STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP993-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER L. STEINHARDT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE SANDY A. WILLIAMS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

MARGUERITE M. MOELLER
Assistant Attorney General
State Bar #1017389

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 266-9594 (Fax)
moellermm@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES

Page

STATUTES

OTHER AUTHORITIES

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP993-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER L. STEINHARDT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE SANDY A. WILLIAMS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED FOR REVIEW

1. In pleading no contest to counts one and two of the information, did Steinhardt forfeit the claim that conviction and sentencing on both counts violated her state and federal right to be free from double jeopardy?

Although the State argued that Steinhardt had waived her double-jeopardy claim, the trial court did not address this argument.

2. Assuming Steinhardt did not forfeit her double-jeopardy claim, did her convictions for failure to act under Wis. Stat. § 948.02(3) and first degree sexual assault of a child, party to a crime, under Wis. Stat. § 948.02(1)(e), violate her right to be free from double jeopardy because both convictions arose from the same course of conduct?

The trial court said no.

3. What is the proper remedy if this court were to find a double-jeopardy violation?

Having found no violation, the trial court did not address this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the parties' briefs thoroughly set forth the relevant facts and legal authorities, the State does not request oral argument.

Because this court can resolve this appeal summarily on the basis of waiver/forfeiture[1] without addressing the double-jeopardy claim, the State does not request publication.

SUPPLEMENTAL STATEMENT OF FACTS

Facts additional to those presented in Steinhardt's brief will be incorporated into the Argument section where necessary.

---

[1] Although the relevant cases use the term "waiver," the correct terminology in the present context is "forfeiture," i.e., "'the failure to make the timely assertion of a right.'" *See State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted).

ARGUMENT

I. In Pleading No Contest, Steinhardt Forfeited Her Claim Of A Double-Jeopardy Violation.

In *State v. Kelty*, 2006 WI 101, ¶ 34, 294 Wis. 2d 62, 716 N.W.2d 886, the supreme court held that "[a] guilty plea waives a multiplicity claim anytime the claim cannot be resolved on the record, regardless whether a case presents on direct appeal or collateral attack." There, the court held that Kelty's guilty pleas to two counts of first-degree reckless injury "relinquished her opportunity to have a court determine the merits of her multiplicity challenge" because additional fact-finding was necessary to determine "exactly how Kelty inflicted the baby's injuries." *Id.* ¶ 51.

Although it found that Kelty had waived her double-jeopardy claim, the supreme court also held that where a court can resolve a double-jeopardy challenge without venturing beyond the record, the court should decide the claim on its merits. *Id.* ¶ 39. Steinhardt claims that is the case here:

> Unlike the situation in *Kelty*, no further factual development is necessary. The question is simply this: based on the facts set forth in the complaint, are Steinhardt's acts and omissions multiplicitous?

Steinhardt's brief at 17.

Steinhardt is wrong, as she herself unwittingly demonstrates. Specifically, in arguing that her conduct underlying the two charges encompassed but a single volitional act, Steinhardt *assumes* what the facts would show:

> The complaint gives no indication of the amount of time involved in the assault, but since it is not mentioned, it is reasonable to assume that it did not

> take anywhere near the two and one-half hours found in *Eisch*.

Steinhardt's brief at 10.

By assuming that the entire episode during which her husband sexually assaulted her daughter took significantly less than the two and a half hours involved in *State v. Eisch*, 96 Wis. 2d 26, 291 N.W.2d 800 (1980), Steinhardt is able to argue that "the allegations only concerned one relatively short time frame," a circumstance she presumably believes would render *Eisch* distinguishable. Steinhardt's brief at 7.

Steinhardt should not be able to indulge that assumption, given her later argument that all the facts necessary to decide her multiplicity claim appear on the record.

As Steinhardt points out at page 8 of her brief, the complaint did not specify which of her acts or omissions underlay count 1 as opposed to count 2. Nor was there ever a discussion between the parties regarding the facts supporting each count. Contrary to Steinhardt's assumption, however, this omission does not mean she is now entitled to assert that the identical conduct underlay both counts. Rather, by pleading no contest without raising a multiplicity challenge, Steinhardt made it unnecessary for the prosecutor to identify the specific conduct constituting the individual charges, and she should not be able to now benefit from this gap in the record. Had Steinhardt timely raised a multiplicity challenge, the prosecutor could have clarified—assuming the trial court found it necessary—that the conduct underlying the charge of sexual assault, failure to act, was different than and temporally separate from the conduct underlying the charge of sexual assault of a child, party to a crime. The State will illustrate how this was possible.

