As this Court has written, counsel's failure to raise a particular legal

claim can be ineffective only "where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *Lemberger*, 2017 WI 39, ¶ 33.

Because Breitzman bears the burden of establishing deficient performance, she must "demonstrate[] that controlling law" supports her analysis that the First Amendment bars her prosecution for disorderly conduct. *Id*. Here, no controlling law supports Breitzman's contention. Breitzman asserts that there is no case law anywhere upholding a criminal conviction in a case like hers, and concludes that she is therefore entitled to a reversal. (Breitzman's Br. 27.) Breitzman has it backwards. Because there is no controlling case law, counsel was not ineffective, and the State is entitled to an affirmance.

Significantly, Breitzman asked the court of appeals to publish its opinion in this case in order to develop the case law on her free speech challenge to the disorderly conduct charge. (Breitzman's Court of Appeals' Br. 2.) That request constituted an implicit recognition that her claim, at best, rested on an unsettled area of the law. Therefore, by Breitzman's own concession, her counsel's failure to move to dismiss did not fall below the objective standard of reasonableness necessary to sustain an ineffective assistance of counsel claim.

Breitzman has not established that the law was well-settled in her favor. As counsel recognized, the disorderly conduct statute is interpreted under fairly broad parameters. (R.77:7.) And here, given this Court's prior decisions including *Schwebke* and *A.S.*, which reiterated its commitment to the differentiation between protected and unprotected speech under *Chaplinsky*, counsel would have had no reason to believe that a First Amendment challenge to the disorderly

conduct charge would have been successful. *See A.S.*, 243 Wis. 2d 173, ¶ 15. Indeed, in denying Breitzman's ineffective assistance claim, the circuit court noted that it would have denied the motion had counsel filed it. The circuit court had determined that Breitzman's utterances constituted unprotected speech because they tended to cause or provoke a disturbance. (R. 80:12-16.) Based on this record, Breitzman has failed to demonstrate that counsel's performance fell below an objective standard of professional representation.

2. Any alleged deficiency did not prejudice Breitzman because the profane language directed at J.K. under circumstances that tended to cause a disturbance was not constitutionally protected.

Breitzman's disorderly conduct charge and conviction did not violate the First Amendment. Therefore, any arguable deficiency in counsel's performance for not moving to dismiss the disorderly conduct charge did not prejudice Breitzman.

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. (R.17:2.) Relying on the standard jury instruction, Wis. JI-Criminal 1900 (2012), the circuit court informed the jury that the State had to prove two elements: (1) Breitzman engaged in disorderly conduct, and (2) Breitzman's conduct "under the circumstances as they then existed tended to cause or provoke a disturbance." (R.73:83.) The circuit court instructed the jury: "Only conduct that unreasonably offends the sense of decency or propriety of the community is included." (R.73:83.) The jury was also instructed that conduct that might disturb an overly sensitive person is not disorderly if the community would generally tolerate it. (*Id.*) In other words, the jury was

expressly told that it could not convict Breitzman if the language she used merely annoyed J.K. *See Schwebke*, 253 Wis. 2d 1, ¶ 31.

The evidence establishes that Breitzman used profane language, directed at her son, under circumstances that tended to provoke a disturbance. When Breitzman returned home to the smell of burnt popcorn, she berated J.K., telling him that he "always mess[es] things up," that he was a "retard," a "fuck face," and a "piece of shit." (R.71:49.) J.K. felt "worthless" when Breitzman called him a "piece of shit" and "fuck face." (R.71:50.) When J.K. asked Breitzman to stop calling him names, Breitzman replied, "I don't give a fuck." (R.71:50.) Breitzman told J.K. to pack up his belongings because she intended to kick him out of her house. (R.71:51.) J.K.'s friend, D.M., overheard Breitzman's profanity-laced tirade over the phone. (R.71:49.) D.M. heard Breitzman call J.K. "really mean names" and say "fuck a lot." (R.72:22.)

