No. 2015AP993

In The Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

HEATHER L. STEINHARDT,
DEFENDANT-APPELLANT-PETITIONER.

On Appeal from the Ozaukee County Circuit Court, The Honorable Sandy A. Williams, Presiding, Case No. 13-CF-136

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUES PRESENTED

1. Based on the record at the time Heather Steinhardt pleaded no contest, can the Court conclude that her convictions for "failure to act" to protect a child from sexual assault, Wis. Stat. § 948.02(3), and first-degree sexual assault, as party to a crime, Wis. Stat. §§ 948.02(1)(e), 939.05, violated the Double Jeopardy Clause?

The circuit court and court of appeals answered, "No."

2. Did Steinhardt receive ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), when her trial counsel failed to inform her of an alleged Double Jeopardy Clause defense?

The circuit court and the court of appeals answered, "No."

INTRODUCTION

Heather Steinhardt's husband prodded her to allow him to have sex with her 12-year-old daughter, F.G. Such prodding had gone on for three years, and Steinhardt finally gave in. Steinhardt brought F.G. into the bedroom where her husband was lying, prepared. Steinhardt then sat on the bed, while her husband ordered F.G. to take off her clothes. He then engaged in digital penetration of F.G., forced her to perform oral sex on him, and then had forced sexual intercourse with her, vaginally. Steinhardt remained on the bed the whole time watching—and doing nothing.

The State charged Steinhardt with, as relevant here, failure to protect a child from sexual assault, Wis. Stat. § 948.02(3), and first-degree sexual assault of a child under 13 years old, as party to a crime, Wis. Stat. §§ 948.02(1)(e), 939.05. Steinhardt pleaded no contest to both charges, but now argues that her convictions violate the Double Jeopardy Clause. Steinhardt's argument is wrong because the two charges involved different conduct, which the State can punish separately: the sexual-assault charge is premised on Steinhardt bringing F.G. into the bedroom, knowing that her husband intended to sexually assault F.G. The failure-to-act charge is premised on Steinhardt sitting on the bed, watching the sexual assault take place, and doing nothing to stop it.

Steinhardt's argument to the contrary rests primarily upon her repeated assertion that the *only* fact supporting these two contested charges is her sitting on the bed. She claims that this Court must ignore the fact that she brought F.G. into the bedroom because the State used this action to support a third charge to which she also pleaded no contest: child enticement. But Steinhardt is wrong on the law. She has not included that third charge in her double-jeopardy challenge here because that charge is unquestionably separately chargeable from the other two counts. Therefore, the State is allowed to use the fact that Steinhardt brought F.G. into the bedroom to support one of the challenged charges here, consistent with double jeopardy.

STATEMENT

1. On April 1, 2013, Steinhardt was at her home in Ozaukee County with her husband, Walter Steinhardt, and her 12-year-old daughter, F.G. App. 175. Steinhardt's husband "had been prodding" Steinhardt throughout the day "to allow him to have sexual intercourse with F.G." App. 175. Indeed, he had expressed "interest[ ] in having intercourse with both of [Steinhardt's] daughters for the last three years." App. 175. Steinhardt gave in. She "went to one of the other rooms where F.G. was and brought her into the bedroom that [Steinhardt] shared with Walter." App. 176. She "sat with [F.G.] on the bed," where "Walter was prepared, lying . . . under the covers." App. 176.

Once F.G. was on the bed, "Walter then told F.G. to take off her clothes," which she did. *See* App. 176. "Walter engaged in digital penetration of F.G.," he "had F.G. engage in oral sex with him," and he "ultimately [ ] had sexual intercourse with F.G." vaginally. App. 176. Steinhardt "remained on the bed the whole time." App. 176. Once "Walter finished," "F.G. left the room to take a shower" and Steinhardt "follow[ed] her into the bathroom." App. 176.

The police discovered these crimes after F.G. confided in her biological father. *See* R.67:12.

2. The State charged Steinhardt with, as relevant here: (1) failure to protect a child from sexual assault, Wis. Stat. § 948.02(3), and (2) first-degree sexual assault of a child under 13 years old, as party to a crime, Wis. Stat.

§§ 948.02(1)(e), 939.05. App. 175–76 (criminal complaint). The State later added a third charge: (3) child enticement in violation of Wis. Stat. § 948.07. App. 177. Steinhardt has not challenged this third charge here. Opening Br. 14 & n.6.

At her plea hearing, Steinhardt pleaded no contest to all three counts. R.66:10. Before accepting the pleas, the circuit court ensured that Steinhardt had read the criminal complaint, particularly the probable-cause portion, which provided the factual basis. R.66:7. She stated that she had read the document and admitted that the facts in it were "substantially true and correct." R.66:7. The court therefore accepted the no-contest pleas, stating, "I find that there are sufficient facts to find [Steinhardt] guilty." R.66:10–11. The court then ordered a presentence investigation. R.66:8.

The circuit court sentenced Steinhardt to 12 years, 6 months imprisonment on the failure-to-protect count (split between 7 years and 6 months of initial confinement and 5 years of extended supervision). R.67:42. The court sentenced Steinhardt to 25 years imprisonment on the sexual-assault count (split between 15 years initial confinement and 10 years extended supervision), consecutive to the previous sentence. R.67:42–43. Finally, the court sentenced Steinhardt to 25 years on the third charge of child enticement, which the court ordered to be served concurrent to her sentence for sexual assault. R.33:1.

