STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP001610-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GINGER M. BREITZMAN,

Defendant-Appellant-Petitioner.

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-PETITIONER

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ISSUES PRESENTED

I. Did the free speech protections of both the U.S. and Wisconsin Constitutions prohibit the State from prosecuting and convicting Ms. Breitzman for disorderly conduct for calling her son rude names inside the privacy of their family home?

Ms. Breitzman argued post-conviction that she was denied the effective assistance of counsel as her attorney failed to move to dismiss the disorderly conduct charge on free speech grounds. The circuit court denied her post-conviction claim, and the Court of Appeals affirmed the circuit court's decision.

II. Was Ms. Breitzman denied the effective assistance of counsel when her attorney (a) failed to move to dismiss the disorderly conduct charge on free speech grounds, (b) failed to object to the admission of a barrage of improper other acts evidence which painted her as an all-around bad mother, and (c) argued a theory of defense in opening that contradicted her anticipated testimony?

Ms. Breitzman argued post-conviction that she was denied the effective assistance of counsel. The circuit court denied her claims of ineffective assistance of counsel. The Court of Appeals deferred to the circuit court's legal conclusions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to accept review reflects that oral argument and publication are warranted.

STATEMENT OF FACTS AND CASE

A. The Complaint and Charges

The State originally charged Ms. Breitzman with two counts—one of physical abuse of a child for slapping her teenage son (J.K.) and one of child neglect for failing to take him to the doctor when he was vomiting. (2). The eight-page complaint listed many additional allegations of Ms. Breitzman being a bad mother—including calling her son inappropriate names, pulling his hair, failing to take him to a dentist, and not getting him new glasses. (2).

The State filed an amended information adding three additional charges, including one count of disorderly conduct for "profane conduct" "in a private place", for calling her teenage son rude names inside their home. (17; *see also* 71:49-53).[1]

[1] Ms. Breitzman thus faced five counts at trial: (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).

B. The Trial

In opening, defense counsel explained that the defense would focus on "the question of reasonable parental discipline." (71:24-25).

J.K. was between fourteen and fifteen years old when the charges allegedly occurred. (71:28;17)(noting date of birth and dates of alleged offenses). As to the two counts of alleged physical abuse, J.K. testified that his mother hit him in the face on both occasions. On the first occasion, she wanted him to get out of bed but he wanted to nap; she slapped him, and he got a bloody nose. (71:38-39). He acknowledged, though, that he had regular nose bleeds. (71:87).

On the other occasion, he testified that he was sweeping the floor; his mother told him he was not doing it correctly and hit him with the back of her fisted hand. (71:40-42). He acknowledged that he told his mother's friend that same evening that the bruise on his face was the result of him dropping a dumbbell on his face, but nevertheless told his friend and girlfriend that his mother hit him. (71:78-82,43).

As to the two child neglect charges, J.K. stated that at one point he became sick and was vomiting and had diarrhea; his mother did not take him to the doctor, and he was sick for six to seven days. (71:45-48).

He stated that on another occasion, he left for school and did not take a jacket because it was warm outside. (71:31-34). When he got home, it was colder; the house was locked and he did not have a key; he testified that he could tell his mother was home but she did not answer the door. (71:34-36). He stated that he tried calling friends but no one answered. (71:34-36;84-85). He acknowledged that there

were businesses within a few blocks to which he could have walked, but he instead hid under a grill cover for a few hours until his mother opened the door. (71:34-36;85).

As to the disorderly conduct charge, J.K. stated that he got into an argument with his mother over burnt popcorn. (71:49). He stated that his mother 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 his mother 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). 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 after this exchange with his mother, he ran downstairs and talked with his friend about discussing his mother's behavior with police. (71:49).

J.K.'s friend testified that he overheard through the phone Ms. Breitzman use curse words and call J.K. "really mean names." (72:22). He testified that Ms. Breitzman seemed upset about a "couple of things" and J.K. just "listened" and "didn't really argue back". (72:22). J.K.'s friend said that it lasted about "five to ten minutes" and then J.K. and his mother argued about J.K. not changing his sheets; J.K. told his friend he would change his sheets and call him back; J.K. called back about an hour later and cried about his mother. (72:23). J.K.'s friend acknowledged that this appeared to be a "limited situation between the two of them [J.K. and his mother]." (72:24).

J.K. and other State's witnesses testified to additional allegations of Ms. Breitzman's mistreatment of her son beyond the charged offenses. A few examples: that she refused to buy him glasses after he lost a previous pair, that she failed to fill out the proper paperwork for him to get free

lunches at school, and that she put a lock on the refrigerator to prevent him from overeating. (71:38,57,58;72:9-16;72:20-21).

Defense counsel did not object to the admission of any of this testimony. *See* (71:38,57,58;72:9-16;72:20-21).