Breitzman's use of profane language tended to cause a disturbance. It caused J.K. to feel worthless. (R.71:50.) His friend D.M. observed J.K.'s reaction, describing J.K. as being a "little bit scared." (R.72:21.) Minutes later, when the two spoke, J.K. was crying, something that D.M. had never witnessed J.K. do before. (R.72:23.) Breitzman's conduct pushed J.K. over the edge, prompting him to report her behavior to a school counselor and a police officer the following day. (R.71:48, 52-53.)[4]

[4] That the conduct resulted in police contact is a consideration in assessing whether it tended to cause a disturbance. *Schwebke*, 253 Wis. 2d 1, ¶¶ 32, 44.

That J.K. did not lash out verbally (R.72:22) or physically does mean that Breitzman's conduct did not tend to cause a disturbance. Simply because J.K. "exhibit[ed] fortitude in the face" of Breitzman's conduct is not a reason to allow her conduct to go unpunished. *See Douglas D.*, 243 Wis. 2d 204, ¶ 29. Indeed, J.K. had good reason for exercising restraint. In the past, Breitzman's verbal abuse of her son was accompanied by physical abuse.

This record supports the jury's finding that Breitzman's conduct was not conduct that would be generally tolerated by the community because it offended the community's sense of decency and propriety. Breitzman's conduct, even though in the form of language, was not protected by the First Amendment. Her profane utterances were not an "essential part of any exposition of ideas," were "utterly devoid of social value," and tended to cause a disturbance. *A.S.*, 243 Wis. 2d 173, ¶ 17. And, under the circumstances, they were not constitutionally protected because "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinksy*, 315 U.S. at 572. J.K. was shaken and disturbed by Breitzman's conduct, as illustrated by his reporting what happened to D.M., the counselor, and the police. D.M., who overheard some of the verbal abuse, was also disturbed and shaken. Thus, Breitzman's profanity tended to—and did—cause a disturbance under the circumstances. It was not constitutionally protected speech.

Breitzman's right to constitutionally protected speech was not violated here. The circuit court's instruction protected her from being prosecuted based solely on her use of profane language. First, the jury could not find Breitzman guilty unless she engaged in profane conduct under circumstances that tended to cause a disturbance. Second, the jury understood that Breitzman's conduct itself had to

"unreasonably offend" "the sense of decency or propriety of the community." (R.73:83.) The circuit court also told the jury that conduct is not disorderly if it "is generally tolerated by the community at large but might disturb an oversensitive person." (*Id.*) Thus, consistent with this Court's prior decisions, the jury understood that Breitzman's conduct was not disorderly if it "cause[d] only personal annoyance" to J.K. *See Schwebke*, 253 Wis. 2d 1, ¶ 30. The instructions prevented the jury from convicting Breitzman based solely on her profane language.[5]

Breitzman's First Amendment challenge to her disorderly prosecution fails on the merits. Therefore, even if there was some legal basis for counsel to move to dismiss the charge, his failure to do so did not prejudice Breitzman because such a motion would have been unsuccessful.

C. Profane conduct that tends to cause a disturbance is not protected speech.

Breitzman suggests that it was her use of profane language alone that formed the basis for her conviction. (Breitzman's Br. 27.) The State disagrees. Proof of profanity alone does not trigger liability under sec. 947.01(1), which this Court has found "is not aimed at circumscribing the content

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[5] Breitzman focuses on counsel's failure to file a motion to dismiss. In fact, this Court has viewed the question of "whether an alleged statement constitutes a true threat, unprotected by the First Amendment, is an issue of fact for the fact finder" unless the court determines that the evidence is insufficient as a matter of law. *State v. Perkins*, 2001 WI 46, ¶ 48, 243 Wis. 2d 141, 626 N.W.2d 762.

of speech directly." *In re A.S.*, 243 Wis. 2d 173, ¶ 13.[6] The jury did not find Breitzman guilty simply because she used profane language. Rather, the jury found her guilty because she engaged in profane conduct under circumstances that tended to cause or provoke a disturbance. The court of appeals rejected Breitzman's challenge to the sufficiency of the evidence to sustain her disorderly conduct conviction, a challenge that she did not renew before this Court. *Breitzman*, 2016 WL 4275591, ¶ 18.

Breitzman's argument that counsel was ineffective rests on the premise that *Chaplinsky* is no longer good law and that it provides little precedential guidance in assessing her ineffective assistance claim. (Breitzman's Br. 20-24.) Breitzman's view of the validity of *Chaplinsky* fails to help her, for two reasons.

