STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP001610-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GINGER M. BREITZMAN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Rebecca F. Dallet, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Did the State present insufficient evidence to meet its burden to prove that Ms. Breitzman was guilty of child neglect and disorderly conduct?

A. Did the State meet its burden to prove that Ms. Breitzman was guilty of child neglect, where her teenage son, who was locked out of the house for a few hours after school, remained outside and felt cold, instead of walking to nearby businesses to avoid the cold?

B. Did the State meet its burden to prove to prove that Ms. Breitzman was guilty of disorderly conduct for calling her son unpleasant names in their home?

The jury convicted Ms. Breitzman of child neglect and disorderly conduct, and the circuit court denied her post-conviction motion to vacate her convictions on grounds of insufficient evidence.

II. Was Ms. Breitzman denied the effective assistance of counsel?

A. Was Ms. Breitzman denied the effective assistance of counsel where her attorney failed to move to dismiss the disorderly conduct charge against her on grounds that it violated her constitutional rights to free speech?

B. Was Ms. Breitzman denied the effective assistance of counsel where her attorney failed to object to the admission of a barrage of improper other-acts evidence which painted her as an all-around bad mother?

C. Was Ms. Breitzman denied the effective assistance of counsel where her attorney argued a theory of defense in his opening statement which contradicted Ms. Breitzman's anticipated testimony?

The circuit court denied Ms. Breitzman's claims of ineffective assistance of counsel following a ***Machner***[1] hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Breitzman would welcome oral argument should this Court find it helpful. Publication may be warranted to help develop the case law concerning when a trial strategy is irrational and thus not reasonable, and further to develop the case law concerning a First Amendment challenge to a disorderly conduct charge for statements made to a family member in the privacy of one's home.

STATEMENT OF FACTS AND CASE

A. Charges and Complaint

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

Ms. Breitzman stood trial for five charges—two counts of abuse, two counts of neglect, and one count of disorderly conduct—involving different interactions with her teenage son, J.K.[2] The complaint also referenced, among other uncharged allegations of mistreatment, an alleged incident in which Ms. Breitzman slapped J.K. in the car. (2).

B. The Trial

In opening, trial counsel explained that the defense would focus on "the question of reasonable parental discipline." (71:24-25). The State called six witnesses at trial: (1) J.K.[3]; (2) J.K.'s school counselor; (3) J.K.'s girlfriend; (4) J.K.'s friend; (5) a neighbor; and (6) a detective.[4] The defense called three witnesses: two friends of Ms. Breitzman, and Ms. Breitzman herself.

As to Count 1 (abuse), J.K. testified that one day between June and December of 2012, he was in his room in the dark and his mother came in and was upset. (71:38). She told him to get out of bed, he said he wanted to take a nap,

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[2] Ms. Breitzman faced the following counts, as set forth in the Amended Information: (1) Physical Abuse of a Child, Intentional Causation of Bodily Harm (Wis. Stat. § 948.03(2)(b)) (for slapping J.K. resulting in a bloody nose); (2) Physical Abuse of a Child, Intentional Causation of Bodily Harm (Wis. Stat. § 948.03(2)(b)) (for backhanding J.K. resulting in a bruise); (3) Child Neglect, Resulting in Bodily Harm (Wis. Stat. §948.21(1)(b)) (for failing to seek medical care for J.K. on November 18, 2012"); (4) Child Neglect (Wis. Stat. § 948.21(1)(a)) (for locking J.K. out of the house during the winter of 2011-2012); and (5) Disorderly Conduct (Wis. Stat. § 947.01(1)). (17).

[3] J.K. was between fourteen and fifteen years old at the time of these events. *See* (2)(noting J.K.'s date of birth).

[4] The State attempted to call Sergeant Marla Martin as a rebuttal witness; however, the circuit court sustained defense counsel's objection to her testimony. (73:58).

and she hit him in the face with her hand. (71:38-39). He testified that his nose bled and was sore. (71:39). He acknowledged, however, that he had regular nose-bleeds between twelve and fifty-two times a year. (71:87).

As to Count 2 (abuse), he stated that on another occasion during this timeframe, he was watching his sister and sweeping the kitchen. (71:40). He testified that his mother told him that he was not sweeping correctly, grabbed the broom, and hit him with the back of her hand with a clenched fist, causing a bruise. (71:40-42). He acknowledged that the evening after this occurred, he told his mother's friend that his bruise was caused by him dropping a dumbbell on his face. (71:78-82). J.K. testified that he nevertheless told his friend and girlfriend that his mother hit him. (71:43).

As to Count 3 (neglect resulting in bodily harm), J.K. stated that in November of 2012, he became sick and was throwing up and had diarrhea, with "blood in both areas a little bit." (71:45). He stated that he told his mother, who said she would buy him Gatorade at the end of the week if he was still sick. (71:45-46). He testified that he remained sick for six to seven days and posted on Facebook that he was sick and his mother was not taking care of him. (71:46-47). He stated that his next-door neighbor responded, and had her son bring him Gatorade, crackers, and medicine. (71:48). He stated that he told his mother he wanted to go to the doctor, but she did not take him. (71:46).

As to Count 4 (neglect), J.K. testified that during the winter of 2012, one day he came home from school and could not get inside. (71:31). He explained that after he lost his house key in elementary school, his mother did not allow him to have another key. (71:37-38). He stated that it was approximately a thirty-minute walk to the school he chose to

attend. (71:31,70). He rang the doorbell repeatedly with no answer. (71:32-34). He wore a sweatshirt and pants, but did not have a coat, because when he left the house it was "a good 50 degrees." (71:34). When he returned home, though, he believed it was "hitting lower than the 30's." (71:84).

He stated that he could tell someone was home given the car in the driveway. (71:32). After knocking on multiple doors for about thirty minutes, he hid under a grill cover for a few hours. (71:34). He stated that he was getting cold. (71:36). While he was waiting, he tried calling friends and checked next door, but no one answered. (71:34-36). He did not try to call the police, but instead kept trying to call his mother until his phone battery died. (71:84-85). He acknowledged that there were businesses a few blocks away to which he could have walked. (71:85).

J.K. testified that his mother opened the door at about 8:30pm, and said she had been asleep. (71:37). He did not tell her that he had been hiding under the grill cover. (71:90).