The crime of sexual assault of a child, failure to act, has seven elements, paraphrased as follows:

> 1) The defendant was a person responsible for the child's welfare.
>
> 2) The child was under 16 at the time of the alleged offense.
>
> 3) A named person either intended to have, was having, or had sexual intercourse or contact with the child.
>
> 4) The defendant knew that the person either intended to have, was having, or had sexual intercourse or contact with the child.
>
> 5) The defendant was physically and emotionally capable of taking action which would have prevented the sexual intercourse or contact from taking place or being repeated.
>
> 6) The defendant failed to take action that would have prevented the sexual intercourse or contact from occurring or being repeated.
>
> 7) The defendant's alleged failure to act either exposed the child to an unreasonable risk that sexual intercourse or contact may occur or facilitated the sexual intercourse or contact that did occur between the child and the person.

Wis. JI-Criminal 2106, 1-2 (2009).

All seven elements required for a violation of § 948.02(3) were complete when Steinhardt's husband digitally penetrated F.G. According to the complaint (1:2) and the presentence investigation report (29:2-3), this was the first of three discrete acts of sexual intercourse between Walter Steinhardt and

twelve-year-old F.G. Steinhardt knew her husband planned on having intercourse with F.G. when she led her daughter to the bedroom. Rather than leading F.G. to the bedroom like a lamb to the slaughter, Steinhardt could have prevented the sexual assault by having F.G. leave the house, by leaving the house with her, or by taking some other evasive action. Once Walter Steinhardt digitally penetrated F.G., the crime of sexual assault of a child, failure to act, was complete. The prosecutor could have proffered this explanation, had he been given the chance.

As the factual basis for the charge of first degree sexual assault of a child, party to a crime, the prosecutor could have used, individually or in combination, Steinhardt's conduct of directing F.G. to remove her clothing, or Steinhardt's conduct of telling Walter to "get her [F.G.] started" (*see* 29:2). Each act aided and abetted the fellatio Walter had F.G. perform on him and the vaginal intercourse he engaged in with F.G., both acts having taken place after he digitally penetrated her. Although the criminal complaint recites that Walter told F.G. to remove her clothes (1:2), that information came from Steinhardt's version of the assaults. In contrast, the PSI reports that F.G. told a social worker and a detective on June 16, 2013, that it was her mother who told her to remove her clothes (29:2). During the sentencing hearing, the prosecutor attributed this statement to Steinhardt, and the defense did not object (*see* 67:10). Had Steinhardt raised a multiplicity claim before pleading no contest, the prosecutor could have clarified the matter.

In summary, by pleading no contest to the charges, Steinhardt forfeited the right to claim that her convictions on counts 1 and 2 were multiplicitous. As the foregoing discussion reveals, factual development additional to the facts as presented in the complaint is necessary to resolve Steinhardt's belated multiplicity challenge. Pursuant to *Kelty*, 294 Wis. 2d 62, this court should decline to address the merits of Steinhardt's claim.

II. Under The Facts Presented In The Complaint And In The Presentence Investigation Report, Steinhardt's Convictions For Sexual Assault, Failure To Act, And First Degree Sexual Assault Of A Child As Party To A Crime Are Different In Fact And Not Multiplicitous; Conviction Of Both Offenses Therefore Does Not Violate Steinhardt's Right To Be Free From Double Jeopardy.

A. Although § 948.02(3) is a lesser-included offense of § 948.02(1)(e), conviction of both crimes is permissible when based on different facts.

In arguing that her convictions for sexual assault, failure to act, and first degree sexual assault of a child, party to a crime, are multiplicitous, Steinhardt takes a position completely opposite the position she took in her postconviction motion (44). In her postconviction motion, Steinhardt categorically represented that "[f]ailure to [a]ct is *not* a lesser-included offense of 1st Degree Sexual Assault of a Child" (*id.*:4; emphasis added).

