

No. __-_____

**IN THE
SUPREME COURT OF THE UNITED STATES**

**GINGER M. BREITZMAN,
Petitioner,**

vs.

**STATE OF WISCONSIN,
Respondent.**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT**

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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*Minors' names have been redacted from the Appendix for privacy.

SUPREME COURT OF WISCONSIN

CASE No.:	2015AP1610-CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Respondent, v. Ginger M. Breitzman, Defendant-Appellant-Petitioner.
REVIEW OF A DECISION OF THE COURT OF APPEALS Reported at 371 Wis. 2d 760, 886 N.W.2d 593 (2016 - Unpublished)	
OPINION FILED:	December 1, 2017
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	September 20, 2017
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Milwaukee
JUDGE:	Rebecca F. Dallet
JUSTICES:	
CONCURRED:	ABRAHAMSON, J. concurs (opinion filed).
DISSENTED:	
NOT PARTICIPATING:	
ATTORNEYS:	

For the defendant-appellant-petitioner, there were briefs filed and an oral argument by *Hannah Schieber Jurrs*, assistant state public defender.

For the plaintiff-respondent, there was a brief filed by *Donald V. Latorraca*, assistant attorney general, with whom on the brief were *Brad D. Schimel*, attorney general, and *Maura F.J. Whelan*, assistant attorney general. There was an oral argument by *Donald V. Latorraca*.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2015AP1610-CR
(L.C. No. 2013CF270)

STATE OF WISCONSIN

:

IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Ginger M. Breitzman,

Defendant-Appellant-Petitioner.

FILED

DEC 1, 2017

Diane M. Fremgen
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 ANNETTE KINGSLAND ZIEGLER, J. This is a review of an unpublished decision of the court of appeals, State v. Breitzman, No. 2015AP1610-CR, unpublished slip op., (Wis. Ct. App. Aug. 16, 2016), which affirmed the Milwaukee County circuit court's¹ denial of Ginger Breitzman's ("Breitzman") postconviction motion challenging her convictions for child neglect under Wis. Stat. § 948.21(1)(2013-14)² and disorderly conduct under Wis. Stat. § 947.01(1).

¹ The Honorable Rebecca F. Dallet presided.

² All references to the Wisconsin Statutes are to the (2013-14) version unless otherwise noted.

¶2 In a criminal action by the State, Breitzman was charged with, and convicted of, five crimes relating to her negative interactions, confrontations, abuse, and neglect of her son, J.K., during the time period ranging from November 2011 through December 2012: (1) Physical Abuse of a Child (Intentional Causation of Bodily Harm) under Wis. Stat. § 948.03(2)(b); (2) Physical Abuse of a Child (Intentional Causation of Bodily Harm) under § 948.03(2)(b); (3) Child Neglect (Bodily Harm) under Wis. Stat. § 921.21(1)(b); (4) Child Neglect (Misdemeanor) under Wis. Stat. § 948.21(1)(a); and (5) Disorderly Conduct under Wis. Stat. § 947.01(1).

¶3 In the circuit court, Breitzman filed a postconviction motion under Wis. Stat. § 809.30(2)(h) seeking judgments of acquittal for counts three, four, and five. For all three, she argued that there was insufficient evidence to support a conviction. Additionally, she argued that defense counsel at trial had been ineffective because he failed to move for dismissal of count five for disorderly conduct on free speech grounds, pursued a defense theory of reasonable parental discipline in opening remarks that was inconsistent with Breitzman's plan to deny striking J.K., and failed to object to testimony regarding other-acts evidence. Following a Machner³ hearing, the circuit court granted the motion for judgment of acquittal as to count three and denied the motion as to counts

³ State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

four and five, concluding that there was sufficient evidence to sustain the convictions on counts four and five and that counsel had not been ineffective at trial.

¶4 In the court of appeals, Breitzman challenged the circuit court's denial of her postconviction motion as to counts four and five, again challenging the sufficiency of the evidence and asserting that defense counsel at trial had been ineffective. The court of appeals affirmed the circuit court.

¶5 On petition to this court, Breitzman seeks review of the denial of her ineffective assistance of counsel claim. In this regard, we note that Breitzman's claim does not raise a facial or as-applied challenge to the disorderly conduct statute, Wis. Stat. § 947.01. A facial challenge would argue that "profane conduct," as listed in § 947.01(1), is not actionable as a crime because profanity is protected speech. An as-applied challenge would argue that Breitzman's profane conduct in this case was not actionable as a crime because it was protected speech. Breitzman argues neither. Breitzman only

argues that her trial counsel rendered ineffective assistance.⁴ Thus, while this case touches on an interesting issue of free speech law, we reserve full analysis of what constitutes profane speech and whether profane speech is otherwise protected as free speech for another day and confine our analysis here to the ineffective assistance of counsel issue presented, briefed, and argued by the parties.

¶6 The ineffective assistance of counsel issue raised requires consideration of whether counsel was ineffective for any of the following reasons: (1) failing to move to dismiss the disorderly conduct charge on the basis that it violated Breitzman's constitutional right to free speech; (2) failing to

⁴ We further note that the standard for establishing that a statute is unconstitutional is high; because we assume the constitutionality of statutes, "the party challenging a statute's constitutionality must prove that the statute is unconstitutional beyond a reasonable doubt." See State v. Smith, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90. Additionally, where a statute has been authoritatively interpreted by this court, the party challenging that interpretation must establish that our prior interpretation was "objectively wrong." See Progressive N. Ins. Co. v. Romanshek, 2005 WI 67, ¶45, 281 Wis. 2d 300, 697 N.W.2d 417 (noting that "stare decisis concerns are paramount where a court has authoritatively interpreted a statute"). Wisconsin Stat. § 947.01 has been upheld by this court against facial and as-applied challenges on free speech grounds on numerous occasions. See infra ¶52. Moreover, when an authoritative interpretation of a statute has stood for many years, stare decisis concerns take on even greater significance. See id., ¶52; see also Bauman v. Gilbertson, 7 Wis. 2d 467, 469-70, 96 N.W.2d 854 (1959) (holding that it was not proper to depart from stare decisis where the interpretation stood for 11 years). Here, our interpretation of § 947.01 as constitutional has stood as law for nearly 50 years. See infra ¶52.

present opening remarks consistent with Breitzman's anticipated testimony; and (3) failing to object to testimony regarding other uncharged conduct.

¶7 As to the first, we conclude that trial counsel's failure to move to dismiss the disorderly conduct charge on the basis that it violated Breitzman's constitutional right to free speech was not deficient performance, and thus not ineffective assistance of counsel, because whether profane conduct that tends to cause or provoke a disturbance is protected as free speech is unsettled law.

¶8 As to the second, we conclude that trial counsel's theory of reasonable parental discipline, as presented in opening remarks, was not deficient performance, and thus not ineffective assistance of counsel, because it reflected trial counsel's reasonable expectations, which were rationally based on discussions with Breitzman, and it was part of a reasonable trial strategy.

¶9 As to the third, we conclude that trial counsel's failure to object to testimony regarding uncharged conduct was not deficient performance, and thus not ineffective assistance of counsel, because declining to object was part of a reasonable trial strategy.

¶10 Because we conclude that trial counsel's performance was not deficient, we need not address whether, in the context of ineffective assistance of counsel, there was prejudice to Breitzman, and we decline to do so.

¶11 Thus, we affirm the decision of the court of appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶12 To give proper perspective on the narrow issues we address here, it is important to outline the charges, allegations, and evidence presented to the jury, as well as the theory of defense and strategy of trial counsel.

¶13 The State charged Breitzman with the following five counts: (1) Physical Abuse of a Child (Intentional Causation of Bodily Harm) under Wis. Stat. § 948.03(2)(b), as to striking J.K. in the face, resulting in a bloody nose, for J.K.'s failure to wash the floor; (2) Physical Abuse of a Child (Intentional Causation of Bodily Harm) under § 948.03(2)(b), as to striking J.K. in the face, resulting in a bruise, for J.K.'s failure to prepare a meal; (3) Child Neglect (Bodily Harm) under Wis. Stat. § 948.21(1)(b), as to Breitzman's failing to seek medical care for J.K. when he was sick for a week with vomiting and diarrhea; (4) Child Neglect (Misdemeanor) under § 948.21(1)(a), as to Breitzman's locking J.K. out of the house during the winter; and (5) Disorderly Conduct under Wis. Stat. § 947.01(1), as to Breitzman's engaging in "profane conduct, under circumstances in which such conduct tended to cause a disturbance."⁵ Breitzman entered pleas of not guilty and the case was set for a jury trial. At trial, the State's primary witness was J.K., Breitzman's son.

⁵ The criminal complaint was filed on January 12, 2013, and Breitzman entered pleas of not guilty on May 20, 2013. On January 31, 2013, Breitzman waived her right to a preliminary hearing. An amended information was filed on May 20, 2013.

¶14 As to the first charge, for physical abuse, J.K. testified that he had been sweeping the floor while also trying to keep an eye on his three-year-old little sister. Breitzman wanted him to hurry up sweeping the floor, but his sister was running around the house and throwing things on the floor, in J.K.'s words, "being a three year old." Then, when Breitzman came into the room and saw that he was not sweeping "right or fast enough," she grabbed the broom and struck him on the side of his head with her fist (she could not reach his face because he had raised his hands defensively when she grabbed the broom), telling him he never did anything right and calling him a "piece of shit" and the "dog of the house."

¶15 As to the second charge, also for physical abuse, J.K. testified that he could not recall the precise date on which Breitzman struck him, but he remembered clearly the bloody nose that resulted because it lasted three minutes and he had to go find something to stem the flow. He said that Breitzman had seemed angry with him when she came into his room and then struck him in the face when he would not get out of bed, calling him a "fuck face" and a "retard." When she left, he remembers crying and that he did not know what he'd done wrong.

¶16 As to count three, for child neglect, J.K. testified that, on or about November 18, 2012, he became very ill. He had been vomiting almost every hour and had diarrhea, both of which appeared to have blood in them. When he told Breitzman this, she said she would get him a Gatorade at the end of the week if he was still sick. He testified that he was sick like this for

six to seven days, but when he asked Breitzman if he could go to the doctor, she refused. This prompted him to call friends and post on Facebook seeking help.

¶17 As to count four, also for child neglect, J.K. testified that, in the winter of 2011-2012, he could not get into the house when he got home from school because his mother had locked the doors. The weather that morning had been warmer, so he had not taken a coat with him to school; the weather grew cooler over the course of the day, however, and it was cold when he returned home at about 3:30 p.m. Finding the house locked, he testified that he knocked on the front and back doors and rang the doorbell for about three minutes to no avail. J.K. said he could tell that Breitzman was home because her car was in the driveway, but she did not come to the door so he crawled under the grill cover on the porch for shelter. He continued to ring the doorbell every fifteen minutes, but spent approximately four hours outside, huddling under the grill cover to keep from freezing.

¶18 As to the fifth charge, for disorderly conduct, J.K. testified that, when he got home from school on December 4, 2012, he put a bag of popcorn in the microwave, but ended up burning it and having to throw it away. When Breitzman got home about a half hour later, he was on the phone with his best friend, D.M., and, when he heard Breitzman come through the door, he hid his phone in his pocket because he was afraid she would be mad. He testified that, when she smelled the burned popcorn and saw the bag in the trash can, she sought him out and

told him he always messed things up, calling him a "fuck face," "retard," and a "piece of shit." He defended himself by saying that he had not done it on purpose, but Breitzman persisted saying she "[didn't] give a fuck." He then asked Breitzman to stop calling him names, which she responded to by threatening to kick him out of the house. Later that night he called D.M. back crying and needing someone to talk to.

¶19 Over the course of J.K.'s testimony, he further testified that it was a daily occurrence to be called "retard" and "fuck face." He also testified that he had not had glasses or treatment for his lazy eye since second grade and had not been to the dentist since he was five; that there was a lock on the refrigerator at home and he could not get lunch at school because Breitzman would not complete the paperwork for free lunches; and that Breitzman struck J.K. once when they were in the car because he disagreed with her about who had taught him a song when he was younger. The latter came up during trial counsel's cross-examination:

Q You just have a problem with frequent nosebleeds?

A From what it appears. But this was after the incident when she hit me in the car and my nose was bleeding on me.

Q By the way, was she driving the car at the time?

A Yes, sir.

Q And where were you located?

A I was in the passenger's seat.

Q And so it was her attempt to slap you, she was hitting you with the back of her hand at that time?

A She hit me with the back of her hand.

Q She couldn't have hit you with the palm of her hand because there wasn't quite a way to do that, right, so she actually had to go this way?

A Yes, sir.^[6]

¶20 The State also introduced evidence to corroborate J.K.'s testimony: J.K.'s best friend, D.M., testified that over the course of about six months, J.K. went from "always happy and nice" to "more stressed out and tired and just more sad." Specifically, when J.K. called him back on the night of December 4, 2012, he said that J.K. seemed "beat down" and that he had "never heard [J.K.] cry before." D.M. also testified that J.K. had a bruise for about a week at the time of the second allegation of abuse; J.K.'s girlfriend, A.G., also verified this.

¶21 J.K.'s neighbor also testified. She said she had sent over Gatorade and crackers in response to J.K.'s Facebook post about being ill—she had had some on hand because her daughter had been sick with the flu. She was also the one J.K. called looking for a place to stay when Breitzman kicked him out on December 4, 2012.

¶22 Additionally, the State called J.K.'s high school counselor and the West Allis detective who investigated J.K.'s

⁶ In this exchange, the questions were asked by Breitzman's trial counsel and were answered by J.K.

claims. The counselor testified that J.K. met with him on November 29, 2012, and told him about what had been going on at home, that he was tired of being called "retarded" and a "[f]uck face" and being "smacked in the head" by his mother. J.K. then met with a detective from the West Allis Police Department on December 11, 2012. In investigating J.K.'s claims, the detective interviewed Breitzman. The detective testified that Breitzman admitted that she called J.K. names, slapped and backhanded J.K., and did not allow J.K. to have a key to the house.

¶23 Breitzman's general defense to these allegations and charges was that J.K. was lying and that he was a rebellious and irresponsible teenager. She attributed this behavior to the fact that his father had rejected him and that J.K. had a new girlfriend.⁷ Specifically, as to counts one and two, Breitzman denied striking J.K., and said that the bruise had been the result of him dropping a dumbbell on his face. As to count three, Breitzman testified that J.K. was not sick for a week, that she told him there were crackers and Gatorade available, and that the redness in his vomit and diarrhea was fruit punch Gatorade, not blood. As to count four, Breitzman confirmed that

⁷ The defense called two additional witnesses, Ramona Smith and Dan Percifield—both long-time friends of Breitzman. Smith testified that J.K. had been well-behaved up until the last few years, when he became more defiant. Percifield also testified that J.K.'s relationship with Breitzman had deteriorated recently, attributing it to J.K.'s new girlfriend.

she knew what time J.K. got home from school, that she had locked the doors to the house, that she did not let J.K. have a key, and that she chose to take a nap at that time; but she defended her actions by pointing out that there were any number of businesses close by where J.K. could have gone to wait. As to count five, Breitzman said that her conduct was justified because J.K. had scorched the microwave when he burned the popcorn and he "was belligerent with [her]."