As to Count 5 (disorderly conduct), J.K. explained that the night before he reported his mother's behavior to authorities (December 4, 2012), they got into an argument over burnt popcorn. (71:49). He stated that his mother returned home and asked him where he got the popcorn and called him a "retard," "fuck face" and "piece of shit." (71:49). She accused him of hoarding food and called him worthless. (71:49-50). J.K. testified that during this argument he had his friend on the phone, but had put his phone in his pocket because he did not want his mother to see him on the phone. (71:49). J.K. stated that he ran downstairs after this exchange and talked with his friend Duncan about discussing his mother's behavior with police. (71:49). J.K. stated that he

talked with police, and also told his school counselor about his mother's behavior. (71:52-53).

J.K. further testified that his mother refused to buy him glasses after he lost a previous pair, had not taken him to the dentist since he was five years old, and called him names such as "retard" and "fuck face" almost daily. (71:38, 43, 59). He discussed a conversation in which his mother referred to him as a "dog." (71:44). He testified that he did not receive free lunch at school because his mother failed to fill out the paperwork, and explained that he was responsible for taking care of his sister for hours a day while his mother slept. (71:57;61-62). He further stated that after the incident in which he hid under the grill cover, he had to crawl through his window multiple times a week to get in the house. (71:90). J.K. further stated that his mother would put a lock on the refrigerator because she believed he overate. (71:58). He acknowledged that after being taken from his mother's care, he was never taken to a hospital or placed in emergency care because of any health problems. (71:83).

J.K. also testified that he was kicked off the football team because he missed practices due to being sick; however, he clarified that this illness was not the illness which he posted about on Facebook. (71:75-77). He stated, however, that during this separate illness he was also "expelling blood" when using the bathroom and his mother did not take him to the doctor. (71:96-97).

During cross examination, defense counsel asked J.K. questions about his nose bleeds; at one point, he asked J.K.: "You just have a problem with frequent nose bleeds?" (71:87). J.K. answered: "From what it appears. But this was after the incident when she hit me in the car and my nose was bleeding on me." (71:87). Defense counsel did not object to

this testimony, and instead asked J.K. follow-up questions about this incident:

> Q: By the way, was she driving in the car at the time?
>
> A: Yes, sir.
>
> Q: And where were you located?
>
> A: I was in the passenger's seat.
>
> Q: And so it was her attempt to slap you, she was hitting you with the back of her hand at that time?
>
> A. She hit me with the back of her hand.
>
> Q: She couldn't have hit you with the palm of her hand because there wasn't quite a way to do that, right, so she actually had to go this way?
>
> A: Yes, sir.

(71:87-88). On re-direct, the State followed up about this incident. (71:91). The State clarified that this incident was separate from the charged abuse: "So this driving incident that defense counsel questioned you about is a third incident where your mother struck you in the face; isn't that right?" (71:92). J.K. answered yes.

The State asked J.K. to "tell the jury about this incident," and J.K. stated:

> Well, we were in the car and talking, and I told her that I missed my old teacher, she was a Kindergarten teacher, her name is Miss King. I told her about the song that I learned and I started singing it in the car. It was—it's just a little jingle that I learned from school at the time and I always remembered it, and my mother told me that she is the one who taught me the song and I said that,

> you know, no, my—I remember Miss King teaching it to me, and she said no, it was me, and then I said, I'm pretty sure it was me, and she struck me with her hand and told me to shut up.

(71:92). J.K. said that he had a bloody nose as a result. (71:93).

Larry Leinenberger, J.K.'s high school counselor, testified to what J.K. told him: that he was tired of being abused; tired of being called "retarded" and "fuck face" and tired of being smacked in the head. (72:5-9). Autumn G., J.K.'s girlfriend, testified that she at one point saw a bruise on J.K.'s face which lasted about a week, and that J.K. told her that his mother had hit him. (72:9-16). She also testified that J.K. said that his mother did not want to sign the forms to get him free lunch at school. (72:9-16).

Duncan M., J.K.'s friend, testified that he saw a bruise on J.K.'s face and that J.K. told him that his mother had backhanded him. (72:18-20). He testified that he never saw J.K. with lunch and that J.K. told him that his mother would not sign the form to get him free lunch. (72:20-21). He also stated that he overheard the December 4th argument over the telephone, which lasted five to ten minutes. (72:21-25). He testified that Ms. Breitzman said "fuck" a lot and called J.K. names. (72:22). He testified that in the year-and-a-half prior to that incident, J.K. never complained to him about problems with his mother. (72:24-25).

Jennifer Turner, Ms. Breitzman's next-door neighbor, testified that in November of 2012, she saw on Facebook that J.K. wrote that he was sick with the flu and was asking for help. (72:27). She stated that she offered some items to J.K.. (72:26-28). She also testified that J.K. called her on

December 4, 2012, and told her that he was being abused and needed a place to stay. (72:28).

Detective Jessica Wink testified that Ms. Breitzman admitted to calling her son names and to backhanding her son in the car over a song. (72:34-35). Detective Wink stated that Ms. Breitzman acknowledged that she "backhands and slaps," as well as doing "sporadic" "hair pulling," but "did not make any specific mention on any certain incidents." (72:35). She noted that Ms. Breitzman stated that her son was irresponsible and loses his keys. (72:36-38). She stated that Ms. Breitzman said that her son refused to wear glasses and would hoard food. (72:36-37). She testified that she asked Ms. Breitzman if she knew where her son was currently staying, as he had left her house, and Ms. Breitzman said she did not know. (72:39).

The State moved into evidence six exhibits: Exhibit 1 was J.K.'s Facebook posting complaining about his mother not taking his illness seriously. (71:47;82). Exhibits 2-6 were text messages between J.K. and Ms. Breitzman in which J.K. asked his mother to not call him names, and a text message from Ms. Breitzman in which she told J.K. that he eats leftovers and makes a mess like the "family dog." (71:56-57;82). Defense counsel did not object to these text messages as other-acts evidence. (72:63).

Defense witness Ramona Smith testified that she had known Ms. Breitzman for twenty-eight years and knew her children. (72:63-65). She testified that in 2012, J.K. became defiant against his mother. (72:65-65). On cross-examination, she acknowledged having been convicted of one crime in the past. (72:67). Dan Percifield testified that he was at Ms. Breitzman's "a lot" from June to December of 2012. (73:48). He stated that J.K. became more challenging when J.K. began

dating his girlfriend, and he told Ms. Breitzman to discipline J.K. more. (73:49). He stated that he at times saw J.K. yell at his mother, but also that he heard her call J.K. names, including "fuck face" "more than a couple times." (73:52-55).