Additionally, defense counsel at one point asked J.K. whether he had 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). This answer referenced a third alleged slapping incident which was not charged, but was referenced in the complaint. (71:87-88).

Counsel did not object to J.K.'s answer, but instead asked him follow-up questions. (78:87-88). On re-direct, the State asked J.K. to tell the jury about this third incident. (71:91-93). J.K. noted that his mother slapped him, causing a nose bleed, over a disagreement about who taught him a song. (71:91-93).

A detective testified that Ms. Breitzman admitted to calling her son names and to backhanding her son in the car over a song. (72:34-35). The detective 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).

Ms. Breitzman testified that she did not hit her son on either of the two charged occasions. (72:75-93). She, and other defense witnesses, testified that her son had become more defiant and had been acting out. (72:75-76,62-65,49). She acknowledged that she did hit her son with the back of

her hand in the car (the third, uncharged incident) because he was "getting loud" with her, but that this was the only time she slapped or backhanded him. (72:80-85,101).

With regard to the allegation involving her son vomiting, she testified that she told him to eat crackers and drink Gatorade, juice and water; she further stated that the illness did not persist for days. (72:96).

With regard to J.K. hiding under the grill cover, she explained that she was asleep, 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).

With regard to the allegations that she called her son names one day in their home (the disorderly conduct charge), she did not deny being "belligerent" with her son. (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).[2] The State objected, noting that Ms. Breitzman was not asserting parental discipline with regard to either of the charged abuse counts. (72:110-14). With regard to third, uncharged alleged slapping, 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", and "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 [sic] an analysis about other acts." (73:7). 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". (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).

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

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). 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. (75).

C. Post-Conviction Litigation

Ms. Breitzman filed a post-conviction motion seeking judgments of acquittal on the child neglect and disorderly conduct counts on grounds of insufficient evidence; further, with regard to the disorderly conduct charge, she sought a judgment of acquittal on grounds of ineffective assistance of counsel for failure to argue that the charge violated her constitutional free speech protections. (53).

She moved for a new trial on any remaining counts on grounds that she was denied the effective assistance of counsel as her attorney opened the door to the admission of prejudicial other acts evidence, and asserted a defense which was inconsistent with Ms. Breitzman's testimony.(53).[3]

Following court-ordered briefing, (54,59,60), the court held a ***Machner***[4] hearing. (77;App.158-216).

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[3] 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). The court granted her request to vacate the DNA surcharge. (53;62;63;App.122-124).

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

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". (77:6-7;App.163-164). He stated that he did not think it would 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.163-164).

At the ***Machner*** hearing, the State asked trial counsel, and trial counsel confirmed, that as part of the disorderly conduct charge, the State further alleged that Ms. Breitzman also said she would kick her son out of the house; however, counsel explained that a "comment like that" would "not be something that she necessarily ever followed through on" but would use to try "to shake some sense when he would be getting dramatic." (77:22,32;App.179,189). At trial, the State never presented any evidence reflecting that Ms. Breitzman ever attempted to actually throw her son out of the house during this incident. (*See generally* 71;72). Further, the State charged Ms. Breitzman with disorderly conduct for her allegedly *profane* conduct, and the jury was so instructed. (17;73:83).

Counsel further stated at the ***Machner*** hearing that he questioned J.K. about the uncharged slapping "because it wouldn't make sense later if we provided that as a defense, but we had objected to its introduction." (77:20;App.177). He noted that he discussed this strategy with Ms. Breitzman and she agreed to it. (77:20-21;App.177-178). 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.186). 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.187).

Trial counsel also acknowledged that Ms. Breitzman told him she wished to testify at trial. (77:8;App.165). Counsel stated that Ms. Breitzman told him prior to trial 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.166). Counsel later noted that he could not recall whether Ms. Breitzman categorically denied striking her child during the instances charged. (77:26,34;App.183, 191).

Counsel acknowledged that the complaint contained allegations about Ms. Breitzman's treatment of her son beyond the charges. (77:11;App.168). The State stipulated that the uncharged slapping was referenced in the complaint. (77:12;App.169). 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.

(77:15-16;App.172-173). He noted that he thought it best not to "sit there and make lots of objections on things that would be overruled" and instead wanted to "let the jury see what is the other side here." (77:16;App.173). Counsel elaborated:

"They're obviously letting them talk about this stuff. Let's see what happens when the mother gets up there." (77:16; App.173).

Trial counsel stated that he requested the reasonable parental discipline instruction because it was the "only major defense position" he believed they could take. (77:24; App.181). He noted that Ms. Breitzman agreed with this strategy. (77:24;App.181).

Ms. Breitzman testified at the post-conviction hearing 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.197-198). She testified that her attorney never told her that 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.198).

