STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2017AP1977 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ALEXANDER M. SCHULTZ,

Defendant-Appellant

On appeal from the Circuit Court for Lincoln County,

The Honorable Robert R. Russell, presiding

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

ALEXANDER M. SCHULTZ

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I. Table of Contents.

II. Table of Authorities.

Cases

Constitutional Provisions

Statutes

Other Authorities

III. Statement of issues presented for review.

This appeal presents the following issue for review. Namely, when determining whether two offenses charged in successive prosecutions are the same in fact, and thus violative of the Double Jeopardy Clause, may a court determine the scope of jeopardy in the first prosecution in the light of testimony that was adduced at trial? Or alternatively, must a court determine the scope of jeopardy based upon whether a reasonable person familiar with the totality of the facts and circumstances would have construe the initial charging documents, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the charging document of the subsequent prosecution?

To put it in plainer language, how do you determine the scope of jeopardy? Do you look at the charging documents in light of the facts and circumstances known when jeopardy attached, which in the case of a jury trial is when the jury is sworn, or may a court narrow the scope of jeopardy based upon testimony that was later adduced at trial? The circuit court in its decision below concluded that the scope of jeopardy could be narrowed based upon testimony that was later adduced at trial, and based upon its review of the testimony which was received at trial in the first case, held that the Double Jeopardy Clause was not violated by prosecution of the second case.

IV. Statement on oral argument and publication.

Given the tens of thousands of cases interpreting the Double Jeopardy Clause, it is somewhat surprising how few cases there are providing guidance as to how you are to determine whether two offenses charged in successive prosecutions are the same in fact. There appear to be no Wisconsin cases which directly answer this question. The leading federal case, however, is *United States v. Olmeda*, 461 F.3d 271, 282 (2nd Cir. 2006). That case held that "[t]o determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the

facts and circumstances would construe the initial indictment, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the subsequent prosecution." (emphasis added). In the case of a jury trial, "Jeopardy attaches ... when the selection of the jury has been completed and the jury sworn,"[1]

The circuit court's decision in this case is clearly at odds with cases from the federal courts interpreting the Double Jeopardy Clause of the United States Constitution. Schultz would argue that it is also violative of the Double Jeopardy Clause in the Wisconsin Constitution. This is a previously unaddressed issue in Wisconsin, and this court's decision should be published. This court would also benefit from oral argument.

V. Statement of Case and Facts.

A. Introduction.

In this case Alexander M. Schultz was prosecuted for the crime of second degree sexual assault of a child, M.T.,[2] after having been previously acquitted in a jury trial of the crime of repeated sexual assault of the same child, M.T..[3] In the first prosecution the State alleged in the Information a timeframe for the commission of the crime of "late summer of 2012 to the early fall of 2012". (R.90:1; Appx. 15). In the second prosecution the State alleged a timeframe for the commission of the crime as being "on or about October 19, 2012." (R.30:1; Appx. 16). The first day of fall in 2012 was September 22nd; and the last day of fall in 2012 was December 21st. Thus, the fall season in 2012 lasted for ninety-one days, and October 19th landed upon the twenty-seventh day of the fall, firmly in the first third of the season, or "early fall." Accordingly, trial counsel for Schultz filed a motion to dismiss on the grounds that the court lacked jurisdiction over the defendant because the prosecution of the defendant in this case violated

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[1] Wis. Stats § 972.07(2)
[2] in violation of Wis. Stat. § 948.02(2),
[3] in violation of Wis. Stat. § 948.025.

his rights guaranteed by the Double Jeopardy Clauses of 5th and 14th Amendments to the United States Constitution, and Article I, Section 8 of the Wisconsin Constitution. (R.5; Appx. 65-66).