¶24 Breitzman further testified that she did call J.K. "retarded," a "piece of shit," and a "fuck face," but not regularly;⁸ that she did not get J.K. glasses because she did not have insurance and because he would not wear them when he did have them; that J.K. did not have lunch because he could not remember to bring home the form and did not make his own lunch, and that J.K. always had the code to the lock on the refrigerator, which was just in place to make him think before eating; and that she did strike J.K. in the uncharged incident in the car. Breitzman also testified that she would generally discipline J.K. by grounding him or by taking away phone and/or video game privileges, but would resort to physical violence if she thought he was lying to her, talking back, being belligerent, or if he did not check in when he was out. She testified that she never struck him just to hurt him. In short,

⁸ Smith characterized this name-calling as "jok[ing] around." Percifield testified that he had heard Breitzman call J.K. these names on numerous occasions.

Breitzman's defense was that J.K. could not be believed, and that, as a single parent, she "did what [she] thought [she] had to do."

¶25 At trial, the testimony was bookended by attorneys' arguments. As pertains to the ineffective assistance of counsel issue presented here, Breitzman's trial counsel argued in his opening remarks as follows:

[W]hat's really at the base of this is the question of the instructions that the Court gives you, have any of these been met or not? You will also be getting later on an instruction which is very important to this case, and it is going to be very important when you get to the defense case, and that is the question of reasonable parental discipline privilege, it's a jury instruction, number 950, 950, that's very important because this is eventually what this comes down to. . . .

Was she intentionally trying to inflict pain beyond the right of a parent to inflict pain and, yes, read chapter or read Jury Instruction 950 when you get it, it actually refers to a parent's right to inflict, that means cause pain, and we know you can cause pain a million ways. You can slap someone if they are disrespectful to you. You can smack someone hard on the back of their butt. You can hit them on the side of their head. . . . You are going to have a couple of days of evidence to consider as to whether my client is a criminal or just a struggling parent, and I believe the evidence will show that she is not a criminal^[9]

As is general practice, the circuit court instructed the jury that attorney arguments are not evidence:

⁹ We note that, although Breitzman was present for opening remarks and trial, neither the trial nor the Machner hearing transcripts reflect that she expressed any dissatisfaction with trial counsel's statement.

Remarks of the attorneys are not evidence. If the remarks suggested facts not in evidence, disregard the suggestion.

Consider carefully closing arguments of the attorneys but their arguments and conclusions and opinions are not evidence.

¶26 On May 23, 2014, the jury convicted Breitzman of all five counts. After the verdict, the circuit court entered the judgments of conviction.

¶27 On February 6, 2015, Breitzman filed a postconviction motion, seeking judgments of acquittal for counts three, four, and five. For all three, she argued that there was insufficient evidence to support a conviction. Additionally, she argued that defense counsel at trial had been ineffective because he failed to move for dismissal of count five for disorderly conduct on free speech grounds, pursued a defense theory of reasonable parental discipline in opening remarks that was inconsistent with Breitzman's plan to deny striking J.K., and failed to object to testimony regarding other-acts evidence. On May 29, 2015, the circuit court held a Machner hearing on the motion, at which both trial counsel and Breitzman testified.

¶28 As to his failure to challenge the disorderly conduct charge on free speech grounds, trial counsel testified that he had contemplated moving to dismiss count five for disorderly conduct on free speech grounds, but decided not to because it was "too shallow and there wasn't enough guts to it."

¶29 As to his assertion of the reasonable parental discipline theory of defense, Breitzman's trial counsel testified as follows:

Q Prior to the commencement of the actual jury trial, you asked for the Court to include within the opening statements the reasonable discipline defense; isn't that true?

A . . . yes.

Q Why did you ask for that?

A Because it was the only major defense position I believed we could take, regardless of all the charges, because jurors . . . [are] really trying to decide which side is telling the truth in the end . . . and the major morality of this case was whether he had a struggling mother doing the best she could or whether we had a mother engaged in abuse

That's why I included the recommendation originally, and the client saw the wisdom of it. . . .^[10]

¶30 As to his failure to object to other-acts evidence, Breitzman's trial counsel further testified as follows:

Q Was there a reason why you did not file a motion in limine pretrial to preclude any reference to these other allegations of her bad behavior?

A The heart of her defense was that she had a rebellious child. She was a single mom with very limited economic resources. She had another child she had to take care of. She had had a very difficult set of circumstances she was dealing with. She had loved her son and had had a good relationship with him until a point in time, a year or two before where he suddenly became rebellious, which she attributed to either school friends or girlfriends, and things had gone downhill from there.

¹⁰ In this exchange, the questions were asked by Breitzman's appellate counsel and were answered by Breitzman's trial counsel.

When we talked about how to approach the defense, her concern was that a jury would see that she was doing the best she could. She did not think in advance that anything she did to him was wrong. . . . And I believed her that she didn't at the time believe that she was engaged in criminal activity. She was just doing her best as a parent.

Q Was there any reason, other than that then, why you did not object when discussion of the things we've just talked about, these allegations of bad behavior on her part, were then brought up at trial?

A The plan for the defense is that we believe the son's story, or expression of these things, would go to such an extended or aggravated or aggrandized extent that he would lose credibility, and then she would take the stand and show what really happened, that she cared for her son, that these were difficult times of rebellion.

. . . .

So the best approach would be to be very transparent about it with the jury 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. . . .

The facts were what they were, and we would approach the defense very transparently.^[11]

¶31 Breitzman also testified at the Machner hearing; her testimony focused on her understanding of the reasonable parental discipline defense and the other acts that might come up. As to the reasonable parental discipline defense, she testified as follows:

¹¹ In this exchange, the questions were asked by Breitzman's appellate counsel and were answered by Breitzman's trial counsel.

Q Did [trial counsel] ever talk to you about arguing reasonable parental discipline in this case?

A Yes.

Q Okay. Did he tell you this is what he intended to argue?

A Yes.^[12]

Breitzman said, however, that she told trial counsel she had not struck J.K. on the two charged occasions. She also said that she told him she would admit to striking J.K. in the uncharged incident in the car if it came up, but that she did not want it raised. On cross-examination, Breitzman confirmed that she agreed to trial counsel's reasonable parental discipline defense:

Q And did you agree to asserting the reasonable discipline defense at trial?

A Yes^[13]

¶32 As to other acts, Breitzman testified that she knew her statements about striking J.K. to discipline him—which she made in the interview with the detective—would likely come up, and that she discussed with trial counsel the fact that the trial would likely come down to her word against J.K.'s. She also confirmed that, although she was present during opening remarks, she never voiced any objection to the court regarding

¹² In this exchange, the questions were asked by Breitzman's appellate counsel and were answered by Breitzman.

¹³ In this exchange, the questions were asked by the State and were answered by Breitzman.

her trial counsel's introduction of the reasonable parental discipline defense.

¶33 On July 17, 2015, the circuit court granted Breitzman's motion as to count three¹⁴ but denied Breitzman's motion as to counts four¹⁵ and five.¹⁶ As to count four, the circuit court held that there was sufficient evidence to sustain the conviction because it is the "parent's responsibility to provide shelter. It's not a child's responsibility to find alternative shelter." As to count five, the circuit court held that there was sufficient evidence to sustain the conviction because there was ample testimony that Breitzman's profane conduct did tend to cause a disturbance, and in fact did cause a disturbance.

¹⁴ Count three was the charge for Child Neglect (Bodily Harm) under Wis. Stat. § 948.21(1)(b), as to Breitzman's failure to seek medical care for J.K. when he was sick for a week with vomiting and diarrhea. The circuit court found that there was insufficient evidence to sustain a conviction because the State had not proven Breitzman's inaction was a substantial factor in harming J.K., specifically that there was no evidence that, had Breitzman taken J.K. to the doctor, it would have made a difference. Judgment of acquittal on count three was entered on July 24, 2015.

¹⁵ Count four was for Child Neglect (Misdemeanor) under Wis. Stat. § 948.21(1)(a), as to Breitzman's locking J.K. out of the house during the winter.

¹⁶ Count five was for Disorderly Conduct under Wis. Stat. § 947.01(1), as to Breitzman's engaging in "profane conduct, under circumstances in which such conduct tended to cause a disturbance."

¶34 As to the ineffective assistance of counsel claim, the circuit court held that there was no ineffective assistance. With regard to the failure to move for dismissal of the disorderly conduct charge on free speech grounds, the circuit court found that there was no prejudice because it would have denied any motion made on the basis that Breitzman's profanity had no social value and very clear detrimental effects.¹⁷ With regard to admission of other-acts evidence, the court found that there was no deficient performance because it was J.K., not Breitzman's trial counsel, who introduced the uncharged incident in the car, and that her trial counsel's decision not to object on that occasion and on others was part of a reasonable strategy to challenge J.K.'s credibility. Similarly, the circuit court found that trial counsel's reasonable parental discipline theory was not prejudicial because his discussion of it was vague and brief during opening statements. The circuit court further held that there was no aggregate prejudice, in part because it specifically instructed the jury on other acts and limited its instruction on reasonable parental discipline to the context of other acts.

¶35 On August 3, 2015, Breitzman filed notice of appeal. On August 16, 2016, the court of appeals affirmed the circuit

¹⁷ We note that this type of balancing has been rejected as a valid method of determining constitutionality under the First Amendment. See United States v. Stevens, 559 U.S. 460, 470 (2010). Because we affirm on other grounds we need not address the propriety of the circuit court's reasoning here.

court's denial of Breitzman's postconviction motion. See Breitzman, unpublished slip op., ¶26. The court of appeals held that, as to the free speech claim, there was no prejudice because the motion would have been unsuccessful, id., ¶22; that, as to trial strategy, there was no prejudice because the reasonable parental discipline theory was limited to the uncharged incident where Breitzman did not deny striking J.K., id., ¶24; and that, as to other-acts evidence, there was no deficient performance because counsel's decision not to object was strategic, deliberate, and reasonable, id., ¶23.

¶36 On September 15, 2016, Breitzman filed a petition for review in this court. On March 13, 2017, we granted the petition. Our review here is limited to Breitzman's ineffective assistance of counsel claim, which argues that her trial counsel was ineffective for failing to move to dismiss the disorderly conduct charge on the basis that it violated Breitzman's constitutional right to free speech, for failing to present a theory of defense in opening remarks consistent with Breitzman's anticipated testimony, and for failing to object to other-acts evidence.

II. STANDARD OF REVIEW

¶37 "Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel." State v. Lemberger, 2017 WI 39, ¶16, 374 Wis. 2d 617, 893 N.W.2d 232 (quoting State v. Balliet, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334). The same right is guaranteed under Article I,

Section 7 of the Wisconsin Constitution. Whether a defendant was denied effective assistance of counsel is a mixed question of law and fact. See State v. Thiel, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous; whether counsel's conduct constitutes ineffective assistance is a question of law, which we review de novo. Id. To demonstrate that counsel's assistance was ineffective, the defendant must establish that counsel's performance was deficient and that the deficient performance was prejudicial. See Strickland v. Washington, 466 U.S. 668, 687 (1984). If the defendant fails to satisfy either prong, we need not consider the other. Id. at 697.

¶38 Whether trial counsel performed deficiently is a question of law we review de novo. See State v. Domke, 2011 WI 95, ¶33, 337 Wis. 2d 268, 805 N.W.2d 364. To establish that counsel's performance was deficient, the defendant must show that it fell below "an objective standard of reasonableness." See Thiel, 264 Wis. 2d 571, ¶19. In general, there is a strong presumption that trial counsel's conduct "falls within the wide range of reasonable professional assistance." State v. Carter, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. Additionally, "[c]ounsel's decisions in choosing a trial strategy are to be given great deference." Balliette, 336 Wis. 2d 358, ¶26.

¶39 Whether any deficient performance was prejudicial is also a question of law we review de novo. See Domke, 337

Wis. 2d 268, ¶33. To establish that deficient performance was prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See Thiel, 264 Wis. 2d 571, ¶20.

III. ANALYSIS

¶40 In evaluating Breitzman's ineffective assistance of counsel claim, we consider three acts—or failures to act—of Breitzman's trial counsel: (A) trial counsel's failure to move for dismissal of count five for disorderly conduct on free speech grounds; (B) trial counsel's failure to present opening remarks consistent with Breitzman's anticipated testimony; and (C) trial counsel's failure to object to testimony regarding other uncharged conduct.

¶41 As to the first, we conclude that trial counsel's failure to move to dismiss the disorderly conduct charge on the basis that it violated Breitzman's constitutional right to free speech was not deficient performance, and thus not ineffective assistance of counsel, because whether profane conduct that tends to cause or provoke a disturbance is protected as free speech is unsettled law.

¶42 As to the second, we conclude that trial counsel's theory of reasonable parental discipline, as presented in opening remarks, was not deficient performance, and thus not ineffective assistance of counsel, because it reflected trial counsel's reasonable expectations, which were rationally based

on discussions with Breitzman, and it was part of a reasonable trial strategy.

¶43 As to the third, we conclude that trial counsel's failure to object to testimony regarding uncharged conduct was not deficient performance, and thus not ineffective assistance of counsel, because declining to object was part of a reasonable trial strategy.

¶44 Because we conclude that trial counsel's performance was not deficient, we need not address whether, in the context of ineffective assistance of counsel, there was prejudice to Breitzman, and we decline to do so.

¶45 Thus, we affirm the decision of the court of appeals.

A. Trial Counsel Was Not Deficient For Failing
To Move For Dismissal Of The Disorderly Conduct Count
On Free Speech Grounds.

¶46 We consider first whether trial counsel's failure to move to dismiss the disorderly conduct charge on the basis that it violated Breitzman's constitutional right to free speech constituted ineffective assistance of counsel.

¶47 Breitzman argues that the failure to raise a free speech claim was ineffective assistance because the disorderly conduct charge was based on the content of Breitzman's speech in the privacy of her home, which did not fall within one of the narrow categories of unprotected speech. The State argues that the failure to raise a free speech claim was not ineffective assistance because Breitzman has not demonstrated that, as a

matter of settled law, she had a right to engage in profane conduct that tends to cause or provoke a disturbance.¹⁸

¶48 We conclude that trial counsel's failure to move to dismiss the disorderly conduct charge on the basis that it violated Breitzman's constitutional right to free speech was not deficient performance, and thus not ineffective assistance of counsel, because whether profane conduct that tends to cause or provoke a disturbance is protected as free speech is unsettled law.

¶49 At the outset, we note that, for trial counsel's performance to have been deficient, Breitzman would need to demonstrate that counsel failed to raise an issue of settled law. "[F]ailure 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." Lemberger, 374 Wis. 2d 617, ¶18 (quoting Basham v. United States, 811 F.3d 1026, 1029 (8th Cir. 2016)). Rather, "ineffective assistance of counsel cases should be limited to situations where the law or duty is clear" Id., ¶33 (quoting State v. McMahon, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994)). Thus, we turn to the question of whether the

¹⁸ We note that Wis. Stat. § 947.01(1) is not limited to public places: "Whoever, in a public or private place" Thus, the fact that Breitzman was in the privacy of her home does not necessarily affect our analysis.

law is clear that profane conduct that tends to cause or provoke a disturbance is protected as free speech. It is not.

