STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP000993-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER L STEINHARDT,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered and an Order Denying the Postconviction Motion, Entered in Ozaukee County Circuit Court, the Honorable Sandy Williams, Presiding.

REPLY BRIEF

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4105
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

ARGUMENT 1

I. Ms. Steinhardt's Convictions For Failure To Act And First-Degree Sexual Assault Of A Child Are Multiplicitous, Because Counts 1 And 2 Are Identical In Both Law And Fact. In the Alternative, By Enacting Wis. Stat. § 939.66(2p), the Legislature Intended To Prohibit Simultaneous Convictions For § 948.02 Offenses When the Conduct Is Identical In Fact And Therefore, Counts 1 And 2 Are Multiplicitous. 1

A. This Court should invoke judicial estoppel to preclude the State from asserting an inconsistent position on the factual basis supporting Counts 1 and 2..... 1

B. The State's newly-posited theory on the application of the facts requires the Court to adopt an unreasonable application of ***State v. Church*** and creates a new multiplicity violation. 4

1. The State is incorrect that ***Church*** supports its assertion that under its new theory, there is no multiplicity violation. 5

2. Using the same facts to support the sexual assault and child enticement charges does not cure the double jeopardy issue and

simply creates a new multiplicity challenge. 6

a. The language of the statute .. 7

b. The legislative history and context of the statute 7

c. The nature of the proscribed conduct 8

d. The appropriateness for multiple punishments for a single act 9

II. Trial Counsel Was Ineffective For Failing To Advise Ms. Steinhardt Of The Multiplicity Issue. 10

CONCLUSION 11

CERTIFICATION AS TO FORM/LENGTH 12

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) 12

CASES CITED

State v. Anderson,
219 Wis. 2d 740, 580 N.W.2d 329 (1998) 6

State v. Church,
223 Wis. 2d 641, 589 N.W.2d 638
(Ct. App. 1998) 4, 5, 7

State v. DeRango,
229 Wis. 2d 1, 599 N.W.2d 27
(Ct. App. 1999)..... 9

State v. Grayson,
172 Wis. 2d 156, 493 N.W.2d 23 (1992)..... 6

State v. Hirsch,
140 Wis. 2d 468, 410 N.W2d 638
(Ct. App. 1987)..... 3

State v. Johnson,
178 Wis. 2d 42, 503 N.W.2d 575
(Ct. App. 1993)..... 7

State v. Lomagro,
113 Wis. 2d 582, 335 N.W.2d 583..... 4

State v. Patterson,
2010 WI 130,
Wis. 2d 599, 790 N.W.2d 909..... 9

State v. Petty,
201 Wis. 2d 337, 548 N.W.2d 817 (1996)..... 1

State v. Ryan,
2012 WI 16, 338 Wis. 2d 695, 809 N.W.2d 37.... 1

State v. Seymour,
177 Wis. 2d 305, 502 N.W.2d 305
(Ct. App. 1993)..... 4

STATUTES CITED

§ 939.66 7

§ 939.66(2p) 1

§ 948.02 ..... 1, 7

§ 948.07 7

ARGUMENT

I. Ms. Steinhardt's Convictions For Failure To Act And First-Degree Sexual Assault Of A Child Are Multiplicitous, Because Counts 1 And 2 Are Identical In Both Law And Fact. In the Alternative, By Enacting Wis. Stat. § 939.66(2p), the Legislature Intended To Prohibit Simultaneous Convictions For § 948.02 Offenses When the Conduct Is Identical In Fact And Therefore, Counts 1 And 2 Are Multiplicitous.

A. This Court should invoke judicial estoppel to preclude the State from asserting an inconsistent position on the factual basis supporting Counts 1 and 2.

The State's response brief in this Court asserts an entirely new position regarding which facts form a factual basis for Counts 1 and 2. (State's Response Brief at 17, 22). This new argument creates additional legal issues that were not previously litigated at the trial court or court of appeals. This Court should invoke judicial estoppel to preclude the State from advancing this inconsistent position.

Judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." ***State v. Ryan***, 2012 WI 16, ¶ 32, 338 Wis. 2d 695, 809 N.W.2d 37, citing ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). While there is not a specific formula indicating when a court should employ judicial estoppel, Wisconsin courts have outlined three factors that must exist for a party to be estopped from presenting conflicting arguments.

> First, the later position must be clearly inconsistent with the earlier position; second, the facts at issue would be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position--a litigant is never bound to a losing argument.

