STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLEN ARTHEUS BEAL,

Defendant-Appellant.

Appeal No. 14AP002534 CR

Milwaukee County Circuit Court
Case No. 2013CF004222

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ON NOTICE OF APPEAL TO REVIEW A
JUDGEMENT OF CONVICTION AND THE FINAL ORDER ENTERED IN
THE CIRCUIT COURT FOR MILWAUKEE COUNTY,
THE HONORABLE MEL FLANAGAN, PRESIDING

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# BRIEF AND APPENDIX
# OF DEFENDANT-APPELLANT

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## ISSUE PRESENTED

Did the trial court err in refusing to allow the jury to hear any evidence that Mr. Beal's co-actor was entitled to the privilege of reasonable discipline when he was charged as party to a crime and the co-actor was the victim's mother?

The trial court excluded all evidence of reasonable discipline.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Glen Beal does not request oral argument because this written brief fully meets the issues presented on appeal.

Publication is justified under Wis.Stat.(Rule) 809.23 given the novelty and questionable constitutionality of the state's theory of prosecution, the trial court's and the prosecutor's confusion regarding the interplay of the offense of party to a crime physical abuse of a child and the interpretation of the reasonable discipline priviledge.

## STATEMENT OF THE CASE

Defendant-Appellant Glen Beal appeals from his judgment of conviction for Physical Abuse of a Child (intentional causation of bodily harm) as Party to a Crime, Repeater, in violation of Wis. Stat. § 948.03(2)(b) and 939.05 and Disorderly Conduct, Repeater, in violation of Wis. Stat. § 947.01(1) entered in the circuit court for Milwaukee County, the Honorable Mel Flanagan presiding. (27: App. 4).

In the four count criminal complaint dated September 12, 2013, the State charged Beal and Aretha Strong each with separate counts of Physical Abuse of a Child and Disorderly Conduct. (2:1-2; App.1-4) The criminal complaint involved an incident that occurred on September 8, 2013, at 2229 N. 34th Street, in the City of Milwaukee, Milwaukee County. (2:1; App.1) The alleged victim of the child abuse was Jonisha G. who was the 13 year old daughter of Strong. (2:2; App.2) Beal was Strong's boyfriend. *Id.*

Following pretrial proceedings the case proceeded to jury trial on December 16, 2013. (46) On the day of trial, Strong's attorney requested that her case be severed and adjourned from Beal's case. (46:28-31) The court granted the requests. *Id*. at 39. Beal's trial continued. On December 19, 2013, the jury returned verdicts convicting Beal on all counts. (49)

On February 28, 2014, Beal appeared in front of Judge Flanagan for sentencing. (42) The Court sentenced Beal on Count 1: Party to a Crime, Child Abuse 4 WSP (2 years of initial confinement 2 years extended supervision) Count

2: Disorderly Conduct, Repeater 2 WSP (1 year of initial confinement 1 year extended supervision). (42:18).

**TRIAL EVIDENCE**

Prior to the start of the trial, the State filed a Motion to prohibit the assertion of reasonable discipline by Beal. (11) During a discussion with the court, Beal's attorney agreed while his client did not enjoy the "privilege of reasonable discipline" it was "important that the jury knows that the mother of the alleged victim does enjoy that privilege." (46:40; App. 7) The court responded:

> No. That has nothing to do with your client. Your client does not get some—some—you know, contact privileges because he was with the mother of the child. His behavior is seen as a nonparent, and it—the parent—parental observations of involvement is not relevant. *Id.*

The court specifically informed Beal's trial counsel that there was to be no evidence elicited or proffered by either party about any reasonable discipline. *Id.* The court further clarified if Strong testified he could not get in her reasonable discipline defense because it was not relevant. *Id.* at 45.

The State's evidence consisted primarily of statements and testimony by citizen witnesses: Jonisha G., Gerena P., Shantel Sanders, and Maya Hampton. The State also called Officer Erin Mejias and Investigator Carl Bushman.

Jonisha G. testified that while at her friend's house she saw her mother and Beal pull up to the house. (47:23) She then saw the two get out of the vehicle and approach the house. *Id.* Beal then grabbed her shirt and took her to the front of the house. *Id.* at 25. Jonisha G. testified that at this point she and her mother started fighting. *Id.* at 27 She admitted to striking her mother. *Id.* Jonisha G.

testified Beal held her to the ground as her mother was hitting her in the face. *Id.* at 28. Jonisha G. also testified that Beal punched her in the back of the head. *Id*.at 30. She testified that Beal then placed her in the backseat of the vehicle and her mother got into the backseat with her and continued beating her up while Beal drove. *Id.* at 34. Jonisha G. stated once they got to her home and exited the vehicle she was able to break away from her mother and Beal and run to a friend's house. *Id*. at 36. She testified as a result of the fight she sustained a busted lip, scratches on her face and neck, a swollen face, pain in her arms, and a knot in the back of her head. *Id.* at 48.

