IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

IN THE INTEREST OF A.R., A CHILD.

Bradley Cruff, Barnes County State's Attorney Petitioner-Appellee, -vs- A.R., minor child, C.R., Mother, and S.R., Father, Respondents-Appellant.	))))))))))	Supreme Court Nos. 20090197 Barnes County No. 02-09-R-0021

BRIEF OF APPELLANT

APPEAL FROM FINDINGS OF FACT AND ORDER OF DISPOSITION
DATED JUNE 26, 2009
BARNES COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE JOHN T. PAULSON, PRESIDING

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	)	
-vs-	)	
	)	Barnes County No. 02-09-R-0021
A.R., minor child,	)	
C.R., Mother, and	)	
S.R., Father,	)	
Respondents-Appellant.	)	

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STATEMENT OF THE ISSUES

[¶1] Whether the trial court erred in denying the Defendant's Motion to Dismiss a juvenile petition which alleged that the juvenile had committed the criminal violation of disorderly conduct, on the grounds that the State had failed to allege in its Petition a cause of action against the Respondent in that it only alleged that the Respondent had used the word "stupid nigger" to commit the offense and failed to allege the requisite elements of Section 12.1-31-01?

[¶2] Whether the trial court abused its discretion in denying the Respondent's Motion to Dismiss in that the act for which the Respondent was found to be a delinquent child by committing disorderly conduct, specifically calling another person a "stupid nigger", which constituted protected speech under the First Amendment to the United States Constitution, Section 4, North Dakota Constitution, and Section 12-1-31-01(2), NDCC.

[¶3] Whether the trial court abused its discretion in finding there was sufficient evidence to sustain a conviction of disorderly conduct, a violation of Section 12.1-31-01, North Dakota Century Code.

STATEMENT OF THE CASE

[¶ 4] A. Nature of the case, course of the proceedings, and disposition in the trial court.

[¶5] This is an appeal from a juvenile case. On June 26, 2009, the Respondent/Appellant (hereinafter "A.R.") was found to be a delinquent child by committing disorderly conduct, in violation of Section 12.1-31-01, North Dakota Century Code. A.R. duly filed a Notice of Appeal on July 6, 2009.

STATEMENT OF THE FACTS

[¶6] On February 17, 2009, T.L., a teenaged African-American female, was at a teen dance at the Teen Center in Valley City, North Dakota. As she left the Teen Center, A.R., a fourteen-year-old male, called her a "stupid nigger." No other interchange occurred between these parties. A.R. submitted a motion to dismiss with a brief, to which the state responded, setting forth the facts and argument in the case. At the hearing, the Petitioner and the Respondent stipulated as to the facts of the case, as submitted upon briefs. Transcript, p. 3. The trial court made a finding based upon the "previous record and the stipulations that the facts and the briefs and the facts from the previous hearing involving the other juvenile are sufficient". Transcript, p. 4. While not explicitly stated by the trial court, the "previous hearing" refers to a similar case

involving the same alleged victim, T.L., but a different juvenile. This case is also currently on appeal as In the Interest of H.K., a child, Supreme Court No. 20090149, Barnes County No. 02-09-R-0022.

LAW AND ARGUMENT

[¶7] A. Jurisdiction

[¶8] Appeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, NDCC, which provide as follows:

> An appeal to the supreme court provided for in this chapter may be taken as a matter of right.

NDCC Section 29-28-03.

> An appeal may be taken by the defendant from:
> 1. A verdict of guilty;
> 2. A final judgment of conviction;
> 3. An order refusing a motion in arrest of judgment;
> 4. An order denying a motion for new trial; or
> 5. An order made after judgment affecting any substantial right of the party.

NDCC Section 29-28-06. State v. Lewis, 291 N.W.2d 735 (N.D. 1980) [2]. The Defendant's right to an appeal was reiterated in State v. Vondal, 1998 ND 188, 585 N.W.2d 129.