First, in an ineffective assistance context, Breitzman must demonstrate that *Chaplinsky* has been definitively overruled or limited as a matter of *settled law*. Without this showing, she has not proved that counsel's failure to object to her disorderly conduct prosecution was "'[un]reasonable[] under prevailing professional norms' given the current state of the law." *Lemberger*, 2017 WI 39, ¶ 35 (citation omitted). Second, she must also show that this supposed overruling of *Chaplinsky* would affect Breitzman's conviction, which required the jury to find not only that she engaged in profane

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[6] Breitzman cites *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). (Breitzman's Br. 26.) *R.A.V.* is inapposite. The Supreme Court found an ordinance facially unconstitutional because it impermissibly discriminated on the basis of content, proscribing certain symbols such as a burning cross or swastika, but not other symbols that displayed hostility to other ideas. *R.A.V.*, 505 U.S. at 381, 391. Section 947.01(1) does not suffer from the same infirmity because it does not discriminate based on content.

conduct, but under circumstances that caused or tended to provoke a disturbance. She overcomes neither hurdle.

First, Breitzman fails to show that *Chaplinsky* has been limited, much less overruled as a matter of settled law. Citing *Douglas D.*, she notes that this Court did not include profanity as an example of unprotected speech. (Breitzman's Br. 18-19.) But nothing in *Douglas D.* suggests that this Court repudiated *Chaplinsky's* classification of profanity as unprotected speech. In fact, this Court cited *Chaplinsky* approvingly, without limitation, in its decision. *See Douglas D.*, 243 Wis. 2d 204, ¶ 17. More importantly, Breitzman ignores this Court's decision in *A.S.*, issued the same day as *Douglas D.*, which approvingly quoted the passage from *Chaplinsky* including profanity as a "well-defined and narrowly limited class[] of speech" that is not protected. *In re A.S.*, 243 Wis. 2d 173, ¶ 15.

Breitzman notes that the U.S. Supreme Court has more recently not included profanity in its list of unprotected speech. (Breitzman's Br. 19-20.) For example, she notes that in *United States v. Stevens*, 559 U.S. 460 (2010), the Supreme Court identified "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct" as unprotected speech. *Id*. at 468-69 (citations omitted). She fails to note that, after citing these classes of unprotected speech, the Court quoted approvingly from *Chaplinsky* without reservation. *Stevens*, 559 U.S. at 469 (citing *Chaplinsky*, 315 U.S. at 571-72). The absence of "profanity" from a list that includes other types of unprotected speech does not demonstrate that profanity is now protected speech.

Breitzman observes that the *Stevens* Court cautioned that the *Chaplinsky* language—characterizing historically unprotected categories of speech as being "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"—was merely descriptive and did not establish a test that may be applied to permit the State to prosecute a person whose speech is deemed valueless. (Breitzman's Br. 21 (citing *Stevens*, 559 U.S. at 471; *Chaplinsky*, 315 U.S. at 572).) That does not matter here. Section 947.01(1) does not predicate liability on whether the speech has worth or value. Profane language triggers liability only if it is uttered under circumstances that tend to cause a disturbance.

Breitzman fails to show that, as a matter of settled law, *Chaplinsky* is no longer good law. But even if she had, she offers no case even hinting that the First Amendment prohibits a state from criminalizing the utterance of profane language *under circumstances that tend to cause a disturbance*. Her discussion of case law looks only at profanity in isolation. Her reliance on *Cohen v. California*, 403 U.S. 15 (1971) (Breitzman's Br. 23-24), football chant analogy, and reference to the "true threat" standard in *Douglas S.* all fail to take the disturbance requirement of the disorderly conduct statute into account.

Cohen involved a conviction based on wearing a jacket bearing the words "Fuck the Draft" in a courthouse. *Cohen*, 403 U.S. at 16. The Supreme Court held that a state may not "make the simple public display here of this single four-letter expletive a criminal offense." *Id.* at 26. Critical to the Court's decision was the way that Cohen displayed the word: "[I]t was not clearly 'directed to the person of the hearer.' No individual actually or likely to be present could reasonably have regarded the words on [Cohen's] jacket as a direct personal insult." *Id.* at 20 (citation omitted). In stark contrast, Breitzman's conduct was not, as she suggests, a "trifling and annoying instance of individual distasteful abuse of a

privilege." (Breitzman's Br. 23 (citing *Cohen*, 403 U.S. at 25).) She directed her profanity at her son in a hostile and accusatory manner, loud enough for D.M. to clearly hear it over the phone. (R.72:22.)

