STATE OF WISCONSIN

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

DISTRICT III

Case No. 2019AP1105-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANGELINA M. HANSEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE VINCENT R. BISKUPIC, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTEED

1. Was the evidence sufficient for a rational jury to find Defendant-Appellant Angelina M. Hansen guilty of contempt of court beyond a reasonable doubt?

A jury found beyond a reasonable doubt that Hansen intentionally violated a family court placement order when she, unsupervised, visited her children at school.

This Court should affirm because a rational jury could have found Hansen guilty of contempt.

2. Does this Court have jurisdiction to entertain the trial court order denying Hansen's ineffective assistance of counsel challenge?

Hansen's notice of appeal states that this is an appeal only from the judgment of conviction. The notice does not state that this is also an appeal from the order denying her postconviction motion challenging the effectiveness of trial counsel.

This Court should hold that it lacks jurisdiction to review the order denying postconviction relief because this appeal is only from the judgment of conviction.

3. Has Hansen proven that her trial counsel was ineffective?

The trial court held, after a postconviction evidentiary hearing, that Hansen failed to prove her trial counsel's performance was deficient and prejudicial with regard to: (a) counsel's failure to challenge the scope of the family court order; and (b) counsel's strategic decision not to introduce the video of her police interview regarding whether she "nudged" a deputy sheriff with her vehicle as she left the scene.

This Court should affirm because the trial court properly held that Hansen failed to prove deficient performance and prejudice in either respect.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Hansen that this case does not warrant oral argument or publication.

STATEMENT OF THE CASE

An Outagamie County jury found Hansen guilty on May 30, 2017, of three offenses, all arising out of an incident at the Shiocton elementary school attended by Hansen's triplet children on November 4, 2016: second-degree recklessly endangering safety, obstructing an officer, and contempt of court. (R. 45; 98:196.)

The trial court ordered that Hansen serve four years of probation on the recklessly endangering count. As a condition of probation, the court imposed but stayed a 300-day jail sentence. On the obstructing count, the court ordered that Hansen serve two years of probation concurrent with the probation imposed on the recklessly endangering count, but it also imposed the condition that Hansen serve 60 days in jail (with credit for 20 days of time served). On the contempt of court count, the court imposed a concurrent two-year term of probation. (R. 105:40–45.) A judgment of conviction was entered on February 21, 2018. (R. 66.) Hansen filed a postconviction motion challenging the effectiveness of trial counsel on October 22, 2018. (R. 72.) Hansen filed the notice of appeal on June 5, 2019. (R. 88.)

Hansen's postconviction motion challenged the effectiveness of trial counsel: (a) for not investigating whether the family court order that Hansen allegedly violated actually proscribed her conduct; and (b) for not introducing a video recording of Hansen's police interview to refute rebuttal testimony that she "nudged" a deputy sheriff with her vehicle in the school parking lot before fleeing the scene. (R. 72.) The trial court held an evidentiary hearing on December 21, 2018,

at which trial counsel testified. (R. 106.) The trial court issued a written decision denying the motion on April 16, 2019. (R. 81.) The notice of appeal filed on June 5, 2019, does not mention the order denying Hansen's postconviction motion. (R. 88.)

The State proved to the jury's satisfaction at trial that Hansen intentionally violated a family court order when she visited her three children unsupervised at their elementary school on November 4, 2016, without the permission of the parent with primary custody—her ex-husband and father of the children, John Ullmer. When confronted by school staff and a liaison officer, Hansen denied being the mother of the children and claimed she was their aunt. (R. 97:78–80, 96, 120; 98:24–26, 31, 69, 71–72, 91–93, 111–12. 134.)

The State proved to the jury's satisfaction at trial that Hansen obstructed an officer when she lied to Outagamie County Sheriff Deputy and school liaison officer Clint Kriewaldt, who identified himself to Hansen as "Officer Kriewaldt," about her identity and disobeyed his repeated orders to stop and speak with him. (R. 97:90–97, 103; 98:20–31, 94–96, 124.)