The State conceded Schultz's recitation of the law was correct, but contended that testimony adduced at the jury trial in the first case "... was able to pin down a conclusion of her sexual encounters with Mr. Schultz to a date clearly preceding October 19, 2012." (R.20:1). The State argued that the crime charged in 14CF68 was therefore not the crime charged in 13CF110. The State argued that this sort of analysis was approved of in the case of *State v. Nommensen*, 2007 WI App 224, 305 Wis.2d 695, 741 N.W.2d 481, wherein this court held that "... the acquittal of a defendant for having repeated sexual contact with a child at one time and location did not bar a subsequent prosecution for repeated sexual assault of the same victim in a different location and **at a different time**." (R.20:1) (emphasis in the original). The State argued that while this case did not involve different locations, it did involve different times. *Id.*

Schultz's trial counsel submitted a reply brief, arguing that *Nommensen* was inapplicable to this case. (R.21). The circuit court, however, accepted the State's argument and denied Schultz's motion to dismiss. (R.96:6; Appx. 9). The circuit court based its ruling upon its review of a partial transcript of the trial in 13CF110, in which it found that while the Information might have alleged the crime to have occurred during "late summer of 2012 to the early fall of 2012," the victim M.T.'s testimony at trial was that she had sexual intercourse with Mr. Schultz during the months of July, August, and September of 2012. *Id.* Consequently, the circuit court held that "... October 19 was not a date that Mr. Schultz was charged for, and the Court finds that mid-October, 2012, is not a timeframe that the victim testified to." *Id.* Schultz ultimately pled guilty to the charge, and was convicted of the crime of second degree sexual assault of a child, in violation of Wis. Stat. § 948.02(2). (R.33:1, R.100:5 and R.39; Appx. 1-3).

Thereafter, Schultz sought post-conviction relief and filed a motion with the circuit court renewing his Double Jeopardy argument, and citing the case of *United.States v. Olmeda*, 461 F.3d 271, 282 (2nd Cir. 2006), for the proposition that "[t]o determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the subsequent prosecution." (emphasis added). As "Jeopardy attaches ... In a jury trial when the selection of the jury has been completed and the jury sworn,"[4] Schultz argued that the circuit court was in error when it narrowed the scope of jeopardy based upon testimony that was later adduced at trial. (R.55). The circuit court denied the post-conviction motion on the grounds that the court had already denied a similar motion, and that defendant had not produced any new evidence. (R.60; Appx. 13). This appeal then followed. (R.61).

B. Proceedings below and jurisdiction.

On June 27, 2016, Alexander M. Schultz entered of a plea of guilty to, and was convicted of, one count of second degree sexual assault of a child, in violation of Wis. Stat. § 948.02(2); and one count of perjury before the court, in violation of Wis. Stat. § 946.31(1)(a). (R.100:13 and R.39; Appx. 1). Both counts carried a habitual criminality enhancer pursuant to Wis. Stat. § 939.62(1)(b). *Id.*

On September 6, 2016 the Lincoln County Circuit Court, the Honorable Robert R. Russell, sentenced the Schultz to four years in state prison for the perjury count, with two years of initial incarceration to be followed by two years of extended supervision. (R.101:14-15 and R.39; Appx. 1). For the second-degree sexual assault of a child count, Schultz was sentenced ten years in state prison, with five years of initial incarceration to be followed by five years of

[4] Wis. Stats § 972.07(2)

extended supervision. *Id.* Each sentence was made concurrent with the other count, but consecutive to any other sentence the defendant was currently serving. *Id.*

Schultz timely filed his notice of intent to pursue post-conviction relief. (R.41). Thereafter, he filed a motion for post-conviction relief requesting the circuit court vacate his conviction for second degree sexual assault of a child on the grounds that the conviction was violative of the Double Jeopardy Clauses of 5th and 14th Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. (R.55). An order was entered on September 26, 2017, denying Schultz his requested relief. (R.60; Appx. 13). Schultz then filed his notice of appeal. (R.61). He appeals only his conviction for second degree sexual assault of a child, on the grounds that the conviction was violative of the Double Jeopardy Clauses of 5th and 14th Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution.[5] He requests his conviction to be vacated, and the case remanded for entry of a Judgment of Acquittal

This is an appeal from a final judgment and sentence of a circuit court in a criminal case, as well as the denial of a post-conviction motion filed under Wis. Stat. § 809.30. This court has jurisdiction under Wis. Const. art. VII § 5; and Wis. Stat. §§ 808.03(1) and 809.30. See also, *State v. Scherreiks*, 153 Wis.2d 510, 451 N.W.2d 759 (1989).