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.204,208). She acknowledged that she would have to "explain away" the fact that she had slapped him in the past. (77:50;App.207). She recognized that she did not object when her attorney asked for the parental-discipline instruction, but explained that she did not understand until recently that "his defense of me 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.205).

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. (62;63;80:3-7;App.122-124,127-

131). It denied Ms. Breitzman's remaining motions for acquittal and for a new trial on any remaining counts. (62;80:7-32;App.122-123,131-155).

The circuit court also rejected Ms. Breitzman's claim that she was denied the effective assistance of counsel when counsel failed to challenge the disorderly conduct charge on First Amendment grounds. (80:11-16;App.135-140). 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.138-140).

The circuit 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.140-148). The court concluded that 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.142-143). The court noted that it did not believe Ms. Breitzman's testimony "that this wasn't the strategy." (80:20;App.144).

The circuit court concluded that counsel's reference to reasonable parental discipline in opening was "very vague" (80:25-27;App.149-151). 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.152). The circuit court concluded that counsel's position was not "ineffective in any way." (80:29; App.153).

D. Court of Appeals Decision

Ms. Breitzman appealed. The Court of Appeals affirmed the circuit court's rulings. (Ct. App. Op.;App.101-113).

The following is the Court of Appeals' entire consideration of Ms. Breitzman's free speech challenge:

> As to counsel's failure to challenge the disorderly conduct charge on free speech grounds, the postconviction court discussed the basic tenets of free speech law and noted that the disorderly conduct statute "can include both protected and unprotected speech." The court stated that if trial counsel had moved to dismiss the charge, the trial court would have denied the motion. Consequently, trial counsel was not ineffective for failing to move to dismiss the disorderly conduct charge. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (if the motion would have been unsuccessful, there can be no prejudice and the claim of ineffective assistance of counsel fails).

(Ct. App. Op., ¶ 22;App.110-111).

The Court of Appeals concluded that trial counsel's decision not to object to all of the other acts evidence was "deliberate and based on articulated reasons which are neither irrational nor unreasonable." (Ct. App. Op., ¶ 23; App.111-112). The Court stated: "A postconviction court's determination that counsel had a reasonable trial strategy 'is virtually unassailable in an ineffective assistance of counsel analysis.'" (Ct. App. Op., ¶ 23; App.111-112)(quoting ***State v. Maloney***, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620).

The Court of Appeals further held that counsel arguing reasonable parental discipline despite Ms. Breitzman testifying that she did not hit her son on the charged occasions was not deficient. (Ct. App. Op., ¶¶24-25;App.112). The Court concluded that defense counsel testified that his "main theories" centered on: "(1) Breitzman's right to discipline her child; (2) J.K.'s unruly behavior and tendency to exaggerate; and (3) Breitzman's 'difficult set of circumstances' as a single mother with a 'rebellious child' and 'limited economic resources.'" (Ct. App. Op., ¶ 25;App.112). The Court noted that "[c]ounsel stated that he discussed his theories with Breitzman and that Breitzman agreed with his approach." (Ct. App. Op., ¶ 25;App.112). The Court held that "[a]ll of the testimony counsel elicited went to one or more of his theories of defense." (Ct. App. Op., ¶ 25;App.112).

E. Petition for Review

Ms. Breitzman petitioned this Court to review the Court of Appeals' holdings concerning her claims of ineffective assistance of counsel. She did not seek review of the Court of Appeals' orders concerning her challenges to the sufficiency of the evidence. The State filed a response as ordered by this Court, and this Court granted review.

ARGUMENT

I. The Free Speech Protections of Both the United States and Wisconsin Constitutions Prohibited the State From Prosecuting and Convicting Ms. Breitzman for Disorderly Conduct for Calling Her Son Rude Names Inside the Privacy of Their Family Home.

Both the U.S. and Wisconsin Constitutions protect the right to free speech. U.S. CONST. amend I; WIS. CONST. art. I, § 3. The First Amendment holds that "Congress shall make no law…abridging the freedom of speech". U.S. Const. amend. I. The Wisconsin Constitution holds that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech". WIS. CONST. art. I, § 3.

"As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." ***United States v. Stevens***, 559 U.S. 460, 468 (2010) (quoting ***Ashcroft v. American Civil Liberties Union***, 534 U.S. 564 (2002)).

As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid…and that the Government bear the burden of showing their constitutionality." ***Ashcroft v. American Civil Liberties Union***, 542 U.S. 656, 660 (2004).

Whether Ms. Breitzman's speech is protected by the U.S. and Wisconsin Constitutions is a question of law that

this Court reviews de novo. ***State v. A.S.***, 2001 WI 48, ¶ 19, 243 Wis. 2d 173, 626 N.W.2d 712.[5]

A. A Wisconsin disorderly conduct conviction based on speech alone cannot stand if the speech is protected by the First Amendment.

