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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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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.

Ms. Breitzman continues to raise her First Amendment challenge through ineffective assistance of counsel framework. (*See, e.g.* Initial Brief at 16, n.5). She does not raise this challenge on its face as a "free-standing claim" as the State suggests. (*See* Response Brief at 2-3).

The State argues that the ineffective assistance of counsel analysis alters the outcome: that even if a First Amendment challenge "might have been successful", Ms. Breitzman should not prevail because an attorney is "not ineffective for failing to raise an argument" "premised on a novel legal analysis or unsettled law." (Response Brief at 16).

The State is wrong. Its argument rests on fundamental misunderstandings of the role of defense counsel and the standards for ineffective assistance of counsel claims.

This challenge involves the *First Amendment*. Freedom of speech is one of the most bedrock principles of our government and free society. It is anything but novel.

Further, the challenge here does not involve a new, "unsettled" area of constitutional law. Compare this challenge with the challenge raised in ***Lemberger***—a recent decision from this Court which the State cites for the proposition that counsel should not have been expected to bring this First Amendment challenge. (*See* State's Response Brief at 13, 17, 22).

In ***State v. Lemberger***, the defendant argued that his attorney should have objected at his drunk-driving trial to the State commenting on his refusal to take a breathalyzer test. 2017 WI 39, 374 Wis. 2d 617, 893 N.W.2d 232. This Court rejected this argument because settled law at the time held that there was no constitutional problem with the comments. ***Id.***, ¶3. Thus, counsel was not ineffective for not arguing that "controlling law" was wrong and should be overturned. ***Id.***, ¶33.

On the other hand, Ms. Breitzman faced prosecution for speech she used towards her son inside their family home. The law at that time and now *presumed* that this prosecution of speech was unconstitutional unless the State could prove otherwise. ***Ashcroft v. American Civil Liberties Union***, 542 U.S. 656, 660 (2004); ***State v. Douglas D.***, 2001 WI 47, ¶25, 243 Wis. 2d 204, 626 N.W.2d 725.[1] The law holds that profanity which is not likely to cause a "clear and present danger of a serious substantive evil" beyond "annoyance" *is* protected by the First Amendment. *See* ***Douglas D.***, 243 Wis. 2d 204, ¶17 (quotation omitted).

The State nevertheless asserts that because there is "no controlling law" addressing this precise scenario, counsel was "not ineffective". (Response Brief at 17).[2]

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[1] The State suggests that if counsel had raised this challenge it would not have had the burden to prove the disorderly conduct prosecution was constitutional. (Response Brief at 11). But in ***Douglas D.***, this Court held that it *was* the State's burden to show that the disorderly conduct prosecution did not violate the First Amendment. 243 Wis. 2d 204, ¶25.

[2] *See also* ***State v. Peebles***, 2010 WI App 156, ¶28, 330 Wis. 2d 243, 792 N.W.2d 212 (rejecting the State's argument that counsel was ineffective not raising a Fifth Amendment challenge because there was "no existing case law precisely on point").

Consider what the State is saying: because it has never before gone so far as to violate the First Amendment rights of its citizens in this fundamental way, there is no "controlling" case law and Ms. Breitzman therefore cannot prevail even if her rights were indeed violated.

By this same logic, if the State for the first time charged a citizen with obstruction because he refused to let the State house soldiers in his home during peace time, a reasonable defense attorney would not file a motion to dismiss the charge even though it presents a blatant Third Amendment violation. *See* U.S. Const. amend. III.

The State should not be able to uphold its violation of a basic right of one of its citizens simply because it has not violated another person's rights in that particular way before.

The State suggests that because Ms. Breitzman asked the Court of Appeals to publish its opinion, she has conceded this is an unsettled area of the law. (*See* Response Brief at 17). Asking the Court to help "*develop* the case law" does not mean this is a novel challenge. (*See* Initial COA Brief at 2)(emphasis added).[3]

Counsel's duty was clear. To hold that a reasonable attorney should not be expected to challenge the prosecution of speech for a family member simply calling another family member rude names inside a private home would denigrate the role of a defense attorney.

The State also cannot hide behind the disorderly conduct statute to insulate its actions from the First Amendment.

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[3] Further, by the State's logic, if she did not seek publication, defendants would risk losing their rights because no "controlling case law" would exist.

The State cites ***State v. Schwebke***, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666, to note that the disorderly conduct statute "does not necessarily require disruptions or disturbances that implicate the public directly." (Response Brief at 14). ***Schwebke*** did not involve a First Amendment challenge. *See* ***id.***, ¶39. This Court in ***Douglas D.*** held that the disorderly conduct statute cannot be used to prosecute protected speech. 243 Wis. 2d 204, ¶21.

In ***State v. A.S.***, as the State notes, this Court acknowledged that disorderly conduct prosecutions may at times result in "incidental" limitations on speech. 2001 WI 48, ¶¶13-16, 243 Wis. 2d 173, 626 N.W.2d 712."[I]ncidental" limitations on speech do not pose a constitutional problem where the prosecution "is not directed at the content of the speech itself." ***Id.***, ¶15.

