COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2351-CR
2014AP2352-CR

Cir. Ct. Nos. 2011CF301
2011CF930

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LATASHA K. GATLIN,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Latasha Gatlin was tried before a jury and was convicted of six counts of physical child abuse. Her appeal raises several claims of ineffective assistance relating to her trial, and she argues that, post-trial, the

circuit court improperly denied her relief based on prosecutor misconduct and newly discovered evidence. We reject all of Gatlin's arguments, and affirm.[1]

Background

¶2 The procedural history and trial evidence are complicated. We provide a bare bones summary here and supply more details as appropriate in the discussion section.

¶3 At the time school employees and police initiated the investigation that led to charges against Gatlin, she was a single mother living with six of her eight children in Madison. Gatlin's eight children and their ages and sexes at the time of trial, are: Q.G., male, age 19; T.G., female, age 16; T.B.T., female, age 14; A.T., male, age 13; T.T.G., female, age 11; I.M.S., female, age 10; I.S., female, age 7; and C.S., female, age 5. The six girls lived with Gatlin. Her younger son, A.T., lived with Gatlin until at least October 2010 but, by the time of the investigation, had moved to Milwaukee to live with his grandmother. After the move, A.T. visited his family in Madison on weekends "mostly every week."

¶4 On February 7, 2011, the Monday after Super Bowl Sunday, one of Gatlin's daughters, then 10-year-old T.T.G., informed a teacher at her school that she had broken a household item, that she was afraid she would be in trouble, and that she was afraid to go home. The teacher observed that T.T.G. was acting nervous. The next day, February 8, 2011, the teacher observed that T.T.G. seemed

[1] This is a relatively complex case and there have been complicated postconviction proceedings. Since Gatlin was convicted on March 29, 2012, there have been delays, mostly due to requests for delays by postconviction and appellate counsel for Gatlin. Gatlin's postconviction hearing was held on April 25, 2014. The circuit court ruled on the postconviction motion on September 26, 2014. Appellate briefing was not complete until November 5, 2015.

"sad and scared." The teacher spoke with T.T.G. away from the other children, and T.T.G. told the teacher that Gatlin had hit her the night before with a "piece of wood with needles in it." T.T.G.'s report led to a further investigation by school officials, and then by police officers.

¶5 That same day, police officers went to Gatlin's residence to speak with Gatlin and look for evidence that might corroborate allegations made by T.T.G. For example, officers investigated whether there were belts matching belts that T.T.G. alleged Gatlin had used to "whoop" T.T.G. The police were at Gatlin's residence for approximately 3 hours.

¶6 As a result of the investigation, the six children who were then residing with Gatlin were removed from the home. The next day, February 9, 2011, T.T.G. was interviewed by a police detective at Safe Harbor. The interview was video recorded and lasted about an hour.

¶7 Based on information obtained from T.T.G. and later from school employees, police also interviewed two of T.T.G.'s younger sisters on March 15, 2011, at Safe Harbor. A detective interviewed then 9-year-old I.M.S. and then 6-year-old I.S. Again the interviews were video recorded. Both I.M.S.'s interview and I.S.'s interview lasted about half an hour.

¶8 Gatlin was charged with five counts of physical child abuse. Later, an additional charge was added. Gatlin went to trial on the six counts, all involving the three daughters who were interviewed at Safe Harbor. Two counts alleged that, in 2008, when the family was living in a motel, Gatlin kicked T.T.G. in the vagina, and Gatlin pinched I.M.S., leaving marks. The four remaining counts relate to 2010 and 2011, when the family was living in an apartment. It was alleged that on February 6, 2011, Super Bowl Sunday, Gatlin struck T.T.G.

with a belt, and that, the following day, Gatlin struck T.T.G. with a piece of wood door trim. As to I.M.S., it was alleged that, between June 1, 2010, and August 31, 2010, Gatlin "whooped" I.M.S. with a belt, a hanger, and a boot. As to I.S., it was alleged that, between January 1, 2010, and February 1, 2011, Gatlin hit I.S. with a belt.

¶9 The State's case consisted primarily of the video-recorded interviews referenced above, introduced in lieu of testimony pursuant to WIS. STAT. § 908.08.[2] All three girls were called to the witness stand. The prosecutor asked the girls some questions, played the recordings, and then the girls were questioned by both the prosecutor and Gatlin's counsel. In the videos, the three girls related specific instances of being hit by Gatlin and made general statements about how Gatlin used belts, cords, a stick, and other objects to strike them and their older siblings.

¶10 Gatlin's defense consisted of her own testimony and six additional witnesses. Although the jury was instructed, as to two of the charges, that the State was required to prove that Gatlin's conduct was not reasonable discipline, Gatlin's defense at trial was not that any of the charged instances involved reasonable discipline. Rather, her defense as to all of the charged conduct was that the children were lying. Although the jury learned that Gatlin told police during the initial investigation that she never struck her children, at trial Gatlin's position was that she seldom did so and that she would not have physically punished the girls for the behavior the girls said prompted Gatlin to strike them.

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

¶11 Three of Gatlin's older children testified in her defense, and their testimony varied. A son, A.T., who was 13 at the time of trial, testified that he never saw Gatlin spank anyone, but rather that Gatlin used time-outs, made them stand in a corner, or sent the children to their rooms. Gatlin's two older daughters, 14-year-old T.B.T. and 16-year-old T.G., both testified that the normal punishment was non-physical. Both girls testified that Gatlin sometimes spanked the children and sometimes used a belt. For example, T.G. testified that she was struck with a belt "[n]ot that often" but that the striking "wasn't hard that I had bruises on myself."

¶12 The other three witnesses that Gatlin's counsel called were a neighbor with children who played with Gatlin's children and who often visited Gatlin's Madison residence, a friend who often visited the Madison residence, and an uncle who had substantial contact with Gatlin in Milwaukee before Gatlin moved to Madison. All three testified that they never saw Gatlin strike any of her children.

¶13 In closing arguments, the prosecutor focused heavily on reasons why Gatlin was not credible, highlighting, for example, instances in which Gatlin's version of her contact with police officers differed sharply from the officers' accounts.

¶14 Gatlin's counsel focused on T.T.G. and on adults who were in a position to influence the younger girls. As to the alleged abuse of T.T.G. on Super Bowl Sunday and the following day, counsel argued that T.T.G.'s statements about why she got in trouble did not make sense and that it was significant that T.T.G. failed, at trial, to identify the piece of door trim that Gatlin allegedly used to punish T.T.G. during the second incident. Counsel argued that T.T.G. lied and

that "this trial came about because [T.T.G.] wanted to go live with white people. [T.T.G.] thought they had more money." Counsel accused T.T.G. of faking pain at school in an effort to be placed in foster care. Counsel also addressed the allegation that Gatlin kicked T.T.G. in the vagina, and pointed to reasons why the incident would have come to light earlier if the account was true.

¶15 As to the two younger girls, Gatlin's counsel's argument was more general. Counsel did not address any specific instances or types of discipline. Rather, counsel argued that the two girls were influenced by school employees. She argued that the school principal helped implant a memory by telling I.S. that her mother "hit [her] too hard" and that adults "were worried about [her]." Counsel argued that the Safe Harbor interviews of the younger girls did not take place until about a month after the girls had been removed from Gatlin's care and that, during the intervening time, the girls were "surrounded by adults [who] all want to hear how [the girls] were mistreated."[3]

¶16 As noted, the jury returned guilty verdicts on all six charges.

[3] During opening statements, Gatlin's trial counsel suggested two lines of defense that were abandoned during closing arguments. First, counsel proposed that T.T.G. influenced her younger sisters. Second, counsel suggested that the punishment inflicted might have been reasonable. It appears that the proposition that T.T.G. influenced her sisters was dropped because little evidence supported the idea. T.T.G. admitted during cross-examination that, on the day she talked to police, she told I.S. that it was "opposite day" and that I.S. should, "if people ask her a question and the answer was yes, she should say no." But that was weeks before I.S. was interviewed, and does not come close to explaining why I.S. might falsely accuse Gatlin. Moreover, the only other significant reference to T.T.G. attempting to influence anyone was when I.S. was asked, "Did [T.T.G.] tell you what to say a lot of times?" and I.S. said no. As to the suggestion that the punishment inflicted was reasonable, this apparently became a non-issue when it developed that Gatlin's testimony and the general theory of defense was that T.T.G., I.M.S., and I.S. were lying and exaggerating.

