2012 IL App (2d) 110395-U
No. 2-11-0395
Order filed August 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CM-1025
OLIVIA R. COX,	)	Honorable Joseph R. Waldeck,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: Defendant's right to a speedy trial was not violated because the charge of disorderly conduct was not a "new and additional" charge; there was sufficient evidence to find her guilty of disorderly conduct beyond a reasonable doubt; defense counsel was not ineffective because the challenged evidence constituted trial strategy; and there could be no plain error where evidence was admitted as part of trial strategy. Therefore, defendant's conviction was affirmed.

¶ 1 After a jury trial, defendant, Olivia R. Cox, was convicted of disorderly conduct (720 ILCS 5/26-1(a)(1) (West 2010) and sentenced to nine months' conditional discharge, anger management classes, and 50 hours' community service. On appeal, defendant argues that: (1) she was denied her

right to a speedy trial on the charge of disorderly conduct; (2) she was not proven guilty of the offense beyond a reasonable doubt; (3) she was denied ineffective assistance of counsel based on the admission of hearsay, other-crimes evidence, and bad character evidence; and (4) the admission of this evidence also constituted plain error. We affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Procedural History

¶ 4 Based on an incident that occurred on February 28, 2010, defendant was charged by information with two offenses on April 8, 2010. Count I alleged that defendant committed a battery in that she knowingly made physical contact of an insulting or provoking nature with Dana Sebree by spraying her with pepper spray (720 ILCS 5/12-3(a)(2) (West 2010)). Count II alleged that defendant committed criminal trespass in that she knowingly remained upon the land of Terry Berry (Sebree's mother) after receiving notice from the owner to depart (720 ILCS 5/21-3(a)(3) (West 2010)). On the same date, April 8, 2010, defendant, who was released on a personal recognizance bond, filed a speedy trial demand.

¶ 5 On October 12, 2010, the date the matter was scheduled for trial, the State filed an additional count, count III, alleging disorderly conduct. The disorderly count was based on the same February 28 incident and alleged that defendant knowingly sprayed Sebree with a substance in such an unreasonable manner as to alarm and disturb her and provoke a breach of the peace (720 ILCS 5/26-1(a)(1) (West 2010)). The State also amended count I, the battery charge, to allege that defendant knowingly caused Sebree bodily harm by spraying her with a substance that caused her pain and irritation.

¶ 6 Defendant immediately moved to dismiss the "new charges" on the basis that the State violated her right to a speedy trial. According to defendant, the new charges stemmed from the same incident but were filed after 160 days had elapsed from her speedy trial demand. Defendant argued that the 187-day period that had elapsed was attributable to the State with regard to the new charges.

¶ 7 The trial court denied defendant's motion to dismiss, and she moved to reconsider that decision. In addressing defendant's motion to reconsider, the trial court stated that the threshold question was whether the subsequent charges were essentially the same as the original ones. Because the additional and amended counts did not substantially change the original charges, the court denied the motion to reconsider.

¶ 8 Defendant then filed a motion *in limine* to, among other things, bar the State from eliciting testimony about any prior convictions. The State agreed not to present any evidence without a certified copy of conviction.

¶ 9 B. Trial

¶ 10 The following evidence is undisputed. Defendant had one daughter, Anaya, when she married Sebree's brother, Christopher. Defendant and Christopher had a second daughter, Jay, and then divorced. At the time of the February 28, 2010, incident, Berry (Christopher and Sebree's mother/the girls' paternal grandmother) had legal temporary custody of Anaya and Jay.

¶ 11 During opening argument, the State advised the jury that it would hear evidence that Berry had custody of her grandchildren, who were defendant's children. Berry was disciplining the children by grounding them. Defendant wanted to pick up the children from Berry's house, but Berry told defendant to not come over because the children could not go. Defendant came to Berry's house anyway, and was accompanied by her mother, Sharon Cox, and another woman. Berry told

defendant and Sharon to get off of her property. Defendant would not leave, so Berry called her daughter, Sebree. When Sebree went to Berry's house, she and defendant got into an argument during which defendant pepper-sprayed Sebree.

¶ 12 The defense theory was that the situation became violent when Sebree arrived on the scene and aggressively held a snow scraper. Sebree started a physical altercation with defendant that transferred to defendant's mother, Sharon, whom Sebree punched. Defendant tried to get in the car and leave but Sebree continued arguing with her through the open car door. Sebree tried to hit defendant a couple of times, and then Sebree was sprayed in the face with pepper spray. Defense counsel explained that although this was a situation in which Sebree would not relent in provoking defendant, it was not a case of self-defense because Sharon, and not defendant, sprayed Sebree in the face with pepper spray. Defense counsel concluded that in regard to the battery and disorderly conduct charges involving the pepper spray, the State had the wrong person.