Breitzman makes the same error when she suggests that her behavior is no different from football fans who use profane language to chant against the opposing team. (Breitzman's Br. 28-29.) The fans' profane chant simply does not satisfy sec. 947.01(1)'s second element because it is not likely to tend to provoke a disturbance under existing circumstances. In contrast, Breitzman angrily and aggressively directed profane language at her son while threatening to call the police and ordering him to pack his belongings. (R.71:51.) J.K. knew from experience that hostile language was potentially a prelude to physical violence. Given these circumstances, J.K. was so upset that he cried and reported Breitzman's behavior to authorities the following day. (R.71:48, 52-53.) Breitzman's conduct is readily distinguishable from a football fan's profane chant. Her argument trivializes the effects of her behavior on J.K.

And *Douglas D.* does not support Breitzman's contention claim, either. (Breitzman's Br. 16-18.) *Douglas D.* holds that only "true threats" are unprotected and prosecutable under sec. 947.01(1). *Douglas D.,* 243 Wis. 2d 204, ¶¶ 30-32. In *Douglas D.*, a 13-year-old boy wrote about dismembering a teacher as part of a creative writing assignment. *Id*. ¶¶ 4-7. The supreme court determined that Douglas's conduct did not rise to the level of a true threat, in part, because the writing was done in the context of a creative writing class rather than some other class. *Id*. ¶ 38. The supreme court relied heavily on the fact that "there is no evidence that Douglas had threatened [the teacher] in the

past or that [the teacher] believed Douglas had a propensity to engage in violence." *Id.* ¶ 37.

Here, Breitzman's conduct was not the product of a child's middle school writing assignment. And the recipient of her comments was not a teacher, but her child. More importantly, unlike the teacher in *Douglas D.*, J.K. had been physically abused by Breitzman in prior disputes. These prior acts of physical abuse most likely induced fear in J.K. that Breitzman's berating, profane taunts for burning popcorn could and would escalate to physical violence.

* * * * *

Breitzman fails to show that, as a matter of settled law, the First Amendment prevents a state from criminalizing profanity uttered under circumstances that would tend to cause of disturbance. Her counsel was not ineffective for not raising a First Amendment defense.

II. Counsel's decision not to object to the admission of other acts was based on a reasonable trial strategy.

A. The strong presumption of effective assistance extends to trial strategy.

Courts are "highly deferential" when evaluating the reasonableness of counsel's performance. *Strickland*, 466 U.S. at 689. "Counsel enjoys a 'strong presumption' that his conduct 'falls within the wide range of reasonable professional assistance.'" *Carter,* 324 Wis. 2d 640, ¶ 22 (quoting *Strickland,* 466 U.S. at 689). "[The] presumption of constitutional adequacy extends to decisions of trial strategy." *Jenkins*, 355 Wis. 2d 180, ¶ 102. Accordingly, "[c]ounsel's decisions in choosing a trial strategy are to be given great

deference." *State v. Balliette*, 2011 WI 79, ¶ 26, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). Such deference is especially appropriate because "[c]ounsel'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.

Accordingly, the court of appeals has characterized trial strategy as "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, *aff'd*, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436. That counsel's "strategy ultimately proved unsuccessful does not make it any less reasonable for purposes of evaluating" a claim of ineffective assistance. *State v. Maloney*, 2005 WI 74, ¶ 44, 281 Wis. 2d 595, 698 N.W.2d 583.

B. Counsel's decision not to object to J.K.'s testimony about other incidents was not ineffective because it was based on a reasonable trial strategy.

1. Counsel intended to undermine J.K.'s credibility by demonstrating that he habitually made false and grandiose allegations against Breitzman.