[¶9] B. Standard of Review

[¶10] The standard of review in regard to the first issue is whether the trial court abused its discretion in denying the Respondent's Motion to Dismiss pursuant to Section 12.1-

31-01(2).

> A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law.

State v. Berlin, 1999 ND App 1, [6] 588 NW2d 866; State v. Berlin, 2000 ND 13, [14], 604 NW2d 347 (ND 2000), citing State v. Shepherd, 554 NW2d 821, 823 (1996).

[¶11] The standard for review regarding the second issue regarding whether the statements were protected speech the trial judge was clearly erroneous.

[¶12] The standard for review of whether there was sufficient evidence to convict A.R. on the issue of whether the Respondent had committed disorderly conduct is also the abuse of discretion standard. State v. Klose, 2003 ND 39, 657 N.W.2d 276, [18-19].

[¶13] C. Discussion of Freedom of Speech

[¶14] It is easy to defend freedom of speech when the message is something many people find at least reasonable. But the defense of freedom of speech is most critical when the message is one most people find repulsive. This is one of those cases because it involves the utterance by a juvenile of a word which most people find extremely repulsive.

Freedom of speech is one of the most basic of the rights contained in the Bill of Rights:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 1. The individual right of freedom of speech has been extended to the states. See Gitlow v. New York, 268 U.S. 652 (1925). Freedom of speech is also contained in the state constitution:

> Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel the truth may be given in evidence, and shall be a sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases.

North Dakota Constitution, Section 4.

[¶15] Not all speech is protected speech. Falsely shouting “fire” a crowded theater is perhaps the most known of the limitations upon speech which has been incorporated into the law. Schenck v. United States, 249 U.S. 47 (1919). The quote is used as an example of speech which serves no conceivable useful purpose and is extremely and imminently dangerous so that resort to the courts or administrative procedures is not practical and expresses the permissible limitations on free speech consistent with the terms of the First Amendment of the United States Constitution. In the opinion's most famous passage, Justice Holmes sets out the “clear and present danger” test:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

[¶16] Various restrictions on the right to free speech have been imposed in North Dakota. For example, criminal penalties have been established for acts involving speech, such as perjury, falsification, and tampering under Chapter 12.1-11 of the North Dakota Century

Code; disclosure of confidential information by a public employee under Chapter 12.1-13; and criminal defamation under Chapter 12.1-15. Case law also indicates that other reasonable restrictions on free speech may be imposed. *See e.g.* Fargo Womens Health Organization, Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986) (regulation of commercial speech and advertising); State v. Curtis, 2008 ND 93, 748 N.W.2d 709 (threats to inflict physical injury); State v. Niska, 380 N.W.2d 646 (N.D. 1986) (requiring person to be licensed to practice law involves only incidental restrictions on freedom of speech); State v. Backlund, 2003 ND 184, 672 N.W.2d 431 (upholding criminal provisions relating to luring minors to sexual acts by internet).

[¶17] However, here the State's use of the utterance of a word—however objectionable that word may be—by the juvenile Respondent to prosecute him for the criminal offense of disorderly conduct, exceeds the parameters allowed by the federal and state constitutions to place restrictions upon speech.

[¶18] D. Discussion of City of Bismarck v. Schoppert

[¶19] There have been instances in which words and/or gestures have been prosecuted in North Dakota as criminal cases under the disorderly conduct statute. Perhaps the leading case in this area, and one which appears to be in point, is City of Bismarck v. Schoppert, 469 NW2d 808 (ND 1991).

[¶20] Schoppert, a licensed attorney, walked past a police car containing a female officer

and a volunteer police chaplain. As he passed, Schoppert gestured with his middle finger and said, "Fucking bitching cop." The female officer followed Schoppert and attempted to talk to him through her car window. Schoppert never stopped walking, but replied three times, "Fuck you." She then exited her car and physically stopped Schoppert, noticing the odor of an alcoholic beverage on his person. Other officers arrived on the scene, and when a shift supervisor advised Schoppert that his words could be considered disorderly conduct, Schoppert responded, "You don't know who you're fucking with. You just bought yourself a federal lawsuit." After Schoppert took a step toward an officer, he was arrested.