¶ 13 Sebree testified as follows. On the day of the incident, she was shopping when her mother, Berry, called her around 3 p.m. Berry was yelling and screaming into the phone, and Sebree drove to her house in less than five minutes. Sebree parked in the street, took her snow scraper, and walked past a black truck parked in Berry's driveway. Sebree grabbed her snow scraper because she believed Berry was in danger. At the time, defendant was banging and kicking Berry's door. Also, Sharon and another woman had jumped out of the truck.

¶ 14 Sebree asked defendant why she was there, and defendant replied that Sebree did not know the full story. Sebree asked "what f***king story. My mom's taking care of your kids. You falsifying the state." Defense counsel objected, and the court overruled it, stating that it was a statement that Sebree made to defendant. Sebree continued that defendant was "wrong as hell for

going up to the school, having a secretary sign the papers so [defendant] can go get food stamps and the kids don't even live with [her]." The two argued back and forth for about 10 minutes; they were both "heated." Berry, who was handicapped, was standing at the door of her house, and defendant's two girls were standing at the window. Sharon was standing between defendant and Sebree, and the third person was holding onto defendant.

¶ 15 The State asked Sebree what happened after her conversation with defendant, and she replied that she said some things that made defendant mad. "I would have been pissed too, but at this point I said what I had to say, said a couple of things about me tutoring the kids after school, taking my time. *** Her not coming over, bringing anything for the kids, how I felt like she blackmailed my brother when he was in Iraq."

¶ 16 Sebree went on to testify that the three got back in the truck, with Sharon driving and defendant sitting behind Sharon in the back seat. At this point, "it kind of calmed down," although Sebree still had the snow scraper in her hand. Sebree was talking to defendant from the other side of the truck, through the open back passenger door. Defendant then grabbed the snow scraper out of Sebree's hand, and Sharon told Sebree to move because she was "about to pull out." Sharon put the truck in reverse; Sebree got caught in the door; and defendant pepper-sprayed Sebree's face. Sebree denied that either Sharon or the other front passenger sprayed her with the pepper spray; Sebree was looking right at defendant when she sprayed her in the face. Sebree got knocked to the ground. She felt instant burning, as though acid was eating her face. She could not breathe and kept gasping for air because the pepper spray was in her nose.

¶ 17 Sebree screamed to Berry to help her, saying that "this bitch sprayed me in my face with pepper spray." Anaya came out of the house and led Sebree to the kitchen, where she doused herself

with water. The pain lasted for one hour and 45 minutes or more. Sebree got into the bathtub fully clothed and stayed in the shower for over one hour.

¶ 18 On cross-examination, defense counsel asked Sebree whether there was tension between defendant and her girls and Sebree's side of the family. Sebree denied any tension with defendant specifically, saying that she had never had any verbal altercation with her prior to this incident. Defense counsel then asked if anything bothered Sebree in terms of defendant's care of the girls, and Sebree admitted that there were things that bothered her. When defense counsel asked how she was bothered, Sebree answered:

¶ 19 "It worried me that they live five minutes away, and [defendant] never even came over to get the kids except for on the weekend. It bothered me that the little Anaya and [Jay] were both, they both were going to go see a psychiatrist. She never even came. She never even went. The door was always open for her to come. She always neglected the kids. But then went down to the public aid and went to go get food stamps and didn't even have the kids. That really bothered me. And yes, it bothered me that my mom is handicapped, and she was stuck taking care of both of her kids, but that's the type of person my mom is."

¶ 20 Defense counsel then asked how often defendant visited on the weekends, and Sebree did not know the answer to that question. Sebree testified that Anaya was "on punishment" for stealing from a store on the day of the incident. Defendant was mad because she said that every time she called, Anaya was "on punishment." Sebree went on to say that Anaya went through a lot of withdrawal based on defendant not being a part of her life. Anaya would always break down and cry, especially when she went to see the psychiatrist.

¶ 21 Sebree denied having any physical contact with defendant during the incident. However, Sharon, who was taller and heavier than Sebree, was between Sebree and defendant and kept using her body weight to push Sebree back. So, Sebree finally pushed Sharon "real hard." When asked if she punched Sharon, Sebree replied that her "hand might have been bogged up when I went like that to her, yeah." Sebree admitted that she did not respond when Sharon told her to move several times so that she could back out of the driveway. The back truck door was open as Sebree leaned in to talk to defendant. The door knocked Sebree to the ground when Sharon backed out of the driveway.

¶ 22 Berry testified as follows. She had cared for defendant's girls for about 16 months. Pursuant to the court order, defendant was able to take them "whenever, every weekend." Berry never had a problem with defendant seeing the girls. At the time of trial, Berry no longer had custody of the girls.