As part of his trial strategy, counsel attempted to portray J.K. as a child who made false and grandiose allegations against Breitzman. Consistent with this strategy, and in consultation with Breitzman, counsel did not object when evidence of other, uncharged incidents were introduced at trial. These additional acts included allegations that Breitzman slapped J.K. on a previous occasion, that she failed to provide J.K. necessary medical care, and that she called

J.K. profane names on other occasions. The record demonstrates the reasonableness of this trial strategy.

At the postconviction hearing, counsel testified that he intended to portray Breitzman as a struggling mother doing her best under difficult circumstances. (R.77:8.)[7] Counsel noted that J.K. and his mother had a good relationship that soured. (R.77:21.) Breitzman told counsel that she attributed this change to J.K.'s involvement with a girlfriend and his father's refusal to have any contact with him. (R.72:76.) While Breitzman's life had remained constant, J.K. started telling other people that things were bad. (R.77:22.) Breitzman told counsel that J.K. had exaggerated events, twisting them into an argument that something had happened. Breitzman told counsel that J.K. was lying and had become rebellious. (R.77:9.)

Counsel explained that he did not object to J.K.'s allegations about the other incidents involving his mother because he intended to show that J.K. had so aggrandized his complaints that the jury should not believe his testimony about his mother's conduct. (R.77:15-16.) As part of this trial strategy, counsel would paint J.K. as a child who made false and grandiose allegations against Breitzman. (R.77:20.) Counsel believed that by allowing the uncharged allegations to come into evidence without objection, he would be able to put J.K.'s exaggerated claims into a broader context. (R.77:21.) This strategy was connected to a separate defense based on reasonable discipline. (R.77:24.)

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[7] In its decision denying Breitzman's postconviction claims, the circuit court made credibility findings. It found trial counsel's testimony to be credible, and Breitzman's testimony to be not credible. (R.80:20.)

Counsel testified that Breitzman agreed with this strategy. (R.77:20.) Breitzman acknowledged the strategy in her own postconviction testimony. She testified that, as part of the trial strategy, she would portray J.K. as rebellious, defiant, and untruthful. (R.77:51.) Breitzman understood that she would testify and explain what actually happened when she was attempting to deal with J.K.'s rebelliousness. (R.77:16.) Breitzman herself conceded that counsel and she agreed to a strategy that "the whole truth [] come out." (R.77:44.) By readily acknowledging her own flaws, Breitzman recognized that counsel's strategy of undermining J.K.'s credibility was more likely to be successful.

This Court should defer to counsel's trial strategy, which he explained cogently at the *Machner* hearing. Significantly, Breitzman approved the strategy and even acknowledged the reasoning and logic behind counsel's chosen approach. There was no ineffective assistance of counsel here.

2. Counsel was not ineffective when he did not object to J.K.'s testimony about an uncharged incident when Breitzman slapped him.

Trial counsel did not perform deficiently by not objecting to J.K.'s testimony about an uncharged slapping incident. The jury learned on J.K.'s cross-examination that Breitzman had slapped him in the car when counsel questioned J.K. about frequent nose bleeds. (R.71:87.) J.K. acknowledged frequent nose bleeds, and then volunteered, "[b]ut this was after the incident when she hit me in the car and my nose was bleeding on me." (R.71:87.) Breitzman later testified that she had slapped J.K. in the car. (R.72:81.)

J.K.'s testimony about the prior slapping incident did not surprise counsel. At the postconviction hearing, counsel testified that while Breitzman had denied slapping J.K. in the charged offenses, she admitted that she may have previously slapped him. "The other slaps in the past would have been something extremely minor and within her privilege as a parent to do so." (R.77:9.) Before trial, Breitzman knew that the prior slapping incident in the car might arise at trial. (R.77:46, 52.) Breitzman discussed with her counsel how to address this incident should it arise. She would acknowledge it, but explain that it was reasonable under the circumstances (R.77:53.) Breitzman also told her counsel that she believed that the car slapping incident formed the basis for J.K.'s animus against her and prompted him to allege other misconduct against her. (R.77:10, 29.)