[¶21] Schoppert was found guilty by a jury of disorderly conduct, and he appealed. After a lengthy discussion of the concept of "fighting words" and "words which tend to incite an immediate breach of the peace", specifically in another case, State v. Nassif, 449 NW2d 789 (ND 1989), the Court reversed and remanded the case, with instructions to vacate the judgment and enter a judgment of acquittal. The Court's rationale involved the concept of whether the words themselves might have engendered violent consequences on the part of the recipients:

> Schoppert's words were not a clear invitation to fight and the testimony did not demonstrate that these words, spoken to this audience, had any tendency to cause an immediate breach of the peace. The City failed to offer any evidence on this essential element of the crime charged.

Id. at 813.

[¶22] Thus, under the Schoppert test, it must be determined whether the use of the N-word was a clear invitation on A.R.'s part to fight or had a tendency to cause an

immediate breach of the peace. Obviously, the use of the N-word in this context did not lead to a fight, as did neither of the other two confrontations in which T.L. was involved that night with other persons who also used the N-word.

[¶23] It is also interesting to note that in the cases which rely upon Schoppert which follow, the only instances in which a conviction for disorderly conduct is upheld is in those situations in which the offensive words are accompanied by other actions which would be violative of other provisions of the disorderly conduct statute. See e.g. Nassif, [defendant, upset about reported vandalism to his vehicle, stated to police "you fucking son of a bitch, I'm going to go back into the house and get my shotgun and blow you bastards away"]; City of Mandan v. Hoesel, 497 N.W.2d 434 (N.D. 1993) [defendant told officers that "he wasn't going to take any of that shit", then raised his arm toward officer in an apparently threatening manner]; City of Fargo v. Brennan, 543 N.W.2d 240 (N.D. 1996) [defendant at abortion clinic protest stopped abortion administrator, called her a "killer", and violently waived his arms in her personal space].

[¶24] In Schoppert, the Court indicated that the United States Supreme Court had said the "freedom of speech" protected by the First Amendment does not prevent a state from punishing the speaking of "insulting or 'fighting' words, which are those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 811.

> This record tells us that Schoppert could only have been convicted of injuring the feelings of the officers, or the chaplain, all or any of them, an unconstitutional ground for a criminal conviction. There is no evidence that Schoppert's language or conduct tended to incite an immediate breach of the peace. (Citations omitted.)

Id. at 813, citing Nassif at 793.

[¶25] Certainly there is a difference between a trained law enforcement officer and a juvenile African-American girl. As indicated in Schoppert, those law enforcement officers were well-trained and experienced police officers who were able to hear Schoppert's vulgar and abusive speech as part of their duties and divorce themselves from the anger the words might have engendered. Id. at 813, fn. 37.

[¶26] Indeed, virtually all of the cases specifically involving the usage of the N-word are civil in nature: either seeking the reinstatement of a teacher or a student who used the N-word in a school setting; seeking the reinstatement of an employee who used the N-word in an employment situation; imposing removal from public premises of a person who used the N-word; or otherwise dealing with the civil consequences of a firing, suspension, or other civil result of the usage of this word. While these cases do not involve criminal disorderly conduct, they are illustrative of the concept that while the usage of the N-word may be offensive, the word itself does fall within the framework of protected speech for criminal purposes, there still may be civil consequences.

[¶ 27] For example, in Hardy v. Jefferson Community College, 2001 FED App. 0267P (6th Cir.), a federal appeals court said that an instructor's use of the N-word was protected when it was used to discuss race relations and how black people had been mistreated in the past. The court reinstated the instructor who was terminated for using the word in a classroom setting. In Dambrot v. Cent. Mich. Univ., 55 F.3d, 1177 1187 (6th Cir. 1995),

a coach's usage of the N-word in a game huddle, used to motivate the student athletes, was determined to be protected speech.