¶ 23 On the day of the incident, defendant wanted to pick up the girls for a dinner that they had planned, but Berry said that Anaya was being disciplined and could not come. Defendant got angry and cussed at Berry over the phone, so Berry said to give her one hour to calm down and decide whether the girls could come. But defendant kept calling back and did not wait to come over. Defendant came to the house and kicked the door like "boom, boom, boom, and kick, kick, kick." Defendant's behavior caused Berry to call her daughter Sebree.

¶ 24 Sebree arrived and walked up the driveway with a snow scraper. Sebree, defendant, Sharon, and a fourth, heavy-set woman were all outside using their body weight to push Sebree away from the house. Berry went outside, and defendant got up in her face. Before going back inside the house, Berry told defendant that she left her husband and her girls "all for a car and another man. Now you

back." Then, defendant, Sharon, and the third woman got back in the truck. Sebree was talking to defendant, who was in the back seat, and Berry thought things were calming down. Berry heard Sharon tell Sebree to "move, move, move" because she was going to back up the truck. Berry glanced away, and when she looked up, she saw Sebree get up off the snow at the end of the driveway. The truck left so fast it almost turned over. Sebree screamed, ripped her coat off, and said "that bitch just maced me." When Berry asked who, Sebree said defendant. Sebree ran to the sink and yelled to call 911 because she could not see. The police and paramedics arrived, and Sebree got in the shower for 45 minutes. The entire time, Sebree was screaming that it was burning; she could not see; and she needed to go to the hospital. The paramedics said there was nothing they could do other than keep her in the shower with the running water.

¶ 25 On cross-examination, Berry testified that she never had problems with defendant in the past regarding weekend visitation, except on one occasion when defendant's father came to get the girls while intoxicated and they had to call the police. In terms of the pepper spray, Berry did not see what happened because she was back inside comforting the girls. She then heard Sebree screaming and the truck pulling away. Berry reiterated that when she asked Sebree who maced her, Sebree said defendant.

¶ 26 In May, Berry wrote a three-page statement that she gave to the State. In her statement, Berry wrote that "Sharon, you maced [Sebree] and drove down the driveway dropping my baby girl in the door of the Jeep." Berry explained that in order to understand what she wrote, it was necessary to go to the beginning of the paragraph where she wrote that " 'you lie now again, Sharon, what you did, spraying [Sebree] and shoving your body against her chest with all three of you and [defendant]

and the other lady friend.' " In writing that Sharon maced Sebree, Berry was saying that Sharon was lying to the point that she was taking the blame for macing Sebree.

¶ 27 On redirect, Berry read from her statement, " 'And you, Sharon, to save [defendant] say you maced my baby girl. Liar again.' " When the State tried to clarify if Berry saw Sharon mace Sebree, Berry answered, "I'm saying that because she admitted that she did it to take the blame so [defendant] wouldn't get charged with it because she was already on some paper in Georgia. She's taking the blame for her child like I wish I could have took the mace for my child."

¶ 28 On recross, Berry admitted that her statement that Sharon was lying was based on Sebree screaming that that "b**ch just maced me," meaning defendant. Berry herself did not see what happened.

¶ 29 Defendant testified regarding her version of events. Sebree came up the driveway holding a snow scraper, put it in defendant's face, and hit Sharon in the lip with a closed fist. When she, Sharon, and the other woman got back in the truck, Sebree stood on the opposite side and talked to defendant through the open door in the backseat. Sharon told Sebree they were trying to leave five or six times, but Sebree would not leave and said she was not done talking to defendant. So, Sharon put the truck in drive and moved up a little to get Sebree's attention, but Sebree still would not move. Sharon then backed up the truck a little, and Sebree accused Sharon of trying to run her over. Sebree reached in and tried to hit Sharon with a closed fist, but her arm was too short and she only grazed her. After Sebree tried again with her other arm, Sharon pulled the keys out of the ignition, took her pepper spray, and sprayed Sebree in the face. Defendant did not pepper spray Sebree and did not have pepper spray in her purse. The truck was not moving at that point. Sebree fell to the ground, and Sharon backed up and drove off to the police station.

¶ 30 While the instant case was pending, defendant went back to court and got custody of her two daughters. Defendant denied that convictions for battery, disorderly conduct, or criminal trespass would impact negatively on her ability to regain custody of her children.

¶ 31 Sharon was the final witness to testify, and her testimony was substantially the same as defendant's. Sebree approached the scene with a snow scraper and was "going after" defendant. Sebree also pushed Sharon and hit her in the mouth. After they got in the truck to leave, Sebree leaned in, accused them of trespassing, and would not let them leave. Sharon tried to move the truck a little so that Sebree would back away. Sebree was flailing her arms trying to hit either defendant or Sharon, so Sharon sprayed her with the pepper spray that was on her key chain. This caused Sebree to back up away from the truck. When she left, Sharon drove straight to the police station.