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

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. (R.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. (R.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. (R.72:78.) In support of her defense that she did not strike J.K. in the bedroom, counsel extensively questioned J.K. about his nose bleeds. J.K. readily conceded that he was

prone to nose bleeds. (R.71:85-87.) This line of questioning supported Breitzman's theory of defense that J.K. fabricated 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. (R.71:40-42.) Breitzman acknowledged taking the broom away and sending him to his room, but denied physically disciplining J.K. (R.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. (R.72:92-93.) J.K. acknowledged telling Percifield that he injured himself with a dumbbell. (R.71:78.)

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 was 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.

(R.80:24.) The circuit court found that counsel discussed this trial strategy with Breitzman and she agreed to it. The circuit court determined that this was an adequate trial strategy. (R.80:23.) As the court of appeals observed, "Counsel's decision was deliberate and was based on articulated reasons which [were] neither irrational nor unreasonable."

Breitzman, 2016 WL 4275591, ¶ 23. Based on this strategy, counsel was not ineffective when he did not object to the admission of evidence of Breitzman's other conduct.

Counsel's decision not to object to testimony about the prior slapping incident did not prejudice Breitzman's defense. Breitzman intended to testify at trial. (R.77:8.) Breitzman also knew that prior incidents in which she slapped J.K. would likely arise at trial. (R.77:46.) By denying that the physical contact occurred during the charged incidents, Breitzman would have opened the door to the admission of evidence that she had struck J.K. on other occasions.

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 would have been 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, 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 counsel's decision to not seek to exclude evidence that the circuit court would likely have admitted.

To minimize the risk of unfair prejudice from the admission of evidence about the slapping incident, the circuit court provided a limiting instruction. Tracking the language of 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. It also admonished the jury not to use the other act incident for an improper purpose. (R.73:88-89.) This Court has long presumed that juries comply with properly given limiting and cautionary instructions. *See State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399 (a jury is presumed to follow admonitory instructions). And there is no reason to believe that the jury did not comply here.

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. (R.73:89.) That language supported Breitzman's claim that she acted appropriately when she slapped J.K. in the car. (R.77:51-52.) Thus, even if counsel should have objected when J.K. testified about the car slapping incident, J.K.'s testimony did not prejudice Breitzman.

3. Counsel's failure to object to evidence about Breitzman's prior use of profane language was not deficient and did not prejudice Breitzman.

Counsel's failure to object to other instances when Breitzman used profane language was not deficient because the circuit court would not have sustained the objection.

On cross-examination, Breitzman denied regularly calling J.K. a "piece of shit" and insisted that she had called J.K. a "fuck face" "one time." (R.72:98-99.) Breitzman's own witness, Percifield, testified about an incident in which he stepped between Breitzman and J.K. because Percifield believed that J.K. was about to hit her. Percifield stated that Breitzman used inappropriate language to control J.K. when he was defiant with her. (R.73:52-53.) On re-cross examination, Percifield testified that he heard Breitzman use the phrase "fuck face" "more than a couple" times. (R.73:54-55.) He did not know how many times she had used the phrase, "piece of shit." (*Id.*)

Based on Breitzman's denial that she had used the language on other occasions, the State could certainly question Breitzman and Percifield about her use of these words on other occasions for the purpose of challenging Breitzman's credibility. *See* 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 part of the context of the case. On this record, even if counsel had objected to questions about other instances of Breitzman's use of profane language, the circuit court would not have sustained it. Counsel was not deficient for failing to object to proper questions.

Further, even if counsel's failure to object was deficient, it did not prejudice Breitzman's defense. Breitzman admitted using the language that resulted in the disorderly conduct charge. (R.73:22-23.) The issue was not whether she used such language, but whether her use of the language constituted disorderly conduct. (R.74:31-32.) Based on this record,

Percifield's testimony about Breitzman's use of profane language on other occasions did not prejudice her.

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

The State charged Breitzman with child neglect for failing to provide appropriate care for J.K. after he complained about vomiting and defecating blood. (R.2:1, 6; 71:20.) 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. (R.77:9.) In an effort to challenge J.K.'s credibility, counsel contrasted J.K.'s claims with Breitzman's testimony.

Breitzman disputed J.K.'s assertion that she did nothing to care for him when he was sick. She testified that J.K.'s illness did not persist for days as he claimed. Breitzman told J.K. to eat bland foods such as crackers and toast and to drink fluids, including Gatorade and water. (R.72:96.)When J.K. told her that he was vomiting blood, Breitzman believed that it was from drinking red colored Gatorade. (R.72:96-97.)