Discussion

¶17 Gatlin seeks a new trial for several reasons. She claims that she was denied effective assistance of counsel based on her trial counsel's failure to object to other acts evidence, extrinsic evidence, opinion testimony, and calling the child witnesses before playing their recorded statements. Gatlin also contends that the prosecutor made a bad faith representation and that there is newly discovered evidence. In the following sections, we address and reject each argument.

A. Ineffective Assistance Of Counsel

¶18 Gatlin argues that her trial counsel was ineffective in several respects. To obtain relief, Gatlin must show both deficient performance and resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶19 With respect to deficient performance, Gatlin must point to specific acts or omissions by her counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. "Deficient performance is judged by an objective test, not a subjective one." ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461. The focus is not on trial counsel's subjective thinking, but rather on whether counsel's conduct was objectively reasonable. *See* ***id.***

¶20 As to prejudice, Gatlin "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding[s] would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶21 The ineffective assistance analysis has both factual and legal components. The circuit court's findings of what counsel did and the basis for the

challenged conduct are factual and will be upheld unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, whether counsel's conduct amounted to ineffective assistance is a question of law that we review de novo. ***Id.***

¶22 If Gatlin's argument falls short with respect to either deficient performance or prejudice, we need not address the other prong. *See* ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 ("A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one.").

1. Ineffective Assistance: Other Acts Evidence

¶23 Gatlin presents several claims of ineffective assistance that involve her assertion that her trial counsel failed to object to other acts evidence. Before addressing the particulars of this case and the specific other acts arguments, we pause to quote from a supreme court decision summarizing what is now widely referred to as the ***Sullivan*** other acts test:

> When deciding whether to allow other-acts evidence, Wisconsin courts look to WIS. STAT. § 904.04(2)(a), and apply the three-step analytical framework set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Under ***Sullivan***, courts must consider: (1) whether the evidence is offered for a proper purpose under § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury."
>
> The proponent of the other-acts evidence "bears the burden of establishing that the first two prongs are met by a preponderance of the evidence." Once the first two prongs of the test are satisfied, the burden shifts to the opposing party "to show that the probative value of the [other-acts]

> evidence is substantially outweighed by the risk or danger of unfair prejudice."
>
> ....
>
> The admissibility of evidence rests within the trial court's discretion and the decision to admit other-acts evidence is reviewed for an erroneous exercise of discretion. "A [trial] court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrably rational process to reach a conclusion that a reasonable judge could reach." We generally look for reasons to sustain the trial court's discretionary decisions. "Although the proper exercise of discretion contemplates that the [trial] court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." We are required to independently review the record if the trial court does not provide a detailed ***Sullivan*** analysis. As such, [when a] trial court [does] not perform a ***Sullivan*** analysis ..., our review is *de novo*.

State v. Lock, 2012 WI App 99, ¶¶40-43, 344 Wis. 2d 166, 823 N.W.2d 378 (citations and quoted sources omitted).

a. Preliminary Observations About Gatlin's Ineffective Assistance Arguments Involving Other Acts Evidence

(1) Gatlin's Trial Counsel's Postconviction Testimony

¶24 Gatlin spends considerable time detailing the fact that, at the postconviction hearing, her trial counsel could not adequately explain multiple failures to object to other acts evidence. We do not spend time discussing counsel's attempts to explain her decisions. As to some challenged other acts evidence, counsel's deficient performance would not matter because Gatlin has failed to demonstrate prejudice. Regardless, when we do discuss whether counsel's performance was deficient, we focus on the objective reasonableness of that performance, not on counsel's postconviction testimony.

¶25 That is not to say that a defense counsel's postconviction testimony never matters. An evidentiary hearing gives counsel an opportunity to provide a strategic reason for an act or omission that might not be apparent from the record. For this reason, courts may not conclude that an act or omission was deficient performance without giving trial counsel this opportunity. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) ("[A] hearing is important ... to give trial counsel a chance to explain his or her actions ...."). At the same time, just because counsel is unable to provide a sound strategic reason for an act or omission does not mean that counsel's performance was not objectively reasonable.

(2) Observations That Undercut Gatlin's Prejudice Arguments

¶26 In the sections below, we address specific other acts evidence, and sometimes address whether the failure of Gatlin's trial counsel to object to that evidence was prejudicial under ***Strickland***. That is to say, we sometimes assume that the evidence should have been excluded, and then discuss whether its admission undermines our confidence in the verdicts. Here, we point out that Gatlin's prejudice arguments ignore aspects of the trial that show that this case boiled down to a credibility contest between Gatlin and her younger daughters that Gatlin was sure to lose.

¶27 Gatlin argues that the risk of unfair prejudice is high because the evidence against her was "far from overwhelming." In support, Gatlin accurately notes that there was "little [physical] evidence to corroborate the testimony of the

child witnesses."[4] Gatlin also correctly points out that "[n]o independent eyewitnesses corroborated any of the charged instances of abuse or any of the 'other acts' injuries allegedly caused by Gatlin." This was, however, far from a toss-up contest between the word of Gatlin and that of three of her daughters.

¶28 In the following paragraphs, we describe the three most significant problems for Gatlin's defense: (1) the compelling Safe Harbor interviews of T.T.G., I.M.S., and I.S.; (2) the lack of evidence that Gatlin's two younger accusers, I.M.S. and I.S., were influenced by adults; and (3) Gatlin's credibility problems that were unrelated to the other acts evidence.

¶29 **Safe Harbor interviews.** We have watched the three video-recorded Safe Harbor interviews. As one would expect with children this young, there are differences and inconsistencies. We also agree with suggestions that T.T.G. appears to minimize her own misbehavior. But the three statements strongly corroborate each other. The videos show the children, in response to non-leading questions, describing a home in which Gatlin is quick to harshly punish all of the children for misbehaving. There is nothing in the nature of the questions or responses that suggests that the children were repeating something they had been told to say. Rather, each child uses language that rings true. When T.T.G. was asked if anything was being said while T.T.G. was being hit at a particular time, T.T.G. tells the interviewer: "I only said it hurts and she be saying yep, it gotta hurt." After describing multiple instances of harsh physical punishment, all three

[4] There is some corroborating physical evidence, including one adult's observation that T.T.G.'s legs, where T.T.G. asserted that Gatlin had hit her with the door trim, looked "swollen." However, for purposes of this opinion, we will assume that there is no corroborating physical evidence.

girls were asked if they were told not to talk to anyone about it. All three indicated that their mother gave them instructions. Then 10-year-old T.T.G. said her mom told her "if you tell another social worker or your teacher about what's wrong with y'all or something, they gonna take you away, take you to the foster home and I'm not gonna fight for ya." Then 9-year-old I.M.S. responded: "Just if they say something to you, just say no," and "if they tell you something else and then it's really yes, just say I don't know." And, then 6-year-old I.S. responded: "She say don't tell anybody. Like she said don't tell no social worker about her business."[5]

¶30 **I.M.S. and I.S.** Gatlin testified, in effect, that she was a good mother who used reasonable discipline. When asked why, then, her daughters would "say these things," Gatlin responded, "I have not a clue." That largely sums up Gatlin's most serious problem at trial.

¶31 Through counsel, Gatlin's defense against T.T.G.'s allegations was that T.T.G. made false allegations because she wanted to be placed in foster care because T.T.G. thought white foster parents would have more money and more things to give her. For reasons that we do not detail, that argument was a tough sell. But Gatlin faced an even more difficult problem when it came to her younger daughters I.M.S. and I.S. Nothing at trial suggested that I.M.S. or I.S. had a motive to lie about the physical acts at issue. What was left was the suggestion that the two girls had been persuaded to lie or that adults had implanted false

[5] Indeed, Gatlin herself admitted that on one occasion she told her children not to talk to social workers. During direct examination, her counsel brought up the topic: "The children said that you told them not to talk to social workers or the police." Gatlin responded: "I never said police. It was just the one time when I went to Florida, I told them that they don't tell them my business 'cause they so nosy. If they wanted to know, they can call and ask me."

memories. The problem with this defense was that there was virtually nothing to back it up. Gatlin's counsel seized on a single brief encounter between I.S. and the children's grade school principal.