Also at the sentencing hearing, the State mentioned other facts about the crime, drawn from the presentence

investigation and Steinhardt's interview with investigators before she was charged. For example, the State said that Steinhardt "went and got [F.G.] and said, we have to do something special for Walter's birthday." R.67:10 (sentencing hearing). It also said it was Steinhardt who "told [F.G.] to take off her clothes," contrary to the criminal complaint. R.67:10. Additionally, she also told Walter to "get her started first," and she ended her husband's sexual assault of F.G. by telling him "that's it, that's enough." R.67:11. Finally, after the sexual assault, she "[t]ook [F.G.] away" and "had [her] take a shower." R.67:11.

3. Steinhardt filed a postconviction motion to vacate her convictions and sentences, raising two claims. First, she claimed that her convictions on the failure-to-act count and the sexual-assault count violated the Double Jeopardy Clauses of the Wisconsin Constitution and the United States Constitution. App. 112–14. Second, she claimed that she received ineffective assistance of counsel because her lawyer failed to address the alleged double-jeopardy issue before she pleaded. App. 114. The circuit court rejected both claims.

With respect to the double-jeopardy claim, the circuit court confined its review to the facts established at the time Steinhardt gave her pleas, *see* App. 131–32, and concluded that different factual bases supported the two charges, *see* App. 131–32, 135. Specifically, the court concluded that Steinhardt's bringing F.G. into the bedroom supplied the factual basis for the sexual-assault (as party to a crime)

count, while Steinhardt's sitting on the bed as Walter repeatedly sexually assaulted F.G supplied the factual basis for the failure-to-act count. *See* App. 131–32, 135. The court therefore held that "the party to the crime [count] and failure to act [count] are not multiplicitous," because they are factually distinct. App. 135.

With regard to the ineffective-assistance claim, the circuit court rejected it because the court had already concluded that the two counts were not duplicative. *See* App. 135–36. Despite this ruling, the court allowed Steinhardt to make an offer of proof on this claim, which the State did not oppose. App. 136. Specifically, Steinhardt's post-conviction counsel stated that Steinhardt's trial counsel would have testified at the hearing that he did not have a strategic reason for failing to address the double-jeopardy issue. App. 136–37. Post-conviction counsel also stated that Steinhardt would have testified that she had not been informed of the double-jeopardy issue prior to entering a plea and that "if she had known that there was a [double jeopardy] challenge that she would not have pled no contest." App. 137.

4. Steinhardt appealed the circuit court's denial of her postconviction motion to the court of appeals, which affirmed the circuit court on both of Steinhardt's claims.

With respect to the double-jeopardy claim, the court of appeals held that it could review the claim, despite Steinhardt's voluntary no-contest plea, but that its review

was narrowed to the record at the time of the plea. App. 103, ¶ 5 (citing *State v. Kelty*, 2006 WI 101, ¶¶ 18, 38, 294 Wis. 2d 62, 716 N.W.2d 886). The court explained that the counts could both stand if they were based on distinct acts of Steinhardt, as opposed to both being based on "one continuous course of conduct." App. 104, ¶ 8. The court concluded that the "claim cannot be resolved based on" the record at the time of the plea "alone." App. 104–05, ¶ 9. But, since Steinhardt had pleaded no contest, the court's inability to resolve the double-jeopardy claim on the record alone meant it had to deny the claim. App. 104–05, ¶ 9.

Moving to the ineffective-assistance claim, the court concluded that Steinhardt "failed to sufficiently allege prejudice to entitle her to a hearing" on this claim. App. 105, ¶ 11.[1] The court added that Steinhardt's "conclusory allegations" that "she would not have entered her plea" had counsel informed her of the double-jeopardy issue were "insufficient" to establish prejudice. App. 105, ¶ 11.

5. Steinhardt petitioned for review from this Court, which this Court granted. This Court ordered that this case be argued on the same day as *State v. Pal*, No. 2015AP1782, which also raises double-jeopardy issues.

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[1] As Steinhardt notes, Opening Br. 4, the circuit court *did* hold an evidentiary hearing on her postconviction motion, including her ineffective-assistance-of-counsel claim, contrary to the statement in the court of appeals' opinion. The court of appeals' decision is accordingly best read to mean that Steinhardt simply failed to show prejudice.

SUMMARY OF ARGUMENT

I. Applying this Court's two-pronged test for multiplicity claims here, with the limitation of the guilty-plea-waiver rule, Steinhardt's double-jeopardy claim fails.

Under the first prong, the two charges are not identical in fact. Offenses are identical in fact if the defendant's actions constitute a continuous course of conduct, as opposed to distinct courses of conduct. *State v. Eisch*, 96 Wis. 2d 25, 29, 36, 291 N.W.2d 800 (1980). Here, the actions that can support Steinhardt's sexual-assault conviction, her bringing F.G. to her husband with the knowledge that he intended to sexually assault her, are a separate course of conduct from the actions that support her failure-to-act conviction, her sitting on the bed while her husband sexually assaulted F.G. *State v. Ziegler*, 2012 WI 73, ¶¶ 71–73, 342 Wis. 2d 256, 816 N.W.2d 238. These acts are different in nature, as one is an act of omission and the other an act of commission. *Id.* ¶ 73. They caused F.G. different types of harm: she was first harmed when Steinhardt delivered her to her abuser and then harmed again when Steinhardt idly watched the abuse occur. *Id.* And while the record does not state the length of time between Steinhardt's actions, silence here must be resolved in favor of affirming the convictions, in light of Steinhardt's no-contest plea. *See Kelty*, 294 Wis. 2d 62, ¶ 51.