Ryan, 2012 WI 16 at ¶ 32 (internal citations omitted). The goal of prohibiting parties from presenting inconsistent arguments is not to punish, but to preserve the integrity of judicial process. Id.

In its brief to the court of appeals, the State argued that the conduct underlying Counts 1 and 2 was different and temporally separate. The State contended that the basis for Count 1 was "[o]nce 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." (App. 150). The State argued that Count 2 was supported by "Steinhardt's conduct of directing F.G. to remove her clothing, or Ms. Steinhardt's conduct of telling Walter to "get her [F.G.] started." (App. 150).

The State now takes an inconsistent position regarding the underlying factual basis in its brief to this Court. The State now asserts that "[t]he action most appropriately supporting [the count of first degree sexual assault of a child as party to a crime] was Steinhardt "[going] to one of the other rooms were [sic] F.G. was and [bringing] her into the bedroom" where "Walter was prepared, lying of the bed…" (State's Response Brief at 17, 22).

However, in its decision, the court of appeals clearly relied on the State's original position as presented, stating that the parties "effectively agree that the question…is whether Steinhardt's involvement in the sexual assault was one

continuous course of conduct or instead was a series of two or more distinct acts that were sufficiently different in time or nature." (App. 104). In agreeing with the State's interpretation that the complaint lacked a complete factual picture and that the multiplicity claim could not be resolved on the record, the court of appeals pointed out that "[t]he complaint is silent, for example, as to how much time passed during and between events." (App. 104).

Had the State taken below the position it now asserts before this Court, the passage of time between the events would have been irrelevant, as Ms. Steinhardt's actions would have been two distinct volitional. The time period is relevant only if the sexual assault is divided up into separate acts, which explains the court of appeals' reference to ***State v. Hirsch***, 140 Wis. 2d 468, 410 N.W2d 638 (Ct. App. 1987). Therefore, the court of appeals relied upon the State's position on the facts when issuing its decision.

The State attempts to explain the turnabout in its position by claiming that its lengthy discussion of the facts in the court of appeals was "simply a way of demonstrating how the guilty-plea-waiver rule actually limits the scope of review here…" (State's Response Brief at 28-29). A reading of the State's prior argument, however, makes it clear that it took the position that passively sitting by while the sexual assault occurred was the factual basis for the failure-to-act count and the claims that Ms. Steinhardt was the one who instructed F.G. to remove her clothing and that she verbally encouraged the sexual behavior once in the room were the factual basis for the sexual assault charge. (App. 148-150).

Moreover, the fact that the State has proposed two alternative theories as to what facts underlie Count 2 creates a duplicity problem. If the charging language is so vague in

Count 2 that the State can assert that the charge could cover multiple distinct acts (leading the child to the bedroom, instructing F.G. to remove her clothes or verbally encouraging the assault), that charge is duplicitous. "Duplicity is the joining in a single count of two or more separate offenses." ***State v. Lomagro***, 113 Wis. 2d 582, 586-587, 335 N.W.2d 583; ***State v. Seymour***, 177 Wis. 2d 305, 310-311, 502 N.W.2d 305 (Ct. App. 1993).

The State's change in its position on the supporting facts of Counts 1 and 2 is clearly inconsistent with its earlier representations to the court of appeals, there has been no change in the material facts, and the court of appeals relied on the State's previous assertions regarding the supporting facts in reaching its decision in this case. All three requirements for judicial estoppel have been met. Consequently, this Court should invoke the doctrine of judicial estoppel to prevent the State from asserting inconsistent positions regarding the supporting facts for Counts 1 and 2. See ***Ryan***, 2012 WI 16 at ¶¶ 32-33.

B. The State's newly-posited theory on the application of the facts requires the Court to adopt an unreasonable application of State v. Church and creates a new multiplicity violation.

If this Court declines to invoke judicial estoppel, Ms. Steinhardt asserts first that for the Court to accept the State's new theory and uphold Ms. Steinhardt's convictions, the Court would be required to adopt an unreasonable interpretation of ***State v. Church***. ***State v. Church***, 223 Wis. 2d 641, 589 N.W.2d 638 (Ct. App. 1998). Second, Ms. Steinhardt challenges the State's claim that its new theory cures any constitutional defect, but rather the State's

argument to this Court only creates a second multiplicity challenge.

1. The State is incorrect that ***Church*** supports its assertion that under its new theory, there is no multiplicity violation.