C. Facts of the case.

On September 22, 2012, at 2:49 p.m., in an annual event known as the September equinox, the Sun crossed the celestial equator, heading southward, marking the end of summer, and the beginning of the fall season. The fall season

[5] Trial counsel did not seek dismissal of the perjury count on grounds of collateral estoppel, and Schultz has not raised the issue on post-conviction. See, *State v. Canon*, 2001 WI 11, ¶¶ 22–23, 241 Wis. 2d 164, 180–81, 622 N.W.2d 270, 277, aff'g 230 Wis. 2d 512, 523, 602 N.W.2d 316, 321 (Ct. App. 1999).

would last for a period of ninety-one days, until December 21st at 11:12 a.m., when the Sun reached its maximum elevation in the sky, an elevation which would be its lowest daily maximum elevation for the year. That day would be the shortest day of the year, and its night the longest. This event, known as the December or winter solstice, marked the end of the fall season, and the beginning of winter. Meanwhile, it came to the attention of the Merrill Police Department, that M.T., a child of fifteen years of age, was pregnant with child. (R.10:3-5; Appx. 69-71).

An investigation was launched to ascertain who must have been having sexual intercourse with M.T. in the late summer or early fall of 2012, such that she could become pregnant. *Id.* That investigation ultimately identified Alexander M. Schultz as being one of the persons who was having sexual intercourse with M.T. during that period of time. *Id.* A criminal complaint was filed on April 5, 2013, and Schultz was charged with the crime of repeated sexual assault of the same child, in violation of Wis. Stat. § 948.025(1)(e). (R.93:1). As to a timeframe for the crime, the complaint alleged that Schultz "... in the late summer to early fall of 2012 ... did commit repeated sexual assaults involving the same child, [M.T.] where at least three of the assaults were violations of sec. 948.02(1) or (2) Wis. Stats." *Id.* This case was assigned the number 13CF110, and an Information was filed on July 16, 2013 which mirrored the allegations of criminal complaint, and again alleged a timeframe for the crime of "... the late summer to early fall of 2012...." (R.90:1; Appx. 15).

Lincoln County case number 13CF110 was brought to a jury trial on January 21, 2014 and would last for two days. (R.67 and R.69). The jury was selected and sworn prior to any evidence being received. (R.67:110). The charge read to the jury was as follows:

> The Information that has been filed in this case by the district attorney's office charges that the defendant in the late summer to early fall of 2012 at 1709A Water Street in the City of Merrill, Lincoln County, Wisconsin, did commit repeated sexual assaults involving the same child [M.T.], date of birth, May 3,

> 1997, where at least 3 of the assaults were violations of Section 948.02(1) or (2) of the Wisconsin Statutes.

(R.67:8-9 and R.69:75-78; Appx. 22-27). The instructions given to the jury did not limit the timeframe for commission of the crime beyond that given in the Information. The timeframe given to the jury in the final jury instructions was:

> Second element, at least three sexual assaults took place within a specified period of time. The specified period of time is from the late summer to early fall of 2012.
>
> Before you may find the defendant guilty, you must unanimously agree that at least three sexual assaults occurred between late summer or early fall of 2012, but you need not agree on which acts constitute the required three.

(R.69:77 and R.75:7-9; Appx. 26 and 18-20). The jury returned a verdict of not guilty. (R.69:130 and R.74; Appx. 21). The jury's verdict did not limit the timeframe to a period prior to October of 2012, but rather gave its verdict in accordance with the allegations contained in the Information. *Id.* The jury's verdict was as follows:

> THE COURT: The Court will read the verdict. We, the jury, find the defendant, Alexander M. Schultz, not guilty of repeated acts of sexual assault of a child as charged in the information dated this 22nd day of January, 2014 signed by the foreperson.
>
> Madam Foreperson, did I correctly read the verdict?
>
> MADAM FOREPERSON: You did, sir.