Steinhardt claims that the offenses are identical in fact because they are both supported only by the single act of

her sitting on the bed while the abuser sexually assaulted F.G., but she is simply wrong. The complaint clearly alleges that Steinhardt brought F.G. into the room *and then* sat on the bed to watch the assaults. App. 175. Steinhardt claims that double jeopardy requires this Court to ignore this fact (her bringing F.G. to the abuser) because this also supported her third count of child enticement. But her third count is unchallenged here—and, in any event, that charge is not even arguably identical in law to either of the challenged charges here, so there is no double-jeopardy problem with using that fact to support her sexual-assault charge.

Moving to the second prong, Steinhardt has the burden of showing that, despite the factual differences supporting her two counts, the Legislature did not intend "to permit cumulative punishments." *Ziegler*, 342 Wis. 2d 256, ¶ 62. She cannot possibly make this showing because, under all of the relevant factors, the Legislature plainly intended for the two different types of misconduct of the sort at issue here to be punished separately.

II. Steinhardt's counsel properly did not inform Steinhardt about a meritless double-jeopardy claim, thus her ineffective-assistance-of-counsel claim fails. A defendant has a claim for ineffective assistance of counsel when her counsel provided deficient performance that caused her prejudice—defined as creating a reasonable probability that the result of the proceeding would have been different, but for counsel's errors. *State v. Trawitzki*, 2001 WI 77, ¶¶ 39–

40, 244 Wis. 2d 523, 628 N.W.2d 801. Steinhardt claims that her counsel was ineffective because he failed to inform her that the failure-to-act count and the sexual-assault count violated double jeopardy. Yet, since this is not a viable double-jeopardy claim, her counsel's "failure" to inform her of this cannot be deficient performance. *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

STANDARD OF REVIEW

Whether multiple counts violate double jeopardy "is a question of law subject to [this Court's] independent review." *Ziegler*, 342 Wis. 2d 256, ¶ 38. Whether a defendant received ineffective assistance of counsel is "a mixed question of law and fact." *Trawitzki*, 244 Wis. 2d 523, ¶ 19. The "circuit court's findings of fact" are upheld "unless they are clearly erroneous," while the issue of "[w]hether counsel's performance was deficient and prejudicial" is reviewed "de novo." *Id.*

ARGUMENT

I. Steinhardt's Double-Jeopardy Claim Fails Under The *Ziegler* Test And The Guilty-Plea-Waiver Rule

A. A defendant's right not to be placed in double jeopardy is protected by both the Wisconsin Constitution and the United States Constitution. *See Ziegler*, 342 Wis. 2d 256, ¶ 59 (citing Wis. Const. art. I, § 8(1) and U.S. Const. amend. V). "This court traditionally views these two clauses

as identical in scope and purpose." *Ziegler*, 342 Wis. 2d 256, ¶ 59 n.11. This right involves three basic protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *State v. Rabe*, 96 Wis. 2d 48, 64, 291 N.W.2d 809 (1980) (quoting *United States v. Wilson*, 420 U.S. 332, 343 (1975)). This last protection is referred to as "multiplicity." *Id.* at 61.

Steinhardt raises a "unit-of-prosecution (or 'continuous offense') challenge," which is a subset of the protection against multiplicity—the prohibition against multiple punishments for the same offense. *Kelty*, 294 Wis. 2d 62, ¶¶ 16–17.[2] In essence, she alleges that the State "improperly subdivided the same offense into multiple counts of violating the same statute." *Id.* ¶ 16; *see* Opening Br. 9.

Challenges of the sort that Steinhardt is bringing are reviewed "according to a well-established two-pronged methodology." *Ziegler*, 342 Wis. 2d 256, ¶¶ 58–60. "First, the court determines whether the offenses are identical in

[2] Unit-of-prosecution/continuous-offense challenges are one of three types of double-jeopardy multiplicity challenges. *Kelty*, 294 Wis. 2d 62, ¶ 16. The other two types are "second sentence challenges in which a court is alleged to have improperly increased a defendant's first sentence for a charged offense," and "cumulative-punishment challenges in which the state is alleged to have improperly prosecuted the same offense under more than one statute." *Id.*

law *and* fact." *Id.* ¶ 60 (emphasis added). The result of *Ziegler*'s first prong determines which party bears the burden of persuasion on the second prong: whether the Legislature intended "to authorize cumulative punishments." *Id.* ¶ 61. If, under the first prong, the offenses *are* identical in law *and* fact, then the State has the burden of showing that the Legislature intended "to authorize cumulative punishments." *Id.* "Conversely, if the offenses are different in law *or* fact," then the defendant has the burden of showing that the Legislature nevertheless did not "intend[ ] to permit cumulative punishments." *Id.* ¶ 62 (emphasis added). No matter which party bears the burden of persuasion on prong two, the inquiry into legislative intent is guided by the same four factors: "(1) all applicable statutory language; (2) the legislative history and context of the statutes; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct." *Id.* ¶ 63.

B. Steinhardt's prevailing on her double-jeopardy claim is made more difficult for her because she pleaded no contest to the two charges she is now claiming are unconstitutional. "[A] guilty, no contest, or *Alford* plea waives all nonjurisdictional defects [in the convictions], including constitutional claims." *Kelty*, 294 Wis. 2d 62, ¶ 18 (citation omitted). Only a limited exception to this rule exists: If the record at the time the plea was entered "reveals the court had no power to enter the conviction" without

violating the Double Jeopardy Clause, then the defendant's double-jeopardy claim will not be considered waived. *Id.* ¶¶ 26–27, 34 (citation omitted). If the claim cannot be resolved on the record at the time of plea—that is, the Court *cannot* conclude that the Double Jeopardy Clause was violated—then the claim will be considered waived and the defendant's convictions will stand. *See id.* ¶ 34. A similar treatment of factual ambiguity occurs when courts review a conviction for the sufficiency of the evidence: ambiguities in the evidence are resolved in favor of maintaining the conviction. *See, e.g.*, *United States v. Gonzalez*, 922 F.2d 1044, 1053 (2d Cir. 1991).