When J.K. testified about other occasions when Breitzman did not provide care, Breitzman countered J.K.'s assertions. For example, 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. (R.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. (R.72:87.)

J.K. claimed that he had untreated eye problems, but he conceded that he progressed through school with assistance from his teachers. (R.71:103.) Breitzman noted that she had obtained eyeglasses and eye patches for J.K. previously, but that J.K. would not wear them. (R.72:93-94.) In addition, Breitzman no longer had insurance that included optical coverage. (R.72:95.)

J.K. claimed that Breitzman refused to sign him up for school lunches. (R.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. (R.72:108.)

In response to claims that he was not being fed, 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. (R.71:67.) In fact, Breitzman regularly reminded J.K. to eat breakfast, but he declined. (R.72:85.) Breitzman expressed concerns about J.K.'s dietary habits and wanted J.K. to think before he ate. (R.72:109.)

In light of their strategy to undermine J.K.'s credibility by demonstrating that he exaggerated and fabricated complaints about Breitzman, counsel's decision not to object was reasonable. That this strategy was unsuccessful did not render counsel's performance ineffective.

C. The court of appeals did not erroneously defer to the circuit court's assessment of counsel's trial strategy.

Breitzman asserts that the court of appeals misapplied the standard of review. (Breitzman's Br. 32-33.) In making this argument, Breitzman focuses on the following language:

"A postconviction court's determination that counsel had a reasonable trial strategy 'is virtually unassailable in an ineffective assistance of counsel analysis.'" *Breitzman*, 2016 WL 4275591, ¶ 23 (quoting *Maloney*, 275 Wis. 2d 557, ¶ 23). Breitzman suggests that it is trial counsel's strategy that demands deference rather than the circuit court's determination that trial counsel had a reasonable strategy. (Breitzman's Br. 33.)

The State disagrees with Breitzman's interpretation of *Maloney*. There, the court of appeals was deferential to the circuit court's assessment of trial counsel's strategy precisely because "the trial court had the opportunity to both see and hear counsel's presentation and evaluate its purpose in conjunction with counsel's testimony." *Maloney*, 275 Wis. 2d 557, ¶ 23. And here, such deference would have been reasonable because the circuit court observed counsel present Breitzman's case and evaluate it in conjunction with his testimony at the *Machner* hearing.

Moreover, Breitzman's focus on this single sentence in the court of appeal's decision ignores the court of appeals' independent assessment of counsel's trial strategy.

> At the *Machner* hearing, counsel testified that he did not object to evidence that Breitzman hit her son while driving—an uncharged offense—because a central theory of the defense was that J.K. had a tendency to exaggerate. Counsel stated that he planned to counter J.K.'s testimony with testimony from Breitzman in hopes of undermining J.K.'s credibility, telling the court that "the best approach would be to be very transparent about [the incident] and to not sit there and make lots of objections on things that would be overruled and become obvious and rather let the jury see what is the other side here." Indeed, counsel testified that he actually

> wanted the jury to hear some of the allegations J.K. made against Breitzman to paint J.K. as a child who makes "grandiose" allegations against his mother. Counsel's decision was deliberate and was based on articulated reasons which are neither irrational nor unreasonable.

Breitzman, 2016 WL 4275591, ¶ 23. The court of appeals' analysis demonstrates that it independently reviewed the record and that the record supports its conclusion that trial counsel's strategy was reasonable.

* * * * *

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 counsel sought to undermine J.K.'s credibility with respect to the charged offenses. Under the circumstances, 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.

III. Counsel's opening statement was not ineffective because it did not undermine Breitzman's anticipated testimony.

A. Counsel's opening statement was not deficient because it was based on reasonable trial strategy and did not contradict Breitzman's anticipated testimony.

Counsel did not perform deficiently when he introduced a theory of defense, i.e., reasonable parental discipline, in his opening statement, because it did not undermine Breitzman's

testimony. In his pretrial discussions with Breitzman, counsel learned that Breitzman had struck J.K. on occasions other than the charged offenses. (R.77:23.) Breitzman knew that evidence of the uncharged slapping incident might arise at trial. (R.77:52.) Breitzman and counsel agreed that if the slapping incident came up, she would explain that she had the right to defend herself and that her actions were reasonable. (R.77:52-53.)