The State proved to the jury's satisfaction at trial that Hansen engaged in criminally reckless conduct when, with Deputy Kriewaldt positioned directly in front of her sport utility vehicle, she drove out of the school parking lot forcing him to jump out of the way to avoid being hit. (R. 97:97–103, 106–07; 98:31–40, 53–58.) According to Kriewaldt, the vehicle made glancing contact with his right side, causing him to jump out of the way. (R. 98:36, 56.)

Additional relevant facts will be developed and discussed in the Argument to follow.

STANDARD OF REVIEW

1. This Court reviews de novo whether the evidence at trial was sufficient to support a conviction, but its review is highly deferential to the verdict. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. This Court must uphold the jury's verdict unless, after viewing the evidence in the light most favorable to the State and the conviction, it finds that no rational jury could have found guilt beyond a reasonable doubt. *Id.*; *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

2. This Court independently determines whether it has jurisdiction over the trial court's order denying the postconviction motion. *See Dyer v. Blackhawk Leather LLC*, 2008 WI App 128, ¶ 28, 313 Wis. 2d 803, 758 N.W.2d 167 ("This court always has a duty to resolve, even sua sponte, the question of whether it has jurisdiction over an issue on appeal.").

3. On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of law and fact. The trial court's findings of historical fact and credibility determinations will not be disturbed unless they are clearly erroneous. The ultimate determinations based upon those findings of fact and credibility determinations—whether counsel's performance was deficient and prejudicial—are questions of law subject to independent review. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801.

ARGUMENT

I. When it is viewed most favorably to the State and the conviction, the evidence was sufficient to convict Hansen of contempt of a family court order.

Hansen argues that the evidence was insufficient to convict her of contempt of court because the family court order she allegedly violated did not include within its scope unsupervised visits with her children at school. A rational jury could, and did, find her guilty based on the evidence presented.

A. Hansen must prove that no rational jury could have found her guilty beyond a reasonable doubt even after the evidence is viewed most favorably to the State and the conviction.

This Court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 507. If the jury could possibly "have drawn the appropriate inferences from the evidence" to find Hansen guilty, this Court must uphold the verdict "even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.*

When more than one inference can reasonably be drawn from the evidence, the inference that supports the jury's verdict must be the one followed by this Court on review. *State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989). This Court may overturn the verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite

guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.

The jury is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *Poellinger*, 153 Wis. 2d at 506. It is exclusively within the province of the jury to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence. *State v. Wyss*, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985). The standard for review is the same whether the verdict is based on direct or circumstantial evidence. *Poellinger*, 153 Wis. 2d at 503.

"This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

Review is highly deferential because "[a]n appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial." *Watkins*, 255 Wis. 2d 265, ¶ 77 (citing *Poellinger*, 153 Wis. 2d at 505–06). "It is not the role of an appellate court to do that." *Poellinger*, 153 Wis. 2d at 506; *see State v. Steffes*, 2013 WI 53, ¶ 23, 347 Wis. 2d 683, 832 N.W.2d 101 (citing *Poellinger*, 153 Wis. 2d at 507, for the proposition that an appellate court will uphold the verdict "if any reasonable inferences support it").

B. By her own admissions, Hansen violated the family court order.

The State had to prove beyond a reasonable doubt that Hansen intentionally disobeyed the family court order, in violation of Wis. Stat. §§ 785.01(1)(b) and 785.04(2)(a). (R. 5:2; 98:148.) The elements are: (1) a court ordered the defendant to refrain from certain conduct; (2) the defendant had the

ability to comply with the order; and (3) the defendant intentionally disobeyed the court order. Wis. JI–Criminal 2031 (2009).

