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AUGUST 19, 2009
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Interest of H.K.

Bradley Cruff,	)	
Barnes County State's Attorney,	)	Supreme Court No.
Petitioner/Appellee,	)	20090149
	)	
vs.	)	
	)	Barnes County District No.
H.K., a child, D.K., mother,	)	09-R-0022
W.K., father of the above-named child,	)	
	)	
Respondents/Appellant.	)	

ON APPEAL FROM FINDINGS OF FACT AND ORDER OF DISPOSITION
FROM THE DISTRICT COURT
FOR THE SOUTHEAST JUDICIAL DISTRICT
BARNES COUNTY, NORTH DAKOTA
THE HONORABLE JOHN T. PAULSON, PRESIDING

BRIEF OF APPELLEE

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[¶ 1] STANDARD OF REVIEW

[¶ 2] The standard of review for a juvenile court's findings of fact is a clearly erroneous standard. Interest of R.W.S., 2007 ND 37, ¶ 8, 728 N.W.2d 326; N.D.R.Civ.P. 52(a). Due regard is given to the juvenile court judge and the judge's opportunity to assess credibility of the witnesses. Id. Questions of law are reviewed de novo. Id. "When Free Speech arguments are made, the reviewing court must independently scrutinize the record to see if the charged conduct is protected." City of Fargo v. Brennan, 543 N.W.2d 240, 243 (N.D. 1996) (citing Houston v. Hill, 482 U.S. 451, 458, n. 6 (1987)).

[¶ 3] ARGUMENT

[¶ 4] I. REVIEW OF THE EVIDENCE SUPPORTS THE FINDINGS OF FACT.

[¶ 5] The court found that H.K. committed the offense of Disorderly Conduct, as alleged in the petition. Findings of fact in juvenile matters shall not be set aside unless clearly erroneous and due regard shall be given to the trial court in its ability to judge credibility of the witnesses. N.D.R.Civ.P. 52(a). A trial court's findings of fact are presumptively correct and when appealed are reviewed in the light most favorable to the findings if there is evidence to support the findings. Streifel v. Streifel, 2004 ND 210, ¶ 8, 689 N.W.2d 415.

[¶ 6] Disorderly conduct was alleged in the petition as follows:

[S]aid child with intent to harass, annoy or alarm another person or in

> reckless disregard of that fact that another person is harassed, annoyed or alarmed by the individual's behavior, engaged in fighting, or in violent, tumultuous, or threatening behavior, made unreasonable noise, in a public place, used abusive or obscene language, knowingly exposed the individual's penis, vulva, or anus or made an obscene gesture, obstructed vehicular or pedestrian traffic or the use of a public facility, persistently followed a person in a pubic place, or engaged in harassing conduct by means of intrusive or unwanted acts, word, or gestures intended to adversely affect the safety, security, or privacy of another person, more specifically when she called T.L. a nigger at the teen center in Valley City, Barnes County, North Dakota[.]

Appellant's Appendix, pp. 4-5. The petition lays out the disorderly conduct statute from the Century Code. See N.D.C.C. § 12.1-31-01. The court found disorderly conduct based on the testimony of the victim and other witnesses.

> THE COURT: Okay. Well, if I were to accept your argument Mr. Myhre and throw that word [nigger] out what do I do with stupid, whore, oh you flunked out of school, that kind of crap? What do I do with those?
>
> . . . .
>
> What do I do with the following into the bathroom for the purposes of and I'm reasonably certain that it was, they followed her in there just to do that. Just to harass her. I own this bathroom get out, you know that kind of stuff. That much we heard from Ms. Oberlander. So you can't take the word out of the context, but even if I throw that out I've got enough other conduct to establish that the conduct is disorderly.
>
> This is a planned out scheme where when they would see T.L.

> that's what they were going to do. They were going to flip her off, call her names, create harassment, make it as uncomfortable for her as possible. Cheap crappy language, cheap crappy stuff. That is disorderly conduct.

Transcript of Proceedings, Day 1, p. 46, ll. 3-20. The court's findings of fact for disorderly conduct are supported by the evidence.

[¶ 7] The court's findings of fact are not clearly erroneous. "A finding of fact is clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding is induced by an erroneous view of the law." Interest of R.P., 2008 ND 39, ¶ 7, 745 N.W.2d 642. The petitioner's burden is to prove the case beyond a reasonable doubt that the child committed the act. N.D.C.C. § 27-20-29(2). The evidence established that T.L. was harassed by H.K. Transcript, Day 1, p. 3, ll. 18-23; p. 4, ll. 10-16; p. 5, ll. 3-4; p. 5, ll. 10-12; p. 8, ll. 22-25 through p. 9, ll. 1-2; p. 11, ll. 15-23; p. 12, ll. 18-23; p. 14, ll. 19-25. The evidence established that T.L. felt these words and actions were intrusive or unwanted. Transcript, Day 1, p. 5, ll. 21-25 through p. 6, ll. 1-2; p. 9, ll. 6-11; p. 10, l. 1; p. 15, ll. 14-21. Under the "clearly erroneous" standard of review, the Supreme Court defers to the juvenile court's determination of credibility of witnesses. Interest of K.H., 2006 ND 156, ¶ 15, 718 N.W.2d 575. The evidence supports the court's findings of fact. The court's findings are supported by the evidence beyond a reasonable doubt and therefore are not clearly erroneous.