¶ 32 During closing argument, the State's theory was that Sharon was lying about spraying the pepper spray to protect defendant, who was trying to obtain custody of her daughters. Defense counsel posited a different theory that Sebree was biased against defendant because she thought defendant was "just a bad person" and a "bad mother" who did not take care of her children. Defense counsel argued that the escalation of the incident was caused by Sebree, not defendant. Sebree was the only witness to say defendant used the pepper spray, and she was biased against defendant.

¶ 33 The jury found defendant not guilty of battery and criminal trespass but guilty of disorderly conduct. Defendant's motion for a new trial was denied, and defendant was sentenced to nine months' conditional discharge, anger management classes, and 50 hours' community service.

¶ 34 Defendant timely appealed.

¶ 35 II. ANALYSIS

¶ 36 A. Speedy Trial

¶ 37 Defendant's first argument on appeal is that the State violated her right to a speedy trial by filing a charge of disorderly conduct on the day of trial, October 12, 2010. Defendant argues that this charge was filed beyond the 160-day speedy trial period, 187 days after she filed a speedy trial demand, to be exact. Because the subsequent charge was based on the same act, defendant argues it was subject to compulsory joinder, meaning that the delays attributable to her on the original charges could not be attributed to her on the subsequent disorderly conduct charge.

¶ 38 Defendants possess both constitutional and statutory rights to a speedy trial. *People v. Woodrum*, 223 Ill. 2d 286, 298 (2006). Defendant asserts only a violation of her statutory right in this case, and section 103-5(b) of the speedy trial statute contains a 160-day speedy-trial right for a person released on bond. 725 ILCS 5/103-5(b) (West 2010). The period begins to run when the accused files a written speedy-trial demand. *People v. Bonds*, 401 Ill. App. 3d 668, 672 (2010). The charge must be dismissed if a defendant is not tried within the statutory period. *Woodrum*, 223 Ill. 2d at 299.

¶ 39 Any period of delay occasioned by the defendant tolls the speedy-trial period. *Woodrum*, 223 Ill. 2d at 299. However, delays attributable to a defendant in connection with the original charges are not always attributable to the defendant on subsequently filed charges. *Id.* To guide this inquiry, we look to the following rule, commonly referred to as the *Williams* rule:

¶ 40 "Where new and additional charges arise from the same facts as did the original charges and the State had knowledge of these facts at the commencement of the prosecution, the time within which trial is to be on the new and additional charges is subject to the same statutory limitation that is applied to the original charges. Continuances obtained in

> connection with the trial of the original charges cannot be attributed to defendants with respect to the new and additional charges because these new and additional charges were not before the court when those continuances were obtained." *People v. Phipps*, 238 Ill. 2d 54, 66 (2010), quoting *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981).

Our supreme court has clarified that the *Williams* rule applies only when the initial and subsequent charges are subject to compulsory joinder. *Phipps*, 238 Ill. 2d at 67. Therefore, the pivotal question in this case is whether the subsequent charge of disorderly conduct is a "new and additional charge" subject to compulsory joinder. See *id.* (determining whether a charge was "new and additional" controlled whether delays attributable to the defendant on the original indictment were also attributable to him on the subsequent charge). Our review of this legal question, which involves a comparison of the original and subsequent charge, is *de novo*. *Id*.

¶ 41 The purpose of the *Williams* rule is to prevent a trial by ambush. *Woodrum*, 223 Ill. 2d at 300. Otherwise:

> " '[t]he State could lull the defendant into acquiescing to pretrial delays on pending charges, while it prepared for a trial on more serious, not-yet-pending charges. *** When the State filed the more serious charges, the defendant would face a Hobson's choice between a trial without adequate preparation and further pretrial detention to prepare for trial.' " *Id*., quoting *People v. Williams*, 204 Ill. 2d 191, 207 (2003).

In *Phipps*, the supreme court further expounded on the *Williams* rule:

> "The rationale for the rule, therefore, centers on whether the defendant had adequate notice of the subsequent charges to allow preparation of a defense. The focus is on whether the original charging instrument gave the defendant sufficient notice of the subsequent

> charges to prepare adequately for trial on those charges. If the original charging instrument gives a defendant adequate notice of the subsequent charges, the ability to prepare for trial on those charges is not hindered in any way. Thus, when the State files the subsequent charge, the defendant will not face 'a Hobson's choice between a trial without adequate preparation and further pretrial detention to prepare for trial.' " *Phipps*, 238 Ill. 2d at 67-68, quoting *Williams*, 204 Ill.2 d at 207.

Instead, the supreme court continued, the defendant may proceed to trial on the subsequent charges with adequate preparation instead of being forced to agree to further delay. *Id*. at 68. In such a situation, the rationale for declining to attribute to the defendant delays in connection with the original charges does not apply. *Id*.