¶32 Brief cross-examination of the principal revealed the following. After the children had been removed from Gatlin's home, and while I.S. was attending her grade school, she was sent to the principal's office because she had been disruptive. The principal described I.S. as being really angry. The principal apparently suspected that the misbehavior was related to I.S.'s mother and, thus, the principal made reference to I.S.'s mother. In response, I.S. began to cry. The principal then said to I.S.: "Sometimes when mom would give you a whupping, she would hit you too hard and we were worried about you." The notion that this brief comment prompted I.S. to tell the involved story of physical discipline in her home or that it implanted a false memory is not plausible. And, there is no evidence that any adult made any leading statements to I.S.'s sister I.M.S. In sum, I.S.'s encounter with the principal is weak evidence of coaching by adults, and it is all there is. The larger argument seems to be based on the hope that the jurors would speculate, without a sufficient factual basis, that the principal and other adults somehow influenced I.S. and I.M.S. to turn against their mother.

¶33 **Gatlin's credibility.** Apart from Gatlin, six witnesses testified in her defense, three of Gatlin's older children and three adults who testified that they had substantial contact with Gatlin and her children. It is difficult to see how this testimony would have had much of an effect on the verdicts. All of these witnesses were asked to address whether they had been physically punished by Gatlin or whether they had ever witnessed Gatlin using physical punishment. Gatlin's younger son, 13-year-old A.T., and the three adults all testified that they had never witnessed any physical punishment. However, Gatlin's two older

daughters, 16-year-old T.G. and 14-year-old T.B.T., both testified that Gatlin did use spankings as punishment, sometimes with a belt. And, Gatlin herself admitted that she had spanked with a belt, albeit "rarely." Thus, there was no serious dispute that Gatlin used physical punishment.[6] Rather, the question for the jury was whether, on particular occasions, Gatlin used unreasonable physical punishment or if she engaged in specific acts, including striking with a piece of wood trim and kicking.

¶34 Faced with believable accounts by T.T.G., I.M.S., and I.S., and weak to nonexistent evidence of improper influence over these children, Gatlin's own testimony about her treatment of the girls was obviously critical. That is to say, it was important for Gatlin to present herself to the jury as a credible person. Thus, differences between Gatlin's account and the investigating police officers' accounts of their interaction are important.

¶35 Based on T.T.G.'s allegations, on the Tuesday following Super Bowl Sunday several police officers went to Gatlin's residence to investigate. At the time, Gatlin was home with only her 4-year-old daughter C.S. The officers wanted to question Gatlin and look for evidence, including belts and a wood stick described by T.T.G. For reasons that we now explain, we conclude, based on the conflicting testimony about this encounter, that Gatlin likely seriously damaged her credibility by denying details of the encounter provided by two of the investigating officers.

[6] There are other reasons why the jury might not have placed much weight on the testimony of the three adult witnesses, but we need not detail those reasons here. It is sufficient to say, as we do in the text, that the inference the jury might have drawn from these three witnesses, that Gatlin did not use physical punishment, was directly undercut by Gatlin's own children.

¶36 One of the investigating officers took contemporaneous notes, and two of them testified at trial. The officers testified and informed the jury about several observations. When Gatlin later testified, she effectively accused the officers of lying. Gatlin did not deny that police told her that they came to her residence because of an allegation of physical abuse. But Gatlin contradicted the officers on specific details, including many that the officers would have had no reason to get wrong or to lie about. What follows are examples:

1. According to the officers, they went to Gatlin's front door and asked if they could come in, and Gatlin agreed to let them in after she took a short time to get dressed.[7] According to Gatlin, the police entered without permission while she was in a room away from the front door. More specifically, Gatlin denied meeting police at her front door. Gatlin told jurors she was in the bathroom when she heard something and exited to find the police already inside. When asked how police might have entered, Gatlin said she left the door unlocked so that the children could enter when they returned home from school.

2. T.T.G. had reported being struck with belts, and described at least three of them. Police officers told the jurors that Gatlin was asked if she had any belts, and Gatlin responded that she did not. When Gatlin later testified, she denied telling officers that she did not have any belts. To the contrary, Gatlin testified that she told the officers that she had "lots of belts." It was obviously suspicious that Gatlin would deny having any belts, but that is what makes the denial significant. According to an officer, Gatlin had to be pressed to admit that she had any belts. A detective testified that Gatlin was asked: "There aren't, you know, any belts in the house? There's really no belts?" And Gatlin eventually said she "might have a few."

[7] This example combines the testimony of Detective Riley and another investigating officer, Justine Harris. The other examples rely primarily on Detective Riley's testimony.

3. Gatlin's testimony challenged whether she used "swear" words when interacting with police. Police testimony about their encounter with Gatlin included repeated references to Gatlin using words such as "shit" and "bullshit." During cross-examination, Gatlin denied using the word "shit" and denied that she used swear words. In particular, when confronted with an officer's earlier testimony quoting Gatlin as saying, "Oh, here we go again, this shit just got dropped last week, so now they startin' it up again," Gatlin responded that she said all of that except "the bad word, 'cause I don't curse." Gatlin went on to assert that she became a "Born Again Christian" in 2008 and at that time stopped swearing. Plainly, jurors would have questioned why police officers would falsely describe Gatlin as using swear words.

4. Because police found evidence supporting T.T.G.'s accusations of abuse, the topic of taking the children from the home was discussed. According to a testifying officer, Gatlin said that Gatlin's mother would take all of the children, but that her mother would not take T.T.G. And, according to the officer, Gatlin said "[T.T.G.] could go to foster care. She [Gatlin] didn't care." When confronted with this statement, Gatlin denied making it. We think it unlikely that the jurors thought the police officer lied about this. Rather, the common-sense take is that, by the time of trial, Gatlin understood that her reference to not caring about T.T.G. was incriminating and, so, she denied making that statement.

5. Given that all five of Gatlin's daughters who testified at trial told the jurors that at least sometimes Gatlin used spanking with belts as punishment, it is no surprise that, when Gatlin testified, she acknowledged that she did, albeit "rarely." But this created a problem for Gatlin because, when the police first questioned Gatlin, she denied ever using *any* physical discipline during the relevant time period. An officer told the jury that Gatlin was asked "several times" about use of physical discipline and each time Gatlin said, "No, never" or "No, none." Gatlin told police that she had used a belt on one of her male children when the family lived in Milwaukee, but that she had never used physical discipline since. Faced with this contradiction at trial, Gatlin effectively accused the

> testifying police officer of lying. According to Gatlin, when the officer had earlier told the jury that Gatlin several times denied using any physical discipline, that testimony was false.

¶37 On top of these examples, the jury learned that Gatlin had a criminal conviction that they could consider for purposes of assessing Gatlin's credibility. Our point here is not that the evidence against Gatlin was overwhelming. Rather, it is that the evidence, viewed in light of Gatlin's defense, was strong. When we assess the prejudice prong of ***Strickland*** below, we take into account this larger picture.

¶38 With this background in mind, we now proceed to address Gatlin's specific ineffective assistance arguments relating to other acts evidence.

b. Other Acts Directed At T.T.G.

¶39 As we have seen, the charges against Gatlin include three involving her daughter T.T.G., who was 11 at the time of trial in 2012. One charge involved alleged conduct occurring sometime between early September and early October 2008, when Gatlin allegedly kicked T.T.G. in the vagina. The other two charges involving T.T.G. occurred one day apart in February 2011. The first of these alleged that, on a Super Bowl Sunday, Gatlin beat T.T.G. with a belt. The second 2011 charge alleged that the next day, a school day, Gatlin struck T.T.G. on the back of her legs and buttocks with a piece of wood door trim.

¶40 Gatlin complains that her trial counsel performed deficiently when counsel failed to object to evidence of additional acts by Gatlin directed at T.T.G. Specifically, Gatlin argues that her trial counsel should have objected to portions of the video-recorded interviews in which T.T.G. and her sisters alleged that Gatlin hurt T.T.G. in different ways at other times and allowed T.T.G.'s older

sisters to strike T.T.G. on several occasions. This other alleged conduct included pinching, poking, hitting with a stick, and "whooping" with a cord and belts.[8]

¶41 Gatlin's argument is both narrow and cursory in a way that takes some explaining. First, Gatlin's discussion on this topic addresses only deficient performance. Second, on the topic of deficient performance, Gatlin focuses solely on trial counsel's failure to argue that the evidence did not satisfy the three-pronged ***Sullivan*** other acts test. Finally, as to the three-pronged ***Sullivan*** test, Gatlin omits a discussion of the first two prongs and writes: "Even if the other acts evidence satisfies the first two ***Sullivan*** inquiries, the evidence does not satisfy the third inquiry." That is to say, Gatlin's argument here is limited to attempting to show that her counsel performed deficiently because, if her counsel had objected, the objection would have been sustained based on the third ***Sullivan*** inquiry.