[¶ 8] II. THE PETITION ALLEGES WITH PARTICULARITY THE OFFENSE OF DISORDERLY CONDUCT.

[¶ 9] The petition alleges the offense of disorderly conduct, supra, and takes the offense from N.D.C.C. § 12.1-31-01. A juvenile petition must set forth plainly the facts that bring the child under the jurisdiction of the juvenile court. N.D.C.C. § 27-20-21(1). The state's attorney shall present evidence in support of the allegations made in the petition. N.D.C.C. § 27-20-24(3). Juvenile petitions are based on criminal offenses with consequences intended for adults. If H.K. were an adult, a complaint for disorderly conduct must state the name of the person who committed the offense, the county in which it was committed, the general name of the offense, the acts or omissions complained of that constitute the offense, the person against whom the offense was committed, and a general description of property, if necessary. N.D.C.C. § 29-05-01.

[¶ 10] Whether the court relied on the Juvenile Court Act or the statutory requirements for a criminal complaint, the petition did allege with particularity the offense of disorderly conduct. The petition identified H.K. as the person who committed disorderly conduct against T.L. Appellant Appendix, pp. 4-5. The petition also alleged that H.K. had the intent to harass and annoy T.L. and did so by calling her a "nigger" at the teen center in Valley City. Id. Furthermore, the court found disorderly conduct based on all of H.K.'s actions, not merely her utterance of the word "nigger." Transcript, Day 1, p. 46, ll. 3-25.

[¶ 11] III. H.K.'S STATEMENTS TO T.L. ARE NOT CONSTITUTIONALLY PROTECTED SPEECH.

[¶ 12] The Supreme Court of the United States has drawn the line between constitutionally protected speech and "fighting words" since its decision in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In Chaplinsky, the Court held that freedom of speech protected by the First Amendment does not include "fighting words" and the state may punish the utterance of such words. Id. at 572. "Fighting words" were deemed as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. However, as the North Dakota Supreme Court pointed out, Chaplinsky did not involve words that "inflict injury," but rather those words that "tend to incite an immediate breach of the peace." City of Bismarck v. Schoppert, 469 N.W.2d 808, 810 (N.D. 1991). In further holdings by the United States Supreme Court, the Court edited the phrase "inflicts injury" from the Chaplinsky test. Schoppert, 469 N.W.2d at 811 (citing Gooding v. Wilson, 405 U.S. 518, 525 (1972)).

[¶ 13]H.K. merely saying the word "nigger" is protected speech under the First Amendment. The petitioner concedes that H.K. is free to stand on the steps of the courthouse and shout "nigger" one hundred times over. This type of speech has been protected by the Supreme Court time and time again. See, e.g., Bradenburg v. Ohio, 395 U.S. 444 (1969) (holding the leader of a Ku Klux Klan group who had a film crew capture a Klan rally, which depicted members of the Klan holding firearms, burning a cross and making conditional threats against the government, and the film was later disseminated to a wider audience, was constitutionally protected speech);

Watts v. United States, 394 U.S. 705 (1969) (holding a protestor at a public rally at the Washington Monument, who told others gathered that if he were drafted into the army and given a rifle he would point it at the President, was constitutionally protected speech); NAACP, et. al. v. Claiborne Hardware Co., et. al., 458 U.S. 886 (1982) (holding a black community leader who used strong language in public speeches with spontaneous and emotional appeals for lawless action, but those speeches did not incite lawless action, was constitutionally protected speech). On the contrary, H.K. following T.L. around, continually harassing T.L. and calling her a "nigger" is not constitutionally protected speech. That is disorderly conduct.

[¶ 14] H.K.'s use of the word "nigger" did not evoke a violent reaction from T.L. Transcript, Day 1, p. 9, ll. 8-25 through p. 10, ll. 1-3. However, something must be said for self-restraint by T.L. Would an ordinary black citizen, when called a "nigger," react the same way as T.L. and just turn and walk away? Fighting words are measured by an objective standard, not by a subjective one. Svedberg v. Stamness, 525 N.W.2d 678, 686 (N.D. 1994). Fighting words may now be construed as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction[,]" words that are not protected by the First Amendment. Virginia v. Black, 538 U.S. 343, 359 (2003) (citing Cohen v. California, 403 U.S. 15 (1971)). It is reasonable to think that a black teenager in a community makeup of over 95% white people would feel harassed or annoyed by being called a "nigger" and eventually this

name calling would provoke a violent reaction. Merely because H.K.'s utterance of the word "nigger" had yet to provoke a violent reaction from T.L. does not preclude H.K.'s speech as "fighting words."