(R.70:130 and R.74; Appx. 21). A judgment of acquittal on the charge was entered on January 23, 2014. (R.89; Appx. 14).

On January 27, 2014, five days after Schultz's acquittal in 13CF110, Officer Matthew Waid of the Merrill Police Department was informed by the Lincoln County Victim/Witness Coordinator, that the State had made a grievous omission of evidence at trial; it turned out that M.T. had received paternity results showing that Alexander Schultz had been identified as the father of M.T.'s child. (R.10:3; Appx. 69). By January 28, 2014, the day after receiving this information,

Officer Waid had received an email from Assistant District Attorney Kurt Zengler[6], directing him to have M.T sign a Release of Medical Information so that her obstetrician could be interviewed. (R.10:4; Appx. 70) By February 2, 2014, Officer Waid had obtained a signed release from M.T., and by February 15, 2014, he had obtained a report from M.T.'s obstetrician estimating the date of conception to be October 19, 2012. (R.10:4-5; Appx. 70-71). On March 11, 2014, forty-eight days after Schultz's acquittal in 13CF110, a new criminal complaint was filed in the circuit court of Lincoln County charging Schultz with: one count of perjury before the court, in violation of Wis. Stat. § 946.31(1)(a); one count of obstructing an officer, in violation of Wis. Stat. § 946.41(1); and relevant to this appeal, one count of second degree sexual assault of a child, in violation of Wis. Stat. § 948.02(2). (R.1 and R.10; Appx. 67-72). The new case was assigned the number 14CF68.

The new complaint, as well as an amended complaint, alleged that "on or about October 19, 2012" Schultz had sexual intercourse with M.T, who was at that time a child under the age of sixteen. (R.1:1 and R.10:2; Appx. 68). The Information and an Amended Information, would allege the same timeframe. (R.26:1 and R.30:1; Appx. 16). On May 5, 2014, Schultz filed a motion to dismiss the sexual assault count on the grounds that the prosecution of Schultz in this case violated his rights guaranteed by the Double Jeopardy Clauses of 5th and 14th Amendments to the United States Constitution, and Article I, Section 8 of the Wisconsin Constitution. (R.5; Appx. 65-66). Schultz's argument, distilled to its essence, was that October 19, 2012 fell within the "early fall" of 2012, and thus the new prosecution fell within the scope of jeopardy which had been alleged in the charging documents of case number 13CF110.

Schultz filed a letter brief in support of his motion to dismiss. (R.19). Citing appropriate caselaw, Schultz argued that it is well established that the

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[6] Attorney Zengler was also the prosecutor for the jury trial in 13CF110. (R.67:1).

Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal." (R.19:3). He further argued that the State cannot "prosecute an offense whose elements are 'incorporated' into the elements of an offense already prosecuted." (R.19:3). He observed that the elements of the charge in 14CF68, second degree sexual assault of a child, were indeed incorporated into the charge in 13CF110, repeated sexual assault of the same child. (R.19:5). Schultz also noted that the charges in 13CF110 and 14CF68 involved the same child, M.T. (R.19:1). And finally, he noted that the timeframe alleged in 14CF68, "on or about October 19, 2012," landed within the timeframe which was alleged in the Information for 13CF110, namely, the "late summer of 2012 to the early fall of 2012." (R.19:1).

Initially, the State was under the impression that because it did not charge the lesser include offense in 13CF110, it could do so now in 14CF68 without implicating the Double Jeopardy Clause. (R.95:8-14). Schultz strenuously objected to this argument, and by the time the State filed its response brief it had dropped this argument. In fact, in that letter brief, and later at hearing, the State conceded all the legal points Schultz had made in his motion and briefs. (R.96:3-4; Appx. 6-7). Instead, the State took a different approach and simply argued that the charges in 13CF110 and 14CF68 were not the same in fact. (R.20:1). The State contended that the evidence adduced at the jury trial in the first case "... was able to pin down a conclusion of her sexual encounters with Mr. Schultz to a date clearly preceding October 19, 2012." (R.20:1). The State appended three pages of a partial trial transcript in support, and cited this court's decision in *State v. Nommensen*, 2007 WI App 224, 305 Wis.2d 695, 741 N.W.2d 481, as its authority.