The rationale for this guilty-plea-waiver rule is sound: A guilty or no contest plea "is an admission that the defendant committed the crime[s] charged against him. It is an admission that all of the factual and legal elements necessary to sustain a . . . judgment of guilt . . . are true." *Kelty*, 294 Wis. 2d 62, ¶ 30 (citations omitted). A valid plea "mean[s] that the defendant gives up the right to a *fact-finding* hearing on the propriety of multiple charges." *Id.* ¶ 2. Thus, ambiguity in the factual record must be resolved against the defendant when conducting the two-pronged double-jeopardy inquiry. *See id.* ¶¶ 40–42.

C. Applying *Ziegler*'s two-pronged inquiry for multiplicity claims here—through the lens of the guilty-plea-waiver rule—Steinhardt's double-jeopardy claim fails.

1. Steinhardt cannot prevail on the first prong because the two counts to which she pleaded no contest are *not* identical in fact, especially when viewed through the guilty-plea-waiver rule. The charges were identical in law because the failure to protect a child, Wis. Stat. § 948.02(3), is a lesser-included offense of first-degree sexual assault, Wis. Stat. § 948.02(1)(e), by operation of law. *See* Wis. Stat. § 939.66(2p); *see also State v. Sauceda*, 168 Wis. 2d 486, 493–94 & n.8, 485 N.W.2d 1 (1992). But a defendant must establish that the claim is *both* identical in law *and* identical in fact. *Ziegler*, 342 Wis. 2d 256, ¶ 60. And here, the offenses that Steinhardt pleaded to are not identical in fact.

Offenses are identical in fact if "the acts allegedly committed [by the defendant] are [not] sufficiently different in fact to demonstrate that separate crimes have been committed." *Ziegler*, 342 Wis. 2d 256, ¶ 60. In other words, the different-in-fact inquiry asks whether the defendant's actions comprise one continuous course of conduct or distinct courses of conduct. *See Eisch*, 96 Wis. 2d at 29, 36. To determine if the defendant's actions constitute a continuous course of conduct or distinct courses of conduct, this Court considers factors like whether the actions are "significantly different in nature," *Ziegler*, 342 Wis. 2d 256, ¶ 73; "result[ ] in a new and different humiliation, danger, and pain" to the victim, *id.* ¶ 71; are separated in time, *see id.* ¶ 72; or "require[ ] a new volitional departure in [the defendant's] course of conduct," *id.* ¶ 73 (citation omitted).

In *Ziegler*, this Court held that a defendant's five convictions for sexual assault of the same minor by "[1] mouth to penis oral sex, . . . [2] digital penetration of vagina, . . . [3] touching breasts, . . . [4] hand to penis [touching], . . . and [5] striking of buttocks," all charged as violations of Wis. Stat. § 948.02(2), were not identical in fact. 342 Wis. 2d 256, ¶¶ 20, 74 (citations omitted). This Court held that "the five acts allegedly committed [were] sufficiently different in fact to demonstrate that [the defendant] committed five separate crimes." *Id.* ¶ 67. The acts were "significantly different in nature, involve[d] different methods of intrusion and contact and different areas of [the defendant's and the victim's] bodies," and "required a new volitional departure in [the defendant's] course of conduct." *Id.* ¶ 73 (citation omitted). This Court reached its holding despite the fact that all five acts "took place in the course of the same evening" and were committed against a single victim. *Id.*

Similarly, in *Eisch,* this Court was confronted with a defendant charged with "forcible and unconsented sexual intercourse with the victim" by (1) "genital intercourse," (2) "anal intercourse," (3) "fellatio," and (4) "inserting [ ] a beer bottle into her genitals," all in violation of the same statute. 96 Wis. 2d at 28. This Court held that the charges did not violate the Double Jeopardy Clause. *Id.* at 42. This Court held that "[e]ach of these methods of bodily intrusion [was] different in nature and character," *id.* at 35, and "each require[d] a separate" and "new volitional departure in the

defendant's course of conduct," *id.* at 36. Indeed, "by embarking on a course of a different type of intrusion on the body of the victim, a different legislatively protected interest [was] invaded" by the defendant. *Id.* at 36. While "the time elapsed between the acts charged [was] not significant enough to make the time interval *alone* controlling," "the different nature of the acts" rendered them separate for double-jeopardy purposes, *id.* at 33 (emphasis added).

Applying these principles here, Steinhardt's two charges were not identical in fact. Steinhardt's two charges at issue in this appeal are (1) failure to act to protect a child from sexual assault, Wis. Stat. § 948.02(3), and (2) sexual assault of a minor, as party to a crime, Wis. Stat. §§ 948.02(1)(e), 939.05. As evidenced from the record at the time of Steinhardt's plea, distinct and separate acts of Steinhardt support the failure-to-act count and the sexual-assault count. Or, at the very least, this Court *cannot* conclude from the record here that the acts supporting each count are identical in fact, which is what matters under the guilty-plea-waiver rule. *Kelty*, 294 Wis. 2d 62, ¶ 34.