Ms. Breitzman testified that her son became defiant in 2012. (72:75-76). She explained that she raised him by herself, as his father was in prison out of state. (72:71). With regard to Count 1 (abuse), Ms. Breitzman explained that she did not hit J.K., but that her son noted that his nose was wet when he woke up and that she saw blood on his mattress. (72:78-79). With regard to Count 2 (abuse), Ms. Breitzman explained that J.K. was doing a poor job at sweeping the floor, and she told him that he was incompetent. (72:78-79). She testified that he talked back to her and she took the broom from him and sent him to his room, but did not slap him. (72:79-80). She testified that she did remember seeing a bruise and that her son told her this was caused by him dropping a dumbbell on his face. (72:91-93).

With regard to the (uncharged) incident in the car, she stated that she did hit her son with the back of her hand. (72:80-81). She testified that he was interrupting her and "getting loud" with her. (72:85). She testified that this was the only time she slapped or backhanded her son. (72:101).

With regard to Count 3 (neglect resulting in bodily harm), she explained that one morning J.K. told her he was throwing up. (72:95-96). She testified that he went in the bathroom, she did not hear him vomiting, and he came out "just as quick as you can urinate." (72:96). She stated that at mid-day he again said he was sick, and she told him to eat crackers and drink Gatorade, juice, and water. (72:96). Later that day, he told her that he was vomiting blood; however, she believed this was the result of his drinking red-colored

Gatorade. (72:96-97). She testified that his illness did not persist for days. (72:96). With regard J.K.'s testimony that on another (uncharged) occasion he became sick and was kicked off the football team, she testified that her son did not tell her about the coach needing an excuse until after he was told he could not play. (72:87). She stated that during this time, he was healthy enough to hang out with his girlfriend, and was not in bed the whole time. (72:87).

With regard to J.K. hiding under the grill cover (Count 4, neglect), she explained that she is generally the type of person who sleeps during the day and is up at night, and was not aware that her son was outside until she woke up and heard the doorbell. (72:72-73). She noted that he has friends within a few blocks and other people who he can call should he get locked out. (72:74-75). She stated that on this occasion he said he did not call those people because his phone died. (72:75). She also noted that it was fifty degrees that day, and that her son told her that he had been in the family's playhouse. (73:40-43).

With regard to Count 5 (disorderly conduct), she did not deny being "belligerent" with her son on that day. (73:29).

She acknowledged that she did have a lock on the refrigerator many years ago, but that served as a deterrent for him to "make him think" before eating odd foods; further, he knew the code. (72:108-109). She testified that she did fill out the paperwork for free lunch for J.K., but was told that she had done so incorrectly. She asked J.K. to get another form but he did not. (72:107-108). She said she could have driven to the school to complete the form, but wanted her son to be responsible. (72:108). She also noted that there were always "things at [her] house he could have prepared and taken to

school." (72:108). She further testified that she purchased pairs of glasses for her son; however, he would not keep them on. (72: 94-95).

Defense counsel moved for an instruction on reasonable parental discipline. (72:110-14; 74:3-20).[5] The State objected to this, noting that Ms. Breitzman was not asserting parental discipline with regard to either of the charged child abuse counts. (72:110-14). With regard to her admission of slapping J.K. in the car, the State noted: "the State never went there with regards to this other act until the defense opened the door. When he opened the door, I kicked it in and I went there, but it was not the State's intent to even go into that particular issue until the defense introduced testimony about that particular act." (73:6). The circuit court agreed that the "very first time this came up was through defense questioning"; "the amended information is very clear that this act was not part of it." (73:7).

The court noted that the situation was "awkward," that it "usually deal[s] with this ahead of time" but it "came in through the defense." (73:68). The court stated: "[h]ad the defense moved me to exclude it, I would have considered doing so or heard some or do an analysis about other acts." (73:68). Defense counsel explained that it was his "feeling at the time it was in the criminal complaint from the start. It's part of the whole context of the case." (73:11).

The court agreed to read an instruction explaining that the jury should only consider the car slapping "on the issues of intent and context or background," and not to conclude that "the defendant has a certain character or a certain character

[5] Record index item 74 is the transcript of the May 22, 2013 afternoon session. The transcript itself is incorrectly labeled as "morning session."

trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case." (73:88-89). This instruction included an explanation that, as to striking J.K. "in the car, discipline of the child is an issue. The law allows a person responsible for the child's welfare to use reasonable force to discipline that child." (73:88-89).

The court denied defense counsel's motion to dismiss the counts for failure of the State to meet its burden. (73:59-67). In rebuttal during closing arguments, the State explained that it did not charge the "car incident" because it did not know where it occurred. (74:36).[6] The State also emphasized that the defense argument had changed since its opening statement—from a question of reasonable discipline to now that "she didn't do it." (74:33).

The jury found Ms. Breitzman guilty on all counts, and the circuit court denied the defense motion notwithstanding the verdicts. (75).

C. Post-Conviction Litigation

Ms. Breitzman filed a post-conviction motion, seeking judgments of acquittal on Counts 3-5 on grounds of insufficient evidence; further, with regard to Count 5 (disorderly conduct), on grounds of ineffective assistance of counsel for failure to argue that the charge violated her constitutional free speech protections. (53). She also moved for a new trial on any remaining counts on grounds that she was denied the effective assistance of counsel as her attorney (1) opened the door to the admission of prejudicial other-acts

[6] The transcript of this May 22, 2013 afternoon session appears to be improperly labeled as a "morning" session. (74).

evidence, and (2) asserted a defense which was inconsistent with Ms. Breitzman's testimony. (53).[7,8]

Following court-ordered briefing, (54,59,60), the court held a ***Machner*** hearing. (77;App.145-203).

At the hearing, trial counsel testified that he "contemplated" a First Amendment challenge to the disorderly conduct charge, but did not raise it because he decided it would "not be appropriate" based on his experience with disorderly conduct "and the broad parameters in which normally something like that would be seen as inappropriate because it was too shallow and there wasn't enough guts to it." (77:6-7;App.150-151). He noted that he talked with his client about her conversations with her son and decided "on a different course." (77:7;App.151).

Counsel testified that he talked with Ms. Breitzman prior to trial about both the two charged allegations of child abuse and the uncharged slapping in the car. (77:7-10;App.151-154). He explained that Ms. Breitzman "repeatedly" noted that she wished to testify at trial. (77:8;App.152). Counsel testified that Ms. Breitzman told him that: "[t]he only time she recalled slapping [her son] was the incident in the car," and that "it was possible that she may have slapped him at times in the past," but "those times," (referencing the two charged allegations of abuse) "did not occur." (77:9;App.153). When pressed on this issue later in the hearing, counsel noted that he could not recall whether

[7] In her post-conviction motion, she also argued that trial counsel failed to object to the admission of hearsay; however, she withdrew this argument in her post-conviction reply. (53;60).