Wisconsin's disorderly conduct statute under Section 947.01(1) prohibits someone from, "in a public or private place," engaging in "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct," "under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01; WIS. JI-CRIMINAL 1900. The statute 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-CRIMINAL 1900.

Wisconsin's disorderly conduct statute cannot criminalize speech if the speech is protected by the First Amendment. ***State v. Douglas D.***, 2001 WI 47, ¶ 21, 243 Wis. 2d 204, 626 N.W.2d 725. "[T]he statute's sanctions cannot be applied directly to speech protected by the First Amendment." ***Id.***; *see also* ***A.S.***, 2001 WI 48, ¶ 16 (speech may only be prosecuted under the disorderly conduct statute if it "is one of the limited categories of speech that fall outside the protections of the First Amendment").

[5] Ms. Breitzman argues that she was denied the effective assistance of counsel as her attorney did not move to dismiss the disorderly conduct charge on free speech grounds pre-trial. She discusses the application of the legal principles and standards of review for her ineffective assistance of counsel argument in Section II, *infra*.

In ***Douglas D.***, this Court was confronted for the first time with a case where a defendant was convicted of disorderly conduct under Wisconsin Statute § 947.01 "based solely on the content of his or her speech." ***Id.***, ¶ 22.

This Court agreed that "not all conduct which causes personal discomfort in others necessarily falls within the ambit of disorderly conduct" and that the disorderly conduct statute "requires more than mere offensive speech or behavior." ***Id.***, ¶ 27.

Since ***Douglas D.***, this Court has explained further that 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.***

In ***Douglas D.***, this Court held that an eighth-grade student's written story—which involved the student cutting a teacher's head off with a machete and which the 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, this Court noted that while it found the student's story to be "offensive and distasteful," its "feelings

of offense and distaste do not allow [the Court] to set aside the Constitution." ***Id.***, ¶ 41.[6]

This Court therefore concluded in ***Douglas D.*** that the State could only prosecute speech as disorderly conduct if that speech is not protected by the First Amendment, because unprotected speech is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 2001 WI 47, ¶ 17 (quoting ***Terminello v. City of Chicago***, 337 U.S. 1, 4 (1949)).

B. Profanity which is not "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" does not fall in one of the few narrow and well-defined categories of speech unprotected by the First Amendment.

In ***Douglas D.***, this Court provided examples of unprotected speech:

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[6] Here, the Court of Appeals quoted the circuit court for the proposition that the "disorderly conduct statute 'can include both protected and unprotected speech'" and deferred to that conclusion. (Ct. App.Op.,¶22;App.110-111). The circuit court cited ***Douglas D.*** for this proposition. (80:12;App.136); *See also* ***Douglas D.***, 2001 WI 47, ¶ 31.

The circuit court's statement, however, was wrong and does not reflect what this Court held in ***Douglas D.*** The disorderly conduct statute cannot criminalize protected speech—protected speech is protected. Rather, this Court in ***Douglas D.*** noted the important distinction between a "threat" in the general sense of the word (a broad definition which includes "both protected and unprotected speech") and "true threats" which are *not* protected by the First Amendment. ***Id.***, ¶ 31.

- "fighting words", citing ***Chaplinsky***, 315 U.S. 568;

- speech that incites others into imminent lawless action, citing ***Brandenberg v. Ohio***, 395 U.S. 444 (1969);

- obscenity, citing ***Miller v. California***, 413 U.S. 15 (1973)[7];

- libel and defamatory speech, citing ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964);

- and "true threats", citing ***Watts v. United States***, 394 U.S. 705 (1969).

2001 WI 47, ¶ 17. This Court explained that "[d]espite its verbal character, these categories of unprotected speech are essentially "nonspeech" akin to a "noisy sound truck" with no "claim upon the First Amendment." ***Id.*** (internal citations omitted).

These narrow categories echo the U.S. Supreme Court's case law concerning the limited exceptions to the First Amendment's protections of speech.

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[7] "Obscenity" in First Amendment case law means sexually explicit material. *See* ***Miller***, 413 U.S. 15. A work is "obscene" if "(a)…the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest,…; (b)…the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c)…the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." ***Id.*** at 24; *see also* ***State v. Thiel***, 183 Wis. 2d 505, 515 N.W.2d 847 (1994).

In the 2010 case of ***United States v. Stevens***, the U.S. Supreme Court recognized that there are a few "well-defined and narrowly limited classes of speech" of "historic and traditional categories" unprotected by the First Amendment—including "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." 559 U.S. at 468-469 (internal citations omitted).