[¶28] E. Whether the trial court erred in denying the Defendant's Motion to Dismiss a juvenile petition which alleged that the juvenile had committed the criminal violation of disorderly conduct, on the grounds that the State had failed to allege in its Petition a cause of action against the Respondent in that it only alleged that the Respondent had used the word "nigger" to commit the offense and failed to allege the requisite elements of Section 12.1-31-01?

[¶29] Section 12.1-31-01(1) states as follows:

> 1. An individual is guilty of a class B misdemeanor if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by the individual's behavior, the individual:
>
> a. Engages in fighting, or in violent, tumultuous, or threatening behavior;
> b. Makes unreasonable noise;
> c. In a public place, uses abusive or obscene language, knowingly exposes that individual's penis, vulva, or anus, or makes an obscene gesture;
> d. Obstructs vehicular or pedestrian traffic or the use of a public facility;
> e. Persistently follows a person in or about a public place or places;
> f. While loitering in a public place for the purpose of soliciting sexual contact, the individual solicits the contact;
> g. Creates a hazardous, physically offensive, or seriously alarming condition by any act that serves no legitimate purpose; or
> h. Engages in harassing conduct by means of intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person.

Here, the Petition does not lay out any specific unlawful conduct by A.R. that he committed Disorderly Conduct, other than stating that "stupid nigger." In other words,

the specific conduct which A.R. committed was the mere utterance of the N-word. The Petition does not even allege that T.L. was harassed, annoyed, or alarmed by the utterance of the word. The Petition appears to allege that merely uttering the N-word is a criminal offense.

[¶30] Thus, this charge is based entirely upon A.R.'s speech, and in terms of analyzing the conduct alleged in the Petition to the disorderly conduct statute, it is also apparent that this charge is based only upon A.R.'s speech and no other conduct. Thus, it appears that mere usage of the N-word, no matter how offensive it may be, is still protected speech.

[¶31] However, this case is unique, in that it attempts to create a criminal penalty, not for criminal conduct, but rather simply for the use of a word. It is conceded that the word itself is offensive, but no matter how objectionable a word may be, words by themselves can not be criminalized under the precepts of free speech. That is what the State is attempting to do here. Is the N-word objectionable? Most certainly. It is one of the vilest words that there is in the English language. But as objectionable as it is, no matter what the history is behind it, nevertheless, the word by itself can not and does not constitute criminal conduct.

[¶32] F. Whether the trial court abused its discretion in denying the Respondent's Motion to Dismiss in that the act for which the Respondent was found to be a delinquent child by committing disorderly conduct, specifically calling another person a "stupid nigger", which constituted protected speech under the First

Amendment to the United States Constitution, Section 4, North Dakota Constitution, and Section 12-1-31-01(2), NDCC.

[¶33] It is clear the State was only prosecuting this offense because of the particular word which was used—nigger—and not any other conduct accompanying the use of the word. If the Respondent had used any of the other letter abbreviations that we now use to describe objectionable or obnoxious words in the English language (i.e., the B-word, the C-word, the F-word, etc.), the question becomes whether the State would have prosecuted this case at all, let alone as case involving the criminal offense of disorderly conduct.

[¶34] The first indication of the State's intent to prosecute the use of a word, rather than actions of the Respondent, was contained in the Petition itself. Here, the Petition does not lay out any specific unlawful conduct by A.R. that he committed disorderly conduct, other than stating that he said to T.L. that she was a "stupid nigger." Rather, the Petition appears to allege that merely uttering the N-word is a criminal offense.

[¶35] Because the State chose to indicate in the Petition that the conduct constituting disorderly conduct consists solely of speech—and no other accompanying conduct—this places this case squarely into the purview of Section 12.1-31-01(2), as well as raising significant constitutional free speech issues. Further, the testimony of all of the witnesses indicates that the words and actions which took place, while obnoxious, do not rise to the criminal elements of disorderly conduct.