Gerena P. testified that she is a friend to Jonisha G. and on the day of the incident Jonisha G. was at her house. *Id*. at 98. Gerena P. testified that after Beal grabbed Jonisha G. she saw Beal strike Jonisha G. in the face. *Id*. at 100. Gerena P. testified that Beal never held Jonisha G. to the ground and that Beal just watched as Jonisha G.'s mother beat her on the ground. *Id*. at 102. Gerena P. later testified that she saw Beal hit Jonisha G. twice but could not recall where he struck her. *Id*. at 121.

Sanders testified that she is the cousin of Gerena P. and that she was present during the incident on September 8, 2013. (48:6-7) Sanders testified that she ran outside because she heard yelling and when she got outside she saw both Jonisha G's mom and Beal hit Jonisha G.. *Id*. at 10. Sanders testified she saw Beal restrain Jonisha G. while her mother hit her. *Id.* at 11. She also testified that she saw Beal hit Jonisha G. in the face with a closed fist. *Id*. at 11-12. Sanders testified she told Jonisha G.' mother that she could not do this and she responded

"yes, I can, this is my child, you can't tell me what to do with my own child." *Id*. at 11. Sanders also testified that she did not tell the officer that she saw Beal hit Jonisha G.. *Id*. at 26.

Hampton testified about what occurred at her residence when Jonisha G. ran to her home following the incident. *Id*. at 34.

Officer Mejias testified that she interviewed Jonisha G. following the incident. *Id*. at 40. Officer Mejias testified that Jonisha G. told her during the interview that she didn't know if Beal had hit her. *Id*. at 44. Officer Mejias described Jonisha G.' injuries as minor visible injuries. *Id*. at 45.

Aretha Strong testified for the defense. Strong is Jonisha G's mother and Beal's fiancé. (40:37) Prior to Strong's testimony the court ordered Strong to not talk about if "this was reasonable discipline." *Id*. at 19. The Court further instructed Strong:

> There is an affirmative defense under our law of reasonable discipline by a parent. This gentleman is not a parent. He can't use that defense at all. He may not beat a child and call it discipline when he is not the parent of the child. It's not going to be called discipline. It's not going to be called correcting a child's behavior or somehow provide some guidance to. *Id*. at 29; App.13.
>
> [I]t's not relevant that you thought you were disciplining this child. It's not relevant to this case. *Id*. at 30; App. 14.

Strong testified that after getting off of work she learned Jonisha G. was not at home like she was supposed to be. *Id*. at 38. Strong testified that she and Beal went to 3321 N. 34th Street to get Jonisha G. and bring her home. *Id*. at 38-39. Strong testified that she went to the back door and Beal went to the front door. *Id*. at 41. At some point Strong heard Beal yell that he had her and she came to the

front. *Id*. at 41. When Strong got to the front of the residence Beal was holding Jonisha G. to keep her from running. *Id*. Strong said she asked Beal to hold Jonisha G. so they could get her in the car. *Id.* Strong testified at this point Jonisha G. pulled out a can of corn in a sock and a box knife that she had in her purse and started swinging it at her. *Id*. at 42. Strong said Beal tried to stop Jonisha G. from hitting her by holding down Jonisha G.'s right hand. *Id*. Strong admitted to slapping Jonisha G. across the face at this point. *Id*. at 43. Strong stated that Beal did not punch Jonisha G. Strong admitted to striking Jonisha G. two times and said that Beal only held Jonisha G. to help Strong get her back home. *Id*. at 46.

During the state's cross examination of Strong the state specifically asked Strong about Beal aiding her when she struck Jonisha G.:

> Q: You testified on your direct examination that this defendant was holding Jonisha correct?
> A: He was holding her shirt, right here.
> Q: And you saw him holding her shirt, right?
> A: Yes….
> Q: You saw the defendant holding Jonisha's arm, correct?
> A: He held—Yes, he held her arm down.
> Q: Ms. Strong you testified that you did hit your daughter Jonisha, correct?
> A: Yes, I did.
> Q: You testified you slapped her; is that right?
> A: No. I hit her across the head like this.
> Q: With an open hand?
> A: Yes.
> Q: And you testified you hit her twice; is that correct?
> A: Yep.

*Id*. at 54-55.

## ARGUMENT

### I. BEAL SHOULD HAVE BEEN ALLOWED TO ASSERT A DEFENSE BASED ON THE MOTHER'S CONSTITUTIONAL RIGHT AND ON THE REASONABLE DISCIPLE PRIVILEDGE BECAUSE HE WAS CHARGED AS PARTY TO A CRIME.

#### A. Introduction and Standard of Review

Beals' claim is based on due process, because he contends that the circuit court denied him a meaningful opportunity for consideration by the jury of his indirect defense. *See State v. Heft,* 185 Wis.2d 288, 302-03, 517 N.W.2d 494 (1994). This is a question of constitutional fact, which is reviewed de novo. *See id*. at 296, 517 N.W.2d 494.

#### B. The Party To A Crime Allegations Here Require Proof That Beal Intended And Agreed Both That The Victim Be Subjected To Bodily Harm And That The Infliction Of Harm Not Be Privileged.

