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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

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 testimony established that J.K—fifteen years old—had a jacket, but chose not to bring it with him to school, and, upon his return home, could have walked to nearby businesses to avoid the cold but chose not to do so. (71:34,37-38,84-85). Addressing this evidence, the State asserts that "J.K. did not have a duty to find shelter. That was Breitzman's responsibility." (Response Brief at 7). Of course, Ms. Breitzman as a mother with custody of her son had the responsibility to provide adequate shelter and care to him. But again, the question before the jury was not whether Ms. Breitzman was a perfect or even average mother—the question was whether the State proved beyond a reasonable doubt that she was guilty of criminal child neglect.

Criminal child neglect occurs when the defendant "intentionally contribute[s]" to the neglect of the child. Wis. Stat. § 948.21(1)(a). Neglect means that the person failed to provide *"necessary* care, food, clothing, medical or dental care, or shelter" to the level that it "seriously endanger[s] the physical health of the child." Wis. JI-CRIM 2150 (emphasis added). If the State cannot prove that the child actually

became neglected, the State may satisfy its burden "if the natural and probable consequences would be to cause the child to become neglected." ***Id.***

Inherent in this definition of neglect is the notion that what level of care or shelter may be necessary depends upon the circumstances. For example, the inaction of a mother who lets a teenager play alone outside is unlikely to be viewed the same as that of a mother who lets a two-year-old child play alone outside. Similarly, the behavior of a mother who does not ensure that her teenage son has his winter coat before he leaves the house is unlikely to be viewed the same as that of a mother who does not ensure that her two-year-old son has his winter coat before he leaves the house.

As such, Ms. Breitzman points to the facts that fifteen-year-old J.K. had a jacket which he chose not to wear, and knew of nearby places to where he could have walked but chose not to, not to blame her son but instead because it reflects how the State failed to meet its burden to prove that she intentionally failed to prove *necessary* care and shelter for him (or, alternatively, that the natural and probable consequence of her being asleep and not unlocking the door was that he would become neglected).

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 acknowledges that "[t]o be sure, under some circumstances, the use of such profane language may not tend to provoke a disturbance." (Response Brief at 11). The State then rests its argument as to why Ms. Breitzman's language did "tend to provoke a disturbance" on the "*effect* of her

conduct on J.K." (Response Brief at 11)(emphasis added). The State notes that J.K. cried as a result and that Ms. Breitzman's language "prompted him to report her conduct." (Response Brief at 11).

The State's argument incorrectly suggests that the determination of whether conduct will be criminal depends on the actual effect of the conduct, as opposed to the type and nature of the conduct at the time it occurs. Indeed, under the State's theory, if J.K. had simply laughed off his mother's words, Ms. Breitzman's words would not have been criminal because they would have had no disruptive effect.

We know such an interpretation is incorrect, however, because the focus of the disorderly conduct statute is on the conduct itself—not on its subsequent effect. Indeed, the Wisconsin Supreme Court has explained that it "makes no difference under § 947.01" whether "alleged disorderly conduct actually causes a disturbance." ***In re Douglas D.***, 2001 WI 47, ¶ 29, 243 Wis. 2d 204, 626 N.W.2d 725.

The State also mistakenly equates conduct that "emotionally affected" or disturbed J.K. with conduct "of a type that tends to cause or provoke a *disturbance*." (Response Brief at 11);Wis. JI-CRIM 1900 (emphasis added). While the disorderly conduct does allow for the punishment of conduct occurring in a "private place," its focus is on whether that private conduct would be of the type which could spill out into a public disturbance:

> The 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. *Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person*.

State v. Schwebke, 2002 WI 55, ¶ 30, 253 Wis. 2d 1, 644 N.W.2d 666 (emphasis added).

Try as the State might to use J.K.'s emotional response to his mother's words as support for its conclusion that the evidence was sufficient, her words—stated to her son in the privacy of her own home—simply did not rise to the level of conduct which had the "real possibility" of spilling over and disrupting the peace, order, or safety of the community.

While such words would have been understandably unpleasant for J.K., again the question is not whether Ms. Breitzman as a mother *should* have used such words with her son; the question is whether the State met its burden to prove beyond a reasonable doubt that she was guilty of the crime of disorderly conduct. If the evidence here was sufficient to establish the crime of disorderly conduct, then under that same rationale, every person in Wisconsin who has referred to a family member by a rude or insensitive name during a disagreement in a private home would seemingly also be guilty of the crime of disorderly conduct. The State reads the statute too broadly, and the evidence here was insufficient to prove beyond a reasonable doubt that Ms. Breitzman was guilty of disorderly conduct.