The court order in question here specified that Hansen, as the non-custodial parent, "shall have supervised placement only once per week for 2 to 4 hours each time as can be arranged to be supervised by Parent Connection or Family Services." (R. 36.) It also allowed for "another supervisor acceptable to Father." (R. 36.) According to the father, John Ullmer, the guardian ad litem explained the terms of the order both to Hansen and himself in family court. (R. 97:123.) There was no provision in the order for Hansen to have any *unsupervised* placement or visits for any length of time with the children at school or anywhere else. (R. 36.) The order was not modified by the family court. (R. 97:120.)

Hansen acknowledged in her trial testimony her understanding that the order applied to her unsupervised visit with her children in the lunchroom at their school on November 4, 2016. Hansen believed, however, that her visit would not be a problem because she told Ullmer several weeks earlier that she might visit the children at school, and he did not say "no." She also believed there was sufficient supervision in the form of school staff who were present in or near the lunchroom. (R. 98:89–90, 113–14.) The order did not, however, allow for school staff supervision. It allowed only for supervision by the "Parent Connection or Family Services" or for "another supervisor acceptable to Father." (R. 36; 97:119, 122–23.) Hansen acknowledged there was nothing in the order that she signed allowing her to have unsupervised visits with her children at school. (R. 98:122–23.) The November 4, 2016, visit was not set up in advance and it was unsupervised. (R. 98:129.) Hansen did not have permission from their father, Ullmer, to visit her children that day. (R. 98:133.) Defense counsel acknowledged in closing argument that Hansen knew the visit had to be supervised but she believed Ullmer gave

tacit permission for the unsupervised November 4 visit when, a few weeks earlier, she broached the idea to him of an unsupervised school visit and he did not prohibit it. Also, she believed there was sufficient supervision in the form of school personnel on site. (R. 98:172–73.)

Hansen did not challenge the scope of the family court order either in family court or on an appeal from that order.

Given that the evidence must be viewed most favorably to the conviction, the jury was free to disregard Hansen's rationalizations for not complying with the order. Rather, the jury could accept the order as written, and more importantly as it was understood by both Hansen and Ullmer in the family court proceedings: the order's express prohibition on unsupervised "placement" of Hansen's children with her included within its scope her unsupervised visit with the children at school.

The evidence was sufficient for a rational jury to find that the family court order extended to Hansen's unsupervised school visit on November 4, 2016, she was able to comply with that order, and she intentionally disobeyed the order because she did not like the fact that it applied to her school visit. Wis. JI–Criminal 2031 (2009).

Hansen insists, however, that the family court order did not *as a matter of law* include her conduct within its scope because an unsupervised "visit" by the non-custodial parent at school is not the same as unsupervised "placement" of the children with her. (Hansen's Br. 13–19.) This is not the time or place for Hansen to litigate that legal challenge to the order's scope. That challenge should have been made in the family court proceedings. Had Hansen challenged the order's scope in family court or on direct appeal from that order, this Court's review would have been confined to determining whether the family court erroneously exercised its discretion. *Rick v. Opichka*, 2010 WI App 23, ¶¶ 4, 16, 323 Wis. 2d 510,

780 N.W.2d 159. This Court is ill-equipped, on this appeal from Hansen's criminal conviction for contempt of court, to determine either whether the family court order as a matter of law does not apply to her conduct, or whether the family court erroneously exercised its discretion if it did apply, without having the full record of the family court proceedings before it to review.

If Hansen believed the order did not apply to unsupervised school visits, she should have raised that question in the family court proceedings. She did not. *See* Wis. JI–Criminal 2031 cmt. ¶ 1 (2009). "It, apparently, is not appropriate to challenge the validity of the order in the context of the criminal prosecution based on failure to obey that order." *Id*. Absent any such challenge, both Hansen and her ex-husband understood, and were told by the guardian ad litem and presumably the family court, that the placement order applied to any unsupervised visits with the children anytime, anywhere. (R. 97:119–20, 122–23.)