Here, however, the prosecution *was* directed at the content of the speech.

Compare this case with a common disorderly conduct scenario: police are called to an apartment because neighbors report sounds of a man and woman screaming at each other and glass being shattered. Police arrive and the man screams "fuck you bitch" at the woman.

In that situation, though the man swore, prosecution of the language would be "incidental" to the disorderly conduct charge, which resulted from the whole scope of behavior creating the disturbance and police involvement. In that same situation, if instead of "fuck you bitch" the man screamed "I hate you," he likely would still face prosecution.

On the other hand, take this case and replace "retard", "fuck face", and "piece of shit" with "you are a disappointment," "I am angry at your behavior," and "you

continue to frustrate me," With those changes, it is hard to fathom a prosecution. The State prosecuted Ms. Breitzman for the *content* of her speech.

The State further argues that the law is unsettled because "[h]istorically, profanity has not been considered protected speech." (Response Brief at 15, n.3). The State overlooks that "profanity" in our early history was "closely connected to religious notions of sin" and blasphemy. 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, 324-325 (2009). Thus, as the Ninth Circuit explained in 1931, the "question of what constitute[d] profane language" was thus "usually dealt with as a branch of the common-law offense of blasphemy". ***Duncan v. U.S.***, 48 F.2d 128, 133 (1931).

A "second strain of profanity also developed, a broader strain not exclusively limited to expression that was in some sense also blasphemous." Smolla, *Words*, 36 PEPP. L. REV. at 325. More recent case law has not included profanity in the narrow categories of unprotected speech. *See, e.g.,* ***U.S. v. Alvarez***, 567 U.S. 709, 717 (2012). But ultimately, case law makes clear that speech may not be prosecuted unless it is "likely to cause a fight" or "breach of the peace": "a clear and present danger of serious substantive evil that rises far above public inconvenience". *See, e.g.,* ***Douglas D.***, 2001 WI 47, ¶17 (quotation omitted)); ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 572 (1942).

The State asserts that the facts that J.K. cried and disclosed Ms. Breitzman's language to authorities the next day made her behavior "likely to tend to provoke a disturbance." (State's Response Brief at 25). If this were true, then every time a child disclosed to authorities something

upsetting a parent said on a prior date, the parent's words would retroactively become a type likely to cause or provoke a disturbance. This cannot be.

The State also hypothesizes that perhaps J.K. feared that his mother would hit him. (*See* Response Brief at 25-26). J.K., however, never testified that he feared his mother would hit him that day. (*See generally* 71:28-105).

The State's response erroneously focuses on J.K.'s reaction to retroactively determine whether Ms. Breitzman's speech was protected. First Amendment case law looks to whether the conduct is *likely* to cause danger to the public beyond annoyance or unrest. *See* ***Douglas D.***, 243 Wis. 2d 204, ¶17. The problem with relying on the after-the-fact effect of speech (and not its *type)* to determine whether the speech is protected is that it allows for content-based policing by the reactions of people with particular moral views.

An example: An "angry mob" broke out when a speaker attempted to give a lecture at a private college this year. Sarah Larimer, "Senate hearing examines free speech on college campuses after incidents at UC-Berkeley, Middlebury," Washington Post (June 20, 2017), https://www.washingtonpost.com/news/grade-point /wp/2017/06/20/senate-hearing-examines-free-speech-on-college-campuses-after-incidents-at-uc-berkeley-middlebury/?utm_term=.875d32fdc277 (last accessed June 21, 2017).

There, the speaker's (attempted) speech did *actually* result in a public disturbance risking public safety. But should that fact alone mean his intended speech is not protected? No. Our Constitution presumes that speech—even if considered rude or even intolerant—*will* be protected. It only escapes protection if it falls within one of a few narrow categories where the speech—by its very nature—is likely to cause some public evil and disturbance. ***A.S.***, 243 Wis. 2d 173, ¶¶16-17.

Ms. Breitzman does not, as the State suggests, wish to "trivialize[]" the effect her words had on her son. (*See* State's Response Brief at 25). Call it inappropriate. Call it bad parenting. But her language was not "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest". ***Douglas D.***, 243 Wis. 2d 204, ¶17, (quoting ***Terminello v. City of Chicago***, 337 U.S. 1, 4 (1949)). As such, her words are protected by the First Amendment and Article I, Section III of the Wisconsin Constitution.[4]

The State fails to address the serious ramifications of its arguments for Wisconsin citizens. But if Ms. Breitzman's conviction is upheld, many otherwise law-abiding citizens could face criminal prosecution for their choice of words inside their homes.

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

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.

The longstanding standards of review hold that reviewing courts defer to the circuit court's fact-findings unless clearly erroneous but review independently the legal questions of deficient performance and prejudice. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

[4] The State suggests that she does not show prejudice because the jury found her guilty of disorderly conduct. (Response Brief at 18-19). This argument misses the point: the jury was not tasked to address whether the charge violated the First Amendment. If counsel had moved to dismiss the charge, it would have never gone to the jury.