To prove failure to act—the first count here—the State must prove that Steinhardt: (1) "ha[d] knowledge that another person intend[ed] to have . . . sexual intercourse or sexual contact with [her] child," that (2) she was "capable of taking action which [would have] prevent[ed] the intercourse or contact from taking place or being repeated," but (3) she nevertheless "fail[ed] to take that action," and (4) that

"failure to act" either "expose[d] the child to an unreasonable risk that intercourse or contact may occur . . . or facilitate[d] the intercourse or contact that [did] occur." Wis. Stat. § 948.02(3). Here, the actions supporting this count were Steinhardt's choosing to "remain[ ] on the bed the whole time" while her husband "engaged in digital penetration of F.G.," "had F.G. engage in oral sex with him," and "ultimately [ ] had sexual intercourse with F.G." vaginally. App. 176 (criminal complaint). Three times Steinhardt callously observed her husband sexually assault F.G.—forced digital penetration, forced oral sex, and forced vaginal sex—and three times she knowingly failed to stop him. *See* Wis. Stat. § 948.02(3).

Moving to the second count, to prove sexual assault, party to a crime, the State must prove Steinhardt: (1) "[i]ntentionally aid[ed] and abet[ted]" a person to (2) have "sexual contact or sexual intercourse with" (3) "a person who has not attained the age of 13 years." Wis. Stat. §§ 939.05(2)(b), 948.02(1)(e). The action most appropriately supporting this count was Steinhardt "[going] to one of the other rooms were F.G. was and [bringing] her into the bedroom" where "Walter was prepared, lying on the bed," ready to sexually assault F.G. App. 176. Steinhardt purposefully bringing the intended sexual-assault victim to her husband so that he may sexually assault her is intentionally aiding and abetting a sexual assault. *State v.*

Rundle, 176 Wis. 2d 985, 1005, 500 N.W.2d 916 (1993) (defining "aiding and abetting" in Wis. Stat. § 939.05(2)(b)).

The actions that can support Steinhardt's sexual-assault conviction (bringing F.G. to her husband with the knowledge that he intended to sexually assault F.G.), are a separate course of conduct from the actions that support her failure-to-act conviction (sitting on the bed while three different sexual assaults occurred). *Ziegler*, 342 Wis. 2d 256, ¶¶ 71–73. There is a clear line between Steinhardt's choice to march F.G. into the room where her husband was waiting, on the one hand, and her choice to sit on the bed while she watched her husband command F.G. through three distinct sexual assaults, on the other. *See id.* ¶ 71.

Steinhardt's acts caused "new and different humiliation, danger, and pain" to the victim. *Id.* ¶ 71. Steinhardt first harmed F.G. by delivering her to her abuser, and then harmed her again by idly observing her husband repeatedly sexually assault F.G. when she could have intervened. The pain and humiliation F.G. felt when her mother delivered her to her attacker is distinct from the pain and humiliation she felt when her mother then did nothing to stop the three separate attacks. *See Ziegler*, 342 Wis. 2d 256, ¶ 71. And while the record at the time of the plea does not state the length of the gap between Steinhardt bringing F.G. into the room and Steinhardt sitting on the bed while her husband sexually assaulted F.G. three times, silence on this score must be resolved in favor of denying Steinhardt's

multiplicity claim because of her pleas. *See Kelty*, 294 Wis. 2d 62, ¶ 51. In any event, "a relatively short [time] period" would not be dispositive given that the acts alleged are different in nature. *Eisch*, 96 Wis. 2d at 31; *accord Ziegler*, 342 Wis. 2d 256, ¶ 73.

Since Steinhardt's failure-to-act count and sexual-assault count are not identical in fact—or, at the very least, given that this Court cannot conclude the counts *are* identical based on the record at the time of her plea—this Court must resolve the first prong in the State's favor.

2. Moving to the second prong of the double-jeopardy analysis, Steinhardt has the burden of showing that, despite the factual differences supporting her two counts, the Legislature did not intend "to permit cumulative punishments." *Ziegler*, 342 Wis. 2d 256, ¶ 62. The four factors identified in *Ziegler* guide this inquiry: "(1) all applicable statutory language; (2) the legislative history and context of the statutes; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct." *Id.* ¶ 63.

a. *Statutory Language*. The failure-to-act statute punishes a parent who knowingly "fails to take [an] action" "which will prevent" "another person [who] intends to have, is having, or has had sexual intercourse or sexual conduct with the [parent's] child" from completing or repeating his crime. Wis. Stat. § 948.02(3). The sexual assault statute (as party to a crime) punishes a person who "[i]ntentionally aids

and abets" a person to "ha[ve] sexual contact or sexual intercourse with a person who has not attained the age of 13 years." Wis. Stat. §§ 939.05(2)(b), 948.02(1)(e). While Section 939.66(2p) makes failure-to-act a lesser-included offense of sexual assault, there is no double-jeopardy prohibition on convicting a defendant of both the greater and lesser-included offenses when those convictions are supported by different misconduct. *State v. Stevens*, 123 Wis. 2d 303, 322, 367 N.W.2d 788 (1985) ("[A]lthough the lesser-included offense of possession [of drugs] and the greater offense . . . are the same in law, for purposes of double jeopardy, they are not the same in fact [and therefore can both be charged]."). Here, Steinhardt victimized her daughter in two different ways, *see supra* pp. 18–19, and the Legislature intended to punish each victimization.

b. *Legislative History And Context Of The Statute*. The legislative history supports the conclusion that the Legislature intended to permit multiple punishments for violations of Section 948.02(3) and Section 948.02(1)(e) when those punishments are premised on different misconduct. The Legislature created both Section 948.02(3) and Section 948.02(1)(e) with 1987 Wis. Act 332, § 55. *See Ziegler*, 342 Wis. 2d 256, ¶ 76. The Legislature divided the sexual-assault statute, Section 948.02(1), into the subsections years later, with 2005 Wis. Act 430, §§ 3–4, 2005 Wis. Act 437, § 1, and 2007 Wis. Act 80, § 12. The failure-to-act statute has been largely unchanged since its creation. *Compare* Wis.