Hansen and her ex-husband's understanding of the scope of the family court order was also correct. "[P]hysical placement encompasses the act of having a child physically present with the parent . . . ." *In re Marriage of Lubinski v. Lubinski*, 2008 WI App 151, ¶ 8, 314 Wis. 2d 395, 761 N.W.2d 676. The extent of "physical placement" of a child with a non-custodial parent, under Wis. Stat. § 767.001(5), is the same as the extent of "visitation" awarded to a grandparent under Wis. Stat. § 54.56. *Opichka*, 323 Wis. 2d 510, ¶ 12. "There is no difference." *Id*. In essence, then, a visit with the children is synonymous with placement of the children with the non-custodial parent in this situation.

It is true, as Hansen argues, that "placement" also grants the non-custodial parent "rights consistent with legal custody." (Hansen's Br. 14–15.) *Lubinski*, 314 Wis. 2d 395, ¶ 8. That does not change the fact that placement, like a visit, also "encompasses the act of having a child physically present

with the parent." *Id*. Whether it is called "placement" or "visitation," "the same rules apply [to a parent who does not have joint custody but has a right to physical placement]: routine daily decisions may be made, but nothing greater." *Opichka*, 323 Wis. 2d 510, ¶ 13. Those routine decisions might include "what and when to eat, what clothes to wear and when to go to bed." *Id*.

Hansen's school visit, had it been supervised or permitted by the father, would have allowed her to make "routine daily decisions regarding the child's care" during that visit. *Lubinski*, 314 Wis. 2d 395, ¶ 8. If, during a *supervised* visit to the lunchroom, one of the three children suddenly took ill and needed immediate care, or a teacher asked for Hansen's permission to take the child on a field trip the next day, to change the child's lunch diet, or to let the child take a post-lunch nap, the family court placement order would have allowed Hansen to decide during that visit what to do for the child. *Id*.

Hansen's three children were physically present with her on November 4 not by happenstance, like a chance encounter on the street or in a grocery store leading to greetings and hugs. It occurred when Hansen decided to visit them at school unannounced and unsupervised, and did so surreptitiously, in direct violation of the family court order. A rational jury could find beyond a reasonable doubt that she did so intentionally. The evidence was sufficient for a rational jury to find Hansen guilty of contempt of court beyond a reasonable doubt.

II. This Court has no jurisdiction to review the order denying postconviction relief because Hansen appealed only from the judgment of conviction.

Hansen's notice of appeal announced that this is an appeal "from the judgment of conviction entered on February 15, 2018," in Outagamie County Circuit Court. (R.

88:1.) The notice did not also state that this appeal is from the April 16, 2019, written decision and order denying Hansen's postconviction motion challenging the effectiveness of trial counsel. (R. 81.) In her brief, Hansen merely states that she "appeals." (Hansen's Br. 4.)

"The notice of appeal must sufficiently identify the order being appealed from." *State v. Baldwin*, 2010 WI App 162, ¶ 61, 330 Wis. 2d 500, 794 N.W.2d 769. The supreme court has held that, "since the notice of appeal was taken only from the conviction, we also agree with the court of appeals' determination that it had no jurisdiction to review Malone's ineffective assistance of counsel claim since it was not raised until postconviction motions were made." *State v. Malone*, 136 Wis. 2d 250, 258, 401 N.W.2d 563 (1987).

The same holds true here. The judgment of conviction was entered on February 21, 2018. (R. 66.)[1] Hansen filed her postconviction motion challenging trial counsel's effectiveness eight months later, on October 22, 2018. (R. 72.) The order denying the motion was entered on April 16, 2019, or nearly 14 months after entry of the judgment of conviction.

An appeal only from the judgment of conviction "does not bring before the appellate court orders filed *after* the judgment or order appealed from is entered." *Baldwin*, 330 Wis. 2d 500, ¶ 61 & n.13 ("Baldwin never filed a notice of appeal that identified the order denying his *Cherry* motion as the subject of his appeal. Baldwin admits that the notice of appeal his attorney filed in June 2009 identified only the judgment of conviction and sentence as the judgment and order appealed from.").