¶50 An individual is guaranteed the right to free speech under Article I, Section 3 of the Wisconsin Constitution, which states in relevant part that "[e]very person may freely speak . . . his sentiments on all subjects, being responsible for the abuse of that right" The same right is guaranteed under the First Amendment of the United States Constitution, which states in relevant part that "Congress shall make no law . . . abridging the freedom of speech." "Despite the differences in language between these two provisions, we have found no differences in the freedoms that they guarantee." State v. Robert T., 2008 WI App 22, ¶6, 307 Wis. 2d 488, 746 N.W.2d 564.

¶51 The First Amendment case law applicable to profanity and disorderly conduct finds root in Chaplinsky v. New Hampshire, which held:

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

punishment as a criminal act would raise no question under that instrument."

315 U.S. 568, 571-72 (1942) (footnotes omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).

¶52 In a series of cases post-Chaplinsky, this court upheld Wis. Stat. § 947.01 against numerous free speech challenges. In State v. Zwicker we held that § 947.01 (1967-68)¹⁹ did not violate defendants' free speech rights because "[i]t rarely has been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." 41 Wis. 2d 497, 513, 164 N.W.2d 512 (1969). In State v. Maker we again upheld § 947.01 (1967-68), noting that any challenge to the disorderly conduct statute based on words spoken or conduct engaged in must balance "the right to maintain the public peace" with "the imperative to protect constitutionally assured personal freedoms." 48 Wis. 2d 612, 615, 180 N.W.2d 707 (1970). In State v. Werstein we upheld § 947.01 (1971-72) once again, emphasizing that "[i]t is the combination of conduct and circumstances that is crucial in applying the statute to a particular situation"; "convictions for being 'otherwise disorderly' result[] from the inappropriateness of specific conduct because of the circumstances involved," namely, where "demeanor could be deemed

¹⁹ The operative language of subsection (1) of the statute, which is at issue here, has not changed substantially since these cases were decided.

abusive or disturbing in the eyes of reasonable persons." 60 Wis. 2d 668, 672-74, 211 N.W.2d 437 (1973); see also State v. Becker, 51 Wis. 2d 659, 664-65, 188 N.W.2d 449 (1971); State v. Givens, 28 Wis. 2d 109, 121-22, 135 N.W.2d 780 (1965).

¶53 The United States Supreme Court, however, soon after issuing Chaplinsky, narrowed its holding. See Terminiello v. Chicago, 337 U.S. 1, 4 (1949). In Terminiello, the Court held that "freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Id. But see Roth v. United States, 354 U.S. 476, 482-83 (1957) ("[At the time of ratification] all of [the] States made either blasphemy or profanity, or both, statutory crimes. . . . In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.").²⁰

²⁰ In response, Breitzman cites to Duncan v. United States, 48 F.2d 128 (9th Cir. 1931), for the proposition that "[t]he question of what constitutes profane language . . . is usually dealt with as a branch of the common-law offense of blasphemy." Presumably, Breitzman cites this case to undermine the constitutionality of a statute which regulates speech rooted in archaic norms of propriety. We do not address this issue here, however, as Breitzman has not raised a claim that her speech was not profane, or that the statute is facially unconstitutional or unconstitutional as-applied to her; her claim here is limited to whether defense counsel was ineffective for failing to make such a challenge.

¶54 Similarly, while we need not adopt any of the following tests for the purposes of our review today, we note that our more recent case law could be read to restrict statutory regulation of speech to the well-defined categories of unprotected speech: fighting words,²¹ speech that incites others into imminent lawless action,²² obscenity,²³ libel and defamatory speech,²⁴ and true threats²⁵.²⁶ See State v. Douglas D., 2001 WI 47, ¶17, 243 Wis. 2d 204, 626 N.W.2d 725; State v. A.S., 2001 WI 48, ¶16, 243 Wis. 2d 173, 626 N.W.2d 712 ("[The defendant's] speech can be prosecuted only if [it] is one of the limited

²¹ See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

²² See Brandenburg v. Ohio, 395 U.S. 444 (1969).

²³ See Miller v. California, 413 U.S. 15 (1973).

²⁴ See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

²⁵ See Watts v. United States, 394 U.S. 705 (1969).

²⁶ See also United States v. Alvarez, 567 U.S. 709, 717 (2012) (adding "speech integral to criminal conduct," "child pornography," "fraud," and "speech presenting some grave and imminent threat the government has the power to prevent" as other content-based restrictions that have been permitted). With regard to content-based restrictions, Breitzman also cites Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 660 (2004), for the proposition that the Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." We express no opinion here, however, as to the constitutionality of Wis. Stat. § 947.01 with regard to whether it is a content-based restriction or otherwise, because Breitzman has not made a facial or as-applied challenge to the statute; her claim here is limited to whether defense counsel was ineffective for failing to make such a challenge.

categories of speech that fall outside the protections of the First Amendment."); cf. Douglas D., 243 Wis. 2d 204, ¶24, (noting that Wis. Stat. § 947.01 is "a recognition of the fact that in some circumstances words carry with them proscribable nonspeech elements," i.e., "conduct"); State v. Schwebke, 2002 WI 55, ¶¶29-31, 253 Wis. 2d 1, 644 N.W.2d 666 (holding that the disorderly conduct statute does not only apply to public disruptions). The depth and breadth of these restrictions on free speech are not so settled in Wisconsin law that counsel's performance could be deemed deficient in this case.

¶55 Additionally, the United States Supreme Court has rejected any balancing test that may be inferred from its historical descriptions of unprotected categories of speech as being "of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." See United States v. Stevens, 559 U.S. 460, 470 (2010) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 383 (1992) (quoting Chaplinsky, 315 U.S. at 572)); see also Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 792 (2011); cf. Brown, 564 U.S. at 792 (quoting Stevens, 559 U.S. at 472) ("'Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.'").

¶56 This body of case law does not promulgate a clear standard as to whether a charge under Wis. Stat. § 947.01, based on profane conduct that tends to cause or provoke a disturbance, violates the constitutional right to free speech. And, because

Breitzman does not raise a facial or as-applied challenge to the disorderly conduct statute,²⁷ we are confined to considering the narrower issue of whether the law was so well settled that counsel's performance was legally deficient. See State v. Castillo, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds."). In that regard, trial counsel was not ineffective for not moving to dismiss the disorderly conduct charge, because doing so would have required that there be a resolution of an unsettled question of law. See Lemberger, 374 Wis. 2d 617, ¶18.

¶57 We recognize, however, that the use of profanity alone is not enough to sustain a charge for disorderly conduct. A charge for disorderly conduct has two elements: first, that the defendant "engage[d] in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct"; second, that the defendant's conduct "tends to cause or provoke a disturbance." See Wis. Stat. § 947.01(1). Profanity alone might satisfy the first element, but it does not likely satisfy the second element. Thus, it is not profanity alone that is being regulated by the statute.

¶58 We also note that the charge against Breitzman was not just that she engaged in "profane conduct," but that she "did engage in profane conduct, under circumstances in which

²⁷ See supra ¶5, n.4.

such conduct tended to cause a disturbance"28 To be clear, the crime of disorderly conduct under Wis. Stat. § 947.01 requires more than profane speech alone. See Cohen v. California, 403 U.S. 15, 22 (1971) (holding that wearing a jacket bearing the words "Fuck the Draft" did not disturb the peace where the words were the only conduct, in part because there was "no evidence that persons powerless to avoid appellant's conduct did in fact object to it"). But, as is clear from the testimony here, Breitzman was not charged with disorderly conduct solely because she swore at her son in the privacy of her home; rather she was charged and convicted of disorderly conduct because her profane conduct was that which, under the circumstances presented, tended to cause or provoke a disturbance. See Werstein, 60 Wis. 2d at 673-74 ("[C]onvictions for being 'otherwise disorderly' result[] from the inappropriateness of specific conduct because of the circumstances involved," namely where "demeanor could be deemed abusive or disturbing in the eyes of reasonable persons.").

¶59 Here, the jury heard evidence of other occasions where Breitzman called J.K. a "fuck face," "retard," and "piece of shit"—and on two of the five occasions charged, this profanity was punctuated by physical abuse. Conviction on count one, for

²⁸ Additionally, we note that the State could have charged Breitzman with more than "profane conduct," as it is one of many options under the statute. Had the State done so, Breitzman acknowledged at oral argument that the constitutional question here would not be in issue.

physical abuse, was supported by testimony that Breitzman struck J.K. on the side of the head when he was not sweeping "right or fast enough," calling him a "piece of shit" and the "dog of the house." Conviction on count two, also for physical abuse, was supported by testimony that Breitzman came into J.K.'s room and struck him in the face when he would not get out of bed, calling him a "fuck face" and a "retard."

¶60 The jury also heard testimony from J.K.'s best friend about the impact this had on J.K., who went from "always happy and nice" to "more stressed out and tired and just more sad."²⁹ A situation need not escalate to violence for the reasonable person to determine that the profanity tended to cause or provoke a disturbance.³⁰ Simply stated, were this case about profanity alone, isolated from the context and conduct out of which the charge arose, and had Breitzman made a constitutional challenge to the validity of the statute vis-à-vis profanity alone, we might be confronted with the need to resolve a free speech argument. But that is just not this case; rather

²⁹ Additionally, J.K. testified that these interactions with his mother made him feel worthless, often making him cry, ultimately causing him to report this home situation to his counselor at school and to the police.

³⁰ "It is not necessary that an actual disturbance must have been committed from the defendant's conduct. The law requires only that the conduct be of the type that tends to cause or provoke a disturbance under the circumstances as they then existed. You must consider not only the nature of the conduct, but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances." See Wis JI—Criminal 1900 (2016).

Breitzman's conduct, "because [of] the circumstances involved," could rightfully "be deemed abusive or disturbing in the eyes of reasonable persons." Werstein, 60 Wis. 2d at 673-74.

¶61 In sum, Breitzman has failed to demonstrate that counsel's performance was deficient because the law in this area is unsettled. Additionally, Breitzman's conduct was more than just profanity, and the law does not support the notion that, because Breitzman engaged in profane conduct, she is to be protected from prosecution regardless of the fact that the circumstances tended to cause or provoke a disturbance. Thus, her trial counsel's performance did not fall below the objective standard of reasonableness.

B. Trial Counsel Was Not Deficient For Failing
To Present Opening Remarks Consistent With
Breitzman's Anticipated Testimony.

¶62 We consider second the issue of whether defense counsel's theory of reasonable parental discipline at trial constituted ineffective assistance of counsel in light of Breitzman's denial that she struck J.K. on the two charged occasions.

¶63 Breitzman argues that it was inconsistent to argue in opening remarks that striking J.K. was reasonable parental discipline where she planned to testify that she did not strike J.K. on the two charged occasions, and that, but for this inconsistency, the jury would have been presented with a more straightforward credibility comparison. The State argues that Breitzman's counsel's theory of reasonable parental discipline,

as presented in the opening remarks, was not ineffective assistance because it was short, vague, and struck a careful balance between Breitzman's plan to deny that she struck J.K. on the two charged occasions and trial counsel's reasonable anticipation that the uncharged incident in the car would likely arise during testimony; moreover, Breitzman agreed with this strategy and any unfair prejudice was addressed by the circuit court's jury instruction that attorney arguments are not evidence.

¶64 We conclude that defense counsel's theory of reasonable parental discipline, as presented in opening remarks, was not deficient performance, and thus not ineffective assistance of counsel, because it reflected trial counsel's reasonable expectations, which were rationally based on discussions with Breitzman, and it was part of a reasonable trial strategy.

¶65 At the outset, we note that, for trial counsel's performance to have been deficient, Breitzman would need to overcome the strong presumption of reasonableness of her defense counsel's trial strategy by demonstrating that counsel's incorporation of the reasonable parental discipline defense was irrational or based on caprice. Trial strategy is afforded the presumption of constitutional adequacy. See, e.g., Balliette 336 Wis. 2d 358, ¶26; State v. Maloney, 2005 WI 74, ¶43, 281 Wis. 2d 595, 698 N.W.2d 583. "Reviewing courts should be 'highly deferential' to counsel's strategic decisions and make 'every effort . . . to eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" See Domke, 337 Wis. 2d 268, ¶36 (quoting Carter, 324 Wis. 2d 640, ¶22). "This court will not second-guess a reasonable trial strategy, [unless] it was based on an irrational trial tactic or based upon caprice rather than upon judgment." Id., ¶49. In fact, where a lower court determines that counsel had a reasonable trial strategy, the strategy "is virtually unassailable in an ineffective assistance of counsel analysis." State v. Maloney, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. Thus, we turn to the question of whether trial counsel's defense theory of reasonable parental discipline was an irrational trial tactic or based on caprice. It was not.

¶66 The parties focus their arguments on defense counsel's opening remarks, which discussed the jury instruction for reasonable parental discipline and framed the issue as "whether [Breitzman] is a criminal or just a struggling parent[.] I believe the evidence will show that she is not a criminal"

¶67 Trial counsel testified at the Machner hearing that he pursued the reasonable parental discipline theory in part because of his concern about the credibility battle that would play out at trial. He also testified that he discussed the reasonable parental discipline theory with Breitzman, and Breitzman testified that she agreed to it. Trial counsel did not specifically recall whether Breitzman had categorically

denied striking J.K. on the two charged occasions, but did recall that it was important to Breitzman to bring up the uncharged incident in the car to explain J.K.'s level of animosity toward his mother such that he would falsely accuse her of abuse and neglect.³¹

¶68 Given this testimony, defense counsel's decision to incorporate the theory of reasonable parental discipline in his opening remarks was not ineffective assistance. First, "[i]n light of the not uncommon practice of lawyers to argue inconsistent theories, we cannot say that the decision [to do so] deprive[s a defendant] of the right to constitutionally effective assistance, irrespective of whether we or the trial court view that strategy as the best." State v. Marks, 2010 WI App 172, ¶17, 330 Wis. 2d 693, 794 N.W.2d 547; see also Brown v. Dixon, 891 F.2d 490, 494-95 (4th Cir. 1989) (holding that it was not ineffective assistance of counsel where the defense theory was that "Brown either did not commit the murders or did so while drunk" because "the use of inconsistent defenses was objectively reasonable under prevailing professional norms").

¶69 Second, trial counsel's decision was based on a discussion with Breitzman about her relationship with J.K. and the evidence that she expected and wanted to come out at trial;

³¹ At the Machner hearing, defense counsel testified that "[s]he also told me that she believed that [the car incident] was part of the . . . animus [] he had against her to try to create these other issues such as when he was injured lifting dumbbells and claimed she had struck him, et cetera."

therefore, it was not based on caprice. Nor was it irrational: the record reflects that the State pled a number of other acts in its criminal complaint, including the uncharged incident in the car; that Breitzman in fact wanted this other act to come in to establish J.K.'s motive to lie; and that Breitzman never unequivocally told trial counsel that she intended to deny striking J.K. on the two charged occasions.³² Thus, it was rational for her trial counsel to formulate a strategy and argue a theory of defense with the expectation that some other acts would come out at trial. Such a strategy had to account for the possibility that Breitzman's credibility would be undermined by evidence of other acts, and giving the jury an alternate ground for acquittal in the event that they had doubts about Breitzman's credibility and questions about the other acts was a reasonable means of accommodating such contingency.