Stat. § 948.02(3) *with* 1987 Wis. Act 332, § 55. It was not until 2005 that the Legislature enacted Section 939.66(2p), which makes failure-to-act a lesser-included offense of sexual assault. 2005 Wis. Act 430, § 2. And while the Legislature chose to make these crimes identical in law 18 years after they were created, it refrained from prohibiting multiple punishments for these crimes when the punishments are based on different misconduct.

c. *Nature Of The Proscribed Conduct*. With Section 948.02(3), the Legislature proscribed *failing* to protect a child from sexual assault; with Section 948.02(1)(e)—coupled with the party-to-a-crime statute—the Legislature proscribed assisting another in *committing* sexual assault. The Legislature thus proscribed harmful conduct that is different in nature, making multiple punishments appropriate. *Ziegler*, 342 Wis. 2d 256, ¶ 77 ("Each act of sexual contact and sexual intercourse, while proscribed by the same statute and perpetrated against the same victim on the same evening, resulted in a new and different humiliation and danger on the part of a child."); *Sauceda*, 168 Wis. 2d at 499–501; *Eisch*, 96 Wis. 2d at 35–36.

d. *Appropriateness of Multiple Punishments*. Steinhardt pleaded no contest to offenses that proscribe different types of acts that cause harm to a child. Section 948.02(3) proscribes a parent knowingly failing to protect her child from sexual assault, while Section 948.02(1)(e), coupled with Section 939.05, proscribes assisting another in

sexually assaulting a child. As this Court said in *Ziegler*, "[e]ach act . . . while . . . perpetrated against the same victim on the same evening, resulted in a new and different humiliation and danger on the part of a child. Indeed, it is hard to imagine a series of acts that is more appropriately subject to cumulative punishments." 342 Wis. 2d 256, ¶ 77.

D. The counterarguments Steinhardt makes in her Opening Brief are unpersuasive.

First, with respect to the first prong of *Ziegler*'s multiplicity test, Steinhardt repeatedly claims that the *only* fact supporting her two convictions at issue in this appeal is her sitting on the bed while Walter sexually assaulted F.G. three times. *See* Opening Br. 9, 11, 14–15. Since the two charges are solely based on this single fact, so her argument goes, the charges must violate double jeopardy. Opening Br. 15. But, as is plainly stated in the criminal complaint, Steinhardt sat on the bed and watched Walter repeatedly sexually assault F.G. only *after* she brought F.G. to Walter. App. 176; *supra* pp. 16–18. It is the bringing of F.G. to Walter that supports the sexual-assault count; the sitting on the bed supports the failure-to-act count. *Supra* pp. 16–18.

Steinhardt attempts to foreclose the State from relying on the fact of her bringing F.G. to Walter to support the sexual-assault count by arguing that the State already used this fact to support her (unchallenged) third count of child enticement. *See* Opening Br. 14 ("Because Count 3 specifically addresses Ms. Steinhardt's conduct in bringing

F.G. to the bedroom, the other two counts must account for separate behavior."); App. 177. But Steinhardt has not challenged her third count as violating double jeopardy here—nor could she, since the third count is not identical in law with either of her other two counts, *compare* Wis. Stat. § 948.07(1) (elements of child enticement), *with* Wis. Stat. § 948.02(3) (elements of failure to act), *and* Wis. Stat. § 948.02(1)(e) (elements of sexual assault). Thus, the State's use of a fact common with the third count to support the sexual-assault count is constitutionally irrelevant to the arguments in this case. Importantly, Steinhardt has admitted that her bringing F.G. to Walter is different in nature than her sitting on the bed and watching the sexual assaults. Opening Br. 14 ("Ms. Steinhardt's role in the assault [as described in the complaint] can only logically be divided into two parts": "[f]irst, Ms. Steinhardt walked F.G. into the bedroom to Walter" and second, "Ms. Steinhardt sat on the bed and remained [there] while Walter sexually assaulted F.G."). This admission is fatal: since these facts are "logically" divisible, they support the failure-to-act and sexual-assault charges without violating double jeopardy.

At bottom, Steinhardt's objection is that "at no time . . . was there a representation made by the State alleging any division of the conduct as it applied to Counts 1 and 2." Opening Br. 14. Yet Steinhardt relieved the State of this obligation by voluntarily pleading no contest to counts one and two as charged in the complaint. *Kelty*, 294 Wis. 2d 62,

¶ 2 (A valid plea "mean[s] that the defendant gives up the right to a *fact-finding* hearing on the propriety of multiple charges."); R.66:10 (entering of pleas). Her no-contest pleas to the counts alleged in the complaint operate as admissions that the facts in the complaint were both true and sufficient to convict on these counts. R.66:10; *see Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) ("[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case."). Accordingly, the State's only obligation now is to demonstrate that the record at the time of the plea can be construed in a manner that does not violate double jeopardy. *See Kelty*, 294 Wis. 2d 62, ¶¶ 26–27, 34. The State has done that here. *Supra* pp. 13–22.