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

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.

The State first responds that Ms. Breitzman's argument implicitly concedes that whether her speech was constitutionally protected is an unsettled area of law because she asserts that publication may be warranted. (Response at 15). The State notes that an attorney is not deficient for not arguing unsettled law. (Response at 15).

That Ms. Breitzman indicated that publication may be warranted 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 own home," (Initial Brief at 2)(emphasis added), does not in turn mean that this is a novel challenge which counsel should not have been expected to know to raise.

First, counsel testified at the post-conviction hearing that he *did* consider such a challenge; thus, this was not an area which he did not know to consider. Second, the First Amendment's prohibition against the criminalization of speech is one of the most fundamental tenants of American criminal law. U.S. Const. amend I. Third, the Wisconsin Supreme Court has before held that speech which formed the basis for a disorderly conduct charge was constitutionally protected under the First Amendment. *See* ***In re Douglas D.***, 2001 WI 47, ¶ 21, 243 Wis. 2d 204, 626 N.W.2d 725. The fact that there was not a binding decision holding precisely that a defendant's statements made in the privacy of his or her own home were constitutionally protected under the First

Amendment (and that therefore publication of this opinion may be helpful to develop the law) did not mean that counsel did not have an obligation to make this argument on behalf of Ms. Breitzman.

The State further responds that Ms. Breitzman's speech was not protected because it was "utterly devoid of social value" and could "cause or provoke a disturbance." (Response at 17-18). As discussed above, the State confuses conduct which tends to cause or provoke a disturbance with conduct which "disturbed J.K." *See* supra Section I.B.; (Response at 18). Her words to her son was not speech which by its "very nature cause[s] a breach of the peace." *See* ***In re A.S.***, 2001 WI 48, ¶ 15, 243 Wis. 2d 173, 626 N.W.2d 712.

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.

The State seems to suggest that counsel's strategy to welcome into evidence irrelevant other-acts which portrayed Ms. Breitzman as a bad mother was not deficient because Ms. Breitzman "agreed with this strategy." (Response at 21). The State cites as support ***State v. Oswald***, 2000 WI App 3, ¶ 50 n.7, 232 Wis. 2d 103, 606 N.W.2d 238, and asserts that it stands for the following proposition: "When a defendant makes a decision, a court will not find that trial counsel's advice prejudiced the defendant." (Response at 14).

But ***Oswald*** does not stand for such a sweeping proposition. In ***Oswald***, this Court considered a defendant's claim of ineffective assistance of counsel, where the defendant—who had originally entered a plea of not guilty by reason of mental disease or defect ("NGI plea")— withdrew that plea, refused his lawyer's suggestion to reenter it, but

then days before the trial tried to re-enter the plea. 2000 WI App 3, ¶ 48. The circuit court denied his request to do so. ***Id.*** The defendant post-conviction argued that his then-attorney's advice to withdraw his NGI plea constituted ineffective assistance of counsel. ***Id.***, ¶ 50, n.7. This Court rejected this argument, noting: "the record supports the trial court's finding that the decision to withdraw the plea was Oswald's own decision." ***Id.***

Whether a defendant wishes to enter or withdraw a plea is a fundamentally different question than matters of what evidence is and is not admissible at trial, and what is and is not a reasonable trial strategy. For example, if a defense attorney informed his client that the most effective strategy in a sexual assault trial would be to argue that even though the defendant was guilty, the jury should not convict him because he would face decades in prison—that defense attorney cannot then shield himself from a claim of ineffective assistance of counsel simply because the defendant agreed to proceed with this flawed theory.

The State correctly points out that a trial strategy will not be deemed unreasonable in hindsight simply because it failed. (Response at 19). Nevertheless, trial counsel's after-the-fact assertion that a decision "was strategic does not insulate review of the reasonableness of that strategy." ***State v. Coleman***, 2015 WI App 38, ¶ 27, 362 Wis. 2d 447, 865 N.W.2d 190. Instead, "[t]rial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied. This standard implies deliberateness, caution, and circumspection, and the decision must evince reasonableness under the circumstances." ***Id.*** (internal quotations omitted).

Here, trial counsel's articulated strategy was unreasonable from the beginning. With regard to counsel's inquiry into the uncharged slapping in the car, the State asserts that "[b]ecause Breitzman insisted on testifying and denying the physical contact in the charged incidents, trial counsel could reasonably conclude that the circuit court would have permitted the State to explore the prior incidents that Breitzman admitted." (Response at 23). This argument does not hold water: if trial counsel feared that testimony concerning this incident would be admitted, then he should have sought a pre-trial ruling from the court before trial on whether it would indeed be admitted. And once the State questioned J.K. on direct and did *not* ask about this uncharged incident, it would no longer have been reasonable to assume that the State intended to inquire about this incident.