¶70 Additionally, there are many aspects of a trial which make its outcome uncertain and we cannot let our judgment of trial strategy be clouded by the clarity of hindsight. See, e.g., Domke, 337 Wis. 2d 268, ¶36 ("Reviewing courts should . . . make every effort to eliminate the distorting

³² In this regard, we note that the circuit court found that defense counsel's testimony at the Machner hearing was credible. In light of Breitzman's bias, both from hindsight and as an interested party, we cannot hold that such a finding was clearly erroneous. See State v. Shata, 2015 WI 74, ¶31, 364 Wis. 2d 63, 868 N.W.2d 93 ("[T]his court will not exclude the circuit court's articulated assessments of credibility and demeanor, unless they are clearly erroneous.").

effects of hindsight.") We have concluded here that defense counsel's decision to argue the reasonable parental discipline defense in his opening remarks was not ineffective based on the record. We note that the record also reflects that Breitzman's trial counsel adjusted his strategy based on the development of evidence at trial: after Breitzman's testimony concluded, her trial counsel adjusted course, successfully advocating for the inclusion of reasonable parental discipline as a therapeutic instruction for other acts and limiting his discussion of reasonable parental discipline during closing argument to the other acts.³³ These adjustments were appropriate.

¶71 In sum, Breitzman has failed to demonstrate that her trial counsel's performance was deficient because pursuing a theory of reasonable parental discipline was rationally based on counsel's discussions with Breitzman and his expectations for what evidence would come out at trial. Additionally, when trial

³³ After testimony concluded on day two, and before testimony began on day three, the circuit court conferred with the parties outside the presence of the jury regarding jury instructions. The court expressed concern that there was not enough evidence to give the reasonable parental discipline instruction because Breitzman was denying striking J.K. on the two charged occasions. The State agreed. Defense counsel argued that the instruction was appropriate because the State had introduced other acts, namely the uncharged incident in the car, which entitled Breitzman to assert the reasonable parental discipline defense. The court ultimately agreed to incorporate part of the jury instruction for the reasonable parental discipline defense, see Wis JI—Criminal 950 (2014), as a therapeutic instruction responsive to other acts. See infra ¶78.

did not proceed in accordance with counsel's expectations, he adjusted course and the court's limiting instructions—discussed below—appropriately addressed any potential juror confusion. Thus, trial counsel's performance did not fall below the objective standard of reasonableness.

C. Trial Counsel Was Not Deficient For Failing To Object To Testimony Regarding Other Uncharged Conduct.

¶72 We consider third the related issue of whether trial counsel's failure to object to testimony regarding other uncharged conduct constituted ineffective assistance of counsel.

¶73 Breitzman argues that the failure to object to testimony about acts other than those underlying the charges was ineffective assistance because the testimony was inadmissible "other acts" evidence under Wis. Stat. § 904.04 and, but for admission, the jury would have been presented with a more straightforward credibility comparison. The State argues that the failure to object was not ineffective assistance because allowing this testimony was a reasonable means of accomplishing trial counsel's strategy to undermine J.K.'s credibility by depicting him as a rebellious teenager who was making grandiose allegations; moreover, Breitzman agreed with this strategy.

¶74 We conclude that trial counsel's failure to object to testimony regarding uncharged conduct was not deficient performance, and thus not ineffective assistance of counsel, because declining to object was part of a reasonable trial strategy.

¶75 At the outset, we note that this is again a question of trial strategy, and, as such, that Breitzman must overcome the strong presumption of reasonableness afforded to trial counsel's decisions regarding trial strategy; for trial counsel's performance to have been deficient, Breitzman would need to demonstrate that counsel's decision not to object to other acts was inconsistent with a reasonable trial strategy, that is, that it was irrational or based on caprice. As noted above, trial strategy is afforded the presumption of constitutional adequacy. See, e.g., Balliette 336 Wis. 2d 358, ¶26; Maloney, 281 Wis. 2d 595, ¶43. "Reviewing courts should be highly deferential to counsel's strategic decisions and make every effort 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" See Domke, 337 Wis. 2d 268, ¶36 (quoting Carter, 324 Wis. 2d 640, ¶22). "This court will not second-guess a reasonable trial strategy, [unless] it was based on an irrational trial tactic or based upon caprice rather than upon judgment." Id., ¶49. In fact, where a lower court determines that counsel had a reasonable trial strategy, the strategy "is virtually unassailable in an ineffective assistance of counsel analysis." Maloney, 275 Wis. 2d 557, ¶23. Thus, we turn to the question of whether trial counsel's failure to object to other-acts evidence was an irrational trial tactic or based on caprice. It was not.

¶76 Here, the trial strategy was to demonstrate that J.K. was making false and grandiose allegations against Breitzman. As a part of this strategy, trial counsel did not object to other acts involving slapping, failing to provide medical care, and/or profanity, because he intended for that evidence to undermine J.K.'s credibility and cast Breitzman as a single parent doing the best she could with a rebellious teenager. In other words, the testimony as to other acts was central to the defense's strategy for bolstering Breitzman's credibility, and its theory of reasonable parental discipline, because, for the defense to be successful, the jury needed to understand the context of the relationship between Breitzman and J.K. so as to appropriately assess credibility and determine culpability. Thus, failing to object to other-acts testimony was not deficient performance because it was rational in light of trial counsel's strategy and theory.

¶77 In general, it can be quite effective for a defendant to say 'I did this and I did that, but I did not do what the State has charged me with,' because it tends to establish a defendant's credibility. But, there are many aspects of a trial which make its outcome uncertain and we cannot let our judgment of trial strategy be clouded by the clarity of hindsight. See, e.g., Domke, 337 Wis. 2d 268, ¶36 ("Reviewing courts should . . . make every effort to eliminate the distorting effects of hindsight."). Furthermore, Breitzman agreed to the defense theory of reasonable parental discipline and "[a]n accused cannot follow one course of strategy at the time of

trial and if that turns out to be unsatisfactory complain [she] should be discharged or have a new trial." Cross v. State, 45 Wis. 2d 593, 605, 173 N.W.2d 589 (1970). Thus, Breitzman cannot now complain just because a strategy that was reasonable at the outset turned out to be unsuccessful.

¶78 Additionally, the circuit court gave jury instructions that limited any unfair prejudice that may have resulted from the other-acts testimony. With regard to other acts, the court instructed as follows:

Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial. . . . If you find that this conduct did occur, you should consider it only on the issues of intent and context or background. You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

The evidence was received by [sic] the issues of intent, that is, whether the defendant acted with the state of mind that is required for the offense charged, and to prove context or background that is to provide a more complete presentation of the evidence related to the offense charged.

With regard to the uncharged incident in the car, the court additionally instructed as follows:

As to [the] striking of [J.K.] with the back of the hand in the car, discipline of a child is an issue. The law allows a person responsible for the child's welfare to use reasonable force to discipline that child. Reasonable force is that force which a reasonable person would believe is necessary.

Whether a reasonable person would have believed that the amount of force used was necessary and not

excessive must be determined from the standpoint of the defendant at the time of the defendant's acts.

The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under circumstances that existed at the time of the alleged offense.

These limiting instructions were sufficient to address any unfair prejudice that may have resulted from the other-acts testimony, and in fact bolstered Breitzman's defense regarding reasonable parental discipline. See State v. Marinez, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399 ("We presume that juries comply with properly given limiting and cautionary instructions, and thus consider this an effective means to reduce the risk of unfair prejudice to the party opposing admission of other[-]acts evidence.").

¶79 In sum, Breitzman has failed to demonstrate that counsel's performance was deficient because admission of other-acts testimony was central to a reasonable defense theory and strategy. Additionally, any unfair prejudice was appropriately addressed by limiting instructions from the court. Thus, defense counsel's performance did not fall below the objective standard of reasonableness.

D. We Need Not Consider Prejudice Because
Trial Counsel Was Not Deficient.

¶80 To succeed on an ineffective assistance of counsel claim, a petitioner must establish both that counsel's performance was deficient and that the deficient performance was prejudicial. See Strickland, 466 U.S. at 687.

¶81 Where the petitioner fails to satisfy either prong of the ineffective assistance of counsel analysis we need not consider the other. See Strickland, 466 U.S. at 697. Because we conclude that Breitzman has not established that trial counsel's performance was deficient, we need not address whether, in the context of ineffective assistance of counsel, the alleged errors individually or cumulatively prejudiced Breitzman, and we decline to do so.

IV. CONCLUSION

¶82 On petition to this court, Breitzman sought review of the denial of her ineffective assistance of counsel claim. In this regard, Breitzman's claim did not raise a facial or as-applied challenge to the disorderly conduct statute, Wis. Stat. § 947.01. A facial challenge would have argued that "profane conduct," as listed in § 947.01(1), is not actionable as a crime because profanity is protected speech. An as-applied challenge would have argued that Breitzman's profane conduct in this case was not actionable as a crime because it was protected speech. Breitzman argued neither. Breitzman only argued that her trial counsel rendered ineffective assistance. Thus, while this case touched on an interesting issue of free speech law, we confined our analysis to the ineffective assistance of counsel issue presented, briefed, and argued by the parties.

¶83 The ineffective assistance of counsel issue raised required consideration of whether counsel was ineffective for any of the following reasons: (1) failing to move to dismiss the disorderly conduct charge on the basis that is violated

Breitzman's constitutional right to free speech; (2) failing to present opening remarks consistent with Breitzman's anticipated testimony; and (3) failing to object to testimony regarding other uncharged conduct.

¶84 As to the first, we conclude that trial counsel's failure to move to dismiss the disorderly conduct charge on the basis that it violated Breitzman's constitutional right to free speech was not deficient performance, and thus not ineffective assistance of counsel, because whether profane conduct that tends to cause or provoke a disturbance is protected as free speech is unsettled law.

¶85 As to the second, we conclude that trial counsel's theory of reasonable parental discipline, as presented in opening remarks, was not deficient performance, and thus not ineffective assistance of counsel, because it reflected trial counsel's reasonable expectations, which were rationally based on discussions with Breitzman, and it was part of a reasonable trial strategy.

¶86 As to the third, we conclude that trial counsel's failure to object to testimony regarding uncharged conduct was not deficient performance, and thus not ineffective assistance of counsel, because declining to object was part of a reasonable trial strategy.

¶87 Because we conclude that trial counsel's performance was not deficient, we need not address whether, in the context of ineffective assistance of counsel, there was prejudice to Breitzman, and we decline to do so.

¶88 Thus, we affirm the decision of the court of appeals.

By the Court.—The decision of the court of appeals is affirmed.

¶89 SHIRLEY S. ABRAHAMSON, J. (*concurring*). The court's opinion is a very narrow decision limited to the facts of the case and the issues the defendant raised.

¶90 This case does not decide a facial or as-applied challenge to the disorderly conduct statute, Wis. Stat. § 947.01. Breitzman made no such challenge.

¶91 Additionally, in this court, Breitzman does not challenge the sufficiency of the evidence supporting the conviction; Breitzman accepts the jury's finding that her profane conduct tended to cause or provoke a disturbance within the meaning of the statute.

¶92 The claim in the instant case is ineffective assistance of counsel. Breitzman claims that trial counsel was ineffective because counsel failed to raise a First Amendment defense to Breitzman's disorderly conduct charge.

¶93 The majority opinion holds against Breitzman on this claim, relying on the "unsettled law" rubric. The majority opinion asserts that defense counsel was not ineffective because "whether profane conduct that tends to cause or provoke a disturbance is protected as free speech is unsettled law." Majority op., ¶7.

¶94 I write to make two points: (1) Nothing in the majority opinion should be read as commenting on the merits of the underlying First Amendment defense; and (2) The "unsettled law" doctrine guiding the determination of ineffective assistance of counsel is not sufficiently protective of a

defendant's constitutional and statutory rights to effective counsel.

¶95 The bench and bar should be working for a better standard for determining the adequacy of representation.

¶96 I write further on a different topic, namely, my practice in participating or not participating in a case depending on my participation in various aspects of the decision-making process. I write on this topic in the instant case in which I am participating because a majority of the court insists that a justice who does not participate in a case merely state on the court record the fact of non-participation or withdrawal from participation and not state grounds for non-participation.

¶97 Lawyers and litigants should know that it is my practice not to participate in a decision when I do not fully participate in every stage of the decision-making process. Thus, for example, if I were present at oral argument but did not participate in the decision conference, I would be shown as not participating in the decision.

¶98 For the reasons set forth, I write separately.

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP1610-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2013CF270

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GINGER M. BREITZMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Ginger M. Breitzman appeals from a judgment of conviction, following a jury trial, of one count of child neglect and one count of disorderly conduct. Breitzman also appeals from the order denying her postconviction motion. We affirm.

BACKGROUND

¶2 On May 20, 2013, an Amended Information charged Breitzman with two counts of physical abuse of a child, two counts of child neglect and one count of disorderly conduct. As relevant to this appeal, one count of child neglect stemmed from an incident in which Breitzman, as the “person who was responsible for the welfare of [her son] J.K.,” “lock[ed] J.K. out of the house during the winter of 2011-2012.” (Some capitalization omitted.) At the time, J.K. was fourteen years old. The disorderly conduct charge stemmed from an incident between Breitzman and J.K. which took place on December 4, 2012, in which Breitzman “while in a private place, did engage in profane conduct, under circumstances in which such conduct tended to cause a disturbance.” The matter proceeded to a jury trial.

¶3 During opening statements, Breitzman’s counsel told the jury that the charges against Breitzman were essentially an attempt by J.K. to “build a case against [his] mother,” and that the case centered on “the question of reasonable parental discipline.” Multiple witnesses testified.

¶4 The State’s main witness was J.K. As relevant to this appeal, J.K. testified that one afternoon during the winter of 2012, J.K. came home from school at approximately 3:30 p.m. and was unable to enter his house because the door was locked and Breitzman did not respond to his attempts to enter. J.K. stated that he “knocked on the door, multiple times, rang the doorbell almost every ten minutes and it was too cold outside for what [he] was wearing, so ... [he] crawled under a grill cover until [Breitzman] came to the door.” J.K. stated that he shielded himself with a grill cover for approximately two to three hours, checking every fifteen minutes to see if Breitzman would open the door. J.K. stated that he

knew Bretzman was home because the “only car we had was ... in the driveway.” J.K. stated that he attempted to enter through multiple doors, but Breitzman never came to the door. J.K. admitted that he was not appropriately dressed for the weather, as the weather was pleasant when he went to school in the morning, but the temperature decreased when he came home. J.K. also stated that his cell phone battery drained after two hours of attempting to call Breitzman. J.K. attempted to go to a neighbor’s home, but the neighbor was not home. Ultimately, after five hours, at approximately 8:30 p.m., Breitzman came to the door and let J.K. in the house. Breitzman told J.K. that she was sleeping.

¶5 J.K. also testified about an incident which took place on December 4, 2012, in which J.K. burned popcorn, prompting Breitzman to use foul language against J.K. J.K. stated that his mother told him to “grab your stuff out of your room,” and that she was going to call the police. J.K. stated that he was on the phone with a friend during the incident and hid the phone in his pocket so his mother would not see; however, J.K. did not hang up. J.K.’s friend heard the exchange between J.K. and his mother. J.K. stated that he talked to his friend immediately after the incident and “started crying.” J.K. stated that he told his friend he “didn’t want to be in the house anymore” and that he needed “to tell [the police] at school everything that’s going on and things were getting too crazy for me.”