The caselaw Steinhardt cites is likewise unhelpful to her here. In *State v. Carol M.D.* (Opening Br. 10–11, 15), the court of appeals held that the defendant's nine counts of failure to act, all in violation of Section 948.02(3), did not violate double jeopardy so long as a distinct mens rea supported each count. 198 Wis. 2d 162, 171–73, 542 N.W.2d 476 (Ct. App. 1995). Steinhardt claims that, unlike in *Carol M.D.*, "the criminal complaint [here] fails to show that [she] formed a new mens rea for both" counts "while she sat on the bed during Walter's sexual assault of F.G." Opening Br. 15. As noted directly above, Steinhardt ignores the other critical act mentioned in the complaint: her bringing F.G. through

the door to Walter. When this act is considered along with Steinhardt sitting on the bed, it is clear that a separate mens rea supports each count, consistent with *Carol M.D.*

Steinhardt next relies on *State v. Hirsch* (Opening Br. 11–12), where the court of appeals held that the Double Jeopardy Clause was violated when the State charged the defendant with three counts of sexual assault for touching a five-year-old's vaginal area, her anal area, and then her vaginal area again. 140 Wis. 2d 468, 474, 410 N.W.2d 638 (Ct. App. 1987). The court considered the time gap between the defendant's acts negligible, and the assaults were "extremely similar in nature," thus the charges violated double-jeopardy's protection against multiplicity. *Id.* at 474–75. While Steinhardt claims that her "actions were . . . like the behavior in *Hirsch*," Opening Br. 15, she fails to confront the fact that her bringing F.G. to Walter and her sitting on the bed while Walter sexually assaulted F.G. are different in nature, unlike the acts in *Hirsch*. *See supra* pp. 18, 21. And again, while the complaint does not mention the length of time between her acts, silence here weighs in favor of upholding the convictions. *See supra* pp. 18–19.

Finally, Steinhardt cites *State v. Church* (Opening Br. 12, 15), in which the court of appeals considered a defendant charged with two counts of child enticement under Section 948.07. 223 Wis. 2d 641, 645, 589 N.W.2d 638 (Ct. App. 1998). One of the defendant's counts was for "enticement with intent to cause a child to expose a sex organ," and the

other was for "enticement with intent to give a controlled substance to a child." *Id.* at 646. Both charges were based on the defendant enticing the same minor into one hotel room on one evening while intending simultaneously to have the minor "expose a sex organ" and take "a controlled substance." *Id.* at 646–47. The court of appeals held that the two charges were multiplicitous because "[t]he facts on which [the defendant's] convictions were based were not at all separated in time: both convictions were based on [the defendant's] intentions at the instant he" enticed the minor into his hotel room. *Id.* at 657. In other words, the only criminal act was the defendant—with two intentions—enticing the minor to enter the hotel room on one occasion. *Id.* at 657, 665. *Church* is no help to Steinhardt's case here because—as argued extensively above, *supra* pp. 16–18—she committed two acts: she brought F.G. to Walter and then she sat on the bed and watched Walter sexually assault F.G. three times. App. 176.

Second, with respect to the second prong of *Ziegler*'s multiplicity test, Steinhardt's arguments fail to meet her "burden of demonstrating that the offenses are [ ] multiplicitous [despite being different in law or fact,] on grounds that the legislature did not intend to authorize cumulative punishments." *Ziegler*, 342 Wis. 2d 256, ¶ 62. Steinhardt's brief focuses solely on *Ziegler*'s statutory-language factor, Opening Br. 16–17, but her argument is wholly dependent on her winning under the first prong of

Ziegler: she has conceded that the Legislature *did* intend multiple punishments under Section 948.02(3) and Section 948.02(1)(e) *when* the acts supporting the punishments *are* different in fact. *See* Opening Br. 17. As shown above, the acts supporting Steinhardt's two convictions *are* different in fact, meaning the Legislature did not intend to prohibit multiple punishments here. Again, it is Steinhardt who bears the burden of persuasion under prong two; her unconvincing argument on the statutory-language factor, coupled with her failure to develop arguments under the remaining three *Ziegler* factors, means this Court must resolve prong two in the State's favor. *See Ziegler*, 342 Wis. 2d 256, ¶ 74 ("In his briefing, [the defendant] makes no effort to demonstrate that cumulative punishments . . . are contrary to legislative intent.").

Finally, Steinhardt misunderstands the guilty-plea-waiver rule, Opening Br. 17–24, which she describes as follows: "[i]f this Court agrees that [her] double jeopardy rights were violated . . . , it must *then* consider whether she waived her right to assert her claim by [pleading no contest]." Opening Br. 17 (emphasis added). As this Court has explained, the rule is that a plea waives a double-jeopardy claim *unless* the record "reveals the court had no power to enter the conviction" without violating double jeopardy. *Kelty*, 294 Wis. 2d 62, ¶¶ 26–27, 34. If the record does not conclusively reveal a double-jeopardy violation, *then* Steinhardt's claim is waived.

Steinhardt claims that the court of appeals erred by "look[ing] outside of the record to determine whether additional facts that may be used to counter a double jeopardy claim are available." Opening Br. 21. She bases this argument on the court of appeals stating that "[t]he complaint is silent, for example, as to how much time passed during and between [the] events." App. 104, ¶ 8. This again is a misunderstanding of the guilty-plea-waiver rule. The court of appeals referenced the *absence* of a time frame in the complaint because the amount of time between criminal acts is relevant to determining whether charges violate double jeopardy. *See Ziegler*, 342 Wis. 2d 256, ¶ 72–73. Since the timing of Steinhardt's acts was absent in the record at the time of her plea, the court of appeals correctly concluded that Steinhardt was unable to prove that the record "reveals the [circuit] court had no power to enter the conviction[s]" without violating double jeopardy. *Kelty*, 294 Wis. 2d 62, ¶¶ 26–27, 34. Thus the court's use of time did not "*counter*" Steinhardt's otherwise valid "double jeopardy claim," but rather showed that no valid claim could be made. Opening Br. 21 (emphasis added).