¶42 Thus, our attention is focused on the third "balancing" prong of ***Sullivan***—whether the probative value of the evidence is outweighed by the danger of unfair prejudice. Arriving at this point, we find that Gatlin's balancing argument is non-specific. Gatlin simply asserts that evidence of T.T.G.'s other acts allegations created "a serious risk of confusing the jury about the charged

[8] Gatlin does not specifically explain that she is talking about the failure of her counsel to seek substantial editing to the video-recorded interviews played to the jury, but that must be her contention. Having viewed the videos, we note that it is not clear how successfully the alleged other acts references could have been omitted while maintaining reasonable coherence, even if there had been an effort to do so. For example, often the "other acts" evidence was in the form of questions asking about a specific child and answers that supply evidence of a charged crime, but also make reference to all of the children. For example, when T.T.G. was asked, "Does [Gatlin] hit you with anything else?" T.T.G. responded, "she hit us with a stick that had needles in it that go on top of your door." Peppered throughout the interviews, especially of T.T.G. and I.M.S., are similar answers that include "us" and "we" when the children are asked about discipline.

conduct" and that the jury "likely" considered such evidence as propensity evidence.

¶43 As to Gatlin's bald assertion that there was a risk of jury confusion, Gatlin fails to provide an explanation as to why the jury might have been confused, much less confused in a way that might have affected the verdicts. Certainly the jury would not have confused allegations involving older sisters T.G. and T.B.T. with those allegations involving Gatlin. And, we see no reason why the jury would have confused the vagina-kicking incident and the Super Bowl and following Tuesday incidents with other general allegations.

¶44 As to Gatlin's assertion of unfair prejudice under ***Sullivan*** because the jury would have relied on T.T.G.'s other acts assertions to conclude that Gatlin had a propensity to commit the type of conduct charged, the argument suffers a logical flaw. There is no reason to suppose that the allegations made by T.T.G., I.M.S., and I.S. relating to both charged and uncharged conduct directed at T.T.G. do not rise and fall together. When other acts evidence involves *the same type of conduct* and *the same accuser*, it rarely makes sense to suppose that a jury would assess the other acts evidence independently from the charged conduct. Here, we have no reason to suppose that Gatlin's jury looked independently at the other acts evidence, concluded that the girls were truthful about that uncharged conduct, and then relied on that independent assessment to conclude that Gatlin had a propensity to commit the charged conduct.

¶45 The propensity problem typically arises when a jury is presented with an allegation involving a different victim. It is in that situation that there is a danger that jurors will look to this separate evidence and rely on it to conclude that

a defendant committed the crime at hand because the defendant is prone to commit the type of crime charged. That is not the case here.

¶46 In sum, Gatlin's argument hinges on the third prong of ***Sullivan***. And, in that respect, Gatlin fails to persuade us that the probative value of the T.T.G. other acts evidence was outweighed by the danger of unfair prejudice. Thus, Gatlin fails to persuade us that her trial counsel could have successfully challenged the T.T.G. other acts evidence and, thus, fails to persuade us that her counsel's failure to object to that evidence was deficient performance.

¶47 Taking a step back, even if we were to conclude that the T.T.G. other acts evidence should have been excluded because it was inadmissible other acts evidence and, therefore, Gatlin's trial counsel deficiently failed to object, we would still reject this part of Gatlin's ineffective assistance argument. The same reasoning that shows there is no problem under the ***Sullivan*** prejudice prong also shows that Gatlin could not show prejudice under ***Strickland***. The fact that the jury heard about additional *similar* allegations *from the same accusers* does not indicate to us a serious risk that the jury relied on impermissible propensity reasoning. The allegations either rose or fell together, depending on whether the jury believed the girls or, instead, believed Gatlin. We are confident that the jury's credibility assessments would not have been different absent the additional allegations.

¶48 Because Gatlin's T.T.G.-other-acts argument falls of its own weight, we need not address the State's arguments or Gatlin's reply to them. However, we choose to comment briefly.

¶49 The State argues that the T.T.G. other acts evidence was probative of T.T.G.'s credibility and that it assisted the jury in understanding the "household

dynamics." But the State does not supply supporting case law directly on point. Indeed, it seems that, apart from the sexual assault context, there is a dearth of case law addressing the admissibility of other acts of abuse when all of the allegations are part of a larger course of conduct alleged by one victim against a defendant. We suspect that there is a lack of case law on this topic because it seldom occurs to litigants that evidence of such closely related allegations carries a significant risk of unfair prejudice. That is to say, common sense suggests that such other acts evidence in this circumstance—same type of conduct and same accuser—seldom makes a difference.

c. Other Acts Directed At Children Not Listed In The Complaint

¶50 According to Gatlin, her counsel performed deficiently when counsel failed to object to portions of the video recordings that contain allegations of uncharged conduct directed at four of Gatlin's other children. This amounts to much less than Gatlin's argument suggests.

¶51 Gatlin is talking about video-recorded statements of T.T.G. and I.M.S. that Gatlin "whooped" or otherwise physically punished her daughters T.G., T.B.T., and C.S., and her son A.T. None of the charged conduct was directed at these other children. Gatlin accurately summarizes this alleged other acts conduct, but she largely ignores the fact that the *source* of these allegations is *not* these other four children. Instead, the source of the allegations is T.T.G. and I.M.S., who were the subjects of the charged instances of abuse. As we have seen, this is important when it comes to assessing prejudice under ***Strickland***.

¶52 Even if we assume for argument's sake that Gatlin's trial counsel performed deficiently when counsel failed to object to this other acts evidence, we can be confident that the evidence did not affect the outcome of the trial. As

demonstrated above, the trial hinged on the credibility of Gatlin as compared with T.T.G., I.M.S., and I.S.—the children who were the subjects of the charged conduct. And, the jury had little reason to doubt the children's credibility, and many reasons to doubt Gatlin's.

¶53 Thus, once again, we do not have the situation that gives rise to a significant risk that jurors will look independently to other acts evidence to conclude that a defendant has a propensity to commit the type of crimes charged. And, once again, we are confident that the challenged evidence did not affect the verdicts.

d. Additional Other Acts Evidence

¶54 Under a single subheading, Gatlin has three subsets of what she calls "Other Acts Evidence Referred to by the Circuit Court or [her trial counsel] as Not 'Other Acts.'" Gatlin contends that her trial counsel rendered ineffective assistance when counsel failed to object to these additional subsets of "other acts." We address each subset individually below.

(1) Accidental Burn

¶55 Gatlin points to a portion of I.S.'s Safe Harbor interview in which I.S. indicates that a scar on her arm resulted from Gatlin accidentally burning I.S. with an iron. Gatlin argues that this incident, being an accident, was completely irrelevant. She contends that the burn evidence was unfairly prejudicial because the jury might "speculate that Gatlin intentionally burned" I.S. It follows, according to Gatlin, that her trial counsel's failure to object to this portion of the video of I.S.'s interview amounted to ineffective assistance. We disagree.

¶56 Our review of this portion of the video, and the related transcript, reveals that the brief questions and answers on this topic were innocuous. The interviewer was questioning I.S. about whether the punishment she received from Gatlin left marks on her body. The interviewer asked I.S. whether there were any marks on her arms from Gatlin hitting her. I.S. responds: "No, just from the iron and just on my legs from ... spilled hot noodles ...." I.S. went on to explain that she "went by the ironing" and Gatlin turned around and "just stung me on accident." I.S. said it hurt "a little bit."

¶57 Nothing about this portion of the video indicates wrongdoing by Gatlin. Nothing indicates that the burn was anything but a minor accident. Reasonable counsel for Gatlin could have decided not to request that this portion of the video be excised.

¶58 Gatlin seemingly suggests that an additional aspect of this brief exchange during the interview was objectionable. At one point I.S. says, parenthetically, that one of her sisters has "one on her arm." In context, this may have been an assertion by I.S. that, due to some unspecified cause, one of her sisters also has a minor burn mark. Gatlin characterizes this short statement, combined with I.S.'s description of her own accidental burn, as "testimony that two children had scars on their arms from being accidentally burned." If Gatlin means to argue that her counsel was additionally deficient in failing to object to this brief reference to a sister, we disagree. As to the unnamed sister, I.S. did not even indicate that the mark was caused by Gatlin.