The Supreme Court has long recognized that these narrow exceptions occur where the speech by its "very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace." *See, e.g.,* ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 572 (1942); *see also* ***Cohen v. California***, 403 U.S. 15, 16-17 (1971)("[t]he defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence"); *see also* ***Terminello v. City of Chicago***, 337 U.S. at 4 ("freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest…There is no room under our Constitution for a more restrictive view")(internal citation omitted).

Importantly, in ***Stevens***, the Court explicitly rejected a balancing test for the First Amendment. The Government argued that the Court should employ the following test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal cost." 559 U.S. at 470. The Supreme Court pointedly rejected this proposal: "As a free-floating test for First Amendment coverage, that sentence is startling and dangerous." ***Id.***

The Court continued to explain that First Amendment protections are by no means limited to speech with societal benefit:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id.

The ***Stevens*** Court acknowledged that some of its earlier case law, including the often-quoted ***Chaplinsky*** case, perhaps suggested consideration of the societal value of the speech when evaluating whether a First Amendment violation occurred. ***Id.***

Indeed, in the 1942 ***Chaplinsky*** case, the U.S. Supreme Court held that there are certain types of speech, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words", "which are no essential part of any exposition of any ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order or morality." 315 U.S. 568, 572 (1942).

But in ***Stevens***, the Supreme Court noted that the ***Chaplinsky*** language was just "descriptive," not "a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary". ***Id.*** at 471.

The Court pointed out that "*[m]ost* of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation." ***Id.*** at 479 (internal quotations omitted)(emphasis in original).

Furthermore, though the U.S. Supreme Court listed the "profane" in the 1942 ***Chaplinsky*** decision as one of the few forms of speech that may be outside of the protections of the First Amendment, more recent U.S. Supreme Court decisions have not included profanity in the narrow categories of unprotected speech. *Compare* ***Chaplinsky***, 315 U.S. at 572 (referencing the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" as those that may fall outside of First Amendment protection), *with* ***R.A.V.***, 505 U.S. at 383 (discussing the First Amendment's exceptions of obscenity, defamation, and 'fighting words'); *and* ***U.S. v. Alvarez***, 567 U.S. at 709, 132 S. Ct. 2537, 2544 (listing "advocacy intended, and likely, to incite imminent lawless action", obscenity, defamation, speech integral to criminal conduct, "so called 'fighting words'", child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has power to prevent" as the "categories" that have been "permitted" as exceptions to First Amendment protections).

As law professor Rodney Smolla has explained, modern free speech doctrine does not generally permit prosecution for use of profanity absent the language threatening a breach of the peace:

> Does modern Speech Clause doctrine permit the government to ban profanity on the theory that the utterance of the words alone, without more, may be penalized? For the most part, the answer is "no." While the government may, if it satisfies rigorous modern

> doctrinal limitations, proscribe incitement to violence, fighting words that threaten an immediate breach of peace, or true threats, it may not penalize the mere utterance of profanity.

Rodney A. Smolla, *Words "Which By Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 330-31 (2009).

Indeed, even in the 1942 ***Chaplinsky*** decision, the U.S. Supreme Court only considered—among other narrow exceptions—the "profane" as unprotected where it was "likely to cause a fight" or "breach of the peace." 315 U.S. at 572-573.

As an example of the U.S. Supreme Court's more recent consideration of profanity and the First Amendment, consider the 1971 case of ***Cohen v. California***. The Supreme Court held unconstitutional the defendant's arrest and conviction for disturbing the peace for wearing a jacket in a courthouse that said "Fuck the Draft." 403 U.S. at 16.

The Court stressed that freedom of speech means that the First Amendment must tolerate ugly language: "To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance…That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." ***Id.*** at 24-25. The Court explained such ugly language is necessary to preserve our free society: "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." ***Id.*** at 25.

The Court also emphasized that speech serves a "dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well". ***Id***. It noted that "words are often chosen as much for their emotive as their cognitive force". ***Id.*** at 26. The Court rejected the idea that the Constitution did not also protect the "emotive function" of speech. ***Id.***

Of particular importance to the case at hand, the Court in ***Cohen*** illustrated the dangers inherent in the government policing word choice: "How is one to distinguish this from any other offensive word?...For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." ***Id.*** at 25. The Court emphasized that this is why the Constitution protects free speech: "Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." ***Id.***

The Court held that the government cannot cleanse speech "to the point where it is grammatically palatable to the most squeamish among us." ***Id.*** "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." ***Id.*** at 26.

C. The free speech protections of both the U.S. and Wisconsin Constitutions prohibited the State from criminally prosecuting Ms. Breitzman for disorderly conduct for calling her teenage son rude names inside the privacy of their family home.

The State prosecuted Ms. Breitzman for the content of her speech. If Ms. Breitzman had—in the same manner, tone, and context—instead told her son: "you are behaving poorly," "I am extremely frustrated with and disappointed in you," or "you have been disrespectful," the State would not have charged her with disorderly conduct. Even if she had instead called her son an "idiot," that likely would not have led to the prosecution. Instead, it was her word choice—the *content* of her speech, that the State prosecuted.