Accordingly, this Court lacks subject matter jurisdiction to entertain Hansen's challenge to the trial court's

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[1] The notice of appeal is off by six days. It erroneously states that the judgment was entered on February 15, 2018. (R. 88.)

written decision and order denying her postconviction motion alleging ineffective assistance of counsel; a defect that can neither be waived by a party nor overlooked by this Court in the interest of justice. *See Malone*, 136 Wis. 2d at 260–61.

III. If this Court has jurisdiction over this issue, Hansen failed to prove that trial counsel was ineffective for not researching the legal distinction between *physical placement* and *visitation* and for deciding not to introduce the video of her police interview.

If this Court determines that it has subject matter jurisdiction to review the trial court order denying Hansen's postconviction motion, it should uphold the lower court's determination that trial counsel was not ineffective because: (1) there is no practical difference between the legal concepts of *physical placement* and *visitation* pertinent to what occurred here; and (2) counsel made a sound strategic decision not to introduce the video of Hansen's police interview in an effort to bolster her credibility because the police video could have been used by the State to undermine her credibility.

A. The law applicable to an ineffective assistance challenge

Hansen bore the burden of proving at the evidentiary hearing that the performance of trial counsel was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

To prove deficient performance, Hansen had to overcome a strong presumption that counsel acted reasonably within professional norms. *Strickland*, 466 U.S. at 690; *Trawitzki*, 244 Wis. 2d 523, ¶ 40. There is a strong presumption that counsel exercised reasonable professional judgment, and that counsel's decisions were based on sound trial strategy. *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d

595, 698 N.W.2d 583. Decisions that fall squarely within the realm of strategic choice are not reviewable under *Strickland*. *United States v. Cieslowski*, 410 F.3d 353, 361 (7th Cir. 2005); *see Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009). "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer*, 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland*, 466 U.S. at 690).

The reviewing court is not to evaluate counsel's conduct in hindsight but must make every effort to evaluate counsel's conduct from counsel's perspective at the time. *McAfee*, 589 F.3d at 356. Hansen was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *Id.* at 355–56; s*ee State v. Wright*, 2003 WI 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386. Ordinarily, a defendant does not prevail unless she proves that counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

Regarding prejudice, Hansen had to prove a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. "A reasonable probability is [one] sufficient to undermine confidence in the outcome." *McAfee*, 589 F.3d at 357; *see Trawitzki*, 244 Wis. 2d 523, ¶ 40. Hansen could not speculate. She had to affirmatively prove prejudice. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. "The likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

The reviewing court need not address both the deficient performance and prejudice components if Hansen failed to make a sufficient showing as to either one of them. *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

B. The postconviction hearing testimony

Hansen's trial attorney, Assistant State Public Defender Christine Heywood, testified at the December 21, 2018, postconviction *Machner*[2] hearing. Heywood admitted that she has no experience in family law and did not even consider whether Hansen's unsupervised visit with her children at school on November 4, 2016, was within the scope of the family court order prohibiting her from having unsupervised "placement" with her children. Heywood admitted that she did not research the legal distinction between "placement" and "visitation." (R. 106:3, 18–21, 24–26.)

A significant issue developed at trial regarding the recklessly endangering charge: whether there was any physical contact between Hansen's vehicle and Deputy Kriewaldt, who placed himself in front of the vehicle, before she fled the scene. As discussed above, Kriewaldt testified that Hansen's vehicle made slight contact with his right leg, causing him to jump out of the way. (R. 98:36, 56.) Before then, Kriewaldt tried to physically prevent Hansen from leaving when he stood in front of her vehicle and placed his hands and body up against it each time it moved slowly towards him. He said that Hansen several times backed up onto the grass behind her, revved the engine, and slowly moved forward, forcing him backward and causing him to shuffle his feet as he physically tried to resist its forward momentum. (R. 98:34–35, 53–54, 58.)