(2) Government Assistance

¶59 Gatlin complains that her trial counsel deficiently failed to object to evidence indicating that Gatlin received Social Security Disability Income (SSDI).

According to Gatlin, the prosecutor was improperly permitted to attempt "to cast aspersions on Gatlin's character based on [Gatlin's] receipt of disability income." We understand Gatlin to be arguing that this evidence improperly painted a picture of Gatlin as a woman who took advantage of government assistance.

¶60 Here, Gatlin is complaining about her trial counsel's failure to object to questions asked during the prosecutor's cross-examination of Gatlin. We agree with Gatlin that the prosecutor's questions were an apparent attempt to highlight the fact that Gatlin received disability income. But it is inaccurate to suggest, as Gatlin does, that the prosecutor succeeded in presenting any significant *new* evidence during cross-examination.

¶61 Prior to the prosecutor's cross-examination of Gatlin, the jury learned:

- Gatlin had eight children with three different last names: three named Gatlin, three with a second last name, and two with a third last name.
- That, in 2008, Gatlin moved to Madison with her children with the assistance of the Salvation Army.
- That, in 2009, the Salvation Army assigned two social workers to Gatlin and that one social worker visited once a month and the other visited once a week.
- That Gatlin received money from "Disability and Caretaker Supplements and Food Share."
- That the last time Gatlin "worked [was] when the children were growing up ... back in 1998," at which point "they decided that [Gatlin] should stay on Disability."
- That Gatlin had been convicted of a crime.

Given that the jury already had all of this information and more, it is fair to say that the prosecutor, whatever her motive, was dwelling on information that the jury already knew, namely, that Gatlin was heavily dependent on government assistance. Thus, we are not persuaded that the only objectively reasonable course was for trial counsel to object.

¶62 In a closely related argument, Gatlin complains about the failure of her trial counsel to object to an assertion made by the prosecutor during closing argument that, according to Gatlin, "falsely linked the SSDI income and Gatlin's desire to keep custody of her children." Gatlin writes: "ADA Rusch made the unfounded and inaccurate argument in her closing that Gatlin had a motive to lie about the abuse because she wanted to keep custody of her children so that she would not lose her SSDI." Gatlin points to the following argument by the prosecutor:

> [Gatlin] has income that is dependent on having custody of these kids. She wants the kids back I would submit to you for those reasons. She can't admit she did this and still get them back.

¶63 The problem with this argument is that the prosecutor's comment does not link Gatlin's disability income with Gatlin's custody of her children. Rather, it would have been apparent to the jury that the prosecutor was referring to the caretaker supplements that the jury had learned Gatlin received. That form of government assistance was tied to the number of children Gatlin cared for, and would have provided Gatlin with a financial incentive to lie. The State makes this common-sense argument, and Gatlin does not respond to it. We deem the argument conceded.

(3) Housekeeping Evidence

¶64 Gatlin contends that her trial counsel performed deficiently when counsel failed to object to the testimony of two police officers describing the condition of Gatlin's home. Gatlin characterizes this evidence as showing the "squalid conditions of the children's rooms in contrast to the extravagance of [Gatlin's] room." Gatlin argues that "[e]vidence of Gatlin's housekeeping had no relevance to whether she abused her children."

¶65 Generally speaking, this testimony, and related photographs, showed that the two bedrooms the children slept in were dirty and messy. For example, officer testimony and photographs revealed that the children's rooms had piles of dirty clothes, including urine-soaked clothing, little furniture, and mattresses with no sheets. The condition in the children's bedrooms contrasted with Gatlin's own bedroom, which was tidy and had a king-size bed, nice bedding, and a large-screen television. We are not persuaded that the failure to object to this evidence was deficient performance or resulted in prejudice.

¶66 We agree with Gatlin that evidence that she is a poor housekeeper has no significant proper probative value. But the evidence here was not presented to show that Gatlin was a poor housekeeper. Rather, as Gatlin recognizes, it was introduced to show the contrast between Gatlin's bedroom and the bedrooms of her children. The inference the jury was asked to draw was that Gatlin was more concerned with her own welfare than with the welfare of her children. It seems to us that such evidence is relevant for the same reason that, in a spousal battery case, it would be proper to introduce evidence showing that one spouse, accused of battering the other, required the battered spouse to sleep in a damp basement while the battering spouse slept in relative splendor.

¶67 Gatlin argues that the housekeeping evidence was evidence of Gatlin's negligence toward her children which was irrelevant because Gatlin was charged with crimes requiring intent. Gatlin, citing ***State v. Asfoor***, 75 Wis. 2d 411, 428, 249 N.W.2d 529 (1977), asserts that "[i]ntent and negligence are mutually exclusive mental states; one cannot intend to injure someone by negligent conduct." The comparison with ***Asfoor*** fails. As Gatlin's own summary of ***Asfoor*** indicates, that case addressed whether a single act could be both negligent and intentional. Regardless whether Gatlin's conduct, relating to the conditions in which her children lived, was negligent or intentional, it was different conduct than disciplining her children and did not create a significant danger of unfair prejudice.

¶68 In sum, Gatlin does not persuade us that, if there had been an objection, the circuit court would have been required to exclude evidence of the relative conditions of the bedrooms.

¶69 Furthermore, even if we assume for argument's sake that it was deficient performance to fail to object to the housekeeping evidence, we are confident that the evidence did not affect the verdicts. It is not difficult to imagine this trial without evidence of the poor condition of the children's bedrooms. In our view, this was not a particularly close case. As should be clear by now, Gatlin was faced with allegations by three of her children and no persuasive reason why all three would lie, much less how they could have been coached in a way that would have resulted in the recorded interviews that were shown to the jury. And, for the reasons we explained earlier, the defense witnesses, other than Gatlin herself, helped little, if at all. Most importantly, Gatlin's testimony and cross-examination went badly for her. When we take the condition of the children's bedrooms out of the equation, the fundamentals of this trial do not change.

2. Ineffective Assistance: Extrinsic Evidence

¶70 Gatlin argues that her counsel performed deficiently when counsel failed to object to extrinsic evidence bearing on Gatlin's credibility. The extrinsic evidence relates to whether Gatlin, during a break in the trial, said "fuck you" to a detective as Gatlin walked out of the courtroom. We will assume, without deciding, that counsel deficiently failed to object to extrinsic evidence that Gatlin made the remark. We conclude, however, that the failure did not affect the verdicts.

¶71 During cross-examination, Gatlin was confronted with several statements of police officers about what happened when they went to Gatlin's home to investigate possible abuse. As we have detailed in item 3 in paragraph 36 of this opinion, part of this line of cross-examination involved Gatlin denying that she used the term "shit" and, more generally, denying that she cursed while interacting with police officers. In the face of obviously credible evidence that she used swear words, Gatlin was insistent that she had not, indicating that she stopped swearing entirely after becoming a born-again Christian in 2008. What we have not discussed yet is evidence about the "fuck you" comment.

¶72 It appears that, prior to the time Gatlin was cross-examined by the prosecutor, the prosecutor was alerted to an allegation that earlier that same day Gatlin said "fuck you" to a detective as Gatlin walked out of the courtroom. Thus, after Gatlin repeatedly asserted that she *never* swears, the prosecutor asked Gatlin if she had said "fuck you" to Detective Ann Turner as she "walked out of the courtroom today." Gatlin denied doing so and denied doing so in the presence of a bailiff, who was then present but had since left. At this point, the following exchange took place:

> [Gatlin]: No, I did not. Did the bailiff say that?
>
> [Prosecutor]: The bailiff, Lori, who was here earlier with the dark curly hair?
>
> [Gatlin]: Well, she should be here to testify. That's – why would you say that and she's gone? I did not say that.
>
> [Prosecutor]: Okay.
>
> [Gatlin]: So I guess you just trying to make me to be a liar.

To this point, Gatlin does not argue that there was a problem. Rather, Gatlin complains about what happened later.

¶73 After Gatlin stepped down, the prosecutor called Detective Turner as a witness. Turner testified that, at the time of the lunch break that day, as Gatlin passed Turner, Gatlin looked at Turner and said, "Fuck you." Gatlin argues that her counsel could have prevented this testimony by pointing out that the testimony ran afoul of WIS. STAT. § 906.08(2), which generally prohibits extrinsic evidence offered to prove a specific instance of misconduct.