[8] Ms. Breitzman also asked the court to vacate the DNA surcharge; the court granted this request and amended the judgment accordingly. (53;62;64;App.106-108).

Ms. Breitzman categorically denied striking her child during the instances charged in Counts 1 and 2. (77:26,34;App.170,178).

Counsel acknowledged that the complaint contained allegations about Ms. Breitzman's treatment of her son beyond the charges. (77:11;App.155). The State stipulated that the uncharged slapping was referenced in the complaint. (77:12;App.156). Counsel recognized that the complaint also referenced such other things as Ms. Breitzman allegedly not buying her son glasses and not taking him to the dentist regularly. (77:12-13;App.156-157). He acknowledged that he had been aware of these allegations prior to trial. (77:13;App.157). He confirmed that he was also aware of an uncharged allegation of Ms. Breitzman not taking her son to the doctor, resulting in him being kicked off the football team. (77:13;App.157). Counsel acknowledged that "any allegation that the child raises to try to express what they believe is abuse is negative," and agreed that this information reflected poorly on his client. (77:14;App.158).

When asked why he did not file a motion in limine to preclude any reference to these other allegations of bad behavior, counsel answered:

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

(77:14-15;App.158-159). When asked why he did not object when the State presented evidence about these other,

uncharged allegations of her as a bad mother, counsel responded:

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

(77:16;App.160). He noted that he thought it best not to "sit there and make lots of objections on things that would be overruled,", and instead "let the jury see what is the other side here:" "They're obviously letting them talk about this stuff. Let's see what happens when the mother gets up there." (77:16;App.160).

When asked how the subject of the uncharged allegation (of slapping in the car) came up in the context of questioning Ms. Breitzman's son, counsel noted that there "were certain things we wanted to bring up and put into the record so there was a basis the jury was aware of before the defendant took the stand, and that was one of them." (77:18;App.162). "He had some kind of nosebleed problem generally, but he was claiming the number of times the mother had caused nosebleeds, and I wanted to get that into the record so the jury would be wondering about that before we got to the defense where the mother could explain it." (77:18;App.162).

Counsel further noted that he questioned J.K. about this incident "because it wouldn't make sense later if we provided that as a defense, but we had objected to its introduction." (77:20;App.164). He noted that he discussed this strategy with Ms. Breitzman and she agreed to it. (77:20-21;App.164-165). He believed this uncharged allegation was

important to discuss because "if you don't show that there was a clear time where the mother did something to the child to make him become specifically angry at her…there would not be a full-enough context for the jury to consider what it was that was going on here." (77:29;App.173). He noted that Ms. Breitzman believed that this uncharged incident was one of the motivating factors for her son to fabricate the other accusations. (77:30;App.174).

Defense counsel addressed why he requested the reasonable parental discipline instruction:

> Because it was the only major defense position I believed we could take, regardless of all the charges, because jurors tend to take the position of how they feel about things, and sometimes they don't entirely agree with what the law is or how they read the jury instructions.
>
> They're really trying to decide which side is telling the truth in the end, and I felt, regardless, if you don't have a defense to some of the charges, the major ones, and the major morality of this case was whether he had a struggling mother doing the best she could or whether we had a mother engaged in abuse and would continue to do that with the child.

(77:24;App.168). He noted that Ms. Breitzman agreed with this strategy. (77:24;App.168).

Ms. Breitzman testified at the ***Machner*** hearing. She stated that she talked with her attorney prior to trial, and told him that the two charges of abuse did not happen. (77:40-41;App.184-185). She testified that her attorney never told her he planned to bring up the uncharged allegation of slapping at trial, and that she never told him she wanted him to bring this up. (77:41;App.185). She further noted that when

talking with her attorney, she noted that she would be honest about the uncharged incident if it came up. (77:53;App.197).

Ms. Breitzman testified that part of the strategy was to show the jury that her son was rebellious, but explained that she was never asserting physical discipline with regard to the abuse charges. (77:47,51;App.191,195). She did acknowledge that she would have to "explain away" the fact that she had slapped him in the past. (77:50;App.194). She recognized that she did not voice an objection when her attorney asked for the instruction, but noted that she did not understand until recently that "his defense of me that that was reasonable discipline basically meant that I was incriminating myself and that I had done those things when I hadn't." (77:48;App.192).

Following testimony, the court ordered supplemental briefing and scheduled the matter for an oral ruling. (77:58;App.202). Ms. Breitzman filed a supplemental brief; the State did not. (61;80:2;App.113).

At the oral ruling, the circuit court granted Ms. Breitzman's motion for a judgment of acquittal on Count 3 (neglecting a child resulting in bodily harm for not taking him to the doctor) on grounds of insufficient evidence. (80:3-7;App.114-118). The court denied Ms. Breitzman's remaining motions for acquittal and for a new trial on any remaining counts. (80:7-32;App.118-143).

With regard to Count 4 (child neglect for J.K. being locked outside of the house), the court concluded that "being locked out of the house in that kind of cold certainly could seriously endanger the physical health of the child." (80:7-8;App.118-119).

With regard to Ms. Breitzman's challenge to Count 5 (disorderly conduct), the court found that there was "ample

testimony that these words used by Ms. Breitzman tended to cause or provoke a disturbance." (80:8-10;App.119-121). The court noted that J.K. was crying and talked to a counselor and the police; further, it noted that the mother-son relationship contributed to this behavior tending to cause or provoke a disturbance. (80:10-11;App.121-122).

The circuit court rejected Ms. Breitzman's claim that she was denied the effective assistance of counsel where counsel failed challenge this charge on First Amendment grounds. (80:11-16;App.122-127). The court noted that it "would agree" that her statements were not a true threat, but nevertheless concluded that, under ***Chaplinsky v. New Hampshire***, 315 U.S. 568 (1942), there was "nothing valuable about the words that Ms. Breitzman used." (80:14-16;App.125-127).

The court also denied Ms. Breitzman's claim that she was denied the effective assistance of counsel when counsel failed to move to preclude admission of prejudicial other-acts evidence. (80:16-24;App.127-135). With regard to the uncharged alleged slapping, the court noted that "J.K. brought it up himself" at trial. (80:17;App.128). The court concluded that the all of the other-acts at issue "fit within" the "framework" of the defense strategy, to use this "essentially to challenge J.K.'s credibility." (80:18-19;App.129-130). The court noted that it did not believe Ms. Breitzman's testimony "that this wasn't the strategy." (80:20;App.130). The court concluded that trial counsel's strategy did not appear to be simply a "made-up strategy" articulated post-conviction. (80:20). The court found that this strategy fit with what counsel asserted at trial, and found that Ms. Breitzman had agreed to this strategy. (80:20-23;App.131-134). The court also noted that it instructed the jury with regard to other

conduct, including the uncharged alleged slapping. (80:30-31;App.141-142).