[¶36] The use of words, in and of themselves, are constitutionally protected under the

concept of Freedom of Speech. However, in order to rise to the level of criminal activity, the words must be accompanied by something else which is not constitutionally protected and which takes the use of those words out of the aura of constitutional protection.

[¶37] In terms of whether the use of the N-word would be, in and of itself, a criminal violation of law is an interesting usage of the criminal statutes. First, it must be recognized that not all arguments, disagreements, or confrontations rise to the level of criminal violations of the law. The purpose of the First Amendment is to encourage a healthy exchange of ideas and information, and if every disagreement carried with it a criminal charge, the very purpose of the First Amendment would be destroyed.

[¶38] Second, while there are many words in the English language which may be disagreeable, offensive, or abusive, the mere usage of these words does not constitute criminal activity. Indeed, there are many words in the common vernacular which are sexually, racially, or otherwise offensive, but while the usage of these words may be disagreeable in polite society, they are not in and of themselves criminal conduct.

[¶39] This case appears to be factually identical to Schoppert, in that A.R did make a disagreeable, offensive, or abusive statement. However, Schoppert's conduct was more egregious, in that his unsolicited statement was also accompanied by an offensive gesture. When confronted, Schoppert continued his offensive conduct. The Court in Schoppert concluded:

> This record tells us that Schoppert could only have been convicted for injuring the feelings of the officers, or the chaplain, all or any of them, an unconstitutional

ground for a criminal conviction.

Id. at 812.

[¶40] While there was no testimony taken at A.R.'s hearing, for the purposes of this argument A.R. would concede that the utterance of the words "stupid nigger" would make T.L. feel hurt and upset and that she did not like the word. However, hurt feelings are not at the same level with the criminal conduct required under Section 12.1-31-01, NDCC.

[¶41] Unlike Schoppert, who took a step toward an officer, A.R. did not engage in any other threatening behavior. This was a bare utterance made in passing to T.L., who apparently passed right by A.R. and continued about her life.

[¶42] G. Whether the trial court abused its discretion in finding there was sufficient evidence to sustain a conviction of disorderly conduct, a violation of Section 12.1-31-01, North Dakota Century Code.

[¶43] Taking the facts in the light most favorable to the State, A.R. did not harass, annoy, or alarm T.L. to such a degree so as to be violative of Section 12.1-31-01, North Dakota Century Code. Even if it is conceded that T.L. hurt and upset by the utterance of the word, she did not like the word, and she wanted A.R. to stop using it, this does not rise to the level of harassing, annoying, or alarming another person in violation of the disorderly conduct statutes.

[¶44] While the parties agreed to submit this matter to the trial court upon stipulation and the trial court incorporated testimony from another similar case, this case is not about the right to confront and cross-examine witnesses. It is about whether the State can impose criminal sanctions against any person, regardless of whether that person is an adult or a juvenile, for uttering a word. This is a word which is used by many people, usually in private, but the use of the word "nigger" is not uniformly condemned nor uniformly discouraged. Indeed, in common usage, there are apparently different cultural rules about whom may use the word in public with impunity, such as a situation in which an African-American addresses another African-American as opposed to a situation in which a non-African-American uses the same word. In the former situation, it seems to be a word bespeaking affection or common heritage, whereas in the latter, it seems that racism is attached. And in still other contexts, it is a word which is overtly racist

CONCLUSION

[¶45] Here, A.R.. was prosecuted for saying a word. It was not a nice word in our current culture. Indeed, it was a word that carries significant racial overtones. But even uttering an offensive word does not necessarily constitute disorderly conduct, and the State has attempted to make such speech illegal. If A.R. had uttered another word, even if it was also offensive, he would not have committed disorderly conduct under the circumstances of this case. Accordingly, the case should be reversed and remanded for finding consistent herein.

Dated this 29th day of September, 2009.

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