To be clear, Ms. Breitzman is not arguing that the words she used with her son were commendable or even appropriate. But the question is not whether she behaved like the mother-of-the-year. The question is whether her words to her son in the context in which she used them fell within the one of the narrow, limited categories of speech unprotected by our state and federal constitutions such that the State could *criminally* prosecute her for using them.

Ms. Breitzman's words to her son did not fall within any of the narrow exceptions to our constitutional free speech protections: they were not an incitement, were not obscene, and were not a "true threat". *See* ***Douglas D.***, 2001 WI 47, ¶ 17.

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 this 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." ***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 the privacy of their own home. Though her statements were overheard by her son's friend who, unbeknownst to Ms. Breitzman, was listening over the phone, her words—inside her own family home—did not create the real

possibility that the disturbance would spill over and disrupt the peace or safety of the community.[8]

Ms. Breitzman's words were rude; but they were protected. Just as in ***Douglas D.***, this Court should not allow itself to "set aside the Constitution" because of "feelings of offense and distaste." 2001 WI 47, ¶ 41.[9]

D. To hold that Ms. Breitzman's speech is unprotected would undermine the free speech protections of all Wisconsin citizens and would presumably render myriad Wisconsin citizens criminals.

Ms. Breitzman is unaware of *any* other cases in the United States where a criminal conviction has been upheld where the sole basis for the conviction is the individual's use of profanity towards another family member inside the family home. The glaring absence of such cases on a national level reflects our country's respect for and adherence to the First Amendment. Wisconsin should not be the exception.

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[8] The State's assertion at the ***Machner*** hearing that part of the charge also involved Ms. Breitzman saying that she was going to kick her son out of the house does not change the fact that it prosecuted her for speech. Indeed, at trial the State never presented any evidence 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).

[9] To hold Ms. Breitzman's speech protected would not in turn mean that Wisconsin children are wholly unprotected from emotional abuse in the home. A child suffering from "emotional damage" for which the parents are unwilling to provide treatment may serve as a component of a child in need of protective services (CHIPS) proceeding. Wis. Stat. § 48.13(11); *see also* ***State v. Aimee M.***, 194 Wis. 2d 282, 533 N.W.2d 812 (1995).

Should this Court uphold Ms. Breitzman's disorderly conduct conviction, the ramifications for Wisconsin citizens would be extreme and—frankly—terrifying: if Ms. Breitzman's words are not protected by the First Amendment, then presumably none of these scenarios would be either: a wife calling her husband an "asshole" inside their family home; a teenager calling his father a "dick"; a sister calling her brother a "shithead"—the list could go on and on.

While none of that language is of course ideal, it is concerning to think of how many otherwise law-abiding Wisconsin citizens could become criminals if Ms. Breitzman's conviction stands.

Consider another example: At every University of Wisconsin Badger football home game, in a stadium that seats over 80,000 people[10], thousands of Wisconsin students chant: "Eat Shit, Fuck You! Eat Shit, Fuck You!" *See* Isthmus, "Tell All: Profane UW Chanting," (Nov. 7, 2013), *available online at* http://isthmus.com/opinion/tell-all/tell-all-profane-uw-chanting/ (last accessed April 5, 2017); Allegra Dimperio and Carolyn Briggs, "Eat Shit? Fuck You!", The Badger Herald (Oct. 13, 2011), *available online at* https://badgerherald.com/opinion/2011/10/13/eat-shit-fuck-you/ (last accessed April 5, 2017).[11]

Many people do not like this chant, particularly because of the children in attendance at Badger football games. *See* ***id.*** University staff would prefer it not to happen.

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[10] *See* "Facilities-Camp Randall Stadium," University of Wisconsin,http://www.uwbadgers.com/sports/2015/8/21/GEN_2014010132.aspx (last accessed April 5, 2017).

[11] A video of the chant is available on YouTube at https://www.youtube.com/watch?v=gyjO1ZDPg6c (last accessed April 5, 2017).

See Ariel Sandler, "The University of Wisconsin Would Appreciate it if Their Fans Refrained from Chanting Swear Words at Football Games," Business Insider (Oct. 14, 2011), *available online at* http://www.businessinsider.com/the-university-of-wisconsin-would-appreciate-it-if-their-fans-refrained-from-chanting-swear-words-at-football-games-2011-10 (last accessed April 5, 2017).

Whether preferable, or even appropriate, no one appears to consider the students' actions *criminal*. Indeed, it seems ludicrous to think that the State would suggest that every one of the thousands of University of Wisconsin students and fans to have ever uttered this chant is guilty of a crime.