With regard to Ms. Breitzman's argument that counsel argued a theory of defense inconsistent with her testimony, the court noted that counsel's reference to reasonable parental discipline in opening was "very vague" (80:25-27;App.136-138). Additionally, "in terms of parental discipline, [counsel] testified that Ms. Breitzman didn't deny having used it; therefore, he wanted to incorporate it to show that there were times that it was appropriate. But those times didn't necessarily apply to these specific times, but that the child had exaggerated or confused or mushed them all together." (80:28;App.139). The court concluded that counsel's position was not "ineffective in any way." (80:29;App.140).

The circuit court entered a written order reflecting its oral pronouncements, and a judgment of acquittal was entered on Count 3. (62;63;App.109-111).

Ms. Breitzman filed a notice of appeal (65), and now appeals the circuit court's order denying her request for judgments of acquittal on Counts 4 and 5, and for a new trial on any remaining counts.

ARGUMENT

Introduction

The Complaint in this case—an eight-page document which ventured far beyond the charges to discussing everything from Ms. Breitzman allegedly pulling her son's hair as a form of punishment "for years" to Ms. Breitzman allegedly not taking her son to the dentist, (2)—reflects that from the beginning, the State was accusing Ms. Breitzman of of being an all-around bad mother.

But the question before the jury was not whether Ms. Breitzman was a perfect mother to her son; the question was whether the State could prove beyond a reasonable doubt that she was guilty of the serious criminal charges it levied against her. Even viewed in the light most favorable to the jury's verdicts, the State failed to meet its burden on multiple counts.

Without any motions or objections from trial counsel to limit the evidence at trial to matters relevant to the particular charges, the trial, just like the Complaint, extended far beyond an examination of the charges to an overall indictment of Ms. Breitzman as a mother. To add to this, trial counsel opened the door to discussion of an uncharged allegation of Ms. Breitzman slapping her son, and argued a defense of reasonable parental discipline to the two charged counts of abuse, even though Ms. Breitzman testified that she did *not* hit her son on those occasions.

Instead of the jury hearing Ms. Breitzman's son's account of the charged behavior, and weighing that against her account of the charges, the jury heard the myriad ways she was allegedly a bad mother to her son, learned of an uncharged incident in which she acknowledged hitting her son, and were presented with a theory of defense which contradicted Ms. Breitzman's own testimony.

I. The State Presented Insufficient Evidence to Meet its Burden to Prove that Ms. Breitzman was Guilty of Child Neglect and Disorderly Conduct.

A conviction that is based upon insufficient evidence cannot constitutionally stand. ***Jackson v. Virginia***, 443 U.S. 307 (1979). The due process clause of the United States and Wisconsin constitutions provide individuals with protection from conviction in a criminal case except "upon proof beyond

a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship,*** 397 U.S. 358, 365 (1970); *accord* ***State v. (Bonnie) Smith,*** 117 Wis. 2d 399, 415, 344 N.W.2d 711 (Ct. App. 1983). The evidence must be "sufficiently strong and convincing to exclude every reasonable hypothesis consistent with the defendant's innocence in order to meet the demanding standard of proof beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 502, 451 N.W.2d 752 (1990).

Though facts may be established by reasonable inferences as well as direct evidence, an inference is reasonable only if it can fairly be drawn from the facts in evidence. ***In re Paternity of A.M.C.***, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988). A proper inference is one drawn from logic and proper deduction. ***Id.*** And while "a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." ***Piaskowski v. Bett***, 256 F.3d 687, 693 (7th Cir. 2001); ***Yelk v. Seefeldt,*** 35 Wis. 2d 271, 280-81, 151 N.W.2d 4 (1967).

In Wisconsin, a criminal defendant may challenge the sufficiency of the evidence on appeal regardless of whether he specifically raised the issue at trial. ***State v. Hayes***, 2004 WI 80, ¶4, 273 Wis. 2d 1, 681 N.W.2d 203. An appellate court does not substitute its judgment for the fact-finder, but instead asks whether the evidence, viewed in the light most favorable to the State, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***Id.***, ¶56. If the reviewing court concludes the evidence was insufficient, the conviction must be reversed, with a remand to the circuit court for entry of a judgment of acquittal. ***State v. Wulff***, 207 Wis. 2d 143,

144-145, 557 N.W.2d 813 (1997) (citing ***Burks v. United States***, 437 U.S. 1, 18 (1978)).

A. The State Failed to Prove that Ms. Breitzman was Guilty of Child Neglect, Where Her Teenage Son Was Locked Out of the House After School and Remained Outside For a Few Hours and Felt Cold, Instead of Walking to Nearby Businesses to Avoid the Cold.

The State charged Ms. Breitzman with child neglect, in violation of Wisconsin Statute § 948.21(1)(a), for not unlocking the door for J.K. when he came home from school, such that he was outside for a few hours during the winter and became cold (Count 4). This offense required the State to prove that (1) J.K. was under 18, (2) Ms. Breitzman was responsible for J.K.'s welfare, and (3) that Ms. Breitzman "intentionally contributed to the neglect" of J.K. Wis. Stat. § 948.21(1)(a); Wis. JI-CRIM 2150.

"Intentionally contributed" "means that the defendant either had a purpose to contribute to neglect or was aware that her action or failure to take action was practically certain to cause that result." Wis. JI-CRIM 2150. Neglect occurs when the person fails "for reasons other than poverty to provide necessary care, food, clothing, medical or dental care, or shelter so as to *seriously endanger the physical health of the child*." ***Id.*** (emphasis added). The State is not required to prove that the child actually became neglected; instead, a "defendant's action or failure to take action contributes to the neglect of a child if the natural and probable consequences would be to cause the child to become neglected." ***Id.***

The State here failed to prove that Ms. Breitzman's actions or lack thereof "seriously endanger[ed]" J.K.'s "physical health." J.K., a teenager, testified that when he left

for school that morning, he chose not to wear a coat because when he left the house it was a "good 50 degrees." (71:34). He testified that by the time he came home, the temperature was "hitting lower than the 30's." (71:84).

Though J.K. did not have a house key, he had a cell phone, and acknowledged that there were businesses a few blocks away to which he could have walked. (71:37-38,84-85). Instead, however, J.K. chose to stay at the house under the grill cover, according to his testimony. (71:37-38,84-85).