Hansen testified that she inched or nudged the vehicle towards Kriewaldt, but she denied that the vehicle contacted any part of his body at any point during this five to seven-minute standoff. The only physical contact was, she insisted,

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[2] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

initiated by Kriewaldt when he advanced toward the moving vehicle and placed his hands and body against it. (R. 98:96–99, 124–27.) Hansen specifically denied telling Sergeant Krzoska in an interview later that day at her house that she "nudged" Kriewaldt out of the way with her vehicle. (R. 98:125–26.)

The State recalled Sergeant Krzoska in its rebuttal case. When asked whether Hansen admitted that her vehicle contacted Kriewaldt, Krzoska recalled that Hansen used the word "nudge." (R. 98:133.) When asked whether Hansen admitted that she nudged the officer out of the way, Krzoska obliquely answered: "It was taken as she was trying nudge [sic] him out of the way or move him from the front of the vehicle." (*Id.*)

Krzoska interviewed Hansen at her home later on November 4, 2016. He recorded the interview and a one-and-a-half-minute segment of it was played at the postconviction hearing. (R. 98:69; 106:13–14.) The video apparently includes Hansen's denial that she struck Kriewaldt with her vehicle, and it contains her statement that she "nudged" the vehicle toward him. (R. 106:8.)

Attorney Heywood testified at the *Machner* hearing that she strategically decided not to introduce the one-and-a-half-minute segment of the video to rebut Krzoska's rebuttal testimony. Heywood was concerned that Hansen's use of the word "nudge" on the video might be seen by the jury as corroborating Krzoska's testimony that she indeed used the word "nudge." The jury might take it as Krzoska did and find that Hansen nudged Kriewaldt with her vehicle rather than, as she testified, inched or nudged the car towards him but not into him. (R. 106:7–9, 11–12, 15–16, 28.)

The trial court ruled that Hansen failed to prove that trial counsel was ineffective in either respect:

(1) Attorney Heywood made a sound strategic decision not to rebut Krzoska's rebuttal testimony with the video because counsel was legitimately concerned that it might damage Hansen's credibility, especially that part of her testimony where she used the word "nudge" to describe what she did with her vehicle before fleeing the scene. (R. 81:5–7.) The court noted that Hansen had already testified that she inched or nudged the vehicle toward Kriewaldt, but she denied striking him with it. (R. 81:5.) The court also found, after it viewed the video of the entire police interview, that "there are numerous confusing and contradictory statements made by defendant Hansen." (R. 81:6.) There are statements that might "have negatively impacted" Hansen's credibility, including statements that show her consciousness of guilt such as her admission that she identified herself to school staff as her children's aunt, her denial that she had ever seen the family court order, and her admission that she had different license plates on the front and back of her vehicle. (*Id.*)

The court went on to find that Hansen also failed to prove prejudice because the evidence of her guilt on all three counts was overwhelming. There is no reasonable probability of a different outcome even if counsel had played the video to rebut Krzoska's rebuttal testimony. (R. 81:6–7.) It also risked "open[ing] the door for a broad scope of information very detrimental to the defense case," including evidence showing her consciousness of guilt "and contradictory statements by Hansen." (R. 81:7.)

(2) Hansen failed to prove deficient performance or prejudice caused by counsel's failure to challenge the scope of the family court order. There was no legal basis for arguing that the order did not encompass Hansen's unsupervised school visit on November 4, 2016. There is no legal distinction, the court held, between unsupervised placement and unsupervised visits by the non-custodial parent like the one

that occurred here. (R. 81:7–8.) "Thus, the use of placement or visitation did not have an impact on whether [Hansen] in fact violated the family court order." (R. 81:8.)

C. Counsel performed reasonably and there is no reasonable probability of a different outcome had counsel delved more deeply into the legal distinction between *physical placement* and *visitation*.