¶ 42 Without citing our supreme court's decisions in *Woodrum* or *Phipps*, defendant argues that the subsequent disorderly conduct charge constituted a "new and additional" charge because the elements of disorderly conduct are different than battery. We disagree and do not view the subsequent disorderly conduct charge as a "new and additional" charge subject to compulsory joinder. As we discuss, under *Phipps*, the elements need not be identical but "essentially the same."

¶ 43 In *Phipps*, the defendant was originally charged with reckless homicide and then later with aggravated driving under the influence. The original reckless homicide charge alleged that defendant drove a motor vehicle while under the influence of alcohol at a high rate of speed and failed to stop at an intersection, thereby hitting a car and causing a person's death. *Phipps*, 238 Ill. 2d at 57. The subsequent aggravated driving under the influence charge alleged that defendant drove while under the influence of alcohol and was involved in a motor vehicle accident which caused the death of a person. *Id*. at 58. The supreme court noted that the original and subsequent charges alleged the

same conduct, meaning that the original charge provided the defendant notice of the material allegations in the subsequent charge. *Id*. at 68. Significantly, the court noted that the reckless homicide and aggravated driving under the influence offenses "had *essentially* the same elements" and provided the same penalty. (Emphasis added.) *Id*. In sum, the court reasoned that the rationale for the *Williams* rule did not apply in *Phipps* because the original charge gave the defendant notice of the subsequent charge from the outset of the prosecution, and there was no danger of trial by ambush. *Id*. at 69-70. The court reiterated that the statement in *Woodrum*, which was that the defendant could not have been surprised by the subsequent charges because they were essentially the same as the original ones, applied equally to the defendant in *Phipps*. *Id*. at 70.

¶ 44 As in *Phipps*, the original and subsequent charges in this case involved different statutory violations, yet they were based on the same conduct of using the pepper spray. The original battery charge alleged that defendant knowingly made physical contact of an insulting or provoking nature with Sebree by spraying her with pepper spray. It was later amended to allege that defendant knowingly caused Sebree bodily harm by spraying her with a substance that caused her pain and irritation. The subsequent disorderly conduct charge was also premised on the act of spraying the pepper spray and contained the same knowing mental state. It alleged that defendant knowingly sprayed Sebree with a substance in such an unreasonable manner as to alarm and disturb her and provoke a breach of the peace. Thus, the elements of the two offenses were essentially the same. The only difference between the battery charge and the disorderly conduct charge was the effect of the act; either harming Sebree or alarming and disturbing Sebree and provoking a breach of the peace. Moreover, the concern underlying the *Williams* rule, which is lulling the defendant into continuances while preparing and later surprising the defendant with a more serious charge, is not

present here. The original and amended battery charge was a Class A misdemeanor (720 ILCS 5/12-3(b) (West 2010)) whereas the disorderly conduct charge was a Class C misdemeanor (720 ILCS 5/26(b) (West 2010)).

¶ 45 A comparison of the original battery charge and the subsequent disorderly conduct charge reveals that defendant had adequate notice to prepare his defense to the disorderly conduct charge. Therefore, the disorderly conduct charge was not "new and additional" for speedy-trial purposes, meaning that the delays attributable to defendant on the battery charge were also attributable to him on the disorderly conduct charge. Hence, no speedy trial violation occurred.

¶ 46 B. Sufficiency of the Evidence

¶ 47 Defendant next argues that the evidence was insufficient to find her guilty of the offense of disorderly conduct beyond a reasonable doubt. When reviewing a challenge to the sufficiency of the evidence, we consider whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). We will not retry a defendant when considering a sufficiency of the evidence challenge; the trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses. *Id.* at 114-15. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id.* at 115.

¶ 48 A person commits disorderly conduct when she knowingly does any act in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace. 720 ILCS 5/26-1(a)(1) (West 2010). Disorderly conduct is loosely defined and is a highly fact-specific inquiry.

People v. McLennon, 2011 IL App (2d) 091299, ¶ 7. It embraces a wide variety of conduct serving to destroy or menace the public order and tranquility. *Id.* The main purpose of the offense is to guard against an invasion of the right of others not to be molested or harassed, either mentally or physically, without justification. *Id.*

¶ 49 In particular, defendant challenges the State's proof on the element of provoking a breach of the peace. Generally, to breach the peace, a defendant's conduct must threaten another or have an effect on the surrounding crowd. *Id.* ¶ 8. The defendant's conduct must actually bring about a breach of the peace and not merely tend to do so. *People v. Allen*, 288 Ill. App. 3d 502, 505 (1997). Still, it is not necessary that the act occur in public, only that the defendant's actions disturb the public order. *Id.* at 506. " 'A breach of the peace may as easily occur between two persons fighting in a deserted alleyway as it can on a crowded public street.' " *Id.*, quoting *People v. Davis*, 82 Ill. 2d 534, 538 (1980). Many of the cases addressing the breach-of-the-peace element concern inappropriate or vulgar sexual remarks, obscenities, or fighting words. *Id.* However, in this case, the breach of the peace did not stem from words but from the act of spraying someone in the face with pepper spray. Clearly, this type of conduct does more than threaten another; it causes actual harm.