The State makes no attempt to defend the Court of Appeals' failure to conduct any independent analysis of the First Amendment claim. (*See generally* Response Brief). The State nevertheless does argue that the Court of Appeals' deference to the circuit court's legal conclusions about counsel's trial strategies was "reasonable". (Response Brief at 37).

But the Court of Appeals did not simply note that it found the circuit court's analysis helpful to its own independent review—it misquoted case law to hold that the circuit court's legal conclusions were "virtually unassailable." (Ct. App. Op., ¶23)(Initial App.111). This was wrong, and the State fails to explain why this Court should upend the longstanding standards of review.

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.

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.

As argued in Section I, counsel performed deficiently by not raising this First Amendment challenge. This is not a novel, creative challenge. A reasonable defense attorney would have raised this challenge.

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.

The State suggests that counsel's strategy was not deficient because Ms. Breitzman "approved" it. (Response Brief at 29). But counsel, not Ms. Breitzman, was required to understand the parameters of the admission and exclusion of other acts evidence.[5]

Trial counsel's plan was unreasonable from the beginning. 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.

It was not reasonable to allow the jury to hear the myriad ways Ms. Breitzman allegedly mistreated J.K. to show that he "exaggerated events", when (a) the evidence could have been excluded, and (b) the defense did not have any specific proof to show that J.K. *was* exaggerating.

The State suggests that counsel was not ineffective for inviting evidence of the uncharged car slap because (a) Ms. Breitzman herself "knew that prior incidents" "would likely arise at trial," and (b) by denying the charged slapping incidents, she "would have opened the door." (Response Brief at 32).

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[5] The court did not make a finding that Ms. Breitzman's post-conviction hearing testimony was wholly incredible. (*See* Response Brief at 28). It explicitly found two points of her testimony incredible: (1) that allowing J.K.'s allegations of her uncharged bad behavior into evidence was not part of the strategy; and (2) that her attorney did not discuss this strategy with her. (80:20,23;Initial Brief App.144,147).

Again, Ms. Breitzman was not the lawyer; it was not her responsibility to know what evidence was excludable.

Second, counsel filed a pre-trial motion 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 harm to the child J.K." (13).

Third, the State had no intention of discussing the uncharged slapping until "the defense opened the door" by questioning J.K. about it. (73:6). It did not serve to provide "context", (*see* Response Brief at 32), because it occurred on a separate occasion. It served no purpose other than to suggest that because she slapped her son then, she likely did so on the charged occasions.

The State asserts that because Ms. Breitzman denied calling her son rude names on other occasions, the State was allowed to ask about these other occasions on cross. (Response Brief at 33-35). This argument is circular. First, with effective assistance, the disorderly conduct charge would have been dismissed. Second, the defense would not have needed to address allegations of other swearing had her attorney objected when the State first presented the improper evidence of other swearing.

The State also argues that evidence of other swearing was admissible to show that her swearing on the charged occasion was "not an accident." (Response Brief at 32). It is unclear how her speech could have been accidental. She admitted being "belligerent" with her son that day when he "scorched the microwave". (73:24,29). Instead, the State's argument that it was admissible to show that the charged date was "not an accident" appears to mean that it showed her propensity for swearing.

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

It was not reasonable to tell the jury that the case "comes down to" the reasonable parental jury instruction. (*See* 71:24-25). The State argues that counsel needed to be ready "if and when evidence of prior physical acts came into evidence." (Response Brief at 39). This argument fails because counsel could have kept reference to the uncharged slapping out of evidence.

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

The State argues that this is "not a case where counsel's errors 'kept significant evidence from the jury that would have undermined the complainant's credibility.'" (Response Brief at 42)(citing ***State v. Domke***, 2011 WI 95, ¶60, n.11, 337 Wis. 2d 268, 805 N.W.2d 364).

Keeping relevant evidence from the jury is only one form of prejudice. *See, e.g.,* ***State v. Banks***, 2010 WI App 107, 328 Wis. 2d 766, 790 N.W.2d 526 (holding that counsel's failure to object to improper evidence was prejudicial). Counsel's deficiencies prejudiced Ms. Breitzman by allowing the jury to hear *too much* irrelevant evidence.

Absent counsel's deficiencies, the disorderly conduct charge would have been dismissed and the trial would have been an evaluation of J.K.'s allegations against Ms. Breitzman's testimony. Instead, due to the ineffective assistance of her attorney, the trial devolved into a character assassination of Ms. Breitzman as an all-around bad mother. Without physical evidence supporting J.K.'s allegations, counsel's errors are sufficient to undermine confidence in the outcome of the trial.

CONCLUSION

For these reasons and those in her Initial Brief, 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 22nd day of June, 2017.

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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 2,999 words.

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Dated this 22nd day of June, 2017.

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