¶6 On cross-examination defense counsel asked J.K. about his nose bleeds. J.K. responded that his nose bleeds frequently, but also described an incident in which his mother hit him “in the car and [his] nose was bleeding.” Counsel did not object, but rather asked J.K. follow-up questions regarding the incident. The State clarified that the incident J.K. described was separate from the two charged incidents of child abuse.

¶7 Breitzman also testified, telling the jury that the day J.K. was locked out of the house, she was not aware that J.K. had come home. She stated that she was sleeping and J.K. had a tendency to break his cell phone so she did not hear from him. She stated that she did not give J.K. a set of house keys because J.K. used to lose the keys frequently as a child and she “couldn’t trust him.” Breitzman did not deny getting “belligerent” with J.K. on December 4, 2012, the day of the popcorn incident, nor did she deny hitting her son in the car, causing a bloody nose; however, she stated that J.K. was interrupting and “getting loud” with her and that was the only time she ever “back handed” him.

¶8 The jury found Breitzman guilty of two counts of child abuse, one count of child neglect (stemming from the Winter 2012 incident), and one count of disorderly conduct (stemming from the popcorn incident).

¶9 Breitzman filed a postconviction motion, arguing, as relevant to this appeal, that there was insufficient evidence presented at trial to support the child neglect and disorderly conduct convictions. She also argued that her counsel was ineffective for: (1) “opening the door” to other acts evidence that Breitzman slapped J.K. in the car causing a nosebleed; (2) failing to object to hearsay testimony “concerning what [J.K.] purportedly told other people”; and (3) for “asserting in his opening statement a defense which was inconsistent with Ms. Breitzman’s testimony.”

¶10 The postconviction court held a *Machner*¹ hearing, at which both counsel and Breitzman testified. The postconviction court ultimately denied the motion. This appeal follows.

DISCUSSION

¶11 On appeal, Breitzman contends that there was insufficient evidence to support the child neglect and disorderly conduct convictions. She also argues that counsel was ineffective for multiple reasons. We conclude that the evidence is sufficient to support the convictions and that counsel was not ineffective.

Sufficiency of the Evidence

¶12 The standard for reviewing the sufficiency of the evidence “is whether the evidence was sufficient to prove the defendant’s guilt beyond a reasonable doubt.” *State v. Sharp*, 180 Wis. 2d 640, 658-59, 511 N.W.2d 316 (Ct. App. 1993). If there is any possibility the trier of fact “could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt,” we may not overturn the verdict even if we believe “that the trier of fact should not have found guilt based on the evidence before it.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The jury determines the credibility of witnesses and the weight of the evidence, and we will not substitute our judgment for the trier of fact’s “unless the evidence supporting the jury’s verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible.” *See*

¹ *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Sharp, 180 Wis. 2d at 659; *see also Poellinger*, 153 Wis. 2d at 507 (“[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate 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.”). This standard applies regardless of whether the evidence is direct or circumstantial. *See Poellinger*, 153 Wis. 2d at 501.

Child Neglect

¶13 To prove that Breitzman was guilty of child neglect, the State was required to show that: (1) Breitzman was responsible for J.K.’s welfare; (2) Breitzman intentionally contributed to the neglect; and (3) J.K. was under the age of eighteen. *See* WIS JI—CRIMINAL 2150; WIS. STAT. § 948.21 (2013-14).²

¶14 It is undisputed that J.K. was under the age of eighteen in the winter of 2012 and that Breitzman was responsible for his welfare. The second element outlined above requires that the defendant intentionally contribute to the neglect of the child. The term “intentionally” requires only that the defendant be “aware that his [or her] conduct was practically certain to cause that result.” *See* WIS JI—CRIMINAL 2150. A child is neglected if the person responsible for the child’s welfare fails “to provide necessary care, food, clothing, medical or dental care, or shelter so as to seriously endanger the physical health of the child.” *Id.* However, the jury instructions also provide:

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

It is not required that the child actually become neglected. An act or failure to act contributes to the neglect of a child if the natural and probable consequences of that act or failure to act would be to cause the child to become neglected.

Id.

¶15 J.K. testified that he waited outside of his home for approximately five hours before his mother let him in the house. He stated that the temperature got progressively colder, prompting him to take shelter under a grill cover. J.K. was certain his mother was home because her car was in the driveway; however, she did not answer his phone calls or come to any of the house's doors despite J.K.'s repeating knocking and doorbell ringing. The jury found J.K. credible and clearly concluded that Breitzman endangered J.K.'s health and safety by leaving him outside for five hours in the winter. J.K.'s testimony supports the jury's conclusion.

Disorderly Conduct

¶16 WISCONSIN STAT. § 947.01(1) provides: "Whoever, in a public or private place, engages 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 is guilty of a Class B misdemeanor." To prosecute a defendant for disorderly conduct, the State must prove two elements. *See State v. Douglas D.*, 2001 WI 47, ¶15, 243 Wis. 2d 204, 626 N.W.2d 725. First, it must prove that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct. *See id.* Second, it must prove that the defendant's conduct occurred under circumstances where it tended to cause or provoke a disturbance. *See id.* "An objective analysis of the conduct and circumstances of each particular

case must be undertaken because what may constitute disorderly conduct under some circumstances may not under others.” *State v. Schwebke*, 2002 WI 55, ¶24, 253 Wis. 2d 1, 644 N.W.2d 666.

¶17 The trial court instructed the jury following WIS JI—CRIMINAL 1900:

Before you may find the defendant guilty of [disorderly conduct], the State must prove ... that the following two elements were present.

1. The defendant engaged in profane conduct.
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

“Disorderly conduct” may include physical acts or language or both.

....

The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community. This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large but that might disturb an oversensitive person.

It is not necessary that an actual disturbance must have resulted from the defendant’s conduct.

¶18 The jury returned a verdict of guilty on the disorderly conduct charge. We presume jurors follow the instructions they were given. *See State v. Delgado*, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. Breitzman contends that the evidence presented at trial was insufficient to support a conviction for disorderly conduct. The basis of the disorderly conduct charge was

Breitzman's conduct towards J.K. during the popcorn incident, in which she yelled at J.K., calling him a "retard," a "fuck face," and a "piece of shit." Breitzman does not deny calling J.K. those names, but rather contends that her conduct did not tend to cause or provoke a disturbance. Here, J.K. had his phone hidden in his pocket, allowing his friend to hear Breitzman's foul language. J.K. later cried to his friend and essentially stated that he had reached a breaking point, prompting J.K. to contact the police the following day. The jury could reasonably conclude that Breitzman's language and tone towards J.K. "unreasonably offends the sense of decency or propriety of the community," thus satisfying the elements of WIS. STAT. § 947.01(1). Because the statute encompasses conduct that tends to cause a disturbance that is "private in nature," we must conclude that the evidence supports the jury's finding that Breitzman's conduct was profane and that it disturbed J.K. *See Schwebke*, 253 Wis. 2d 1, ¶31.³

Ineffective Assistance of Counsel

¶19 Breitzman contends that she was denied the effective assistance of counsel for three reasons: (1) trial counsel did not move to dismiss the disorderly conduct charge on grounds that the charge violated her right to free speech;

³ In *State v. Schwebke*, 2002 WI 55, ¶¶31-32, 253 Wis. 2d 1, 644 N.W.2d 666, the Wisconsin Supreme Court noted:

[I]n domestic disputes, even though the disturbance may only occur on a private level, such conduct affects the overall safety and order in the community.... [T]he conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person.

(Formatting altered.)

(2) counsel failed to object to prejudicial other acts evidence; and (3) counsel argued a theory of defense that contradicted her testimony. We disagree.

¶20 In evaluating an ineffective assistance of counsel claim, we apply the two-part test outlined by *Strickland v. Washington*, 466 U.S. 668(1984). See *State v. Roberson*, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. To satisfy this test, Breitzman must show that: (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced her defense. See *Strickland*, 466 U.S. at 687. If Breitzman fails to satisfy either prong of the two-part test, her ineffective assistance of counsel claim must also fail. See *id.* Deficient performance requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* With respect to the "prejudice" component, Breitzman must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *id.* at 694.

¶21 "[A]n ineffective assistance of counsel claim presents a mixed question of fact and law." *State v. Champlain*, 2008 WI App 5, ¶19, 307 Wis. 2d 232, 744 N.W.2d 889. We review a postconviction court's findings of fact for clear error; whether trial counsel's performance is constitutionally infirm is a question of law, which we review *de novo*. See *id.*

¶22 We agree with the postconviction court that Breitzman did not receive ineffective assistance of counsel. As to counsel's failure to challenge the disorderly conduct charge on free speech grounds, the postconviction court discussed the basic tenets of free speech law and noted that the disorderly conduct statute "can include both protected and unprotected speech." The court stated that if trial counsel had moved to dismiss the charge, the trial court would have denied

the motion.⁴ Consequently, trial counsel was not ineffective for failing to move to dismiss the disorderly conduct charge. *See State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if the motion would have been unsuccessful, there can be no prejudice and the claim of ineffective assistance of counsel fails).

¶23 We also agree with the postconviction court that trial counsel's decision to not object to the other acts evidence was a matter of trial strategy. A postconviction court's determination that counsel had a reasonable trial strategy "is virtually unassailable in an ineffective assistance of counsel analysis."

State v. Maloney, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. 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. "We will not second guess trial counsel's selection of trial tactics or strategies in the face of alternatives that he or

⁴ The postconviction court also presided over the trial.

she has considered.” *State v. Nielsen*, 2001 WI App 192, ¶26, 247 Wis. 2d 466, 634 N.W.2d 325.

¶24 Finally, we agree with the postconviction court that counsel did not present the jury with testimony contrary to his theories of defense. Breitzman contends that trial counsel’s opening remarks to the jury included an explanation that the theory of defense was reasonable parental discipline; however, Breitzman testified that she did not hit J.K. on the two occasions for which she was charged, but did hit J.K. on the one occasion for which she was not charged. Breitzman contends that it was irrational for counsel to apply the discipline defense to an uncharged occurrence and that counsel most likely confused the jury, leading the jury to believe that counsel’s defense theory was contrary to Breitzman’s testimony.

¶25 Counsel testified at length about his defense strategy, telling the court that his main theories of defense centered on: (1) Breitzman’s right to discipline her child; (2) J.K.’s unruly behavior and tendency to exaggerate; and (3) Breitzman’s “difficult set of circumstances” as a single mother with a “rebellious child” and “limited economic resources.” Counsel stated that he discussed his theories with Breitzman and that Breitzman agreed with his approach. Accordingly, throughout the course of the trial, counsel elicited testimony from Breitzman that discussed: (1) J.K.’s behavioral changes and tendency towards rebellion; (2) J.K.’s tendency to exaggerate facts; (3) Breitzman’s disciplinary methods; (4) Breitzman’s struggles as a single mother; and (5) Breitzman’s love for her child. All of the testimony counsel elicited went to one or more of his theories of defense.

¶26 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

State of Wisconsin vs. Ginger M Breitzman

Judgment of ConvictionSentence Imposed & Stayed,
Probation OrderedFILED
07-23-2013
John Barrett
Clerk of Circuit Court

Date of Birth: 09-29-1973

Case No. 2013CF000270

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Child Abuse-Intentionally Cause Harm	948.03(2)(b)	Not Guilty	Felony H	06-01-2012	Jury	05-23-2013
2	Child Abuse-Intentionally Cause Harm	948.03(2)(b)	Not Guilty	Felony H	06-01-2012	Jury	05-23-2013
3	Neglecting a Child (Consequence is Bodily Harm)	948.21(1)(b)	Not Guilty	Felony H	11-18-2012	Jury	05-23-2013

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	07-12-2013	Probation, sent imposed	3 YR	Department of Corrections	
2	07-12-2013	Probation, sent imposed	3 YR	Department of Corrections	
3	07-12-2013	Probation, sent imposed	3 YR	Department of Corrections	
Sentence(s) Stayed				Comments	Sent. Credit
1	House of Correction		12 MO	Concurrent with: Counts 2 & 3. Consecutive to Counts 4 & 5.	0
2	House of Correction		12 MO	Concurrent with: Counts 1 & 3. Consecutive to Counts 4 & 5.	0
3	House of Correction		12 MO	Concurrent with: Counts 1 & 2. Consecutive to Counts 4 & 5.	0

State of Wisconsin vs. Ginger M Breitzman

Judgment of ConvictionSentence Imposed & Stayed,
Probation Ordered

Date of Birth: 09-29-1973

Case No. 2013CF000270

FILED

07-23-2013

John Barrett

Clerk of Circuit Court

Conditions of Sentence or Probation**Obligations:** (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	524.00			39.00	276.00		250.00

Conditions

Ct.	Condition	Length	Agency/Program	Begin Date	Begin Time	Comments
1	House of Correction	60 DA				As to CTS 1,2,& 3: This time is stayed pending a review on 1-24-14.

Ct.	Condition	Agency/Program	Comments
1	Other		PROBATION CONDITIONS AS TO CTS 1, 2 & 3:
1	Psych treatment		Mental Health Evaluation and take ALL prescribed medication, and/or any treatment deemed appropriate.
1	Other		Successfully complete Anger Management, and continued programming. Cooperate with all CHIPS orders. Successfully complete any other counseling and/or treatment deemed appropriate.
1	Employment / School		Complete a parenting class. Obtain and maintain employment.
1	Alcohol assessment		Defendant to participate in Alcohol and Drug Assessment and successfully complete recommended treatment including random urine screens. Maintain absolute sobriety.
1	Prohibitions		No contact with victim, UNLESS the victim requests contact, and then only after the court has approved a modification to no violent contact.
1	Costs		Court ordered defendant to provide a DNA sample, if not already provided, and pay the DNA fees and surcharges by the end of probation.
			Defendant to pay all applicable costs and surcharges, victim/witness surcharge, and supervision fees as determined by the Department of Corrections. Any amount remaining due and owing is subject to civil judgment and/or tax intercept or other means.
1	Firearms/Weapons Restriction		No firearms; weapons. Court advised defendant that as a convicted felon she may never possess a firearm or body armor. Court advised defendant that his voting rights are suspended, and may not vote in any election until his civil rights are restored.
2	Costs		
3	Costs		

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:The Defendant is ☐ is not ☐ eligible for the Challenge Incarceration Program.The Defendant is ☐ is not ☐ eligible for the Substance Abuse Program.