In fact, M.T.'s testimony at trial, as to when the incidents of sexual intercourse occurred, was very imprecise. She testified that she began having sexual intercourse with Schultz in July of 2012. (R.67:130-31; Appx. 31-32). She stated that they broke up around the beginning of September 2012. (R.67:134;

Appx. 35). There was no testimony, however, as to whether they may have had sexual intercourse after they broke up. M.T. could not give a specific date for any of the alleged acts of sexual intercourse. (R.67:153; Appx. 54). She claimed that they had sexual intercourse more than five times, (R.67:134; Appx. 35), but could not specify how many times she had sexual intercourse with the defendant, much less identify three specific occasion on which she had sexual intercourse with the defendant. (R.67:153; Appx. 54). M.T. did not keep a diary, take notes, or send texts which would allow her to give a precisely date for when any of the alleged sexual assaults occurred. (R.67:146; Appx. 47). She could not remember the dates on which she told the other witnesses about her sexual relations with Schultz. (R.67:153; Appx. 54). With regard to whether M.T. had sexual intercourse with Schultz in the month of October, her testimony was as follows:

> Q. Did he initially interview you about an incident that happened in the beginning of October of 2012?
>
> A. Yes.
>
> Q. And after he asked you about that incident, did he have occasion to ask you if you had sex with anyone in the month or so leading up to the beginning of October of 2012?
>
> A. Yes.
>
> Q. And what did you tell him?
>
> A. I told him that I had sex with Alex.

(R.67:135; Appx. 36). It merits notice that the last sentence in this exchange was omitted from the portions of the partial transcript which the State attached to its letter brief to the circuit court. (See, R.20:2). As to when M.T. told her friend Samantha Yeskis that she was in a relationship with the defendant, M.T. testified as follows:

> Q. What did you tell Sam?
>
> A. I told Samantha I was in a relationship with Alex and that we had sex before.
>
> Q. And when did you tell her that?
>
> A. I don't remember.

Q. Was it in July?
A. No.
Q. August?
A. No.
Q. September?
A. Probably closer to October.
Q. Was it after you had stopped seeing Alex?
A. Yes.

(R.67:157; Appx. 58). Significantly, at no point in her testimony does M.T. state that she did not have sexual intercourse with Schultz in the month of October 2012. (R.67:127-63; Appx. 28-64).

Other witnesses were, if anything, even more imprecise as to when M.T. told them she was having sexual intercourse with Schultz. The witness Jessica Nowak testified to receiving a text from M.T. to the effect that she was having sexual intercourse with the defendant, but could not specify the time period in which she received this text any more accurately than "summer/fallish of `12". (R.67:169-70). The witness Lance Nowak testified to being aware that M.T. and the defendant were dating "in the late summer and early fall of 2012". (R.67:173). And Officer Matthew Waid's testimony as to M.T.'s statement concerning sexual relations with the defendant around the month of October was as follows:

Q. Were you asked to investigate an incident with -- involving [M.T.] that occurred in early October of 2012?
A. Yes.
Q. And in the course of that interview, you asked [M.T.] if she had had sexual relations with anyone in the month or so prior to early October of 2012?
A. Yes, I did.
Q. What was her response?
A. She stated that she had sexual intercourse with Alexander Schultz.

(R.67:192).

Schultz's reply to the State's letter brief was to deny the State's argument that the timeframe in 14CF68, that is "on or about October 19, 2012," was a

different timeframe than that alleged in 13CF110, that of "late summer to early fall of 2012." (R.21). In his reply brief, Schultz relied heavily upon this court's decision in *State v. Fawcett*, 145 Wis.2d 244, 426 N.W.2d 91 (1988). In *Fawcett*, this court in holding that the State is has considerable flexibility in charging the timeframe in child sexual abuse cases, also held that "[i]f the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged." *Id.* at 255.