The State relies on ***Church*** to argue that the legislature intended to allow multiple punishments when the one singular act of leading a child to a room can be charged under multiple sections of the criminal code, so long as the multiple counts aren't brought under the child enticement statute. This conclusion ignores the holding in ***Church***.

In ***Church***, the defendant was charged with, among other things, two counts of child enticement, one for leading a boy to a hotel room for the purpose of exposing his genitals and the other for leading the same boy to the same hotel room with the second desire of providing the boy with a drug, were multiplicitous. ***Church***, 223 Wis. 2d at 646-647. The court of appeals ultimately held that the two allegations, while factually different with distinct elements, show that the defendant had only one singular and simultaneous intention, to take the boy to a hotel room. The court cited the legislative history of the statute, holding that the passage of Wis. Stat. § 948.07, child enticement, "renders criminal the act of enticement. Its purpose is not to provide additional punishment for commission of the intended wrongful act." ***Id.*** at 664. The court concluded that "there is no basis on which we might conclude that the legislature intended more than a single punishment for a single act of enticement of a single child…" ***Id.*** at 665.

The ***Church*** holding specifically notes that the legislature did not intend to permit an individual prosecution of child enticement for every illicit act that might occur once

the child was brought to the private location, but rather, to criminalize the single act of bringing the child to the private place. ***Id.*** To conclude without any argument that the legislature intended to allow for multiple convictions for the same behavior penalized by the child enticement statute by simply charging the same conduct under a different subsection creates an unreasonable result and one that runs contrary to the heart of the ***Church*** decision.

2. Using the same facts to support the sexual assault and child enticement charges does not cure the double jeopardy issue and simply creates a new multiplicity challenge.

In asserting its new position that the sexual assault charge is supported by Ms. Steinhardt's leading F.G. to the bedroom - which overlaps with the factual basis for the child enticement charge - the State claims that there can be no double jeopardy challenge to the use of the same factual basis for Counts 2 and 3 because they are not identical in law. (State's Response Brief at 23). The State is incorrect.

Conviction for two charges that are not identical in law, but are identical in fact, may very well be multiplicitous, which is why the courts developed a test for assessing whether the legislature intended multiple punishments for a single act. See ***Church*** at 660; ***State v. Anderson***, 219 Wis. 2d 740, 752-753, 580 N.W.2d 329 (1998). Whether the two charges are identical in both law and fact is only the first part of the inquiry. If the two charges are not the same in law, the inquiry advances on to the next prong, which asks whether the legislature intended the charges to be brought as a single count. ***State v. Grayson***, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992). The court presumes that the legislature intended to

permit cumulative punishments, but this presumption may be overcome by an indication of legislative intent to the contrary. ***Grayson***, 172 Wis. 2d at 160; ***State v. Johnson***, 178 Wis. 2d 42, 50, 503 N.W.2d 575 (Ct. App. 1993).

In determining whether the legislature intended to permit multiple punishments for a single act, the court must examine four factors: "(1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct." ***Church***, 223 Wis. 2d at 660 (internal citation omitted).

a. The language of the statute

Both Wis. Stat. §§ 948.02 and 948.07 were created during the 1987 overhaul of statutory provisions for crimes against children. As noted in ***Church***, there is nothing in the language of Wis. Stat. § 948.07 that specifically indicates the legislature's intent on whether multiple punishments are appropriate for the single act under that subsection. *See* ***Church***, 223 Wis. 2d at 660-661. Regarding Wis. Stat. § 948.02, the legislature specifically enacted a statutory scheme preventing multiple convictions of offenses charged in Wis. Stat. § 948.02 for a single act. See Wis. Stat. § 939.66.

b. The legislative history and context of the statute

Church discusses the process of overhauling the statutory scheme of crimes against children and the passage of the newly created offense of child enticement under Wis. Stat. § 948.07. ***Church*** notes that the legislature empaneled the Special Committee on Crimes against Children. ***Id.*** at 661-662. The court reviewed the summaries of the proceedings held by the committee, which contained no

information on multiple punishments for crimes of child enticement. This led the court in ***Church*** to conclude that the legislature did not intend for multiple punishments for a single act of enticement. ***Id.*** at 663.