State of Wisconsin vs. Ginger M Breitzman

Judgment of ConvictionSentence Imposed & Stayed,
Probation Ordered

Date of Birth: 09-29-1973

Case No. 2013CF000270

FILED

07-23-2013

John Barrett

Clerk of Circuit Court

IT IS ADJUDGED that 0 days sentence credit are due pursuant to §973.155, Wisconsin Statutes**IT IS ORDERED** that the Sheriff shall deliver the defendant into the custody of the Department.**BY THE COURT:****Distribution:**Rebecca F. Dallet-40, Judge
Matthew J Torbenson, District Attorney
Thomas J McClure, Defense AttorneyElectronically signed by John Barrett
Circuit Court Judge/Clerk/Deputy Clerk

July 23, 2013

Date



State of Wisconsin vs. Ginger M Breitzman

Judgment of Conviction

Amended

and Sentence to the
County Jail/Fine/Forfeiture

Case No. 2013CF000270

FILED

08-28-2013

John Barrett

Clerk of Circuit Court

Date of Birth: 09-29-1973

COURT COPY
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The defendant was found guilty of the following offense(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
4	Neglecting a Child	948.21(1)(a)	Not Guilty	Misd. A	11-01-2012	Jury	05-23-2013
5	Disorderly Conduct	947.01(1)	Not Guilty	Misd. B	12-04-2012	Jury	05-23-2013

The defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Begin date	Begin time	Agency	Comments
4	07-12-2013	House of Correction	6 MO			Department of Corrections	AS TO CTS 4 & 5: Huber privileges for verifiable work, and twice a week (3 hours per visit) visitation with child pursuant to Sec. 303.03 Wis. Stats to apply. ***8-28-13, Judge Dallet, Court ordered defendant may be release for Children's Court CHIPS case appearances involving her children***
4	07-12-2013	Costs					AS TO CTS 4 & 5: Defendant to pay all applicable costs and surcharges and victim/witness surcharge. Any amount remaining due and owing is subject to civil judgment and/or tax intercept or other means.
5	07-12-2013	Costs					
5	07-12-2013	House of Correction	3 MO			Department of Corrections	

Sentence Concurrent With/Consecutive Information:

Ct.	Sentence	Concurrent With/Consecutive To	Comments
4	House of Correction	Concurrent	with Count 5. Consecutive to any other sentence.
5	House of Correction	Concurrent	with Count 4. Consecutive to any other sentence.

Obligation Detail:

Ct.	Schedule	Amount	Days to Pay	Due Date	Failure to Pay Action	Victim
4	Misdemeanor Court Costs	243.00		07-12-2016	Judgment	
5	Misdemeanor Court Costs	243.00		07-12-2016	Judgment	

Obligation Summary:

Ct.	Fine & Forfeiture	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge	Totals
4		163.00			13.00	67.00			243.00
5		163.00			13.00	67.00			243.00

Total Obligations: 486.00

State of Wisconsin vs. Ginger M Breitzman

Judgment of Conviction

Amended

and Sentence to the
County Jail/Fine/Forfeiture

Case No. 2013CF000270

Date of Birth: 09-29-1973

FILED

08-28-2013

John Barrett

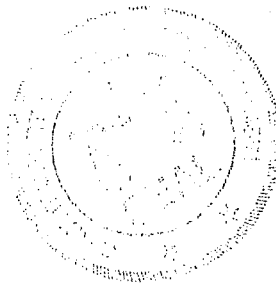
Clerk of Circuit Court

It is adjudged that **3** days sentence credit are due pursuant to §973.155, Wisconsin Statutes.

☐ **It is ordered** that the Sheriff take the defendant into custody.

THIS IS A FINAL ORDER/JUDGMENT FOR PURPOSES OF APPEAL.**BY THE COURT:****Distribution:**

Rebecca F. Dallet-40, Judge
Matthew J Torbenson, District Attorney
Thomas J McClure, Defense Attorney
County Sheriff



Electronically signed by John Barrett

☐ Circuit Court Judge ☒ Clerk ☐ Deputy Clerk

August 28, 2013

Date

State of Wisconsin vs. Ginger M Breitzman

Judgment of Conviction

Amended

Sentence Imposed & Stayed,
Probation Ordered

Date of Birth: 09-29-1973

Case No. 2013CF000270

FILED

07-31-2015

John Barrett

Clerk of Circuit Court

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Child Abuse-Intentionally Cause Harm	948.03(2)(b)	Not Guilty	Felony H	06-01-2012	Jury	05-23-2013
2	Child Abuse-Intentionally Cause Harm	948.03(2)(b)	Not Guilty	Felony H	06-01-2012	Jury	05-23-2013

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	07-12-2013	Probation, sent imposed	3 YR	Department of Corrections	
2	07-12-2013	Probation, sent imposed	3 YR	Department of Corrections	
Sentence(s) Stayed				Comments	Sent. Credit
1	House of Correction		12 MO	Concurrent with: Count 2. Consecutive to Counts 4 & 0 5.	
2	House of Correction		12 MO	Concurrent with: Count 1. Consecutive to Counts 4 & 0 5.	

State of Wisconsin vs. Ginger M Breitzman

Judgment of Conviction

Amended

Sentence Imposed & Stayed,
Probation Ordered

Date of Birth: 09-29-1973

Case No. 2013CF000270

FILED

07-31-2015

John Barrett

Clerk of Circuit Court

Conditions of Sentence or Probation**Obligations:** (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	361.00			26.00	184.00		

Conditions

Ct.	Condition	Length	Agency/Program	Begin Date	Begin Time	Comments
1	House of Correction	60 DA				As to CTS 1&2: This time is stayed pending a review on 1-24-14.
Ct.	Condition		Agency/Program			Comments
1	Other					PROBATION CONDITIONS AS TO CTS 1 & 2:
1	Psych treatment					Mental Health Evaluation and take ALL prescribed medication, and/or any treatment deemed appropriate.
1	Other					Successfully complete Anger Management, and continued programming. Cooperate with all CHIPS orders. Successfully complete any other counseling and/or treatment deemed appropriate.
1	Employment / School					Complete a parenting class. Obtain and maintain employment.
1	Alcohol assessment					Defendant to participate in Alcohol and Drug Assessment and successfully complete recommended treatment including random urine screens. Maintain absolute sobriety.
1	Prohibitions					No contact with victim, UNLESS the victim requests contact, and then only after the court has approved a modification to no violent contact.
1	Costs					Court ordered defendant to provide a DNA sample, if not already provided, and pay the DNA fees and surcharges by the end of probation.
						Defendant to pay all applicable costs and surcharges, victim/witness surcharge, and supervision fees as determined by the Department of Corrections. Any amount remaining due and owing is subject to civil judgment and/or tax intercept or other means.
1	Firearms/Weapons Restriction					No firearms; weapons. Court advised defendant that as a convicted felon she may never possess a firearm or body armor. Court advised defendant that his voting rights are suspended, and may not vote in any election until his civil rights are restored.
2	Costs					

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:The Defendant is ☐ is not ☐ eligible for the Challenge Incarceration Program.The Defendant is ☐ is not ☐ eligible for the Substance Abuse Program.

State of Wisconsin vs. Ginger M Breitzman

Judgment of Conviction

Amended

Sentence Imposed & Stayed,
Probation Ordered

Date of Birth: 09-29-1973

Case No. 2013CF000270

FILED

07-31-2015

John Barrett

Clerk of Circuit Court

IT IS ADJUDGED that 0 days sentence credit are due pursuant to §973.155, Wisconsin Statutes**IT IS ORDERED** that the Sheriff shall deliver the defendant into the custody of the Department.**BY THE COURT:****Distribution:**Rebecca F. Dallet-40, Judge
Matthew James Torbenson, District Attorney
Thomas J McClure, Defense AttorneyElectronically signed by John Barrett
Circuit Court Judge/Clerk/Deputy Clerk

July 31, 2015

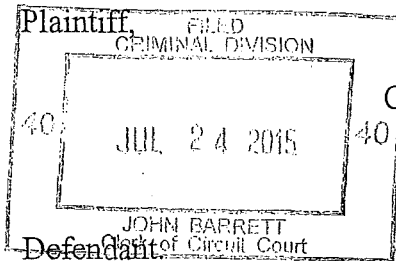
Date

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 40

STATE OF WISCONSIN,

v.

GINGER BREITZMAN,



Case No. 13-CF-270

RECEIVED
JUL 31 2015
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

ORDER DECIDING POST-CONVICTION MOTION

Defendant Ginger Breitzman, having filed a post-conviction motion in the above-captioned case on February 6, 2015, the State having filed a response on April 13, 2015, Ms. Breitzman having filed a reply on April 27, 2015, an evidentiary hearing having been held on May 29, 2015, and an oral ruling hearing having been held on July 17, 2015;

IT IS HEREBY ORDERED that:

The motion for a judgment of acquittal on Count 3 (Neglecting a Child Resulting in Bodily Harm) on grounds of insufficient evidence is **granted** for the reasons stated on the record on July 17, 2015;

The motion for a judgment of acquittal on Count 4 (Neglecting a Child) on grounds of insufficient evidence is **denied** for the reasons stated on the record on July 17, 2015;

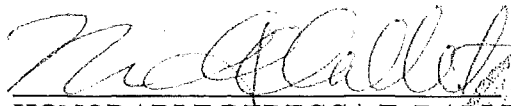
The motion for a judgment of acquittal on Count 5 (Disorderly Conduct) on grounds of both insufficient evidence and ineffective assistance of counsel is **denied** for the reasons stated on the record on July 17, 2015;

The motion for a new trial on all remaining counts on grounds of ineffective assistance of counsel is **denied** for the reasons stated on the record on July 17, 2015;

The motion to vacate the \$250 DNA surcharge is **granted** for the reasons stated on the record on July 17, 2015.

Dated this 24 day of July, 2015.

BY THE COURT:



HONORABLE REBECCA F. DALLEY
Circuit Court Judge



STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 40

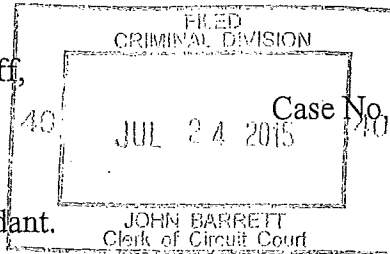
STATE OF WISCONSIN,

Plaintiff,

v.

GINGER BREITZMAN,

Defendant.



ORDER ENTERING JUDGMENT OF ACQUITTAL ON COUNT 3 AND
AMENDING JUDGMENT OF CONVICTION ON REMAINING COUNTS

Pursuant to this Court's oral rulings on July 17, 2015, and this Court's subsequent written order deciding post-conviction motion,

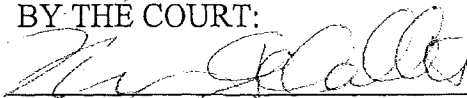
IT IS HEREBY ORDERED that the defendant's conviction and sentence on Count 3, Neglecting a Child Resulting in Bodily Harm, are **vacated**.

IT IS FURTHER ORDERED that a judgment of acquittal be entered on Count 3;

IT IS FURTHER ORDERED that the judgment of conviction on the remaining Counts be amended to vacate the \$250 DNA surcharge.

Dated this 24 day of July, 2015.

BY THE COURT:


HONORABLE REBECCA F. DALLEY
Circuit Court Judge



RECEIVED
JUL 31 2015
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 40

MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

GINGER V. BREITZMAN,

Defendant.

RECEIVED
AUG 24 2015

Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

File No. 13-CF-00270

DECISION AND ORDER

Proceeding held on July 17, 2015

BEFORE THE HONORABLE REBECCA DALLET
CIRCUIT COURT JUDGE PRESIDING

A P P E A R A N C E S

MATTHEW TORBENSON, Assistant District
Attorney, appeared on behalf of the State of Wisconsin.

HANNAH SCHIEBER JURSS, Attorney at Law,
appeared on behalf of the defendant.

The defendant appeared in person.

Rose Marie Roderick
Official Court Reporter

COPY

1 THE CLERK: State of Wisconsin versus
2 Ginger Breitzman, 13-CF-270.

3 Appearances, please.

4 MR. TORBENSON: Matthew Torbenson appears
5 for the State.

6 MS. SCHIEBER JURSS: Ms. Breitzman appears
7 in person and by Assistant State Public Defender Hannah
8 Schieber Jurss. Good afternoon.

9 THE COURT: Good afternoon. We're here for
10 my decision on this post-conviction motion. I know we
11 spent a lot of time on it. We had testimony. We have had
12 numerous briefs. I've read everything. I went back and
13 looked at the case law again.

14 If there's anything anyone wants to add,
15 I know you've had time ample time to do that. Does anyone
16 want to add anything?

17 MR. TORBENSON: Judge, I was hoping to file
18 an additional brief. I was in trial two of the last three
19 weeks, and I was on vacation one week. I apologize for
20 not filing anything, but I will rely on my submissions and
21 the arguments at this point.

22 THE COURT: Did you want to argue anything
23 else, Ms. Schieber Jurss?

24 MS. SCHIEBER JURSS: As Your Honor noted,
25 we filed certainly quite a bit, so I'm comfortable relying

1 on that.

2 THE COURT: I think everybody went through
3 the issues very thoroughly, especially the defense. So
4 I'm going to go through the specific claims and my
5 decision as to each of the points that were raised by the
6 defense on the post-conviction motion.

7 So I'm going to do it in the order that you
8 went through in your brief, Ms. Schieber Jurss, so we'll
9 start with the claims of -- I'm sorry -- insufficient
10 evidence. Those are the first claims that were made by
11 the defense. Looking at the post-conviction motion
12 itself, which is very detailed, starting with the
13 insufficient evidence for Count 3.

14 So on Count 3 the claim is that there was
15 insufficient evidence to prove child neglect. The
16 argument is that the State did not establish by proof
17 beyond a reasonable doubt all of the elements of child
18 neglect, and the main claim is that this issue of illness
19 that J.K. suffered from, that that was not -- it was not
20 established that Ms. Breitzman's actions or lack of
21 actions or omissions were a substantial factor in
22 producing bodily harm to J.K., the child.

23 With respect to this count, I do agree with
24 the defense. I do not think there was sufficient evidence
25 to make that connection with respect to the substantial

1 factor. I do think there was testimony that J.K. was
2 sick. There was testimony that Ms. Breitzman did not take
3 him to the doctor. These were in the testimony on
4 May 21, 2013, in the morning on Page 45 and 46.

5 There was testimony from the neighbor's mom
6 that she had provided some items -- I believe it was
7 Gatorade -- to J.K. at that time after her daughter had
8 also been sick from the flu. That was on Pages 26 and 27.
9 The problem is that there's no connection here to any
10 actions of Ms. Breitzman. Had she taken J.K. to the
11 doctor, there's no testimony or evidence that it would
12 have had any difference in terms of his illness.

13 MR. TORBENSON: Judge, I guess in brief
14 response to that, that's precisely the reason why the
15 charge was issued because his illness was prolonged for a
16 period of time. He was bleeding for a period of time and
17 had he gone to the doctor, that would have been diagnosed
18 and there would have been relief provided.

19 THE COURT: We don't know that so that's
20 the problem.

21 MR. TORBENSON: I understand that we don't
22 know that, but if that argument carries today, then any
23 child who is denied medical relief by a parent and is ill
24 for an extended period of time but recovers on their own,
25 that parent then per se by this Court's ruling today is

1 not committing child neglect.

2 THE COURT: That's not necessarily true.
3 I take full issue with that. There are plenty of ways
4 someone could be sick or ill that it could be shown that
5 actions on the part of the parent or failure to take
6 action was a substantial factor in the prolonging of the
7 illness, not so for the flu.

8 We have no actual medical testimony of what
9 kind of flu it was, whether anything was going to help
10 that flu, whether it was going to take six or seven days
11 because that's the kind of flu it was. There was nothing
12 there.

13 I disagree this sets any kind of precedent
14 because I think in plenty of other circumstances, for
15 example pneumonia or even a different kind of bacterial
16 infection or even a virus that could have been treated
17 somehow with something that wasn't treated, that was
18 prolonged. But this was a really vague testimony.