¶ 50 According to defendant, Sebree was the aggressor responsible for whatever breach of the peace that occurred. The situation prior to the use of the pepper spray involved a heated exchange on all sides. But this was not, as defendant concedes, a case of self-defense. Therefore, the fact that Sebree may have been guilty of breaching the peace by her actions does not justify or excuse defendant's breach of the peace by spraying her with pepper spray. As the State points out, Sebree's aggression toward defendant and her mother does not somehow eliminate defendant's breach of the

peace. The spray caused Sebree to fall to the ground and scream out in pain, as if acid were burning her skin. And though not necessary to establish a breach of the peace, defendant's use of the pepper spray affected the surrounding crowd; namely, Berry and the two girls, who called 911 and helped Sebree douse her face in water.

¶ 51 Defendant also appears to argue that her conduct was not unreasonable given what had transpired between the parties up until that point. See *McLennon*, 2012 IL App (2d) 091299, ¶ 29 (to prove the defendant guilty of disorderly conduct, the State had to prove that the defendant knowingly engaged in conduct that (1) was unreasonable, (2) alarmed or disturbed another, and (3) provoked a breach of the peace). Defendant argues that "[i]f anything, the act of spraying Sebree was the only way to end the confrontation that Sebree was attempting to escalate." Again, as stated above, this is not a viable argument given that defendant never raised the theory of self-defense and thus did not admit to being the one who sprayed the pepper spray. See *People v. Chatman*, 381 Ill. App. 3d 890, 897 (2008) (self-defense is an affirmative defense and the raising of such a defense necessarily constitutes an admission by the defendant that he committed the crime for which he is being prosecuted). In other words, defendant cannot argue that spraying the pepper spray was justified or reasonable while at the same time arguing that Sharon, and not her, did the spraying.

¶ 52 Last, defendant argues that Sebree was not credible and had a powerful motive to testify falsely so that Berry could keep custody of the two girls. It was up to the jury to assess the witnesses' credibility and determine whose version of events to believe. Sebree testified that she was looking right at defendant when defendant sprayed her with the pepper spray. Berry, on the other hand, did not see who did the spraying. Defendant and Sharon's testimony conflicted with Sebree in that they both stated that Sharon was the one who did the spraying. It was reasonable for the jury

to accept the State's theory that Sharon was taking the blame to protect defendant, who was in the process of regaining custody of her children. Therefore, there was sufficient evidence to find defendant guilty of disorderly conduct beyond a reasonable doubt.

¶ 53 C. Ineffective Assistance of Counsel

¶ 54 Defendant next lists several reasons why her counsel was ineffective. Under the two-prong test for assessing whether trial counsel was ineffective articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct must be considered sound trial strategy." *Id*. Under the second prong, a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *Id*. In order to establish ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. *Id*. at 144-45.

¶ 55 Defendant refers to several instances in which defense counsel was ineffective for either failing to object or for eliciting the allegedly prejudicial testimony. For the most part, the testimony defendant challenges falls into one or more of three categories: other-crimes evidence, evidence attacking defendant's character, or hearsay.

¶ 56 First, defendant points to Berry's testimony on redirect examination that Sharon was taking the blame for the offense to protect defendant "because she was already on some paper in Georgia."

Defendant argues that this testimony gave the jury the impression that defendant had an out-of-state conviction, yet defense counsel did not object.

¶ 57 Second, defendant argues that defense counsel allowed the State's witnesses to destroy her character on matters that had nothing to do with the charges against her. For example, Sebree testified on direct examination that some of the things she said to defendant made defendant mad, such as not visiting the girls, not bringing anything for them, and blackmailing her brother (Christopher) when he was in Iraq. Defendant argues that the blackmail statement constituted inadmissible hearsay, at the very least, and improper proof of other-crimes evidence in violation of the motion *in limine*. However, defense counsel failed to object.

¶ 58 Third, defendant argues that defense counsel compounded the damage to defendant's character by eliciting testimony from Sebree regarding what bothered her in terms of defendant's care of her girls. Sebree testified that it worried her that defendant lived five minutes away yet never picked up the children except on weekends; that the girls were both seeing a psychiatrist but defendant never came to the appointments; that defendant always neglected her children; and that defendant "went down to public aid and went to go get food stamps and didn't even have the kids." Defendant argues that perpetrating a fraud on the department of public aid constituted yet another allegation of criminal activity against her.