Now, for the first time on appeal, Steinhardt points out that under Wis. Stat. § 939.66(2p), sexual assault, failure to act, *is* a lesser-included offense of first degree sexual assault of a child under § 948.02(1). *See* Steinhardt's brief at 12-13.[2] Steinhardt is right the second time around; § 939.66(2p) includes in the definition of included crimes "[a] crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged."

---

[2] Actually, Steinhardt says something akin to that: "The Failure to Protect offense under § 948.02(3) is a less serious type of violation under s. 940.02 [sic, 948.02] than First Degree Sexual Assault under." Steinhardt's brief at 13.

Because of Steinhardt's concession in her postconviction motion, neither the prosecutor nor the trial court had occasion to address this argument. Under these facts, the State justifiably could argue that Steinhardt should be estopped from taking an opposite position on appeal. To ward off a later claim of ineffective postconviction counsel, however, the State will address this claim on the merits and asks this court to do so, too, assuming it does not hold that Steinhardt forfeited her multiplicity claim by pleading no contest. *See* Argument I, *supra*.

Because § 939.66(2p) uses the term "violation" rather than "sexual assault," the State reluctantly acknowledges that the legislature has decided that sexual assault, failure to act, is a lesser-included crime of first degree sexual assault of a child under § 948.02(1)(e). That concession does not resolve the question whether Steinhardt could be convicted of both offenses for her role in the multiple sexual assaults her husband committed against her daughter, however. Rather, as Steinhardt implicitly concedes in her brief at 7-11, if the conduct underlying the individual offenses is different and represents two separate volitional acts, then her conduct can be punished under both statutes without violating her right to be free from double jeopardy.

Applying case law to the facts as set forth in the complaint and the presentence investigation report (PSI), the State will show below that the conduct underlying each offense is different and represents at least two volitional acts.

B. Different conduct and volitional acts underlie counts 1 and 2.

There is no question but that Steinhardt's husband could have been charged with three counts of first degree sexual assault of a child based on the episode in the bedroom that

underlies the charges against Steinhardt. The digital penetration, the fellatio, and the vaginal intercourse could each form the basis for a separate charge under Wis. Stat. § 948.02(1)(e). *See State v. Ziegler*, 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238. In *Ziegler*, the supreme court held that five counts of second degree sexual assault of the same child in the course of the same evening were not multiplicitous because they were "significantly different in nature, involving different methods of intrusion and contact and different areas of Ziegler and [the victim's] bodies." *Id.* ¶ 73. The counts in *Ziegler* were based on fellatio, digital penetration of the victim's vagina, the touching of the victim's breasts, the victim's touching of Ziegler's penis, and the striking of the victim's buttocks. *See id.* The supreme court concluded that each act was distinct from the others and "'required a new volitional departure' in Ziegler's course of conduct." *Id.* Accordingly, the court held that the five acts were sufficiently different factually to demonstrate that Ziegler committed five separate crimes. *Id.*

Similarly, the digital penetration of F.G.'s vagina, fellatio, and vaginal intercourse with F.G. were significantly different in nature, involving different types of intrusion and contact and different areas of Walter's and F.G.'s bodies. Under *Ziegler*, the State could have charged Walter Steinhardt with at least three separate counts of first degree sexual assault of a child in violation of § 948.02(1)(e).

Given that her husband could have been charged with at least three counts of sexually assaulting F.G., it logically follows that Steinhardt could have been charged with and convicted of three counts of sexual assault, failure to act, given her awareness of each separate sexual assault as it was unfolding. Support for this proposition comes from *State v. Carol M.D.*, 198 Wis. 2d 162, 542 N.W.2d 476 (Ct. App. 1995).

In *Carol M.D.*, 198 Wis. 2d at 174, this court declared that "[p]rohibited criminal conduct suggests multiple units of prosecution if the perpetrator subjects the victim to a new and different humiliation, danger and pain with each action." There, this court upheld the defendant's convictions on nine counts of sexual assault, failure to act, each count having been based on a separate instance of defendant leaving her son with her boyfriend, who sexually assaulted the child on each occasion. *Id.* at 170.