Although most reasonably competent defense attorneys likely would have delved more deeply into the family court matter and researched the law to determine whether Hansen's conduct came within the scope of the order, counsel was not ineffective for failing to do so here. Both Hansen and her ex-husband, Ullmer, testified that they knew the order applied to any unsupervised visits with the children such as the one at their school. (R. 97:122–23; 98:122–23, 129, 133.) The guardian ad litem told them so in the family court proceedings. (R. 97:123.) Hansen apparently did not question the scope of the order during the family court proceedings or challenge its scope on an appeal from that order. It was reasonable for Heywood to decide that she could not challenge the family court order's scope in this criminal proceeding. *See* Wis. JI–Criminal 2031 cmt. ¶ 2 (2009). Attorney Heywood cannot be faulted for her investigative efforts when Hansen gave her no reason to believe that further investigation into the scope of the family court order would bear fruit. *Strickland*, 466 U.S. at 691; s*ee State v. Leighton,* 2000 WI App 156, ¶ 40, 237 Wis. 2d 709, 616 N.W.2d 126.

In any event, Hansen failed to prove prejudice. As discussed above, there is no legal difference between unsupervised physical placement with a non-custodial parent, no matter how brief or for what purpose, and the unsupervised school visit by Hansen here. There is no reasonable probability of a different outcome had trial witnesses, both attorneys, and the contempt of court jury

instruction more correctly used the word "placement" instead of "visitation" or "visit" when they referenced the family court order at trial.

D. Counsel made a sound strategic decision not to introduce the video of Hansen's interview at her home to rebut Sergeant Krzoska's rebuttal testimony, and this decision did not prejudice the defense.

As discussed above, counsel would have gained little and risked much had she introduced the video of Hansen's police interview at her home to rebut Krzoska's rebuttal testimony that she used the word "nudge," and his testimony that "[i]t was taken" to mean that she used her vehicle to physically "nudge" Deputy Kriewaldt out of the way rather than, as Hansen insisted, to merely nudge it forward but without making contact with him. (R. 98:133.)

There is no dispute that Hansen refused to comply with Kriewaldt's orders to stop, get out of the vehicle, and speak with him. Hansen admitted in her trial testimony that Kriewaldt placed himself in front of and, at times, in physical contact with her vehicle to prevent her from leaving. Hansen also admitted that she inched or nudged the vehicle backward and then forward toward Kriewaldt hoping that he would move out of the way and let her escape. If there was any physical contact at all, it was only glancing contact with Kriewaldt's right leg. Hansen may have been telling the truth when she denied striking Kriewaldt because she may not have realized that her vehicle made incidental contact with his right leg as she drove off.

Counsel reasonably decided not to run the risk that the video would only confirm Krzoska's testimony that she used the word "nudge" in trying to get Kriewaldt to move out of the way. The word "nudge" connotes physical contact: "To push against gently." *Nudge, The American Heritage Dictionary of*

the English Language (5th ed. 2016). Counsel reasonably decided to avoid giving unnecessary emphasis to the negative connotation of the term that Hansen used to describe her actions. The fact remains that, even if her vehicle did not nudge Kriewaldt's leg, Hansen endangered his safety by driving a sport utility vehicle towards him in such a way that it came within inches of his right foot and leg, causing him to jump to the side to avoid being hit as Hansen fled from the parking lot, ignoring his repeated orders to stop. (R. 98:35–36, 58.) The video would not have diminished the impact of that evidence.

Counsel also, as the trial court pointed out, wisely decided not to risk opening the door to other negative evidence on the video that could seriously damage Hansen's credibility. This included Hansen's lies to school authorities about who she was, her contradictory statements, and her consciousness of guilt. There is no reasonable probability of a different outcome had counsel introduced the video to clarify that Hansen meant to say only that she nudged her vehicle *toward* Kriewaldt, but she did not use her vehicle to make physical contact with him by nudging or pushing him out of the way.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 20th day of November 2019.

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 5,346 words.

Dated this 20th day of November 2019.

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DANIEL J. O'BRIEN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 20th day of November 2019.

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