With regard to how this experience physically affected him, he testified:

> Both my hands were getting cold and face started getting cold, I had to blow in my hands and put them on my face, and like just my pants, my legs were getting cold because I was wearing regular jeans, and so I wanted to warm my whole body but I could not with my hands, they were too cold so I used a grill cover.

(71:36). He testified that he also put his hands in his pockets, and that he used the grill cover for "[a]bout two or three hours." (71:36).

This evidence, even viewed in the light most favorable to the State—wholly failed to establish that Ms. Breitzman's actions *seriously endangered* J.K.'s physical health. While of course unpleasant and unfortunate that J.K. was unable to get inside of his house, the fact that J.K. became cold does not in and of itself demonstrate beyond a reasonable doubt that his physical health was placed in *serious danger*. Indeed, he himself acknowledged that he could have walked to nearby businesses to avoid the cold, but did not do so. If the evidence presented was sufficient for a jury to conclude that Ms. Breitzman was guilty of child neglect, would that not mean that whenever a parent does not force a teenager to wear a

coat, and the teenager becomes cold, that parent would also could also face charges of criminal child neglect?

Again, the question before the jury was not whether Ms. Breitzman's behavior was ideal; the question was whether the State could prove beyond a reasonable doubt that her action or inaction seriously endangered the physical health of her teenage son. The State failed to meet this burden and this Court should enter an order reversing her conviction for Count 4 (Child Neglect) and remanding this matter to the circuit court for the entry of a judgment of acquittal.

B. The State Presented Insufficient Evidence to Prove that Ms. Breitzman was Guilty of Disorderly Conduct for Calling Her Son Unpleasant Names in the Privacy of Her Own Home.

The State charged Ms. Breitzman with disorderly conduct (Count 5), in violation of Wis. Stat. § 947.01(1), for calling her son inappropriate names. The disorderly conduct statute required the State to establish that she, "in a public or private place," engaged in "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct,"[9] and that she did so under circumstances in which the conduct "tended to cause or provoke a disturbance." Wis. Stat. § 947.01; Wis. JI-CRIM 1900. This does not require that an actual disturbance occurred, only that the behavior be "of a type that tends to cause or provoke a disturbance." Wis. JI-CRIM 1900.

J.K. testified that his mother called him a "retard," a "fuck face," and a "piece of shit," and said that he was

[9] Here, the State alleged that the charge was that Ms. Breitzman engaged in profane conduct. (17).

worthless. (71:49-50). Duncan M.—J.K.'s friend listening over the phone—testified that he heard Ms. Breitzman say "fuck" a lot and call J.K. names. (72:17-25). Ms. Breitzman did not deny becoming "belligerent" with her son on that occasion. (73:29). Even viewed in the light most favorable to the State, Ms. Breitzman's language did not rise to a level that would tend to "cause or provoke a disturbance." Indeed, to say that it did would seemingly mean that the *crime* of disorderly conduct occurs every time a family member refers to another by a rude or offensive name inside that private family home. Though impolite and insensitive, the names Ms. Breitzman allegedly called J.K. in their own home did not rise to the level necessary to establish that her behavior was of the type which would tend to cause or provoke a disturbance such that it constituted the crime of disorderly conduct.

II. Ms. Breitzman was Denied the Effective Assistance of Counsel.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Smith***, 207 Wis. 2d at 273.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced his defense. ***State v. Artic***, 2010 WI 83, ¶ 24, 327 Wis. 2d 392, 768 N.W.2d 430. To prove deficient performance, the defendant must "identify the acts or omissions of counsel that

are alleged not to have been the result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Smith***, 207 Wis. 2d at 276 (citing ***Strickland***, 466 U.S. at 694).

An ineffective assistance of counsel claim presents a mixed question of law and fact. A circuit court's findings of fact will not be overturned unless clearly erroneous. Its legal conclusions as to whether a lawyer's performance was deficient and prejudicial are questions of law that are reviewed *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990).

While a reviewing court will not second-guess a *reasonable* trial strategy, a reviewing court may conclude that an attorney's performance was deficient if based on an *irrational* trial tactic or based on caprice rather than judgment. ***State v. Domke***, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364.

A. Counsel Performed Deficiently By Failing to Move to Dismiss the Disorderly Conduct Charge Against Her on Grounds that it Violated Her Constitutional Rights to Free Speech.

i. Case law addressing free speech and disorderly conduct

Both the U.S. and Wisconsin Constitutions protect the right to free speech. U.S. Const. amend I; Wis. Const. art. I, § 3. Statutes generally enjoy a presumption of constitutionality

that the challenger must refute, but in First Amendment cases the burden is reversed and the State must demonstrate constitutionality beyond a reasonable doubt. ***State v. Weidner***, 2000 WI 52, ¶7,235 Wis. 2d 306, 611 N.W.2d 684.

Pursuant to both constitutions, the government may not punish a person for the *content* of speech unless the speech falls into one of a few narrow categories defined by the U.S. Supreme Court: among them "fighting words," incitement, obscenity, libel and defamatory speech, and "true threats." ***R.A.V. v. City of St. Paul, Minn.***, 505 U.S. 377, 382-83 (1992).

The Wisconsin Supreme Court has held that the First Amendment does not inherently bar the State from applying the disorderly conduct statute to speech alone—*if* the speech is unprotected under the First Amendment. ***In re Douglas D.***, 2001 WI 47, ¶ 21, 243 Wis. 2d 204, 626 N.W.2d 725. The Court reached this conclusion under the rationale that even though the disorderly conduct statute may be applied to speech, "this application is permissible because the application is not directed at the content of the speech itself. Instead, the prosecution is directed at controlling the harmful effects of the speech"—speech which by its "very nature cause[s] a breach of the peace." ***In re A.S.***, 2001 WI 48, ¶ 15, 243 Wis. 2d 173, 626 N.W.2d 712.

The Wisconsin Supreme Court has also explained that the disorderly conduct statute "encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, *as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well.*" ***State v. Schwebke***, 2002 WI 55, ¶ 30, 253 Wis. 2d 1, 644 N.W.2d 666 (emphasis added). "Conduct is not

punishable under the statute when it tends to cause only personal annoyance to a person." ***Id.***

For example, in the case of ***In re Douglas D.***, the Wisconsin Supreme Court concluded that an eighth-grade student's written story, which involved a student cutting a teacher's head off with a machete—which the student's teacher perceived as a threat—did not constitute a "true threat" and as such was protected under the First Amendment. 2001 WI 47, ¶¶ 6-41. In so doing, the Court noted that while it found the student's story to be "offensive and distasteful," the Court's "feelings of offense and distaste do not allow [the Court] to set aside the Constitution." ***Id.***, ¶ 41.

ii. While unpleasant, Ms. Breitzman's statements to her son were constitutionally protected free speech.