The circuit court, nonetheless accepted the State's assertion that the testimony adduced at the jury trial in the first case "... was able to pin down a conclusion of her sexual encounters with Mr. Schultz to a date clearly preceding October 19, 2012." (R.20:1). In its oral ruling, the circuit court, based upon its review a partial transcript, found that:

> ... the timeframe that the victim testified to was July, and August, and September of 2012.
>
> The Court maintained that October 19 was not a date that Mr. Schultz was charged for, and the Court finds that mid-October, 2012, is not a timeframe that the victim testified to.
>
> So when we look at late Summer, early Fall of 2012, Mr. Kelz, under your argument of when Fall starts and when Fall ends, but the Court finds that the victim, when she testified to late Summer, early Fall, the victim was looking at July, August, and September of 2012, and the victim did not testify to any alleged incidents of sexual assault that took place in mid-October, certainly October 19, 2012.
>
> Given the Court's findings, the Court finds that Mr. Schultz was not charged and not tried for an alleged sexual assault that occurred on October 19, 2012.
>
> Therefore, the Court finds that double jeopardy does not attach. The Court will deny the defense's motion to dismiss count three, and that is the ruling of the Court.

(R.96:6; Appx. 9).

VI. Argument.

A. Summary of Argument.

In this case Alexander M. Schultz was prosecuted for the crime of second degree sexual assault of a child, M.T., after having been previously acquitted in a jury trial for the crime of repeated sexual assault of the same child. In the first prosecution the State alleged in the Information a timeframe for the commission of the crime of "late summer of 2012 to the early fall of 2012". In the second prosecution the State alleged a timeframe for the commission of the crime as being "on or about October 19, 2012." October 19th clearly landed within the "early fall of 2012," and the second prosecution should have been dismissed as it was violative of the Double Jeopardy Clauses of the United States and Wisconsin Constitutions. The circuit court, however, denied Schultz's motion to dismiss because it found the timeframe that the victim testified to at trial was July, August, and September of 2012. The court therefore found that Mr. Schultz "was not charged and was not tried for an alleged sexual assault that occurred on October 19, 2012." (R.96:6; Appx. 9).

The law provides that "[t]o determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, *at the time jeopardy attached in the first case,* to cover the offense that is charged in the subsequent prosecution." *United.States v. Olmeda,* 461 F.3d 271, 282 (2nd Cir. 2006) (emphasis added). In a jury trial jeopardy attaches when the selection of the jury has been completed and the jury sworn. The circuit court was therefore in error when it narrowed the scope of jeopardy based upon facts that were later adduced at trial. Schultz's conviction for second degree sexual assault of a child should be vacated, and this case remanded to the circuit court for the entry of a judgment of acquittal.

B. The circuit court erred in denying Schultz's Double Jeopardy claims by determining the scope of jeopardy based upon facts that were adduced at trial in the first prosecution.

1. Double Jeopardy, Generally.

The United States and Wisconsin Constitutions have near identical language prohibiting persons from being placed twice in jeopardy of punishment for the same offense. *State v. Sauceda*, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992). "The Double Jeopardy Clause is intended to provide three protections: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense." *Id*. citing *North Carolina v. Pearce*, 395 U.S. 711, 717, (1969).

It is the first of these protections, namely "protection against second prosecution for the same offense after acquittal" that Mr. Schultz believes applies to his case. "For whatever else that constitutional guarantee may embrace, *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time. *Green v. United States*, 355 U.S. 184, 190, 78 S.Ct. 221, 225, 2 L.Ed.2d 199." *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). Successive prosecutions of offenses that are identical in law and fact are violative of the Double Jeopardy Clause. *State v. Anderson*, 219 Wis.2d 739, ¶11, 580 N.W.2d 329 (1998).