¶74 To repeat, we will assume that Gatlin's trial counsel deficiently failed to object to the detective's testimony. We note that, at the postconviction stage, the circuit court concluded that the evidence was "extrinsic and collateral," thus seemingly concluding that Gatlin's trial counsel deficiently failed to object. The circuit court instead rejected the argument based on lack of prejudice. We do the same.

¶75 Before the detective testified on rebuttal, the jury had been presented with ample evidence that Gatlin lied about whether she used swear words. For that matter, the jury knew several other instances in which Gatlin denied events related by the investigating officers. Thus, in our view, the circuit court aptly

characterized the impeachment value of the challenged extrinsic evidence as "gilding the lily."

¶76 We readily acknowledge that the prosecutor asked the jurors to look to the "fuck you" evidence as a telling moment. But, without the detective's rebuttal testimony, the prosecutor's argument that Gatlin should not be believed would have been just as strong. The prosecutor could still have pointed to many instances in which Gatlin effectively accused the police of lying when there was no reason to think the police were mistaken and no reason to think the police had a motive to lie.

3. Ineffective Assistance: Opinion Testimony

¶77 Gatlin argues that her trial counsel deficiently failed to object to two aspects of testimony by an expert witness called by the State, Dr. Barbara Knox. We first summarize the challenged testimony, and then address Gatlin's argument.

¶78 During her testimony, the prosecutor asked Dr. Knox: "And how important is medical history to your ability to diagnose and treat?" Dr. Knox began to answer that question, but strayed to a topic that, apparently, neither the prosecutor nor the defense attorney expected. The doctor said that what T.T.G. told the doctor "it was something that children of that age [T.T.G.'s age] do not have the mental capacity to make up such a convoluted lie. So they don't have the capacity to carry through something." At this point the prosecutor interrupted, saying: "Dr. Knox, I'm just gonna stop you right there and I'm gonna just direct your testimony back to the questions that I ask."

¶79 Later, Dr. Knox was asked about marks on T.T.G.'s arms. Referring to a particular mark, the prosecutor asked Dr. Knox: "[B]ased on the history

provided and your observations of this injury and your training, were you able to diagnose child abuse on that injury?" Dr. Knox answered: "Yes. So this injury alone I would say is consistent with [T.T.G.'s] disclosure of being beaten with an extension cord and a belt. And that lesion in itself would be a definite indication of child abuse."

¶80 Gatlin contends that, in both instances, Dr. Knox's testimony ran afoul of ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). The ***Haseltine*** court explained: "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96.

¶81 As to Dr. Knox's testimony about T.T.G.'s "mental capacity to make up such a convoluted lie," we will assume, without deciding, that the testimony violates ***Haseltine***.[9] Nonetheless, we agree with the circuit court and the State that it was reasonable trial strategy to omit an objection and, instead, rely on the prosecutor's approach of quickly redirecting the witness to another topic. We agree that interrupting that transition to a different topic to state an objection would necessarily have focused attention on the expert's briefly stated opinion.

[9] We note that it is not readily apparent that the testimony does violate ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). We acknowledge that there is some similarity to testimony found to be objectionable in ***State v. Krueger***, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W.2d 114. In ***Krueger***, a social worker gave the opinion that a seven-year-old victim's account of sexual abuse was not the product of outside influence because the child was not sophisticated enough to consistently tell a "fabricated story." ***Id.***, ¶¶2-5. However, as the State points out, there are differences between this case and ***Krueger*** that might matter. In particular, in ***Krueger*** we suggested that, if the testimony there had not been solely about the victim in that case, but was instead "testimony about a child's consistency, when coupled with testimony regarding the behavior of like-aged children," then such testimony "could serve a legitimate purpose." ***Id.***, ¶15. Here, Dr. Knox's testimony does not refer to T.T.G., but rather to "children of that age."

There would have been a need to parse out the offending portion from the longer answer. That is, the proposition would have needed to have been repeated in order for the jury to be told to disregard it. Moreover, although an objection might have led to a directive that the jury disregard the expert's assertion, the jury would not have been told that the expert was wrong. Thus, once the expert made the statement, defense counsel was between a rock and a hard place. An objection was not the only reasonable response.

¶82 As for counsel's failure to object to Dr. Knox's testimony that a lesion on T.T.G.'s arm was "a definite indication of child abuse," we again agree with the State that the lack of an objection did not constitute deficient performance.

¶83 The larger context of that statement shows that Dr. Knox was giving an opinion that a particular V-shaped injury was "consistent with [T.T.G.'s] disclosure of being beaten with an extension cord and a belt." Dr. Knox explained that the "V" or "U" shape was the sort of injury that occurs when a child is hit hard with a looped belt or cord. This was typical expert testimony regarding the source of injury, not ***Haseltine*** evidence.

¶84 We agree with the State that the situation is comparable to that in ***State v. Elm***, 201 Wis. 2d 452, 549 N.W.2d 471 (Ct. App. 1996). In ***Elm***, we rejected a similar ineffective assistance argument. An emergency room doctor gave his opinion, based on his examination of a child and the medical history the child and her mother gave, that the cause of the condition of the child's erythema was that the child had been "molested." ***Id.*** at 457. We stated:

> [The doctor's] statement did not explicitly address truth or veracity in any way.... [The doctor's] testimony was not his personal opinion about [the victim's] statements.

> Instead, [the doctor] gave his medical diagnosis of the cause of the erythema he observed, based on his physical examination of the child, his discussions with the child and her mother, and his training and experience as an emergency room physician....
>
> ... Moreover, [the doctor's] testimony did not purport to identify the individual who may have molested [the child] or to confirm that the child was telling the truth about the ultimate issue in the case, whether [the defendant] had assaulted her.

Id. at 458-59. For reasons that we think are obvious, the same reasoning applies here.

¶85 Thus, Gatlin has failed to demonstrate that her trial counsel performed deficiently with respect to the alleged ***Haseltine*** evidence.

4. Ineffective Assistance: Children On Witness Stand During Playing Of Videos

¶86 As we have seen, the allegations made by T.T.G., I.M.S., and I.S. were primarily presented by means of showing the jury the videos of the Safe Harbor interviews with the children. In each instance, the prosecutor called the child to the witness stand, asked some preliminary questions, such as the child's age, asked the child to identify the CD with video of her Safe Harbor interview, and asked the child whether she told the truth during that interview. In each instance, the prosecutor then commenced playing the video while the child remained in the presence of the jury. In the case of T.T.G., who testified first, the trial transcript notes that she left the courtroom two minutes after the video started playing.

¶87 According to Gatlin, her trial counsel performed deficiently by failing to object to this order of presentation. Gatlin asserts that calling the

children before playing the videos violated WIS. STAT. § 908.08. Gatlin argues that she was prejudiced by the lack of objections because the children displayed distress during the playing of the videos and that objections would have prevented the jury from witnessing these displays of emotion. We conclude that there was neither deficient performance nor prejudice.

¶88 We will assume that Gatlin could have, based on WIS. STAT. § 908.08, successfully prevented the children from taking the witness stand until after the videos were played. We make this assumption based on our opinion in ***State v. James***, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727. We pause here, however, to comment on the statutory language and our ***James*** opinion.

¶89 Contrary to certain language in ***James***, nothing in WIS. STAT. § 908.08(5)(a) precludes calling a child to the stand prior to showing the child's recorded statement. Section 908.08(5)(a) provides:

> If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

The first sentence merely speaks in terms of what an offering party "may" do. The second sentence is mandatory, but only in that it requires production of a child witness after the showing of a recorded statement. Obviously, that requirement is satisfied if the child is already on the stand. It is not reasonable to read either sentence as prohibiting calling the child sooner.

¶90 In ***James***, we summarized the subsection above in a way that now appears to us to be both inaccurate and unnecessary to our discussion in that case. We wrote: "[WIS. STAT. § 908.08(5)] is couched in mandatory terms and unambiguously requires the videotape to precede direct and cross-examination." ***James***, 285 Wis. 2d 783, ¶9. If this sentence is read to state that a party presenting a child witness *may not* call that witness to the stand prior to playing a recording, we question whether we correctly interpreted the statute in ***James***.