19 It was only offered by J.K. as to what he
20 was suffering from. It was just unclear, I think at least
21 to that level of proof beyond a reasonable doubt, if even
22 Ms. Breitzman had taken him to the doctor, whether or not
23 it would have made any difference at all, shortened it.
24 Who knows?

25 There just wasn't enough there with respect

1 to this count, so I'm going to dismiss Count 3.

2 MR. TORBENSON: Dismissing it or -- I guess
3 my second argument is, is it not child neglect as a
4 misdemeanor, which would be a lesser included of the
5 felony offense that the jury convicted of, to not seek
6 medical care for your child. Your child says, "I'm
7 bleeding; I'm sick; I want to go see a doctor."

8 THE COURT: I don't think I can go back and
9 do that. I really don't.

10 MR. TORBENSON: The jury found all those
11 elements that the Court is agreeing with. They found
12 those beyond a reasonable doubt, and the element the Court
13 is disputing is the substantial causal link to bodily
14 harm. So you're not taking away from the jury those other
15 elements, which they found. In this case there was a
16 child who said he wanted medical care and wasn't given
17 medical care, and it was a lesser-included offense.

18 THE COURT: I don't know what your position
19 is, Ms. Schieber Jurss. I don't know that I can go back
20 at this point. I think I deal with the relief you're
21 asking for with respect to that count.

22 If it's insufficient evidence, and that's
23 what I am saying it is with respect to that count, what's
24 the remedy?

25 MS. SCHIEBER JURSS: My understanding is

1 the remedy is to vacate the conviction, and that count is
2 simply vacated. If, as a matter of law, there was
3 insufficient evidence to sustain that charge, I think
4 Your Honor is correct, that it would be vacated.

5 THE COURT: That's what I think, too,
6 Mr. Torbenson. I just don't think I can go into the
7 business of lesser includeds, and that, on this type of
8 motion. So if you come up with something different and
9 you want me to reconsider with some kind of case law to
10 that effect, but right now I'm vacating Count 3.

11 Now, as to Count 4, child neglect, for
12 locking the child, J.K., out of the house during the
13 winter. The claim on behalf of Ms. Breitzman is that
14 basically that Mr. -- or that J.K. could have done
15 something else, that he could have gone to someone else's
16 house, that he could have -- he had a cell phone. He
17 could have gone to businesses. But I don't think that's
18 the standard with respect to this child neglect with
19 respect to Count 4.

20 It's the same element with respect to
21 Count 3 that I was reviewing, and it is a parent's
22 responsibility to provide shelter. It's not a child's
23 responsibility to find alternative shelter. Even though
24 he was not acting responsibly to go without a coat that
25 day, the fact of the matter is there was testimony that

1 Ms. Breitzman did lock J.K. out of the house, that it was
2 very cold, and that is essentially child neglect by law.

3 It certainly is shown with the evidence in
4 this case in that a parent's responsibility, one of the
5 responsibilities, is to provide necessary shelter. And
6 that in this case with this count the jury found
7 Ms. Breitzman guilty, and it is with respect to not
8 providing shelter.

9 It is not required that he became -- he
10 actually became neglected, and it is whether natural and
11 probable consequences would be to become neglected. And
12 being locked out of the house in that kind of cold
13 certainly could seriously endanger the physical health of
14 the child, and it was shelter that was not provided --
15 necessary shelter not provided by Ms. Breitzman.

16 So I'm going to deny the defense motion
17 with respect to Count 4. I do think there is sufficient
18 evidence with respect to that count.

19 As to Count 5, on this count the argument
20 is interesting, and I did read the case law. And this
21 ties to one of the other claims as well, but I'll deal
22 with it here first. I read the case law, had the help of
23 my intern in terms of even reviewing further case law with
24 respect to disorderly conduct and the issue of free
25 speech.

1 So the argument here is that -- the first
2 argument made is not the one related to free speech. So
3 first, the defense makes the argument that this was not
4 disorderly conduct. Again, the argument that there's
5 insufficient evidence to support the conviction for
6 disorderly conduct because the words used by
7 Ms. Breitzman, and testified to by J.K., that those words
8 did not rise to the level of that which would tend to
9 cause or provoke a disturbance and that they were impolite
10 and insensitive but did not rise to that level.

11 And as the case law holds -- actually, as
12 the instructions even say, there's no requirement that
13 there actually be a disturbance. It's caused. It's just
14 that the testimony rises to the level of tending to cause
15 or provoke a disturbance.

16 All right. With respect to this claim, I
17 do think there was ample testimony that these words used
18 by Ms. Breitzman tended to cause or provoke a disturbance.

19 I believe that that is demonstrated in the
20 way in which J.K. conducted himself as a result of those
21 words, the testimony as to how he was affected, the
22 testimony as to what, in fact, he did in terms of
23 reporting, the testimony with respect to how he acted with
24 his friends, that he was sad, according to the friends --
25 and that's on the 21st of May, Page 20. I can't remember

1 if that's a.m. or p.m.-- that he was crying or in shock --
2 -- and that's also on May 21st at Page 23 -- that he
3 brought in a counselor and the police.

4 So in some ways this even did cause a
5 disturbance, not just whether it rose to the level of
6 conduct that would but that, in fact, it did. The
7 disturbance was demonstrated by J.K.'s subsequent conduct
8 as a response to those words and then the fact of this
9 action even being started. I know there were other pieces
10 to it, too, but I believe that there's certainly enough
11 here to show the effect on J.K. in terms of causing or
12 provoking a disturbance.

13 I don't think that the argument that the
14 defense makes that somehow this means -- my ruling somehow
15 means that every time a family member refers to another by
16 a rude or offensive name inside a private home means it's
17 disorderly conduct. I wholly disagree with that. I think
18 there is plenty of instances where that's not the case.

19 I think there's something to look at in
20 this particular case. The claim here is that there was
21 insufficient evidence here, and I believe the testimony
22 here is sufficient.

23 I believe that there also should be
24 consideration given to the relationships of the people --
25 and in this case it is a mother-son relationship -- and to

1 have those names used and those words used with
2 Ms. Breitzman's son by her and then, because of that
3 relationship, also the effect that those words have on
4 J.K. Certainly, I think in this instance it was conduct
5 that tended to cause or provoke a disturbance.

6 There may be times where saying a rude or
7 offensive name inside a home does not rise to that level.
8 I think every case is going to be different, but in this
9 case, given the relationship between the parties, given
10 the subsequent conduct by J.K. in terms of reporting this
11 and in terms of how he was affected, it certainly rises to
12 that level.

13 And profanity is covered by the disorderly
14 conduct, so I believe that there is sufficient evidence
15 with respect to that claim.

16 The connection to that is the next claim
17 made by the defense, which is that counsel should have --
18 no, now is the ineffective assistance of counsel portion.
19 This ties into Count 5 in that the defense argues that
20 defense counsel, Mr. McClure, should have moved to dismiss
21 Count 5 on the grounds that it violated Ms. Breitzman's
22 Constitutional right to free speech.

23 So that's the argument that disorderly
24 conduct -- that Mr. McClure should have brought a motion
25 in front of the Court challenging that count on the

1 grounds that this is free speech, that Ms. Breitzman has
2 the right to use these words, to use these words with her
3 son in her home, and therefore it can't go forward. It's
4 protected speech.

5 So this was the interesting, very
6 interesting, claim. I mean, there certainly is case law
7 dealing with free speech and lots of it. And here I'll
8 start with the premise that there is case law, and it is
9 *In re: Douglas D.*, 243 Wis. 2d 204, where the Court dealt
10 with the initial issue of whether or not disorderly
11 conduct itself, whether the statute infringes on free
12 speech necessarily, whether it's overbroad, whether it
13 infringes on free speech in general.

14 The ruling in this case, disorderly conduct
15 is not -- speech is not necessarily -- let me start by
16 saying this again. Disorderly conduct is not necessarily
17 overbroad. That statute can include both protected and
18 unprotected speech; and, therefore, just as a general
19 rule, there's nothing about this speech that means that
20 it's protected.

21 The Court requires us to delve further --
22 or this Court to delve further to see if these specific
23 words, specifically the language that Ms. Breitzman used,
24 was protected. That's really what makes it -- you have
25 the right to say things to people, but it doesn't mean

1 that you can say anything you want, and it doesn't mean
2 that anything you say is not going to have criminal
3 consequences.

4 The question then becomes whether or not
5 this particular speech is Constitutionally protected
6 speech. Whether her saying to her son -- calling him a
7 retard, fuck face, piece of shit -- whether those kinds of
8 words are Constitutionally protected words that she can
9 and should be able to use without punishment because
10 they're protected speech.

11 So in terms of what category those fall
12 into, the argument that the defense makes is that this was
13 not a threat; this was not incitement; it was not obscene.
14 Those are some of the narrow categories that can be
15 punished and that the government may not punish a person
16 for the content of their speech unless it falls in one of
17 those categories. And the brief lists fighting words,
18 incitement, obscenities, liable and slander, and free
19 speech and true threats.

20 And then the defense further cites
21 Wisconsin case law, which talks about when there's clear
22 and present danger of riot, disorder, some kind of
23 immediate threat to public safety, peace, or order. The
24 threat to punishment is obvious. The definition tries to
25 distinguish this speech from that.

1 I would agree that this doesn't necessarily
2 fall within a true threat; however, at the same time --
3 I'm looking at *Chaplinsky v. New Hampshire*, 315 U.S. 568,
4 572, a 1942 case, which really talks about the fact that
5 there's certain types of speech that have never really
6 raised any First Amendment problem. And those are,
7 according to *Chaplinsky*, "the lewd and obscene, the
8 profane, the libelous, and the insulting or 'fighting'
9 words -- those which, by their very utterance inflict to
10 incite an immediate breach of the peace. It has been well
11 observed that such utterances are no essential part of any
12 exposition of ideas, are of slight social value as a step
13 to truth, that any benefit that may be derived from them
14 is clearly outweighed by the social interest in order and
15 morality."

16 I like that paragraph. I think it's really
17 important when we're talking about free speech. We're
18 talking about social values. Absolutely, you're trying to
19 protect the ability to speak freely, to have that value,
20 that First Amendment right. But, at the same time,
21 there's nothing valuable about the words that
22 Ms. Breitzman used. There's nothing that adds any value,
23 nothing that adds to anything, any exposition of ideas or
24 any kind of essential part of that.

25 On the other side of it, there is this

1 clear detriment in that it tends to cause or provoke a
2 disturbance. Here, as I was saying with respect to the
3 other claim, as I have upheld, there's sufficient evidence
4 to show that this was disorderly conduct, that it tended
5 to cause or provoke a disturbance.

6 There was a disturbance. There was an
7 effect. There was an outcome. This wasn't just words in
8 passing. This wasn't just someone using a profanity with
9 someone else, but there was an outcome and an effect. And
10 that effect was the child reporting this incident,
11 suffering from being sad, crying, having the outcomes that
12 he testified to.

13 And in addition, I also revert again to the
14 relationship here. I don't think that when there is a
15 mother-son relationship or a parent-child relationship,
16 that somehow any speech is fine if it has that negative
17 outcome on the person -- the child. And I don't think
18 that it allows for a parent to call names to any child,
19 anything that they want to call just because somehow it is
20 protected speech, when it has an impact on that person,
21 when it has an impact on that child.

22 And that's the legal responsibility
23 essentially that I'm going back to that this mother has
24 with this child. And I do think that ties into this
25 particular analysis of this particular case. So I do not

1 think that there was a legitimate claim, even that
2 Mr. McClure raised the issue ahead of time to me. I would
3 have done exactly what I did now -- which was with the
4 help of an intern also -- look at case law, analyze the
5 free-speech issues behind this, and reach the conclusion
6 that I wouldn't have granted such a motion to dismiss for
7 free speech rights that Ms. Breitzman had.

8 I don't think those rights trump the
9 ability of the State to make sure that people aren't
10 injured by those words, that disturbances aren't caused by
11 those words -- again, in the context of a mother or a
12 parent and a child -- that those words aren't used in any
13 way to negatively impact the child.

14 So I'm going to deny the claim there too
15 because, again, I can't find ineffective assistance of
16 counsel when I would not have upheld that claim, even had
17 it been raised. There's certainly no prejudice there.
18 I would have denied it.

19 So moving on to the next claim and that is
20 with respect to opening the door to the other acts, so the
21 defense claims that Mr. McClure was ineffective because he
22 opened the door to admission of prejudicial other acts
23 evidence which undermine Ms. Breitzman's defense.

24 So the defense goes through the different
25 types of other acts evidence that was discussed and talked

1 about at trial and questioned about at times by the
2 defense and argues that these other acts would have been
3 excluded, that defense counsel should have objected to
4 testimony, and that the outcome, in fact, would have been
5 different had the jury not heard those other acts.

6 So here the specific other acts that
7 defense refers to are Ms. Breitzman hitting the child J.K.
8 in the car, so I guess I'll start with that. The first
9 thing I can say about that is that it was not the defense
10 that raised it but that it was, in fact, the child that
11 brought that issue up himself when asked about frequent
12 nose bleeds.

13 So I would say that first, with respect to
14 that issue, that J.K. brought it up himself. It wasn't
15 that Mr. McClure specifically brought it up himself, but
16 having said that, he was asked at the hearing, the motion
17 hearing -- and this was on May 29, 2015 -- about that and
18 about why he did not object, and Mr. McClure's response
19 was on Page 20, that he did not object -- and actually
20 from 19 and 20 -- that this was a strategic decision not
21 to object, that to do so basically didn't make any sense
22 because part of the defense strategy was to talk about
23 some of this uncharged conduct. That's on Page 20 of the
24 May 29th transcript.

25 This strategy was, in fact, discussed with

1 Ms. Breitzman, and the strategy was agreed to by
2 Ms. Breitzman. And as part of the strategy, that the
3 defense wanted to have a number of allegations come out
4 that talk about uncharged allegations to point to J.K. as
5 a child who makes these grandiose allegations against his
6 mother, false or grandiose.

7 That's what Mr. McClure said, that it was
8 part of the strategy, that this was a child who was making
9 repeated allegations from the get-go, and that because
10 based on the fact that he was a teenager, that he was
11 twisting or distorting things, he was motivated to do so.
12 This is on Page 21.

13 Mr. McClure talked about going over the
14 facts from day one with Ms. Breitzman, spending a lot of
15 time trying to understand how this happened, the sequence
16 of events, what she was dealing with, and how what
17 appeared to be a good relationship went sour. And this
18 was the trial strategy itself, and in the end he used that
19 essentially to challenge J.K.'s credibility, and even over
20 the course of years, as to his credibility and including
21 the factors that have changed and how that might have also
22 motivated him to make these things up.

23 That included going out for the football
24 team, having a girlfriend. This is on Page 22. This was
25 basically Mr. McClure saying that J.K. had started telling

1 people that things were bad and this was the framework to
2 present the defense.

3 So not only was the defense not going to
4 challenge this other act, but they were going to use it as
5 part of the defense strategy. So there was really no
6 basis then, given that strategy, to object to that
7 particular -- to that particular other act.