At the ***Machner*** hearing, defense counsel asserted that he did not raise a First Amendment challenge because of his experience concerning disorderly conduct charges and what would be "inappropriate," and because he found it to be too "shallow." (77:7;App.151). Counsel thus did not articulate a strategic reason for not pursuing a First Amendment challenge, other than his belief that such a motion would not be successful.

The question, however, was not whether Ms. Breitzman's comments were inappropriate, but whether they fell under any of the narrow exceptions to our constitutional protections against criminalizing speech: they were not an incitement, were not obscene, and were not a threat. Though degrading, her statements were not libelous or defamatory; a communication is defamatory if it "tends to so harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from

associating with or dealing with him [or her]." ***Bauer v. Murphy***, 191 Wis. 2d 517, 523, 530 N.W.2d 1 (Ct. App. 1995). Nor were they "fighting words" in the limited First Amendment definition: they were not words which by their very utterance "tend to incite an immediate breach of the peace." ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 573 (1942). The U.S. Supreme Court has explained that "fighting words" are "analogous to a noisy sound truck"—the "nonspeech" elements of the communication are unprotected, but the government may not regulate the "underlying message expressed." ***R.A.V. v. City of St. Paul***, 505 U.S. 377, 386 (1992).

As our Wisconsin Supreme Court has explained when upholding the disorderly conduct statute in a separate First Amendment Challenge, "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious." ***In re A.S.***, 2001 WI 48, ¶ 41, 243 Wis. 2d 173, 626 N.W.2d 712 (quoting ***Feiner v. New York***, 340 U.S. 315 (1951)).

Such threats to public order were not present here. Ms. Breitzman made her statements to her son within their own home and, though overheard by her son's friend who was unbeknownst to Ms. Breitzman listening over the phone, her words did not create the real possibility that the disturbance would spill over and disrupt the peace or safety of the community. [10]

[10] At the ***Machner*** hearing, the State asked defense counsel, and defense counsel confirmed, that as part of this charge the State further alleged that Ms. Breitzman also tried to kick her son out of the house; however, counsel explained that a "comment like that would be typical but would not be something that she necessarily ever followed through

Here, the State was indeed punishing her for the *content* of her speech. For example, if Ms. Breitzman had—in the same manner, tone, and context—instead told her son: "you are behaving poorly," "I am disappointed in you," and "you have been disrespectful," the State would presumably not have charged her with disorderly conduct. Instead, she was charged for the particular words she used. But just as in ***Douglas D.***, here too this Court should not allow itself to "set aside the Constitution" because of "feelings of offense and distaste." 2001 WI 47, ¶ 41.

As the State was punishing Ms. Breitzman for the content of speech which did not fall under any of the limited exceptions to her constitutional protections, trial counsel performed deficiently by failing to move to dismiss the disorderly conduct charge (Count 5). At the ***Machner*** hearing, counsel's rationale for not raising the issue was in essence because he did not believe it was a viable issue—that he did not believe there were "enough guts to it." (77:6-7;App.150-151). Given, however, that Ms. Breitzman's statements to her son were indeed protected free speech, and that it would have been the State's burden to prove that the speech was constitutional, no reasonable strategy existed for counsel's failure to bring such a motion.

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on in trying to shake some sense when he would be getting dramatic." (77:22;32,App.166,176). J.K. testified at trial that his mother called him names and at one point told him to grab his things because she was going to call the police, but he told her not to do so. (71:48-52). The State never presented any evidence at trial reflecting that Ms. Breitzman ever attempted to actually throw her son out of the house during this incident. (*See generally* 71;72); Importantly, the State charged Ms. Breitzman with disorderly conduct for her allegedly *profane* conduct, and the jury was so instructed. (17;73:83).

B. Counsel Performed Deficiently By Failing to Object to the Admission of a Barrage of Improper Other-Acts Evidence which Painted Her as an All-Around Bad Mother.

Generally, evidence of other crimes, wrongs, or acts is not admissible during trial to "prove the character of a person in order to show that the person acted in conformity therewith." Wis. Stat. § 904.04(2). This is in part because of the "overstrong tendency to believe the defendant is guilty of the charge merely because he is a person likely to do such acts." ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). However, other acts evidence is allowed when the evidence is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2). The analysis asks three questions: (1) Does the evidence fit within any exceptions set forth in Wis. Stat. § 904.04(2)? (2) Is the evidence relevant under Wis. Stat. §904.01? (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice under Wis. Stat. § 904.03? ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

Trial counsel performed deficiently by both failing to file a motion in limine to preclude, and failure to object to, a flood of improper other-acts evidence, and further by opening the door to a damning piece of other-acts evidence which undermined the defense.

Defense counsel should have moved to preclude reference to the admission of testimony concerning: Ms. Breitzman's alleged failure to purchase J.K. glasses or take him to the dentist; failure to complete the paperwork for his free lunches; and her actions towards J.K.'s eating habits.

(71:38,43-44,57-62;72:9-25). This testimony bore no relevance to the charges and created the high risk of unfair prejudice, as it served no purpose other than to portray her as a bad mother.

Defense counsel also should have objected to testimony concerning the allegation that on an occasion other than the one charged, Ms. Breitzman refused to take J.K. to the doctor, resulting in him getting kicked off the football team. (71:75-77;96-97). Counsel further should have objected to any testimony concerning any names Ms. Breitzman allegedly called J.K. on occasion, any difficulty J.K. had getting into the house, or any unspecific allegations of slapping or hair pulling, other than those instances charged. (***Id.*** at 43-44, 59; 5/21/13 PM at 5-9, 35). Any relevance this general testimony may have had was significantly outweighed by the unfair prejudice created by suggesting that Ms. Breitzman had a pattern of ignoring J.K.'s needs and treating him poorly.

Further, defense counsel should have moved to exclude—instead of opening the door to—testimony about the uncharged slapping incident in the car. When defense counsel asked J.K. about whether he had a problem with frequent nose bleeds, and J.K. answered affirmatively but then continued on to reference the alleged incident in which his mother hit him in the car, defense counsel should have objected on grounds of other-acts evidence.[11] Instead, defense counsel asked J.K. a series of follow-up questions which provided a detailed account to the jury of the slap in the car over a song. (71:87-88). Eliciting testimony about a third alleged slapping—which Ms. Breitzman then testified

[11] Counsel first and foremost should have filed a pre-trial motion in limine to preclude testimony about this incident.

did occur—made the defense argument appear completely incredible and instead bolstered the credibility of J.K.'s allegations.