Similarly misplaced is Steinhardt's argument that the State is "attempting" to "supplement the record with additional evidence on appeal" by claiming, for example, that it was Steinhardt, not Walter, who ordered F.G. to take off her clothes. Opening Br. 21–22 & n.8. The State's discussion of facts uncovered after Steinhardt's pleas is

simply a way of demonstrating how the guilty-plea-waiver rule actually limits the scope of review here and why the rule's placement of the burden on Steinhardt is justified. By pleading no contest, Steinhardt removed the State's need to exhaustively develop and present its case of conviction. Had the State been required to present such a case, it would have had the opportunity to prove, for example, that Steinhardt actually told F.G. to take off her clothes. But since Steinhardt pleaded no contest, she now bears the burden of conclusively showing a double-jeopardy violation based solely on the record at the time of her plea. *Kelty*, 294 Wis. 2d 62, ¶¶ 26–27, 34.

II. Steinhardt's Counsel Performed Effectively In Not Informing Steinhardt About A Meritless Double-Jeopardy Defense

A. The Wisconsin Constitution Article I, § 7, and the United States Constitution amendment VI, guarantee the right to the effective assistance of counsel. *Trawitzki*, 244 Wis. 2d 523, ¶ 39. This Court applies the familiar two-pronged *Strickland* test to determine if the defendant has a valid ineffective-assistance claim, under which the defendant must establish both deficient performance and prejudice. *Id.* ¶¶ 39–40 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

Under the deficient performance prong, an attorney performs deficiently by committing "serious errors [such] that counsel was not functioning as the counsel guaranteed"

by the Constitution. *Id.* ¶ 40 (citations omitted). The "defendant must overcome a strong presumption that counsel acted reasonably within professional norms." *Id.* (citation omitted). An attorney has not rendered deficient performance by failing to address legal issues that are unhelpful to his client: such failures are not "errors" at all. *Cummings*, 199 Wis. 2d at 747 n.10 ("an attorney's failure to pursue a meritless motion does not constitute deficient performance"); *accord Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003).

Under the prejudice prong, in turn, the "defendant has the burden to prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Trawitzki*, 244 Wis. 2d 523, ¶ 40 (citations omitted). When the challenged proceeding is the entering of a plea, a defendant establishes prejudice by showing "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

B. Steinhardt cannot prevail under the deficient performance prong. Steinhardt's sole alleged deficiency is her counsel's "fail[ure] to advise her that Counts 1 and 2 violated [ ] double jeopardy." Opening Br. 27. However, as shown extensively above, charging the failure-to-act and sexual-assault counts simply did not violate double jeopardy on the facts of this case. *Supra* pp. 13–22. It was not

"error[ ]"—"serious" or otherwise—for Steinhardt's counsel to not address this issue. *Trawitzki*, 244 Wis. 2d 523, ¶ 40.

Steinhardt has not argued that if her counsel had advised her of possible multiplicity problems, she could have developed additional facts that would then have aided her multiplicity claim if she had been convicted on both counts by a jury. If she had shown that such facts actually existed, then she could have—theoretically—prevailed on her ineffective-assistance claim while losing on her double-jeopardy claim because of the guilty-plea-waiver rule's narrowing of the scope of review. But Steinhardt has not even asserted that the facts alleged in the criminal complaint are incomplete or that her counsel could have introduced other facts that would have made the two counts identical in fact under *Ziegler*'s first prong of the multiplicity analysis. Rather, her argument on her ineffective-assistance claim focuses almost exclusively on the prejudice prong of *Strickland*. Opening Br. 27–29. Since she bears the burden of demonstrating deficient performance, these failures doom her claim. *Trawitzki*, 244 Wis. 2d 523, ¶ 40.

C. If this Court holds that Steinhardt's counsel *did* perform deficiently by failing to identify and raise a valid double-jeopardy claim, then the State agrees that Steinhardt would have suffered prejudice. While a counsel's deficient performance in counseling a guilty plea can—in some circumstances—be non-prejudicial, *see, e.g.*, *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), this would not be

one of those cases, assuming that Steinhardt's double-jeopardy claim is a valid one. The State did not offer Steinhardt a plea bargain, thus Steinhardt did not receive anything of value from the State in exchange for pleading no contest to the failure-to-act count and the sexual-assault count. Opening Br. 29; *see* R.67:5–6, 32–33 (sentencing transcript). The State has no reason to dispute that if, in fact, Steinhardt's double-jeopardy claim is valid and she had been so informed by her counsel, she would not have chosen to plead no contest to two multiplicitous counts and thus expose herself to greater potential liability. App. 136–38 (offer of proof).[3]

CONCLUSION

The decision of the court of appeals should be affirmed.

[3] As noted above, *supra* p. 7 n.1, the court of appeals mistakenly framed the prejudice prong as whether Steinhardt was "entitle[d] [ ] to a hearing under *State v. Bentley*, 201 Wis. 2d 303, 313–18, 548 N.W.2d 50 (1996)." App. 105 ¶ 11. Steinhardt did have a hearing on her ineffective-assistance claim, at which she made a sufficient offer of proof on the prejudice prong. App. 136–38. So, should this Court conclude that Steinhardt's counsel rendered deficient performance—despite the State's substantial showing to the contrary—no remand for an additional hearing on the prejudice prong is required.

Dated this 12th day of January, 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,850 words.

Dated this 12th day of January, 2017.

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I hereby certify that:

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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 12th day of January, 2017.

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