But if that idea is absurd, why is Ms. Breitzman's case any different? If anything, thousands of people screaming "eat shit, fuck you!" at a sporting event with over 80,000 people present seems far more likely to cause or provoke a disturbance of the peace than Ms. Breitzman using language to express her frustration with her teenage son in the privacy of their own home.

Just like the Badger chant, the question here is not whether Ms. Breitzman's words were commendable or even appropriate—the question is whether they are protected by the First Amendment. As Ms. Breitzman's words did not fall within any of the narrow categories of unprotected speech, her conviction for disorderly conduct cannot constitutionally stand.

II. Ms. Breitzman Was Denied the Effective Assistance of Counsel. The Court of Appeals Erroneously Deferred to the Post-Conviction Court's Legal Conclusions When Assessing Ms. Breitzman's Claims of Ineffective Assistance of Counsel. Under the Proper Application of the Standards of Review, Ms. Breitzman Is Entitled to Dismissal With Prejudice of the Disorderly Conduct Conviction and a New Trial on the Remaining Counts.

A criminal defendant has a constitutional right to the effective assistance of counsel. U.S. CONST. amends. VI & XIV, WIS. CONST. art. I, § 7. A criminal defendant in Wisconsin also has the constitutional right to appeal his or her conviction to the Court of Appeals. Wis. Const. art. I, § 21(1); ***State v. Thornton***, 2002 WI App 294, ¶ 12, 259 Wis. 2d 157, 656 N.W.2d 45.

Wisconsin has an extremely limited plain error doctrine. *See, e.g.,* ***State v. Jorgensen***, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77 (explaining that "[c]ourt should use the plain error doctrine sparingly"). Thus, with few very exceptions, Wisconsin law restricts a defendant's post-conviction ability to litigate claims not previously argued to those limited circumstances in which the defendant can prove that his attorney's failure to raise the claim amounted to ineffective assistance of counsel.

Whether a defendant was denied the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. A reviewing court upholds a circuit court's findings of fact unless clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The questions of whether a lawyer's performance was deficient and prejudicial are, on the other hand, questions of law reviewed de novo. ***Id.*** at 128.

With regard to deficient performance, a reviewing court must defer to a reasonable trial strategy. *See, e.g.,* ***State v. Domke***, 2011 WI 95, ¶¶ 36, 49, 337 Wis. 2d 268, 805 N.W.2d 364 (while a reviewing court may conclude that an attorney's performance was deficient if it was "based on an irrational trial tactic" or "based on caprice rather than upon judgment," "*reviewing courts should be highly deferential* to counsel's strategic decisions and make every effort to eliminate the distorting effects of hindsight…[t]here is a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance")(internal quotations omitted)(emphasis added).

Even though this standard demands deference to a reasonable trial strategy, what is and is not a *reasonable* trial strategy is a question of law appellate courts review de novo. ***Johnson***, 153 Wis. 2d at 128.

A. The Court of Appeals erroneously deferred to the post-conviction court's legal conclusions when assessing Ms. Breitzman's claims of ineffective assistance of counsel.

This Court thus reviews de novo the legal questions of whether trial counsel performed deficiently and whether that deficient performance prejudiced Ms. Breitzman, giving deference only to the circuit court's fact-findings. This Court accordingly does not defer to Court of Appeals' legal conclusions on her claims of ineffective assistance.

Nevertheless, it is first and foremost worth noting the key errors in the Court of Appeals' analysis; namely, that instead of conducting a de novo review of the legal questions of deficient performance and prejudice, the Court of

Appeals here incorrectly pulled "magic words" from the deferential components of the ineffective assistance of counsel standards. In so doing, it abdicated its function.

First, the Court of Appeals performed *no* legal analysis of the constitutional free speech claim. It simply stated that counsel was not ineffective for failing to litigate the free speech challenge because "the trial court stated that if trial counsel had moved to dismiss the charge, the trial court would have denied the motion." (Ct. App. Op., ¶ 22;App.110-111).

As support for its deference to the circuit court, the Court of Appeals cited ***State v. Simpson*****,** 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) and noted: "if the motion would have been unsuccessful, there can be no prejudice and the claim of ineffective assistance of counsel fails." (Ct. App. Op., ¶ 22;App.110-111)(citing ***Simpson***, 185 Wis. 2d at 784). But in ***Simpson***, the Court of Appeals conducted the de novo analysis of the constitutional issue (suppression), then concluded that it agreed with the circuit court's legal conclusion that there was no constitutional violation, and held that because there was no constitutional violation, the defendant would not be able to meet a burden to show prejudice. ***Simpson***, 185 Wis. 2d at 784. Here, the Court of Appeals erroneously performed no de novo review whatsoever.