Regarding whether prosecutions are identical in law, "[u]nder *Blockburger*,[7] the state cannot successively prosecute a defendant for two offenses unless each offense necessarily requires proof of an element the other does not. Neither can the state prosecute an offense whose elements are "incorporated" into the elements of an offense already prosecuted. *Dixon*,[8] 509 U.S. at ----, 113 S.Ct.

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[7] *Blockburger v. United States*, 284 U.S. 299 (1932).
[8] *United States v. Dixon*, 509 U.S. 688 (1993).

at 2857, 125 L.Ed.2d at 569. Finally, the state cannot relitigate factual issues that have already been adjudicated to the defendant's benefit in an earlier prosecution. *Ashe*, 397 U.S. at 446, 90 S.Ct. at 1195, 25 L.Ed.2d at 488." *State v. Kurzawa*, 180 Wis.2d 502, 524, 509 N.W.2d 712 (1994). The sequence of prosecution between greater and lesser included offenses is immaterial, "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v. Ohio*, 432 U.S. 161, 198 (1977).

The State previously conceded in the circuit court Schultz's argument that the charge of second degree sexual assault of a child, in violation of Wis. Stat. § 948.02(2), is a lesser included offense of the charge repeated sexual assault of the same child, in violation of Wis. Stat. § 948.025(1)(e). (R.96:3-4). Because the State made this concession in the circuit court, the State is now judicially estopped from arguing to the contrary on appeal. *See Rusk CO. Dep't of Health & Human Servs. v. Thorson*, 2005 WI App 37, ¶5 n.4, 278 Wis. 2d 638, 693 N.W.2d 318. The issue then for appeal is whether the offenses charged in 13CF110 and 14CF68 were the same in fact.

2. Even without the State's concession, the crime of second degree sexual assault of a child is a lesser included offense of the crime repeated sexual assault of the same child.

Notwithstanding the State's concession of the point in the circuit court, it is also clear that second degree sexual assault of a child, in violation of Wis. Stat. § 948.02(2), is a lesser included offense of the charge of repeated sexual assault of the same child, in violation of Wis. Stat. § 948.025(1)(e). This can be seen in the text of Wis. Stat. § 948.025(1)(e), which provides that "(1) Whoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child is guilty of: ... (e) A Class C felony if at least 3 of the violations were violations of s. 948.02(1) or (2)." Wis. Stat. § 948.025(1)(e) clearly incorporates the elements of Wis. Stat. § 948.02(2) by an express reference

to the statute. For purposes of the Double Jeopardy Clause the crimes are identical in law.

3. To determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the charging document, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the subsequent prosecution.

The circuit court erred in its analysis by determining the scope of jeopardy in light of testimony that was later adduced at trial, as opposed to determining the scope of jeopardy by the charges which were alleged at the time when jeopardy attached. "To determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the subsequent prosecution." *United States v. Olmeda*, 461 F.3d 271, 282 (2nd Cir. 2006) (emphasis added).

"Jeopardy attaches ... (2) In a jury trial when the selection of the jury has been completed and the jury sworn." Wis. Stats § 972.07(2). *See also, Crist v. Bretz*, 437 U.S. 28, 38 (1978) ("The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy."); and *State v. Moeck*, 2005 WI 57, ¶ 34, 280 Wis.2d 277, 695 N.W.2d 783. That is, in a jury trial, jeopardy attaches prior to the presentation of any evidence. This is the point in the proceedings where the scope of jeopardy must be determined in a case where the matter has gone to a jury trial.

The State is given considerable flexibility in charging the timeframe in child sexual abuse cases. Accordingly, "[i]f the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged." *State v. Fawcett*, 145 Wis.2d 244, 255, 426 N.W.2d 91 (1988), citing *State v. St. Clair*, 418 A.2d 184, 189 (Me. 1980).

"[A]s between the government and the defendant, the government, being the party that drafts indictments, should bear any burden resulting from imprecise language, *see United States v. Inmon*, 568 F.2d 326, 332 (3d Cir.1977) (`[W]e also point to the obvious fact that it is the government which has control over the drafting of indictments. Any burden imposed by the imprecision in the description of separate offenses should be borne by it.')." *Olmeda*, 461 F.3d at 283.