Additionally, if it was indeed part of counsel's theory to inquire about this incident, how would eliciting testimony about an uncharged incident in which Ms. Breitzman by her own admission *did* slap her son advance a defense theory that J.K. would lie about his mother hitting him?

The State asserts that trial counsel's purported strategy of allowing this uncharged allegation into evidence, as well as allowing the State to introduce testimony concerning all of the many other irrelevant allegations of how Ms. Breitzman was a bad mother to her son, was reasonable because he "intended to show that J.K. had so aggrandized his complaints that he would lose credibility." (Response at 20). But the case boiled down to J.K.'s credibility against Ms. Breitzman's credibility. Without any affirmative ability to rebut the allegations that she failed to purchase him glasses which he needed, failed to complete the paperwork for him to receive free lunch, or failed to take him to the dentist (as a few of many possible examples)—and with Ms. Breitzman in fact

admitting to perhaps the most egregious of these uncharged allegations (the slapping in the car)—it was unreasonable for counsel to presume that J.K. would appear to the jury to be exaggerating; instead, the foreseeable outcome was that this evidence would portray Ms. Breitzman as a bad mother, thus bolstering J.K.'s charged allegations.[1]

Lastly, in her Initial Brief, Ms. Breitzman noted that counsel failed to file a pre-trial motion in limine to exclude references to these other-acts. (Initial Brief at 32,33). The State in response fairly points out that counsel moved in limine "to not allow any witness to testify on any subject or alleged facts unless such testimony directly pertains to either the charge of physical harm to the child J.K. or neglect causing bodily harm to the child J.K." (Response at 19);(13). While this general motion did not address specific pieces of other-acts evidence, insofar as it did seek to limit testimony to the charge at hand, this nevertheless does not change the fact that counsel was deficient: the admissibility of specific other-acts was not decided by the court pre-trial, and counsel did not object to the testimony about these other-acts. Further, if indeed this motion was intended to preclude reference to the harmful other-acts portraying Ms. Breitzman as a bad mother, then that undercuts the notion that counsel strategically intended for these other-acts to come into evidence.

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[1] The State incorrectly asserts that the State would have been able to question Ms. Breitzman about other incidents of calling her son names for "purpose of undermining her credibility" under § 906.08(2). (Response at 24). Wisconsin Statute § 906.08 allows in certain circumstances inquiry on cross examination into matters "probative of truthfulness or untruthfulness" of a witness where the witness "testifies to his or her character for truthfulness or untruthfulness", *see* Wis. Stat. § 906.08; it does not serve as a Trojan horse by which the State may enter into evidence unlimited other-acts evidence on cross-examination.

C. Counsel performed deficiently by arguing a theory of defense in opening statement which contradicted Ms. Breitzman's anticipated testimony.

The State asserts that trial counsel arguing a theory of reasonable parental discipline was "consistent with the theory of defense." (Response at 27). It was not: Ms. Breitzman testified that she did not hit her son on the two charged occasions, and counsel was aware that is how she would testify before trial. (71:78-93;77:9-10;80:29;Initial App.153-154,140). Given this, it was not a reasonable trial strategy for counsel to inform the jury in opening that the case "comes down to" the reasonable parental discipline jury instruction.[2]

D. Prejudice

The question of prejudice asks whether there is a "reasonable probability" that but for counsel's errors, the result of the trial would have been different. ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citing ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." ***Id.***

Instead of weighing Ms. Breitzman's word against the word of her son concerning the two charged incidents of slapping, the jury heard Ms. Breitzman admit to an uncharged slapping incident but deny the two charged slapping

[2] "You will also be getting later on an instruction which is very important to this case, and it is going to be very important when you get to the defense case, and that is the question of reasonable parental discipline privilege, it's a jury instruction, number 950, that's very important because this is eventually what this comes down to." (71:74-75).

incidents, and heard J.K. recount the many ways in which Ms. Breitzman was allegedly an all-around bad mother. Trial counsel's purported strategy to invite this damning testimony into evidence and argue a theory of defense inconsistent with his client's testimony was unreasonable and undermines confidence in the outcome of Ms. Breitzman's trial.

CONCLUSION

For these reasons and those stated in her Initial Brief, 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.[3]

Dated this 7th day of March, 2016.

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[3] As the circuit court has vacated the conviction on Count 3 and entered a judgment of acquittal accordingly, she 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 2,980 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.

Dated this 7th day of March, 2016.

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