If the legislature did not intend for multiple charges of child enticement for a singular act of leading a child to a room, it follows that the legislature would not support a second charge under a different statute within the same chapter for the identical act. It is unreasonable to conclude that charging multiple counts of the child enticement statute violates double jeopardy protections for one volitional act, but that utilizing another statute to twice penalize the same act of bringing the child into the room would not similarly result in a double jeopardy violation. To presume the legislature intended otherwise lacks any support in the history of the statutory scheme, and permitting multiple punishment would subvert the intent of the legislature.

c. The nature of the proscribed conduct

Under the State's new position, Ms. Steinhardt's single act in leading F.G. into the bedroom allegedly supports both Count 2 and Count 3. However, the nature of the conduct criminalized in Counts 2 and 3 is identical. As in ***Church***, Ms. Steinhardt engaged in only one action that underlies those counts - taking F.G. into the bedroom. Thus, under the State's newly-asserted theory, there is only a singular volitional act. As in ***Church***, this factor does not indicate that the legislature intended to impose multiple punishment. See ***Id.*** at 663.

d. The appropriateness for multiple punishments for a single act

In weighing this final consideration, the court must ask: do the two counts as charged protect different interests of the victim? See ***Id.*** at 663-664. Ms. Steinhardt asserts that the two charges in question - sexual assault as party to a crime and child enticement - protect against only a single interest of a child as applied in this case, i.e., that a child not be led to a room for the purpose of a sexual assault. The analysis undertaken by the court in ***Church*** is analogous to this case. ***Id.*** The court in ***Church*** was deciding whether one act of bringing a child to a hotel room while have two illicit desires, to give the child drugs and expose the child's genitals, could be penalized twice under the child enticement statute. The court determined it could not and held that the child enticement statute sought to penalize the volitional act of transporting the child, which occurred only one time.

The appropriateness of multiple punishments for a single act was also considered in both ***State v. Patterson***, 2010 WI 130, 329 Wis. 2d 599, 790 N.W.2d 909, and ***State v. DeRango***, 229 Wis. 2d 1, 599 N.W.2d 27 (Ct. App. 1999). In contrast to Ms. Steinhardt's case, the facts of ***Patterson*** and ***DeRango*** illustrate when a single act can support multiple convictions based on the need to further multiple interests of the community. The defendant in ***Patterson*** was charged with contributing to the delinquency of a minor causing death and reckless homicide for providing his 17-year-old girlfriend with drugs on a single occasion. This Court concluded that the two charges addressed "separate harms for which society has a significant interest in preventing." ***Patterson***, 2010 WI 130, ¶ 42. Because of the societal need to deter these distinct harms, this Court concluded that the presumption that the

legislature allowed for multiple punishments for these offenses was not overcome. ***Id.*** at ¶ 44.

The court of appeals reached a similar result in ***DeRango***, where the defendant contacted an underage female and encouraged her to meet so that he could videotape her in a sexually explicit way. The court concluded that the primary concern of the child enticement statute was the removal of a child from a safe setting with the intent to engage in illicit conduct, and that this was different than intent of the child exploitation statute, which bans the act of coercing a child to depict sexual acts in front of a camera. ***DeRango***, 229 Wis. 2d at 14-15. Because these were different harms that the legislature sought to prevent, the court held that there was no multiplicity violation by DeRango's conviction for both child enticement and child exploitation for the same conduct. ***Id.***

Ms. Steinhardt's case is very different than ***Patterson*** and ***DeRango*** and far more analogous to ***Church***. For those reasons, should this Court decline to invoke judicial estoppel, then a multiplicity issue exists with the child enticement charge in Count 3, and that conviction should be vacated accordingly.

II. Trial Counsel Was Ineffective For Failing To Advise Ms. Steinhardt Of The Multiplicity Issue.

The State concedes that if this Court concludes that there is a valid multiplicity claim, then Ms. Steinhardt was prejudiced, which was established by her offer of proof, and that therefore, no remand for further hearing on the prejudice prong is required, and her conviction for the multiplicitous offense must be vacated as a result. (State's Response Brief at 31-32).

The State asserts, however, that Ms. Steinhardt fails on the deficiency prong because she did not argue that had she been advised by trial counsel of the multiplicity claim, she could have developed additional facts that would have helped this claim had she been convicted by a jury on both counts. (State's response brief at 31). However, additional facts are not necessary, as Ms. Steinhardt's position is that the record itself sufficiently establishes a double jeopardy violation and that counsel was deficient for failing to inform her of this issue. Therefore, no additional facts need to be developed to establish deficiency of counsel.

CONCLUSION

For the reasons stated above, the Court should vacate the conviction for Count 1, failure-to-act.

Dated this 27th day of January, 2017.

Respectfully submitted,

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4105
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,939 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 27th day of January, 2017.

Signed:

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4105
(414) 227-4805
masnican@opd.wi.gov
Attorney for Defendant-Appellant-Petitioner