¶ 59 Fourth, defendant argues that defense counsel failed to object to testimony that served no other purpose than to undermine her character. For example, defendant argues that Sebree directly connected the children's mental state to her alleged neglect by testifying that Anaya had gone through "a lot of withdrawal and stuff not having her mother in her life"; and that she would break down and cry most of the time, especially when seeing the psychiatrist. Defendant concedes that it

may have been defense counsel's strategy to establish that Sebree had issues with defendant and was therefore biased. Even so, defendant argues that the impression left with the jury was that defendant was a terrible mother who had abandoned her children and destroyed their psyches.

¶ 60 Fifth, defendant argues that defense counsel failed to object when Berry testified on direct examination that she told defendant that she left her husband and left her girls, "all for a car and another man. Now you back. You lost your new house, another woman just had a new house built." Also, defense counsel elicited testimony from Berry on cross-examination that defendant's father had come to the house intoxicated on prior occasions, and that she had begged the Department of Children and Family Services (DCFS) to not take defendant's children at a time when defendant still had custody.

¶ 61 In considering defendant's contentions of error, we are reminded that matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). The defense theory relied upon at trial is a matter of trial strategy, and a claim of ineffective assistance of counsel cannot be predicated upon a matter of defense strategy unless the strategy was unsound. *People v. Ramey*, 152 Ill. 2d 1, 25 (1992). Decisions regarding what matter to object to and when to object are also matters of trial strategy (*People v. Perry*, 224 Ill. 2d 312, 344 (2007)), including the decision not to object to the admission of purported hearsay testimony (*People v. Theis*, 2011 IL App (2d) 091080, ¶ 40). A reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight. *Perry*, 224 Ill. 2d at 344.

¶ 62 Beginning with defendant's first contention of error, we agree with the State that Berry's comment that defendant was "on some paper in Georgia" does not necessarily connote wrongdoing

by defendant or an out-of-state conviction. The statement is innocuous or cryptic at best, and it was highly possible that defense counsel allowed the statement to pass without objecting to it to diffuse its importance, rather than object and draw further attention to it. See *Perry*, 224 Ill. 2d at 344-45; see also *People v. White*, 2011 IL App (1st) 092852, ¶ 75 (an attorney may forego an objection or a motion to strike for strategic reasons).

¶ 63 We turn next to Sebree's statements that defendant was blackmailing her brother and improperly collecting food stamps. Evidence that a defendant has committed crimes other than the one for which she is on trial may not be admitted for the purpose of demonstrating her propensity to commit crimes. *People v. Adkins*, 239 Ill. 2d 1, 22-23 (2010); see also *People v. Ward*, 2011 IL 108690, ¶ 24 (generally, evidence relating to a defendant's propensity to commit crimes is excluded from criminal trials because it tends to be overly persuasive to a jury who may convict the defendant only because it feels he or she is a bad person deserving punishment). The State disputes that the "blackmailing" comment constitutes other-crimes evidence. But even if we assume, *arguendo*, that it does, we determine that defense counsel was not ineffective for failing to object to that testimony or for eliciting the testimony regarding food stamps.

¶ 64 The other-crimes testimony challenged by defendant occurred in the context of Sebree voicing her critique and dissatisfaction with defendant as a parent, as a wife to her brother Christopher, and as a person. Berry, like Sebree, expressed disapproval over defendant's lifestyle and her parenting. While defendant also challenges this evidence on the basis of inadmissible hearsay and inadmissible bad character evidence, all of this testimony supported the theory of the defense that these witnesses were biased. See *Adkins*, 239 Ill. 2d at 33 (other-crimes evidence was relevant for a purpose other than showing his mere propensity to commit crimes; the statements were

consistent with and tended to support the theory of the defense); *Theis*, 2011 IL App (2d) 091080, ¶ 40 (no ineffective assistance of counsel where defense counsel used the alleged hearsay testimony as part of her trial strategy); *People v. Smith*, 242 Ill. App. 3d 555, 566-67 (1993) (the defendant's argument that defense counsel was ineffective lacked merit where defense counsel's failure to object to evidence and arguments that the defendant committed other bad acts was a matter of trial strategy).

¶ 65 The defense theory was that Sharon was the one who sprayed the pepper spray; that Sebree was biased against defendant; and that, due to this bias, Sebree was the one who escalated the incident and had the real motive to lie about who sprayed the pepper spray. During closing argument, defense counsel honed down on this theory by explaining that Sebree's bias was due to her belief that defendant was a "bad mother" who did not take care of her kids and "just a bad person." Defense counsel also argued that Sebree had issues with defendant that had nothing to do with the current incident, which explained why she came "storming" up the driveway "with a snow scraper." This theory was intended to counter the State's theory, which was that Sharon was taking the blame for defendant so that defendant would not jeopardize her ability to regain custody of her girls. Defense counsel argued that the real motivation to lie about who sprayed the pepper spray came from Sebree, who did not want defendant to regain custody.