Although the time frame here is very different than it was in *Carol M.D.*, each of Steinhardt's failures to act is different in fact, and each one could have been prosecuted as a separate violation of § 948.02(3). According to Steinhardt's own version of events, after F.G. removed her clothes, Walter "started playing with her. He was touching F.G.'s breasts and rubbing on her. . . . He started touching her vagina and using his fingers on her." (29:3). Having watched this sexual assault unfold, Steinhardt did nothing. Instead, she remained on the bed and watched as Walter "made [F.G.] suck on his penis" while "he kept telling her how good it felt" (*id.*). Again, Steinhardt did nothing. Rather, when Walter was "done" being fellated, Steinhardt still did not intervene, but instead watched as "he had [F.G.] lay down again and he started having sex with her" (29:3).

Just as Carol M.D.'s continuing failure to act to protect her son from being sexually assaulted by her boyfriend subjected her son "to a new and different humiliation, danger and pain with each action," *Carol M.D.*, 198 Wis. 2d at 174, here Steinhardt's continuing failure to act subjected her daughter to a new and different humiliation and pain each time Walter carried out a different sex act with the child. As this court explained in *Carol M.D.*,

> [A] new *mens rea* is formed each time a person fails to act to protect the victim, with the knowledge of the

> prior assault. In other words, the *mens rea* is not just the knowledge of the prior assault, it is the existence of that knowledge accompanied by the circumstance of a failure to act that exposes the victim again.

Id. at 171.

Steinhardt was aware of each assault her husband perpetrated against F.G., yet did nothing to protect the child. Steinhardt's knowledge, coupled with her repeated failure to act, exposed F.G. to multiple assaults, each chargeable under § 948.02(1)(e) as to Walter, and each chargeable under § 948.02(3) as to Steinhardt. Because the State could have used Steinhardt's failure to stop any of the sexual assaults as a factual basis for charging her with violating § 948.02(3), it necessarily follows that the State could have based the charge of first degree sexual assault, party to a crime, on different conduct, such as Steinhardt telling F.G. to remove her clothes, which aided and abetted the commission of all the sexual assaults Walter perpetrated.

Pursuant to *Ziegler* and *Carol M.D.*, the State had at its disposal different conduct and different volitional acts to support count 1 and count 2, so that convictions on both counts was neither multiplicitous nor a violation of Steinhardt's right to be free from double jeopardy. Therefore, if this court decides to address the merits of Steinhardt's claim, this court should reject it.

III. Steinhardt Has Insufficiently Developed The Claim That Counsel Was Ineffective In Failing To Raise The Multiplicity Issue; Alternatively, She Has Offered Only Conclusory Allegations With Respect To The Prejudice Prong Of *Strickland v. Washington*.

In her postconviction motion, Steinhardt raised as Claim 2 the argument that she received ineffective assistance of

counsel when her attorney did not inform her that her convictions violated the Double Jeopardy Clause (44:7). On appeal, it appears Steinhardt has abandoned this claim because she has not included it in the Issues Presented (Steinhardt's brief at 1-2), nor is any heading in her brief devoted to this issue. Nevertheless, in contending that she did not relinquish the right to raise the multiplicity claim, Steinhardt suggests that one reason she did not forfeit the claim is that if counts 1 and 2 are multiplicitous, then counsel was ineffective in foregoing a motion to dismiss count 1. *Id.* at 17.

Although far from clear, Steinhardt possibly believes she has raised a claim of ineffective assistance as an alternative argument despite the fact she does not even cite *Strickland v. Washington*, 466 U.S. 668 (1984). If that is Steinhardt's belief, it is misguided.

Without explicitly referencing *Strickland*'s deficient-performance prong, Steinhardt implicitly asserts she has satisfied it by showing that the two charges were multiplicitous and that trial counsel admittedly had no strategic reason for failing to move for dismissal of count 1 on multiplicity grounds. Steinhardt's brief at 17. With respect to *Strickland*'s prejudice prong—which Steinhardt also does not mention directly—she just cites postconviction counsel's representation that Steinhardt would testify she would not have pled no contest to count 1, had she known of a potential multiplicity challenge. *Id.* at 18 (citing 68:30 of the record).

Steinhardt may believe that merely asserting that she would not have pled no contest to count 1 had she known of the multiplicity challenge satisfies *Strickland*'s prejudice prong by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694. Such a belief would be unfounded, however.