8 I think the other acts that are referred to
9 fit within that same framework. There's a number of them
10 that are referred to in the defense's briefs. They
11 include allegations of not getting him glasses, not taking
12 him to the dentist, failure to complete the paperwork for
13 his lunches, actions toward his eating habits -- this is
14 all referred to on the post-conviction motion, Page 16, as
15 filed by the defense -- refusal to take him to the doctor,
16 getting him kicked off the football team, unspecific
17 allegations of slapping or hair pulling.

18 So the defense argues that these things all
19 were some kind of -- had no purpose, essentially; that
20 they prejudice Ms. Breitzman because they made her look
21 bad and that they had no purpose. And I would disagree
22 with that.

23 I don't think it's the Court's place to
24 talk about what trial strategies people should and
25 shouldn't use, and certainly we know that it didn't

1 necessarily work here, but that's not the standard. The
2 standard really is whether or not there was a strategy
3 involved, a realistic trial strategy, not just an
4 amorphous trial strategy but one that was realistic, at
5 least had a basis.

6 And in doing so, I don't think we can say
7 that certain trial counsel is ineffective with that. Now,
8 I want to give an example, though, of how Mr. -- first of
9 all, I believe Mr. McClure about this. I don't believe
10 Ms. Breitzman's testimony that this wasn't the strategy
11 because, first of all, I think Mr. McClure was extremely
12 particular in describing the strategy, in talking about
13 the reasons for it, and how the goal here was to portray
14 the son J.K. as a liar, someone who exaggerates, someone
15 who is a liar.

16 I think it fits what Mr. McClure was
17 describing, really fit with what he did throughout the
18 whole trial. I think that's the best way to look at it.
19 Is this just a made-up strategy that Mr. McClure just said
20 when he was testifying during his post-conviction motion?

21 I don't think that's the case, given the
22 detail in which he talked about it, the way he detailed
23 his understanding of the case. And then in the
24 questioning that he did, particularly, that strategy is
25 apparent. I'm going to find the one spot I'm thinking of

1 when he was questioning J.K. on page -- when he was doing
2 his cross-examination of J.K., and it really is Pages 74,
3 75, 76.

4 This is the transcript May 21, 2013, in the
5 morning. And Mr. McClure is asking detailed questions
6 about these other acts, but they're things that go to the
7 idea that J.K. makes things up, essentially, that he
8 specifically asks -- he's talking about calling the coach
9 so he wouldn't get him kicked off the football team.

10 And on Page 76, Mr. McClure questioned why
11 he talked to the coach again, asked him if there was
12 anyone who was a witness to him telling his mother three
13 days in a row he wanted her to call the coach, that
14 somehow that he had made a comment there was no health
15 insurance.

16 He said, isn't it true that you went to
17 urgent care for all these things and he detailed those
18 things. And then, isn't it correct that you passed the
19 physical for football?

20 So these are all very detailed descriptions
21 of these other acts, in trying to use those in order to
22 show how J.K. was making it up and how he had been likely
23 to exaggerate things or say things.

24 So Mr. McClure didn't just bring up other
25 acts trying to make Ms. Breitzman out to be a bad mother.

1 That's not at all what I think the intent was here. The
2 intent was to show her as someone who had a son who was
3 really out of control and making a lot of stuff up. Was
4 she perfect? No, but that she did the best she could and
5 that he reached this point in his life where he was
6 defiant and making things up.

7 And then this fits with the theory also
8 that none of this really started until she threatened to
9 call the police, that he then didn't talk to the police
10 until she threatened to call the police. That is on
11 Page 70 there.

12 On Page 69, "only after the incident where
13 the mother said she was going to call the police, that the
14 next day you went and talked to your counselor," and
15 that's Page 69-70. So that this was all motivated. This
16 was all something that J.K. had a stake in, that the stake
17 was something other than truthfulness.

18 And Mr. McClure followed through on that,
19 and that's really the picture that he presented, even in
20 the opening statements as well, in talking about the case
21 and talking about the child. When he testified,
22 Mr. McClure talked about being transparent, to not make a
23 lot of objections, to let the jury see the other side
24 here, that it happened in a different way, and that this
25 approach, again, was one that was discussed with

1 Ms. Breitzman, and that this was the defense strategy from
2 the get-go. And this is on Page 20.

3 And then Ms. Breitzman, I know, testified
4 that Mr. McClure did not tell her he was planning on
5 bringing up these other acts, but I find that, based on
6 this very detailed description that Mr. McClure gave and
7 the way he followed through with his strategy, that that's
8 what they did talk about.

9 I don't find it credible that Mr. McClure
10 never discussed this with Ms. Breitzman. Based on his
11 representations, they had discussions, that they talked
12 about this and that the idea was that, yes, there were
13 times that there may have been reasonable discipline but
14 that a lot of this was exaggerated by her son and that it
15 was discussed with Ms. Breitzman and agreed to by her.

16 And, again, I can't judge whether or not
17 strategies are good strategies or not. They just have to
18 be adequate as a trial strategy. And I think that it was
19 an adequate trial strategy, at least under the law. And,
20 again, the fact that it didn't prevail really isn't the
21 standard that the Court looks at.

22 So I think that those comments, those
23 things that Mr. McClure was asking about that are referred
24 to as the other acts, really were his way of trying to
25 show these exaggerations on the part of J.K. I don't

1 think that they were ineffective to do that given the
2 trial strategy, and I don't think they rose to the level
3 of having caused a different result than if those had not
4 been admitted.

5 But, again, this wasn't a question of
6 whether or not he failed to object to these other acts.
7 This was part of the theory of the defense was to show all
8 of these crazy things that J.K. said that didn't make
9 sense and that he was making it up and that only when his
10 mom threatened to call the police did he talk to the
11 counselor and started bringing all these things up to the
12 State, and that's how it went from there. And if they
13 could knock down J.K.'s credibility, that was the goal and
14 that was the strategy.

15 So I don't think it's ineffective the way
16 that Mr. McClure presented that, so I'm going to deny that
17 claim.

18 Looking at the next claim about failing to
19 object to repeated admissions of hearsay statements, here
20 the argument is that these statements that J.K. made to
21 others would not have come into evidence, that they should
22 not have come into evidence, and that Mr. McClure was
23 ineffective for failing to object to those statements.
24 Here, though, I don't know if they were all excited
25 utterances. I think that's going a little far.

1 MS. SCHIEBER JURSS: Your Honor, I'm sorry
2 for interrupting. I don't know if the Court still wants
3 to address its points on this, but we withdrew the hearsay
4 component of our objection in the post-conviction reply.

5 THE COURT: So you withdrew the hearsay
6 part based on the State's response?

7 MS. SCHIEBER JURSS: Right.

8 THE COURT: So I don't need to go through
9 that. I appreciate that because I think that the State
10 had a good response that it would have come in anyway as
11 to prior consistent statements.

12 MS. SCHIEBER JURSS: We agree. That's why
13 we withdrew that.

14 THE COURT: Thank you. I must have somehow
15 missed that in all my reading, so I'll skip that one.

16 The next one then is the theory of defense
17 and opening statements that contradicted Ms. Breitzman's
18 testimony. And the argument here is that this discussion
19 of reasonable parental discipline contradicted what
20 Ms. Breitzman was saying, that she did not hit her son on
21 the two instances charged.

22 Now, I did go back and look at the opening
23 statement of Mr. McClure, and I think the opening
24 statement he gave actually was very short and not
25 extremely detailed, which is fine. I think that's

1 appropriately what defense attorneys often do because
2 they're waiting to see how things come into evidence.

3 His opening talks about -- talking about
4 the evidence will show drama and arguments and basically
5 the evidence is -- what it's going to come down to is
6 J.K., at the time he begins to date his girlfriend, is
7 becoming independent, talking to this counselor, talking
8 to the officer, and working to build a case against his
9 mother. And this is on Page 24 of the May 21, 2013,
10 morning.

11 And then he talks about the idea of
12 reasonable parental discipline, and he talks about
13 Ms. Breitzman trying to maintain structure and discipline
14 in the house, that J. [REDACTED] was becoming increasingly
15 difficult to deal with, that he had been fine but then
16 things became very aggravated.

17 And then basically he said what it comes
18 down to is this attempt to prove to what degree a parent,
19 based on their circumstances, what they were dealing with,
20 whether they were trying to do things that violated the
21 law. That's on Page 26.

22 And then on the next page, 27, is when he
23 gets into the reasonable discipline types of statements,
24 but it's a very brief discussion, you are going to have a
25 couple of days to see whether my client is a criminal or

1 just a struggling parent and, at the end, you should see
2 that the State is not going to meet their burden and
3 she'll be acquitted.

4 It's a very vague, but appropriately so,
5 opening in the short times that openings are. And I don't
6 think that anything about this discussion of reasonable
7 discipline belies the whole theory.

8 Mr. McClure was asked about this also
9 during his testimony on May 29th. Mr. McClure testified
10 on Page 9. When asked about what did Ms. Breitzman tell
11 you in terms of whether or not she had, in fact, slapped
12 her son on those occasions -- those are the two occasions
13 charged that the defense was asking Mr. McClure about --
14 Mr. McClure answers that, "The only time she recalled
15 slapping him was the incident in the car, which we brought
16 up in trial as part of a way to explain our position on
17 the case. She said it was possible she may have slapped
18 him at times in the past, but those times did not occur.
19 Those other slaps in the past would have been something
20 extremely minor and within her privilege as a parent to do
21 so."

22 So her position from day one was that her
23 son exaggerated or projected back on other things that
24 happened, enough facts to twist them into an argument that
25 something had happened, that he was basically lying, and

1 because he was rebellious and not understanding of the
2 challenges she had as a parent.

3 Really, the way Mr. McClure was approaching
4 this was there had been a slap. There was some parental
5 discipline that may have included that, but he then
6 exaggerated all this. We're back to the whole idea that
7 J.K. is making this up and exaggerating these issues,
8 including making it up when he was injured lifting
9 dumbbells after she claims that she struck him. And
10 Mr. McClure specifically asked J.K. about that during the
11 trial.

12 So in terms of parental discipline,
13 Mr. McClure testified that Ms. Breitzman didn't deny
14 having used it; therefore, he wanted to incorporate it to
15 show that there were times that it was appropriate. But
16 those times didn't necessarily apply to these specific
17 times, but that the child had exaggerated or confused or
18 mushed them all together.

19 You know, it may not have been the exact
20 perfect words when we're talking about reasonable
21 discipline, and it is something that is typically in
22 response to a full agreement with having hit a child. But
23 here there was some agreement to having hit, at least on
24 one occasion it being reasonable. And Mr. McClure
25 testified and appeared to have tried to distinguish those

1 things to the jury from the get-go, what was appropriate
2 parental discipline versus what wasn't.

3 With respect to the specific claim of what
4 during opening Mr. McClure did, I don't think there's
5 anything in that opening that contradicted Ms. Breitzman's
6 testimony. As I said, it's a vague opening. It doesn't
7 say any specifics about the charges but really presents
8 the picture of what the defense is going to be, which
9 really the defense stuck to throughout the trial.

10 So I really don't think there's anything
11 about that opening that was ineffective in any way,
12 especially based on what Mr. McClure testified to. So
13 I will deny that claim as well in terms of ineffective
14 assistance.

15 I should note also that I -- and this goes
16 back a little bit, but I do want to note it. Jury
17 instructions are also a way in which any kind of prejudice
18 can be cured. And I guess this goes to the last claim,
19 too, that somehow all of these challenges, all of these
20 issues together, made it such that Ms. Breitzman did not
21 have effective assistance of counsel, that there was
22 prejudice, that she was denied a fair trial and a reliable
23 outcome; essentially but for all of these errors, that the
24 result would have been different.

25 I think that mostly I found there's not

1 errors, and to the extent that there were, I think that
2 they were pretty minor. And I don't think there's
3 anything about even the aggregate that rises to this level
4 of prejudice.

5 As to the other acts issue itself, I did
6 specifically instruct the jury. And this goes to the
7 reasonable discipline issue, too, because Mr. McClure
8 wanted that instruction, and I did incorporate it into my
9 instructions to the jury. It didn't fit specifically with
10 the charged conduct, but I incorporated it into the other
11 acts instruction.

12 So I did instruct the jury regarding other
13 conduct, and that was specifically with respect to really
14 the most -- I think the most significant other conduct was
15 the slap in the car. And I did instruct the jury
16 specifically about that conduct, that other act, on
17 Page 88 and 89 of the transcript. And this was from
18 May 22nd, morning.

19 And I instructed them that evidence had
20 been received regarding the conduct that Ms. Breitzman was
21 not on trial for; specifically, striking J.K. with the
22 back of her hand in the car. So I did say that it should
23 only be considered for the issue of intent in context or
24 background, but they couldn't use it to conclude
25 Ms. Breitzman had a certain character trait and was acting

1 in conformity with that.

2 And then I even gave them the instruction
3 about discipline that, with respect to the striking, even
4 that discipline becomes an issue and that parents have the
5 ability to discipline, reasonable discipline, and I gave
6 them that standard. I gave them that. I think there's
7 case law that talks about the ability of instructions to
8 cure errors to some extent. And I think certainly the
9 jury heard what they were supposed to do with that other
10 act and how they were supposed to use it. And they could
11 consider reasonable discipline with respect to that other
12 act.

13 Again, in the overall claim, I don't think
14 that prejudice has been shown. I don't think that all the
15 errors are sufficient to undermine -- any errors, if there
16 were -- to undermine competence in the outcome of the
17 trial. I think that there has been a defense that has
18 been articulated, a trial strategy articulated by
19 Mr. McClure.

20 I believe him that that was the strategy
21 and that based on that strategy, decisions were made along
22 the way and that what was done was in conformance with
23 that strategy. And I don't think that -- I think that the
24 issue was credibility with the child, that that's
25 specifically what the defense attacked and that that was

1 something that the jury was able to address.

2 And I don't think that anything that was
3 done here would have affected that. I don't think the
4 failures alleged in the brief of the defense would have
5 changed that or somehow caused a different outcome at
6 trial. So I'm denying the rest of those claims then.

7 And the last issue is whether I should
8 vacate the DNA surcharge, and I will vacate the DNA
9 surcharge. So I will grant that last request to do that
10 based on the lack of -- the Court did not articulate
11 reasons for the DNA surcharge. I agree with the defense,
12 so I will vacate the DNA surcharge in this case.

13 MS. SCHIEBER JURSS: I will prepare a
14 written order.

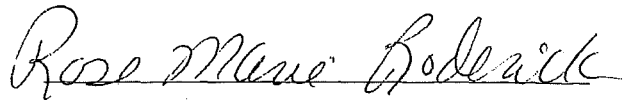
15 THE COURT: Thank you.

16 (Whereupon, proceedings were concluded.)
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3 STATE OF WISCONSIN)
4 COUNTY OF MILWAUKEE) SS.
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8 I, ROSE MARIE RODERICK, certify that I am
9 the official court reporter assigned to report the
10 proceedings herein for the Circuit Court; that the
11 foregoing pages, numbered 1 through 33 inclusive, have
12 been carefully compared by me with my stenographic notes;
13 that the same is a true and correct transcript of all such
14 proceedings taken on the 17th day of July, 2015.

15 Dated this 20th day of August, 2015.
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21 ROSE MARIE RODERICK
22 Official Court Reporter
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24
25