¶ 66 To this end, the testimony defendant challenges, such as defendant's neglect and failure to visit the girls, bring things to them, or attend the girls' appointments with a psychiatrist, revealed Sebree's bias towards defendant, as did Sebree's accusation that defendant was blackmailing her brother when he was in Iraq and improperly collecting food stamps. In a similar vein, Berry's testimony that defendant left her family for another man and that Berry had begged DCFS to not

remove the children from defendant's care revealed her disdain for defendant's lifestyle and treatment of her son Christopher. See *White*, 2011 IL App (1st) 092852, ¶ 75 (defense counsel may have viewed the witness's testimony as more helpful than harmful because it supported defense theory that the police officer did not care who was arrested and was biased). Regarding Berry's testimony that defendant's father, who was intoxicated, came to pick up the girls, defense counsel elicited this testimony in an attempt to show that Berry was biased based on having had problems with defendant exercising visitation in the past.

¶ 67 Defendant next argues that defense counsel failed to object to hearsay testimony elicited during Berry's direct examination. Berry testified that Sebree told her that that "b**ch just maced me. And I'm like who? She said [defendant]." Defense counsel then brought out the identical testimony two more times during Berry's cross-examination. Again, this was a matter of trial strategy in that defense counsel highlighted the fact that Berry was unable to see from inside the house who sprayed the pepper spray. Defense counsel's tactic was to reveal that Berry based her opinion that defendant did the spraying on the basis of what Sebree said, not on what she saw. Accordingly, defense counsel argued that Sebree, who was biased, was the only witness to testify that defendant sprayed her.

¶ 68 Because all of the testimony defendant challenges was a matter of trial strategy, defense counsel was not ineffective. On the contrary, defense counsel's strategy was effective to the extent that defendant was acquitted of two of the three charges.

¶ 69 Defendant's final contention regarding defense counsel's alleged ineffectiveness is that he neglected to argue about the disorderly conduct charge during closing argument. According to

defendant, defense counsel focused only on the battery and criminal trespass charges as opposed to the disorderly conduct charge. We disagree.

¶ 70 First, we note that during the State's closing argument, it argued that the disorderly conduct charge and battery charges were "predicated on the fact that somebody sprayed somebody else with mace, [defendant] sprayed *** Sebree with mace in the face, an absolute breach of the piece [*sic*], an absolute cause of the harm and the pain and humiliation that she felt." Therefore, the State laid out the foundation for both offenses and highlighted the fact that they were both based on the same act.

¶ 71 During defendant's closing argument, defense counsel made specific arguments regarding the criminal trespass charge. In relation to both the battery and disorderly conduct charges, however, defense counsel focused mainly on the act of spraying the pepper spray. Again, this makes sense given that both charges were based on that one act. The real crux of the defense was that Sharon, and not defendant, sprayed the pepper spray. Understandably, defense counsel did not contest the effects of the pepper spray, which were bodily harm (battery) or a breach of the peace (disorderly conduct), because the defense was based on identity alone. In arguing this theory, defense counsel mentioned the charge "battery" only once and never mentioned the charge of "disorderly conduct." Even so, the defense was clear. Thus, defense counsel's failure to make a specific reference to the disorderly conduct charge does not translate into "a failure to subject the prosecution's case to meaningful adversarial testing," as defendant asserts. Moreover, defense counsel concluded his closing argument by asking the jury to find defendant not guilty "on all three counts."

¶ 72 D. Plain Error

¶ 73 Defendant's final argument is that the other-crimes and hearsay evidence referred to above should be reviewed under the plain-error doctrine. Specifically, defendant challenges the admission of: (1) Sebree's testimony accusing her of improperly collecting food stamps and blackmailing her brother while he was in Iraq; (2) Berry's testimony that defendant was "on some paper" in Georgia and had left her husband and children for another man; and (3) the testimony of Sebree and Berry that defendant was a bad mother who neglected her children to the point that they needed psychiatric counseling. Conceding that her claims were not preserved for appeal, defendant argues that the admission of this evidence constituted plain error.

¶ 74 The plain-error doctrine contained in Supreme Court Rule 615(a) provides a narrow exception to the general rule of procedural default. *People v. Lewis*, 234 Ill. 2d 32, 42 (2009). The doctrine allows a reviewing court to consider an unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Id.* at 42-43. The defendant bears the burden of persuasion under both prongs of the plain-error test. *Id.* at 43. Before analyzing the individual prongs, however, our first inquiry under plain-error review is to determine whether any error occurred. *Id.*

¶ 75 We reject this argument for the same reason we rejected defendant's ineffective assistance of counsel claim. Because all of the evidence challenged was part of defense counsel's trial strategy, no error occurred. See *People v. Bush*, 214 Ill. 2d 318, 332 (2005) (when a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, the

defendant cannot contest the admission on appeal). Therefore, defendant's plain error argument fails.

¶ 76 III. CONCLUSION

¶ 77 For the reasons stated, we affirm the Lake County circuit court judgment.

¶ 78 Affirmed.