¶91 The ***James*** characterization of the subsection was also unnecessary to the decision. There, the issue was whether a circuit court could *require* the State to put a child witness on the stand—for the sole purpose of verifying that the child was available for cross-examination—before permitting the State to present the child's recorded statement. ***Id.***, ¶¶4, 12-13. That is, we addressed whether a circuit court, or, for that matter, a defendant, could *force* the State to first call a child witness to the stand. We had no occasion to consider whether the State could choose to first call such a witness to the stand, much less whether this order of presentation could form the basis for an argument in favor of reversing a conviction.

¶92 If declaring language in an opinion dicta was still a possibility, we might do that here. However, that is no longer an option. *See* ***NCR Corp. v. Transport Ins. Co.***, 2012 WI App 108, ¶27, 344 Wis. 2d 494, 823 N.W.2d 532. Thus, although not free from doubt, we will assume for purposes of this decision that our statements in ***James*** are sufficiently clear to bind us to an interpretation of WIS. STAT. § 908.08(5)(a) that prohibits calling a child witness to the stand prior to presenting the child's recorded statement. Acting under this assumption, we now address deficient performance and prejudice.

¶93 Gatlin's deficient performance argument seemingly assumes that, if her trial counsel *could* keep the children off the stand during the playing of the videos, it was deficient performance not to do so. We disagree. We acknowledge that there was reason to think that the children would be distressed to face their mother in the courtroom. It is far less apparent that the situation would be worse if the children were called to the stand before their recorded statements were played. Notably, the record reveals that all three children had viewed the videos with the prosecutor the week before trial.

¶94 As to T.T.G., Gatlin points to nothing that would have alerted Gatlin's trial counsel to the possibility that T.T.G.'s display of stress would be exacerbated by the approach taken by the prosecutor. For that matter, we know little about T.T.G.'s in-court reaction to the video. The transcript reflects that T.T.G. left the witness stand two minutes after the start of the video. There is, however, no record of her reaction to the video. Rather, a later discussion indicates that the cause of T.T.G.'s distress was seeing Gatlin. In the course of discussing the need for the presence of adults to comfort I.M.S. and I.S., the prosecutor explained that she did not anticipate that "the kids were gonna have [so] much difficulty [in the courtroom]." The prosecutor stated: "I think I wasn't actually aware that [the three children] hadn't seen their mother since reporting this [over a year earlier].... [I]t was quite an emotional display with T.T.G. seeing her mother for the first time." Thus, there was reason to suppose that T.T.G. would react emotionally to seeing Gatlin and that T.T.G. did so. But we see nothing in the record supporting the view that Gatlin's counsel should have predicted that the situation, from the defense point of view, would have been better had T.T.G. been called only after the video of her Safe Harbor interview was played.

¶95 As to I.M.S. and I.S., trial counsel would have had the experience of witnessing what went on with T.T.G. Thus, Gatlin might argue, the situation was different and Gatlin's counsel should have lodged an anticipatory objection. But a deficient performance argument in this respect, which Gatlin does not actually make, fails for the same reason. The record does not reflect that the video was the cause of additional distress for T.T.G. and does not provide a basis for concluding that the only reasonable option was to object to calling I.M.S. and I.S. before playing their videos.

¶96 Turning to the topic of prejudice, we first observe that Gatlin is attempting to take advantage of a protection afforded to child witnesses, *not to defendants*. As we wrote in ***James***, "the legislature enacted [WIS. STAT. § 908.08(5)] for the purpose of minimizing the mental and emotional strain that child witnesses in criminal proceedings experience as a result of having to testify." ***James***, 285 Wis. 2d 783, ¶17. Given that the subsection is intended to minimize the emotional strain of child witnesses, it would be deeply ironic if the provision was cause for reversal and the need for a child to endure a second trial. Thus, we question whether the failure to enforce this subsection against the State should ever form the basis for reversing a conviction.

¶97 But even assuming that the failure of a defense attorney to insist on the statutorily authorized order of presentation can be a basis for prejudice within the meaning of ***Strickland***, Gatlin has failed to demonstrate prejudice here.

¶98 As we have explained, Gatlin has not demonstrated that T.T.G. reacted negatively to the playing of the video, as she might have by presenting postconviction testimony from others present in the courtroom. And, as the State notes, T.T.G. was absent for almost all of the time the video was played. More to

the point, the record does not reflect that the distress T.T.G. exhibited would have been appreciably different had T.T.G. first been forced to confront her mother after the video was played. The situation is similar with I.M.S. and I.S. The emotions displayed, whatever they were, might have been somewhat different if the order of presentation had been different, but there is little reason to suppose the difference would have been significant enough to affect the outcome of this trial. The children would still have been forced to confront their mother, which is the only confirmed source of the emotional displays.

¶99 In sum, the failure to object to the presence of the children before and during the playing of the videos was not deficient performance and, even if it was, it does not undermine our confidence in the verdicts.

5. Ineffective Assistance: Cumulative Effect

¶100 Gatlin correctly points out that cases such as ***Thiel***, 264 Wis. 2d 571, teach that prejudice "should be assessed based on the cumulative effect of counsel's deficiencies." *See* ***id.***, ¶59. It is sufficient to say that Gatlin's cumulative effect argument presupposes that most of her claims of ineffective assistance of counsel show both deficient performance and at least some prejudice. As we have seen, this is not true.

¶101 In any event, looking at the claims above in which we conclude or assume that there was deficient performance, we conclude that, viewed cumulatively, these instances did not result in the sort of prejudice that undermines our confidence in the verdicts. As we have explained, Gatlin's analysis correctly asserts that the trial was a credibility contest, but she ignores the fact that the information most damaging to Gatlin's credibility was unaffected by any alleged ineffective assistance of counsel.

B. Prosecutor's Alleged Bad Faith Representation

¶102 Gatlin contends that, on the morning that trial was set to begin, prosecutor Shelly Rusch made a knowing and material false representation to the circuit court. Gatlin's trial counsel started the day by requesting permission to withdraw from representing Gatlin and by asserting counsel's belief that Gatlin's "competency is an issue." The prosecutor opposed withdrawal and, toward the end of her argument on that topic, asserted, "Furthermore, I know that there was a psych eval done in the CHIPS cases and the defendant was found competent." Gatlin argues that this assertion was knowingly and materially false.[10]

¶103 When Gatlin raised this topic post-trial, prosecutor Rusch conceded in an affidavit that she had come to realize that her assertion was false, but Rusch also averred that she had no recollection of what she was thinking when she made the assertion at trial and that she could only conclude that she "misspoke." Rusch further averred that, at the time of trial, she was aware of the evaluation but had not personally read it. The circuit court denied relief, writing: "Rusch's error does not rise to [the] type of conduct that warrants dismissal of the case or a new trial." The court went on, noting that Rusch "made one error on one occasion which she acknowledged before the court. Her actions were neither egregious nor taken in bad faith."

[10] The parties have filed two sets of briefs. One is public with redactions, and one is under seal without redactions. The redactions relate to a confidential CHIPS proceeding. Apparently the parties agree that the fact that the CHIPS proceeding involved an evaluation of Gatlin, and that the evaluator did *not* conclude that Gatlin was competent, is not confidential because the parties discuss this fact in the public portions of their briefs. We follow the parties' lead in this respect.

¶104 We pause to clarify that Gatlin does not challenge the circuit court's finding that she was competent to stand trial. Gatlin does not argue that she was prejudiced by the prosecutor's false statement. Indeed, Gatlin tells us that it is "irrelevant to the analysis that the circuit court did not rely on ... Rusch's misrepresentation in denying Gatlin's request for a competency hearing." According to Gatlin, no showing of prejudice to the defendant is necessary in this context.

¶105 Rather, Gatlin argues that the prosecutor acted in bad faith and that, if we agree, the proper remedy, regardless of prejudice to the defendant, is the reversal of her convictions.[11]

¶106 Gatlin tells us that, in assessing her claim, "[t]he critical inquiry is whether a participant in the legal proceedings acted in bad faith." As legal support, Gatlin cites general language from ***Hazel-Atlas Glass Co. v. Hartford-Empire Co.***, 322 U.S. 238, 246 (1944), explaining the gravity of "tampering with the administration of justice," which is a "wrong against the institutions set up to protect and safeguard the public." Gatlin also cites ***Industrial Roofing Services, Inc. v. Marquardt***, 2007 WI 19, ¶¶39-41, 56, 299 Wis. 2d 81, 726 N.W.2d 898 (discovery violation), and ***Schultz v. Sykes***, 2001 WI App 255, ¶6, 248 Wis. 2d 746, 638 N.W.2d 604 (subornation of perjury). In these Wisconsin cases, the issue was whether the conduct justified the sanction of dismissal prior to a verdict. With an exception noted below, the State does not appear to dispute the applicability of this law but rather argues that the circuit court's no-bad-faith

[11] We are uncertain whether Gatlin takes the position that the proper remedy is a new trial. Before the circuit court Gatlin argued that the proper remedy was to vacate her convictions "with prejudice."

determination must be upheld and, therefore, Gatlin is not entitled to a new trial based on alleged bad faith.