With knowledge of this uncharged incident, counsel had to strike a careful balance in his opening statement. He had to avoid admitting that Breitzman committed any of the conduct alleged by J.K. and avoid any suggestion that Breitzman had never struck J.K. The latter claim would definitely backfire if and when evidence of prior physical acts came into evidence. Counsel sought to portray Breitzman as a mother attempting to do her best to provide structure and discipline to J.K., who had become increasingly difficult to deal with. (R.71:25.) Against this backdrop, counsel referenced the concept of reasonable parental discipline and a parent's privilege to cause pain. (R.71:24-26.)

Counsel raised the discipline defense, but never conceded that Breitzman had actually committed the charged offenses. Counsel told the jury that it had to determine that each fact and each element of each offense had been proven. (R.71:24.) Counsel asked the jury to consider whether Breitzman intentionally engaged in conduct that violated the law. (R.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. (R.71:27.)

As the circuit court observed, counsel's opening statement was "very short and not extremely detailed." (R.80:25.) Counsel never conceded that Breitzman had actually committed the charged offenses. Indeed, the circuit court found that nothing counsel said in his opening contradicted Breitzman's testimony. (R.80:29.) Further, the circuit court also noted that nothing about counsel's discussion of parental discipline belied Breitzman's theory that J.K. had become rebellious and untruthful. (R.80:26-27.) Counsel's reference to reasonable parental discipline merely provided a helpful context for the jury to understand Breitzman's other conduct should the evidence find its way into the record.

Based on this record, counsel's opening statement was not deficient because it did not contradict Breitzman's subsequent testimony.

B. Counsel's opening statement did not prejudice Breitzman's defense.

Even if counsel's opening statement was deficient, it did not prejudice Breitzman. She asserts that the prosecutor's comment in his closing argument about the reasonable parental discipline defense supports her claim that counsel's opening statement prejudiced her defense. (Breitzman's Br. 40.) In fact, the prosecutor only briefly commented on the reasonable parental discipline defense in rebuttal. (R.74:33.) More importantly, the prosecutor's closing argument focused on the evidence that supported Breitzman's convictions, not the reasonable parental discipline defense. (R.74:5-19.)

In addition, through its instructions, the circuit court cautioned the jury regarding the purpose and limitations 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. (R.71:18.) Before closing arguments, the circuit court again 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 [] by the court." (R.73:86.) A jury is presumed to follow admonitory instructions. *Marinez*, 331 Wis. 2d 568, ¶ 41. There is no reason to believe that the jury did not comply with these instructions when it decided Breitzman's case.

Counsel's reference to reasonable parental discipline in his opening statement simply did not prejudice Breitzman's defense.

IV. Counsel's errors, if any, did not result in cumulative prejudice such that it undermines confidence in the outcome of Breitzman's trial.

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.*

Breitzman's claim of cumulative prejudice fails. As addressed above, counsel did not perform deficiently. But even if he did, Breitzman has not demonstrated that his errors, whether considered separately or in the aggregate, created sufficient prejudice to undermine confidence in the outcome of her trial. This is not a case where counsel's errors "kept significant evidence from the jury that would have undermined the complainant's credibility." *State v. Domke*, 2011 WI 95, ¶ 60 n.11, 337 Wis. 2d 268, 805 N.W.2d 364.

Counsel challenged J.K.'s credibility both on cross-examination and through Breitzman's testimony. Counsel presented a defense that portrayed Breitzman as a responsible parent dealing with a rebellious child who fabricated claims against her. That the jury rejected Breitzman's defense does not mean that counsel's performance prejudiced her. Any deficiencies on counsel's part do not undermine confidence in the outcome of Breitzman's trial.

CONCLUSION

The State respectfully requests this Court to affirm the court of appeals' decision affirming the circuit court's entry of the judgment of conviction and order denying Breitzman's motion for postconviction relief.

Dated this 26th day of May, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,850 words.

_____
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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 26th day of May, 2017.

_____
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