To obtain a hearing on a motion for plea withdrawal based on ineffective assistance, "[a] defendant must do more than merely allege that [s]he would have pled differently; such an allegation must be supported by objective factual assertions." *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). Specifically, the defendant must set forth "facts that allow the reviewing court to meaningfully assess" her claim of prejudice. *Id.* at 314. This means the motion must provide a specific explanation of why she would not have pled guilty and would have gone to trial if counsel had properly advised her. *See id.* at 313-17.

Steinhardt does not say she would have expected a shorter sentence had count 1 been dismissed, nor would such an expectation have been reasonable. Assuming the prosecutor would have been forced to drop count 1, which carried a maximum sentence of twelve years and six months (*see* 9), he could have amended the information to add one or two counts of first degree sexual assault of a child, party to a crime, because Steinhardt's husband penetrated F.G. with his finger and with his penis and also had the child engage in oral sex with him (1:2). Each additional count for violating Wis. Stat. § 948.02(1) would have carried a maximum sentence of sixty years, a sentence far greater than the dismissed count did. But even if the prosecutor would not have replaced the dismissed count with a greater charge, Steinhardt has not furnished any reason why the trial court would have given her an aggregate sentence shorter than the twenty-two years and six months of initial confinement and fifteen years of extended supervision she received on all three counts (33). Given that Steinhardt's convictions on counts 2 and 3 carried a combined maximum sentence of eighty-five years (*see* 9),[3] the trial court could have

[3] At sentencing, the trial court mistakenly stated that Steinhardt's conviction on count 3 carried a forty-year maximum (67:39). In fact, the

(footnote continued…)

imposed the same punishment even if the prosecutor had dismissed count 1.

If this court construes Steinhardt's brief as raising a claim of ineffective assistance, this court should decline to address the claim because it is insufficiently developed. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may decline to review issues inadequately briefed). Not only does Steinhardt fail to identify the claim via the Issues Presented or in a brief heading, she does not even cite *Strickland*.

Alternatively, if this court addresses the claim of ineffective assistance after finding that counts 1 and 2 are multiplicitous,[4] this court should hold that Steinhardt has failed to satisfy *Strickland*'s prejudice prong.

IV. The Proper Remedy For A Double-Jeopardy Violation Would Be Dismissal Of Count One And Resentencing On The Remaining Two Counts.

Citing *State v. Church*, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141, Steinhardt argues that if this court finds that count 1 is multiplicitous with count 2, the proper remedy is to vacate her conviction on count 1 without resentencing her on the remaining counts. Steinhardt's brief at 18. *Church*, however, does not support her argument.

---

maximum sentence for child enticement under Wis. Stat. § 948.07(1) is twenty-five years. *See* Wis. Stat. § 939.50(3)(d).

[4] If this court addresses and rejects Steinhardt's multiplicity claim, then her ineffective-assistance claim would fail on *Strickland*'s deficient-performance prong.

The supreme court in *Church*, 262 Wis. 2d 678, ¶ 4, did say that "resentencing on convictions that remain intact after an appellate court reverses and vacates one or more counts in a multi-count case is not always required." But that statement was immediately followed by the explanation that "[w]here, as here, the vacated count did not affect the overall dispositional scheme of the initial sentence, resentencing on the remaining counts is unnecessary and therefore not required." *Id.*

Here, the sentence on the count Steinhardt is seeking to vacate—her sentence of twelve and one-half years on count one—did affect the trial court's overall dispositional scheme. The trial court imposed Steinhardt's sentence on count 2 consecutive to her sentence on count 1, and then ran her sentence on count 3 concurrently with her sentence on count 2 (67:42-43). The trial court said it "came up with a sentence that I think addresses all of those [sentencing] factors and hopefully . . . in a way that will protect the community and send a message that the most vulnerable of all victims do have a voice" (*id.*:42). Given that the trial court envisioned an aggregate sentence that it believed would accommodate the major sentencing factors, the trial court should be given the option of resentencing Steinhardt on her remaining two convictions if her conviction on count 1 is vacated.

CONCLUSION

This court should affirm the judgment and order of the circuit court.

Dated this 18th day of August, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MARGUERITE M. MOELLER
Assistant Attorney General
State Bar #1017389

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 266-9594 (Fax)
moellermm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,750 words.

_____

Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 18th day of August, 2015.

_____

Marguerite M. Moeller
Assistant Attorney General