Second, the Court of Appeals misapplied the standard of review when evaluating Ms. Breitzman's remaining claims of ineffective assistance of counsel. Citing ***State v. Maloney***, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620, the Court of Appeals stated: "[a] *postconviction court's determination* that counsel had a reasonable trial strategy 'is virtually unassailable in an ineffective assistance of

counsel analysis.'" (Ct. App. Op., ¶ 23;App.111-112)(quoting ***Maloney***, 2004 WI App 141, ¶ 23)(emphasis added).

Here too the Court of Appeals picked out key words from the standards of review to defer to the circuit court in lieu of conducting its requisite review.

It is not the *"post-conviction court's determination*" that an attorney had a reasonable strategy which is "virtually unassailable"—it is a reasonable trial strategy itself which demands deference. *See, e.g.,* ***State v. Nielsen***, 2001 WI App 192, ¶ 44, 247 Wis. 2d 466, 634 N.W.2d 325 ("We will not second guess trial counsel's selection of trial tactics or strategies in the face of alternatives that he or she has considered").

This Court should reaffirm and reinforce the longstanding appellate standards of review of claims of effective assistance of counsel. Without strictly-enforced application of these standards, criminal defendants in Wisconsin lose two constitutional rights: the right to the effective assistance of counsel and the right to an appeal.

B. Proper application of the standards of review reveals that Ms. Breitzman is entitled to dismissal with prejudice of the disorderly conduct conviction and a new trial on the remaining counts.

Ms. Breitzman addresses each of her claims of deficient performance in turn and then addresses the prejudice of those deficiencies.

i. Trial counsel performed deficiently by failing to move to dismiss the disorderly conduct charge against her on grounds that it violated her constitutional free speech protections.

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.164). 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. Given that Ms. Breitzman's statements to her son were indeed protected free speech (for all of the reasons discussed in Section I of the Argument, *supra*), and that it would have been the State's burden to prove that the speech was constitutional, no reasonable strategy justified counsel's failure to bring such a motion.

ii. Trial counsel performed deficiently by failing to object to a barrage of improper other acts evidence which portrayed 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 may be 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 failing 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 objected to the 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 restrictions on 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., any difficulty J.K. had getting into the house, or any unspecific allegations of slapping or hair pulling, beyond those instances charged. (71:43-44,59;72:5-9,35). 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, when 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 uncharged slapping incident in the car, defense counsel should have objected on grounds of improper other acts evidence. Instead, defense counsel asked J.K. a series of follow-up questions which provided a detailed account to the jury of Ms. Breitzman slapping her son over a dispute about a song. (71:87-88). Eliciting testimony about a third alleged slapping —which Ms. Breitzman then testified *did* occur— made the defense argument appear completely incredible and instead bolstered the believability of J.K.'s other allegations.

Indeed, the State noted 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 the straightforward credibility contest between J.K.'s testimony that slapping did occur on the charged occasions, and Ms. Breitzman's 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.173). Such a theory only works, however, if one 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 sank the defense.

Counsel's questioning of J.K. about the uncharged slapping in the car also lacked any reasonable strategy. 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.177-178).

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?

iii. Counsel performed deficiently by arguing a theory of defense in his opening statement that 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.166-167). 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 adopted 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"). (80:28;App.152)(emphasis added).

It was irrational 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.

iv. Counsel's failures prejudiced the outcome of Ms. Breitzman's case.

Each of the above-described 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, and the jury would not have learned of the language she used with J.K. (as the disorderly conduct charge would have been dismissed).

Second, without the added errors of failing to prevent 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 J.K.'s friends to establish that they observed a bruise on J.K.'s face; however, the defense would have had J.K.'s own testimony to establish 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 deny him medical treatment, pull his hair, lock him out of the house, and restrict his food. The jury heard Ms. Breitzman acknowledge responsibility for the slapping incident 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.149-151). 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.[12]

[12] The circuit court granted Ms. Breitzman's post-conviction motion for a judgment of acquittal on Count 3 (child neglect resulting in bodily harm for not taking J.K. to the doctor) on grounds of insufficient evidence. (80:3-7;App.127-131). The State did not cross-appeal to challenge this decision. Therefore, should this Court hold that the disorderly conduct conviction violates free speech and must be dismissed, and should it further remand the case for a new trial on the remaining counts, Ms. Breitzman would face Counts 1 (physical abuse of a child), 2 (physical abuse of a child), and 4 (child neglect).

CONCLUSION

For these reasons, Ms. Breitzman respectfully requests that this Court enter an order reversing the Court of Appeals' decision and remanding for a judgment of acquittal on her conviction for disorderly conduct (Count 5) and a new trial on the remaining counts.

Dated this 12th day of April, 2017.

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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 10,214 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 12th day of April, 2017.

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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.

Dated this 12th day of April, 2017.

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