STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2015AP000993 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER L. STEINHARDT,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON APRIL 30, 2015, AND A JUDGMENT OF CONVICTION ENTERED ON JUNE 23, 2014, IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, HON. SANDY A. WILLIAMS PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Steinhardt's Convictions for Failure to Act and 1st Degree Sexual Assault of a Child are Multiplicitous.

In its brief, the State "reluctantly" agrees with Steinhardt and concedes 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)." State's brief at 8. However, the State insists that both offenses could properly be charged because different conduct and volitional acts underlie them.

The State maintains that Steinhardt's husband, Walter, could have been charged with at least three counts of sexually assaulting F.G., since three distinct sexual acts were listed in the criminal complaint. The State then surmises that Steinhardt could have been charged likewise. The State cites to *State v. Ziegler*, 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238, for the proposition that five counts of sexual assault of the same child during the same evening were not multiplicitous because the acts were "significantly different in nature, involving different methods of intrusion and contact and different areas of Ziegler and [the victim's] bodies." State's brief at 9.

The State also cites to *State v. Carol M.D.*, 198 Wis. 2d 162, 542 N.W.2d 476 (Ct. App. 1994). In that case, the court of appeals held that a defendant could be convicted of failing to act to protect a child from nine counts of sexual assault. The State acknowledges that the time frames in *Carol M.D.* were "very different" from the time frame in Steinhardt's case—the sexual assaults in *Carol M.D.* occurred on completely different occasions, while the assaults in Steinhardt's case occurred on a single occasion. *Id.*, 190 Wis. 2d at 170.

The State's argument is that since both Steinhardt and her husband *could* have been charged with multiple counts of first degree sexual assault—based on the allegation that different body parts were touched—it is possible that the State could have based the charge of failing to protect (Count 1) on one type of touching, and the first degree sexual assault (Count 2) on a different type of touching. State's brief at 11. This, according to the State, would resolve any multiplicity problems.

As acknowledged in her brief, Steinhardt does not dispute that the touching of various intimate body parts can properly lead to multiple counts, as demonstrated in *Ziegler* and *State v. Eisch*, 96 Wis. 2d 25, 291 N.W.2d 800 (1980). She also agrees that under *Carol M.D.*, one can be held responsible for failing to act to protect a victim from the acts of another. However, that does not mean that the charges in Steinhardt's case cannot still be multiplicitous if the acts are close enough in time and nature, as was found by the court in *State v. Hirsch*, 140 Wis. 2d 468, 474, 410 N.W.2d 638 (Ct. App. 1987) (multiple sexual assault charges against the defendant were multiplicitous because the acts spanned "no more than a few minutes" and involved the defendant moving his hand from the victim's vagina to her anus and back again).

The problem with the State's argument is this: In Steinhardt's case, the criminal complaint describes the conduct alleged by the State, and every single act that is described can equally be applied to both the sexual assault charge and the failure to protect charge. The criminal complaint did not specify the time period involved. It seems apparent, however, that the time period was relatively short. Nothing in the criminal complaint indicates that the assault occurred over a long period of time. In addition, the State did not charge the direct actor (Walter) with multiple counts of sexual assault.

The sexual assault charge against Walter did not differentiate various acts, and only charged a single count of sexual assault.[1]

Steinhardt contends that reference to the complaint is sufficient to demonstrate that the failure to act count is multiplicitous with the sexual assault count.[2] However, due to the sparseness of the criminal complaint—comprising only six sentences—it is possible that a remand is required to further develop the sequence of events that occurred during the assault. At an evidentiary hearing, it could be determined that the various acts committed against F.G. were very close in time, and essentially all part of one continuous act of failing to protect F.G. and aiding Walter in the sexual assault.

Steinhardt realizes that any need for a remand could subject her to the holding in *State v. Kelty*, 2006 WI 101, ¶34, 294 Wis. 2d 62, 716 N.W.2d 886, which states that a guilty plea "waives a multiplicity claim anytime the claim cannot be resolved on the record." However, since Steinhardt raised her claim partially on the allegation that her trial attorney was ineffective in failing to recognize the multiplicity issue, she has not waived her right to such a hearing. This will be discussed in the next section.

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[1] Displayed at Wisconsin Circuit Court Access (CCAP) at: http://wcca.wicourts.gov/caseDetails.do;jsessionid=BF1064EE57F390FCFBDDC6E0BA5EFACB.render6?caseNo=2013CF000132&countyNo=45&cacheId=AD97A08D5FB20D5737A8CD735F2C98AA&recordCount=1&offset=0&mode=details&submit=View+Case+Details

[2] The State also cites to the PSI to various facts that were not included in the criminal complaint. State's brief at 6. But such allegations are irrelevant to the question presented here. Steinhardt pled no contest based on the facts contained in the criminal complaint. She waived her right to a preliminary hearing (59), and at the time her plea, very few facts were in the court record, thereby making the criminal complaint the chief source of the allegations at the time of the plea.