¶107 This brings us to our standard of review for the circuit court's no-bad-faith determination, a subject the parties *do* dispute. Gatlin cites ***Marquardt*** for the proposition that the issue here is whether the circuit court erroneously exercised its discretion in determining that the prosecutor did not engage in bad faith. The State, on the other hand, appears to argue that bad faith is a question of fact and that the court's finding on this topic must be upheld unless clearly erroneous. According to the State, ***Rubi v. Paige***, 139 Wis. 2d 300, 308, 407 N.W.2d 323 (Ct. App. 1987), "supports the proposition" that a circuit court's bad faith determination must be upheld if it is "one inference that can be drawn from the credible evidence."

¶108 At this point, we make two observations. First, we question whether it makes sense to overturn criminal convictions based on a prosecutor's misconduct if it is clear that the misconduct has not caused the defendant any prejudice. We note that the case law Gatlin relies on is not directly on point for multiple reasons, including, as already indicated, that such law does not involve reversal after a jury verdict. Second, the parties' briefing does not adequately address whether the circuit court's no-bad-faith determination is a factual finding or an exercise of discretion. Thus, based on the briefing, it is not apparent whether we are reviewing the circuit court's decision as clearly erroneous or as a misuse of discretion.

¶109 We conclude that we need not resolve these questions. Even if we assume both topics in favor of Gatlin, her basic argument is unpersuasive.

¶110 Gatlin's argument, in her own words, is this:

> [Prosecutor] Rusch's sworn statement that she was aware of [the CHIPS] report but not of its contents rings hollow, as does her blithe characterization of her action as, "I simply misspoke." If [prosecutor] Rusch knew with certainty that she did not know the contents of [the] report, then her statement to the circuit court was not inadvertent, but made in bad faith. [Prosecutor] Rusch said on the record, "I know that there was a psych eval done in the CHIPS cases and the defendant was found competent." This cannot be chalked up to misspeaking. This is not what one says about a report that one has never seen. Moreover, it was the last thing said to the court before it made its decision. It was the trump card. This is "a conscious attempt to affect the outcome of the litigation."

(Record citations omitted.) Thus, Gatlin is arguing that the only reasonable conclusion based on Rusch's averments is that Rusch consciously attempted to mislead the circuit court and that the circuit court finding to the contrary was a misuse of discretion. We disagree.

¶111 We acknowledge that Rusch should have known at the time she spoke that her statement was false. But we disagree that the only reasonable conclusion from the record is that Rusch was subjectively aware at that time that she was making a false statement. Rather, it is at least as reasonable to conclude that Rusch mistakenly believed that she knew something that she did not know, perhaps misremembering at the time or perhaps having been misinformed as to the CHIPS evaluation's contents.

¶112 Further, it is reasonable to conclude that Rusch had little motive to lie about the CHIPS evaluation. At the time Rusch referenced the CHIPS evaluation and Gatlin's competency, there had been no allegation that Gatlin did not understand the proper role of a defense attorney or the nature of the proceeding against her and no allegation that Gatlin lacked the *ability* to cooperate with counsel. Rather, counsel told the court that Gatlin did not trust counsel and had

failed to cooperate with counsel over the weekend before trial. Thus, when Rusch made the false statement, she had no reason to think that the circuit court was seriously entertaining the idea of finding Gatlin incompetent to stand trial.

¶113 We also take into account that Rusch was responding to an unexpected issue that Gatlin first raised on the morning of trial. Given that both withdrawal and competency were unexpected issues, it is reasonable to think that Rusch was simply responding as best she could on the spur of the moment, albeit with insufficient care. This inference is at least as reasonable as the proposition that Rusch went through the thought process of concocting a false statement and deciding to risk using that false statement to ward off an inquiry into Gatlin's competency to stand trial.

¶114 Given all this, we cannot say that the circuit court misused its discretion when the court determined that the prosecutor did not act in bad faith.

¶115 It bears repeating that Gatlin does not raise her competency as an issue on appeal. The reason is obvious. Nothing in the record provides any significant support for the proposition that Gatlin was *unable* to assist in her defense. Postconviction, the circuit court observed that, when it questioned Gatlin directly during trial about her decision to testify, Gatlin "clearly understood" her constitutional rights and never appeared confused or unsure. The court likewise observed that, when Gatlin actually testified, testimony covering about 50 pages of transcript, Gatlin never appeared confused or unsure about what she was being asked. Indeed, our reading of an admittedly "cold" transcript gives not a hint that Gatlin had trouble understanding questions or anything else. To the contrary, her statements and answers indicate a person who fully understood what was going on and what was at stake.

C. Newly Discovered Evidence

¶116 Gatlin argues that she presented newly discovered evidence warranting a new trial. The purported newly discovered evidence relates to the possibility that [_____ _____].

¶117 To be clear, the newly discovered evidence is not witness testimony or physical evidence that Gatlin contends would be admissible in a new trial. Rather, the evidence consists of CHIPS documents that Gatlin admits would be *inadmissible*. What Gatlin is arguing is that reports prepared by Dane County social services during the course of the CHIPS proceeding [_____ _____]. Gatlin argues that, under WIS. STAT. § 906.08(2), Gatlin could, in a new trial, confront [___] with what the reports say and ask [____] to acknowledge or deny their content. More specifically, Gatlin argues that, based on the reports, she could ask [____]:

- [_____ _____]
- [_____ _____]
- [_____ _____ _____]

¶118 To assess whether the CHIPS reports are newly discovered evidence warranting a new trial, we apply a well-established test:

> In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." When moving for a

> new trial based on the allegation of newly-discovered evidence, a defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.

State v. Plude, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citations and quoted source omitted).

¶119 We agree with the State that the proffered evidence fails this test in several ways. We choose to focus, however, on the most obvious problem with Gatlin's argument.[12] Gatlin erroneously presupposes that the CHIPS reports demonstrate facts that they do not. That is to say, the evidence is not material.

¶120 Gatlin incorrectly characterizes [_____ _____]. However, reports indicate only that [_____ _____]. So far as we can tell from the confidential CHIPS materials and other evidence in the appellate record, [_____ _____ _____ _____]. A portion of a report Gatlin ignores says that [_____

[12] For purposes of this discussion, we treat the two reports that Gatlin relies on as possibly newly discovered. We note here that the State persuasively argues that only the later report, prepared after trial, even arguably constitutes new evidence and, even then, the only preserved argument is Gatlin's claim that the report shows that [_____ _____].

_____]. Nothing in the reports that Gatlin directs our attention to indicates an attempt by social services to [_____ _____]. So far as the reports reveal, [_____ _____ _____].[13]

¶121 More importantly, Gatlin's argument incorrectly assumes that the reports, in Gatlin's words, [_____ _____]. We say this assumption is incorrect for two reasons.

¶122 First, looking to the portions of the reports that Gatlin points to, there is no indication that the agency [_____]. As noted, it does not appear that [_____]. And, there is no suggestion that the agency did anything other than [_____ _____ _____ _____]. The report further states that, [_____ _____ _____ _____ _____]. Thus, the reports, taken together, indicate [_____ _____

[13] [_____ _____ _____].

_____]. They therefore provide no basis for one of the questions Gatlin says she wants to pose: [_____].

¶123 In sum, and as the circuit court observed, the social services agency did not [_____ _____].

¶124 Second, Gatlin reasons that Dane County social services must have [_____ _____]. The problem with this reasoning is that the reports do not reflect that there was a [_____ _____] At best, it indicates that there was [_____ _____].

¶125 Moreover, as the State points out, it is not true that the agency would [_____ _____ _____].

¶126 For these reasons, the reports, even if newly discovered, do not have the evidentiary value that Gatlin attributes to them. The circuit court properly rejected the claim.

Conclusion

¶127 For the reasons stated, we reject all of Gatlin's arguments and affirm the circuit court.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.