The State charged Beal with one count of physical abuse of a child as party to a crime. Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it. WIS JI—Criminal 400.

> Two Ways in Which Defendant Can Be a Party to a Crime
>
> The State contends that the defendant was concerned in the commission of the crime of (child abuse) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.
>
> Definition of Aiding and Abetting
>
> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either: assists the person who commits the crime; or is ready and willing to

> assist and the person who commits the crime knows of the willingness to assist.
>
> To intentionally aid and abet (child abuse) , the defendant must know that another person is committing or intends to commit the crime of (child abuse) and have the purpose to assist the commission of that crime. *See* WIS JI—Criminal 400; App.15.

Accordingly, the State was obligated to prove beyond a reasonable doubt that either Beal directly committed the crime of child abuse or that Beal intended and agreed with Strong to commit the crime of physical abuse of a child. *See Wis.Stat. §* WIS. JI—400. Beal's theory of defense was that he did not directly commit the crime of child abuse and he did not aid Strong in committing the crime of child abuse because her actions were not a crime insomuch as she was entitled to the "reasonable discipline privilege".

Beal's request for the jury to be made aware that Strong had a privilege of "reasonable discipline" was relevant under the second theory of Party to a Crime--that Beal intended and agreed with Strong to commit the crime of physical abuse of a child.

Beal is guilty of physical abuse of a child, party to a crime under this second theory of Party to a Crime only if he intended both that the victim be subjected to bodily harm, as required for the crime of child abuse, *Wis.Stat. §948.03(2)(b),* and that the harm not be caused pursuant to reasonable discipline.

As an affirmative defense to aiding Strong, Beal asserted that he should be able to rely on the mother's statutory privilege to engage in reasonable discipline under *Wis. Stat.* §939.45(5) which provides:

> Privilege. The fact that the actor's conduct is privileged, although otherwise criminal is a defense to prosecution for

> any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances: …When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death.

This privilege constitutes an affirmative defense to the criminal charge of physical abuse of a child under *Wis.Stat.* §948.03 *See* §939.45. Once parental privilege is raised as an affirmative defense, the burden shifts to the state to disprove the parental privilege defense beyond a reasonable doubt.

The Court of Appeals in an unpublished decision *State v. Caminiti*, 353 Wis.2d 553, 846 N.W.2d 34, 2014 App. 45 (2014), addressed the interplay of conspiracy to commit child abuse and "reasonable discipline." In *Caminiti*, the defendant was a religious leader who instructed his church attendees to discipline infants by striking their bare bottoms using wooden spoons and dowels with an amount of force that caused bruising. *Id.* at ¶ 1. None of the charged instances alleged that the defendant personally struck a child. *Id.* at ¶ 4. It was the children's parents, in all but one of the cases who had struck their child and were consider coconspirators with the defendant for following his teachings. *Id.*

As an affirmative defense, the defendant relied on the parents' statutory privilege to reasonably discipline under Wis.Stat. §939.45(5). *Id.* at ¶ 5. The Court of Appeals acknowledged that there was no dispute that the defendant could assert defenses based on the parents' constitutional rights and on the reasonable discipline privilege. *Id.* at ¶ 6.

Beal does not argue that he is entitled to the privilege of "reasonable parental discipline" for any acts of child abuse he directly committed. Beals' theory of defense

was that he did not personally abuse Jonisha G. but that he did aid her mother in what he believed to be "reasonable discipline" of Jonisha G.

Inasmuch as he was charged as Party to a Crime, and the charged coactor is the parent of the victim, and insomuch as she is entitled to the privilege of reasonable discipline, it stands that his actions must be viewed with that privilege in mind if he is charged as Party to a Crime. If he aided and abetted the coactor to practice "reasonable parental discipline" there would be no crime.

The court's refusal to allow the jury to know that Strong had a reasonable discipline privilege denied Beal the due process right to raise an affirmative defense and failed to require proof beyond a reasonable doubt that Beal intended and agreed to participate in discipline that was unprivileged. The court's erroneous refusal to let any testimony of a reasonable discipline privilege on Count 1 deprived Beal of a jury verdict on all facts necessary for a conviction.

Due to the errors of the court, the jury was never directed to resolve that factual dispute, to hold the state to its burden on that point, and to find all facts necessary for conviction. Reversal is appropriate in the interests of justice.

## CONCLUSION

For the aforementioned reasons, Mr. Beal requests that this Court reverse Mr. Beal's conviction for Physical Abuse of a Child-Party to a Crime or, if such relief is not granted, a new trial for Mr. Beal.

Dated this ____ day of February, 2015.

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## CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,668 words.

Dated this _____ day of February 2015 at Milwaukee, Wisconsin.

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## CERTIFICATION FOR APPENDIX CONTENTS

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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**CERTIFICATION OF ELECTRONIC COPY OF BRIEF BEING IDENTICAL TO PAPER COPY OF BRIEF**

I hereby certify, pursuant to Wis. Stat. 809.19(12)(f), that the electronic copy of the brief filed in this case is identical to the text of the paper copy of the brief filed in this case.

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