II. Steinhardt did not relinquish her right to assert a multiplicity claim by pleading no contest.

The State argues that by pleading no contest, Steinhardt forfeited her claim of a double jeopardy violation. The State cites to *Kelty*, which holds that a "guilty plea waives a multiplicity claim anytime the claim cannot be resolved on the record." *Kelty*, 2006 WI 101 at ¶ 34. According to the State, the claim cannot be resolved on the record because there is nothing in the record showing that the sexual assault occurred during a relatively short time frame. State's Brief at 4.

As indicated above, it is fair to assume that the assault did not occur over a lengthy period of time since it is likely that the complaint would have indicated if it had been lengthy, and the State did not charge multiple counts of first degree sexual assault against either Steinhardt or her husband.

But even if the court adopts the State's argument that further fact finding would be necessary, it should find that the multiplicity issue is nevertheless preserved. The reason for this is that in her postconviction motion, Steinhardt claimed that her trial attorney was ineffective for failing to identify and discuss the multiplicity issue with her before she pled (44:7-8).

The *Kelty* court specified that, although a multiplicity claim could otherwise be forfeited, a defendant may still obtain a fact-finding hearing based on a claim of ineffective assistance of counsel. *Id.*, at ¶43. That is precisely what Steinhardt did through her postconviction motion.

In its brief the State surmises that Steinhardt has "abandoned" her ineffective assistance of counsel claim because she did not include it in her Issues Presented or devote a point heading to the issue. State's brief at 12. The State is wrong. First, although the words "ineffective assistance of

counsel" do not appear in the "Issues Presented" portion of her brief, Steinhardt did identify the following issue: "Did Steinhardt relinquish her right to raise the double jeopardy issue by pleading no contest to the charges?" Steinhardt's brief at 2. Surely this statement sufficiently includes the *reason* why Steinhardt did not relinquish her right to raise the double jeopardy issue, that being ineffective assistance of counsel.

Second, in her brief, Steinhardt asserted in the argument section that the double jeopardy issue was preserved because her attorney was ineffective for failing to inform her of the claim. Steinhardt's brief at 17-18. It is difficult to see how the State can fairly claim that Steinhardt has somehow "abandoned" her ineffective assistance of counsel claim.

The State then goes on to argue that Steinhardt did not sufficient developed the ineffective assistance of counsel claim because she did not specify in what ways counsel was deficient, and how she was prejudiced. State's brief at 12-14.

But Steinhardt did not need to go into great detail in her brief because of the obvious nature of the claim. Obviously, if Steinhardt pled no contest to a charge that was multiplicitous, counsel was deficient in allowing that to happen. There could be no strategic reason for entering a plea no an offense that cannot survive a double jeopardy attack. And in her postconviction motion, Steinhardt offered the testimony of Steinhardt's attorney who would testify that he in fact had no strategic reasons for failing to inform Steinhardt of the possible claim (68:30). This was discussed in Steinhardt's brief.

As for the prejudice prong of an ineffective assistance of counsel claim, the State posits that if the prosecutor had been forced to drop Count 1, 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. State's brief at 13.

The State's scenario is highly speculative. For reasons discussed earlier, such additional charges ran the risk of being declared multiplicitous. What is not speculative is that the State did not add additional charges, and there is little reason to assume that the prosecutor would have filed such charges had Count 1 been dismissed.

The State also assumes that the sentencing court would have somehow arrived at the same overall sentence even if Count 1 no longer existed. State's brief at 13. While the same result is possible, it is unlikely. The court sentenced Steinhardt based on the existence of three counts. The court ordered Count 1 to run consecutive to the twenty five year sentences stemming from Counts 2 and 3. Undoubtedly, the court ordered Count 1 to be consecutive because it believed that Steinhardt's failure to act to protect F.G. was deserving of an additional punishment beyond the conduct that formed Counts 2 and 3. But if Count 1 did not exist because it is multiplicitous, an increased sentence on Counts 2 and 3 would not be justified because the conduct underlying those counts would be the same as when she received her 25 year sentences on each. It makes sense that if a defendant is sentenced on two counts, the sentence would be lower than if she is sentenced on three counts, at least when the counts are not all concurrent with each other.

Obviously, Steinhardt cannot know for certain what a court would do with the sentence at resentencing, but the law does not require her to extract such information from a sentencing court in advance. She can, and did, offer a reasonable probability that, upon resentencing, the total

sentence would be lower if Count 1 did not exist. That is all that is required.

CONCLUSION

For the above reasons, Steinhardt respectfully requests this Court to reverse the circuit court's decision and vacate her conviction and sentence for Failure to Act, § 948.02(3).

Respectfully submitted this 25th of August, 2015.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1,875 words.

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John A. Pray

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

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John A. Pray