[¶ 15] The North Dakota Supreme Court has defended boorish behavior that it has deemed as protected speech. The most notable of these cases is City of Bismarck v. Schoppert, supra, which involved an attorney who yelled abusive language and directed obscene gestures at a police officer. Schoppert, 469 N.W.2d at 809. The Schoppert court found that injuring the feelings of officers with obscene language and gestures, without other threatening behavior, was an unconstitutional ground for a conviction of the crime of disorderly conduct. Id. at 812. However, disorderly conduct convictions based on words coupled with more aggressive conduct have been upheld in several North Dakota cases. See, e.g., City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989) (finding disorderly conduct where a defendant who yelled "you fucking son of a bitch, I'm going to go back into the house and get my shotgun and blow you bastards away," along with circumstances of the defendant's elevated agitated state in front of police officers, constituted language which fell within the meaning of "fighting words"); City of Mandan v. Hoesel, 497 N.W.2d 434 (N.D. 1993) (finding disorderly conduct where a defendant who told an officer he "wasn't going to take any shit" then pulled his hand from his pocket and raised his arms, which the officer perceived as the defendant's attempt to hit him); City of Fargo v. Brennan, supra (finding disorderly conduct where the defendant, a

regular protestor at the Women's Health Clinic in Fargo, flailed his arms within two feet of a clinic worker while screaming that the worker was a killer).

[¶ 16] The North Dakota Supreme Court has not determined that disorderly conduct on the part of the speaker means the target of the speech must fight the speaker or want to fight the speaker. In Nassif, the officers testified that they felt threatened and were concerned for their safety because of the defendant's actions. Nassif, 449 N.W.2d at 795. There was no ruling from the court in Nassif that the officers must want to fight the defendant in order for his words and actions to be deemed as disorderly conduct.

[¶ 17] The same holds true for H.K.'s words and actions. T.L. did not have to respond to H.K.'s words by fighting. Rather, T.L. stated H.K.'s words and actions made her feel harassed and annoyed. Transcript, Day 1, p. 5, ll. 24-25 through p. 6, ll. 1-2. The petitioner is not punishing H.K. for saying "nigger." The petitioner agrees that there are times when a single remark is best left unchallenged. See, Schoppert, 469 N.W.2d at 815 (Vande Walle, J. concurring specially). But in this case there is more than a single remark by H.K. The allegation of disorderly conduct and the subsequent findings of fact by the court are based on H.K.'s repeated use of the word "nigger" and all the other harassment that came with the word's utterance.

[¶ 18] IV. T.L. IS FREE TO ASSOCIATE WHERE SHE CHOOSES.

[¶ 19] H.K. argues that T.L. is partially to blame for the instances of name calling because T.L. continued to be in the proximity of H.K. after the first incident

in the bathroom at the teen center. "Further, T.L. chose to continue the confrontation at Pizza Corner with the young people in the backroom by being in their proximity several times by entering and reentering the room with Schmitt and then going up to them to assist Schmitt in delivering their pizzas." Appellant's Brief, ¶ 46. This is constitutional hypocrisy. According to H.K.'s argument, H.K. is free to say the word "nigger" to T.L., but T.L. is not free to go to places in Valley City if H.K. is there first. This includes a pizza restaurant where many teenagers gather to hang out. T.L. works at Taco John's restaurant and the Times-Record newspaper. Transcript, Day 1, p. 3, l. 7. Is this to say that if H.K. came into Taco John's or was on T.L.'s newspaper delivery route that T.L. could not be there, too?

[¶ 20] According to H.K., T.L. is not allowed in the Pizza Corner restaurant if H.K. is there first. T.L. and H.K. should be in the restaurant at separate times. H.K.'s argument stirs up images of Jim Crow laws. The Supreme Court has addressed, in dicta, similar ideas of subtle segregation in Regents University California v. Bakke, 438 U.S. 265 (1978). "[A]ll the improbable applications of the principle suggested . . . in derision [of Jim Crow laws] has been put into practice – down to and including the Jim Crow Bible." Id. at 393. While it may not be the intent of H.K. to conjure up these images, the very idea that T.L. should avoid H.K. at public places, or that T.L. should not go near H.K., smacks in the face of segregation.

[¶ 21] T.L. has the freedom to associate just like any other teenager. If T.L.'s friends are at Pizza Corner, T.L. is free to join them in their "common endeavor."

See, e.g., Boy Scouts of America v. Dale, 530 U.S. 640, 678 (2000). There should be no prohibition against T.L. to be at Pizza Corner simply because H.K. is there. Otherwise it is T.L. who is being punished by the court, not H.K.

[¶ 22] CONCLUSION

[¶ 23] The court's findings of fact are supported by the evidence. H.K.'s speech is not constitutionally protected. T.L. did not choose to be called a "nigger" by H.K. T.L. did not choose to be harassed by H.K. Rather, it was H.K. who chose to call T.L. a "nigger." It was H.K. who chose to harass T.L. It was H.K., with her words and her actions, who committed the offense of disorderly conduct.

[¶ 24] The State respectfully prays that the Court AFFIRM the juvenile court's findings of fact in this matter.

[¶ 25] Dated this 19th day of August, 2009.

[¶ 26] Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lee M. Grossman, do hereby certify that on August 19, 2009, I served the following documents:

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Dated this 19th day of August, 2009.

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