Indeed, the State noted on the record that it was "not the State's intent to even go into that particular issue" until "the defense opened the door." (73:6). The circuit court too acknowledged that it was the defense that brought this allegation up, and further that it would have considered a defense motion to exclude it or "do an analysis about other acts" had the defense brought such a motion. (73:68).

Without the admission of this other-acts evidence, Ms. Breitzman would not have had to address these uncharged allegations in her testimony. The jury would have instead been presented with J.K.'s testimony that slapping did occur on the charged occasions, and her testimony that it did not.

Trial counsel's purported strategy for instead welcoming all of this damaging other-acts evidence was irrational. He explained that he believed that by allowing into evidence reference to all of the other-acts evidence portraying her as a bad mother, the jury would see that J.K. was exaggerating and would "lose credibility." (77:16;App.160). Such a theory only works, however, if you can *disprove* any of those allegations. For example, if counsel had presented records demonstrating that in fact Ms. Breitzman *had* taken her son to the dentist or receipts reflecting that she *had* bought him glasses, then one could reasonably say that allowing in this evidence (to be able to then disprove it) would undermine J.K.'s credibility by proving he was being dishonest.

But counsel presented no such evidence. Instead, all the jury heard were the many, many ways that Ms. Breitzman

was purportedly a bad mother to her son. This faulty strategy hurt, not helped, the defense.

So too was counsel's questioning of J.K. about the uncharged slapping in the car. Counsel explained that he wished to introduce it as part of the defense to show that—because Ms. Breitzman *had* slapped her son in the car—J.K. had motive to lie and make up the two counts of abuse for which she was charged. (77:20-21;App.164-165). This strategy makes no sense. Imagine if, in a trial for two counts of violent sexual assault, the defense attorney (knowing that his client will testify that he did not sexually assault this woman on either of the two charged occasions), introduces evidence of a time where his client *did* violently sexually assault the woman. What is a jury more likely to conclude from this evidence: that because he did assault her once she lied about two other assaults for revenge, or instead that because he did in fact assault her once, he likely assaulted her the other two times as well?

During the trial, when the court noted that it would have considered an other-acts challenge to the uncharged slapping, defense counsel responded by stating that it was "his feeling at the time" that it was "in the criminal complaint from the start. It's part of the whole context of the case." (73:11). At the ***Machner*** hearing, defense counsel further explained that he thought it best not to "sit there and make lots of objections." (77:16;App.160). But this ignores the fact that he could, and should, have filed a pre-trial motion to exclude this evidence.

C. Counsel Performed Deficiently By Arguing a Theory of Defense In Opening Statement Which Contradicted Ms. Breitzman's Anticipated Testimony.

Defense counsel argued in his opening statement that the focus of the defense case would be on the question of reasonable parental discipline. (71:24-25). Ms. Breitzman, however, testified that she did *not* hit her son on the two instances charged. (71:78-93).

Counsel acknowledged at the ***Machner*** hearing that prior to trial, Ms. Breitzman told him that she had hit her son in the uncharged incident in the car, but that she had not slapped her son on the two charged occasions. (77:9-10;App.153-154). Though counsel later said he could not remember for certain whether she categorically denied striking her son on those occasions, the circuit court's fact-findings reflect counsel's original testimony about his conversations with Ms. Breitzman—that while she may have slapped him on other occasions, she did not slap him in the two charged accounts (counsel wanted to incorporate reasonable parental discipline "to show that there were times that it was appropriate. *But those times didn't necessarily apply to these specific times*, but that the child had exaggerated or confused or mushed them all together")(80:29;App.140)(emphasis added).

It was an irrational strategy for counsel to argue a theory of defense which (1) applied only to an uncharged incident which should not have been discussed at the trial anyway, and (2) contradicted his client's testimony. Without any physical evidence, credibility was key. By arguing a theory of defense which contradicted his client's own anticipated testimony, counsel incorrectly suggested to the

jury that his client's testimony had changed and that she was now lying.

D. Prejudice

Each of the above alleged deficiencies alone is sufficient for Ms. Breitzman to show prejudice. Taken together, the errors were overwhelming. *See* ***State v. Thiel***, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305 ("Prejudice should be assessed based on the cumulative effect of counsel's deficiencies"). First, if counsel had brought a First Amendment Challenge, the disorderly conduct charge would have been dismissed. Ms. Breitzman would have faced a trial for two counts of child abuse and two counts of child neglect. Without the added errors of preventing the admission of other-acts evidence and presenting a theory of defense inconsistent with his client's testimony, the jury would have been tasked to weigh the credibility of J.K.'s allegations that his mother slapped him on two occasions against the credibility of Ms. Breitzman's claim that she did not. The State would have had Autumn and Duncan to establish that they observed a bruise on J.K.'s face; however, the defense would have had J.K.'s own testimony, as well as Dan Percifield's, that he stated that he caused this injury to himself with a dumbbell.

Instead, the jury heard in detail about an incident in which Ms. Breitzman slapped her son in the car over a song, and further heard that she would constantly call her son degrading names, deny him medical treatment, lock him out of the house, and restrict his food. The jury heard Ms. Breitzman acknowledge responsibility for the slapping for which she was not charged and deny responsibility for those incidents for which she was charged. And the jury heard Ms.

Breitzman's attorney present a theory of defense which contradicted her testimony.

The circuit court found that counsel's assertion of reasonable parental discipline in opening did not prejudice Ms. Breitzman because his reference to this in opening was "very vague." (80:25-27;App.136-138). But it was specific enough for the State to notice and highlight to the jury in closing arguments that the defense theory had changed since its opening from a question of reasonable discipline to now that "she didn't do it." (74:33).

As a result of counsel's many errors, the trial devolved into a successful character assassination of Ms. Breitzman as an incredible, all-around bad mother. These errors undermined confidence in the outcome of the trial, and Ms. Breitzman is entitled to a new trial on any remaining charges.

CONCLUSION

For these reasons, Ms. Breitzman respectfully requests that this Court enter an order reversing her convictions on Counts 4 (Neglecting a Child) and 5 (Disorderly Conduct) and remanding this matter to the circuit court with directions to enter judgments of acquittal on those counts. She further asks this court to enter an order remanding this matter for a new trial on any remaining counts.[12]

Dated this 17th day of December, 2015.

HANNAH SCHIEBER JURSS
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Attorney for Defendant-Appellant

[12] As the circuit court has vacated the conviction on Count 3 and entered a judgment of acquittal accordingly, Ms. Breitzman does not seek a new trial on that count.

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,696 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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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*Documents in this Appendix Have Been Redacted for Privacy Purposes.