The State was in error when it suggests that the scope of jeopardy may be limited by the facts later adduced at trial. There is no authority for this proposition. Moreover, this proposition flies in the face of prior precedent of the United States Supreme Court that an acquittal is an absolute bar to retrial even if the acquittal is "based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). Indeed, in *Martinez v. Illinois*, 134 S.Ct. 2070 (2014), the United States Supreme Court held that once the jury was sworn, the double jeopardy clause bars retrial even in a situation *where no evidence was adduced at trial at all*.

The testimony of M.T. was entirely irrelevant to the question of whether the charges presented in the Information of 14CF68 were the same in fact with the charges presented in 13CF110. The question is whether a reasonable person might have believed, *at the time the jury was sworn* in 13CF110, that evidence of an act of sexual intercourse with M.T. on October 19, 2012 was covered by the Information. As Schultz will demonstrate below, they most certainly would. If the State had not been deficient in its preparation for trial, no doubt it would have presented testimony that paternity testing had identified Schultz as the father of M.T.'s baby, and that her obstetrician estimated the date of conception as October 19, 2012. If the State had presented this evidence, it would have been within the timeframe alleged in the Information in 13CF110. That the State was deficient in its preparation for trial does not mean Schultz was not in jeopardy of a more competent presentation of evidence at trial, at the time jeopardy attached.

And let us be under no illusions about this, there was incompetence on the State's part in preparing for trial. The evidence was out there, either before trial, or very shortly thereafter. We know that within five days the victim coordinator was in possession of the results of the paternity testing. (R.10:3; Appx. 69). And within twenty-four days they had obtained the obstetrician's report. (R.10:5; Appx. 71). Had the State been minimally effective in its representation of the public, it would either have had this evidence in hand by trial, or at least known that the evidence would be available in the near future. That the State did not request a continuance in order to gather this evidence, demonstrates that the State was blithely unaware of its existence. In fact, not only was there no request for a continuance to gather this evidence, it was the State who demanded that this case be set as a number one trial starting on January 21st, not the defendant. (R.68). Why was the State unaware of this evidence? Schultz's second prosecution appears to be the State's attempt to avoid answering this embarrassing question.

Finally, by narrowing the scope of jeopardy by evidence which was adduced at trial, the circuit court has lost sight of who is the finder of fact in a jury trial. It is the jury, not the judge, who is the finder of fact in a jury trial. *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990). "[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *Id.* at 506-7. The jury's verdict was that Mr. Schultz not guilty of committing repeated acts of sexual assault of the child M.T. during the timeframe alleged in the Information, which was "the late summer to early fall of 2012." (R.69:130 and R.74; Appx. 21). The jury did not limit its verdict to the months July, August and September of 2012. In narrowing the scope of jeopardy by testimony adduced at trial, the circuit court was substituting its own findings fact, for those of the jury. That is to say, the circuit court determined that the jury's verdict was something other than the verdict which the jury actually delivered.

4. The circuit court's reliance on the *Nommensen* was misplaced.

The circuit court's reliance on the case of *State v. Nommensen*, 2007 WI App 224, 305 Wis.2d 695, 741 N.W.2d 481, was misplaced. At no point in that decision did this court ever suggest that the scope of jeopardy alleged in a criminal complaint or information could be narrowed by the facts which were later adduced at trial. In fact, the decision in Nommensen was based solely upon the allegations in the complaints of the successive prosecutions. For the *Nommensen* court it was "... self-evident that the separate allegations against Nommensen in Washington county and Fond du Lac county are different in fact since the conduct occurred in different locations. From that, it is also self-evident that the conduct had to have occurred at different times." Id. at ¶ 9. That is, at the time when jeopardy attached in the first case, no reasonable person could have construed the allegation in the Washington county case to have covered an offense that was committed in Fond du Lac county. These offenses must have occurred at separate times owing to their having occurred in different locations, notwithstanding that there was an overlap of one month in the timeframes. Put another way, *Nommensen* held that you can't be in two different places at the same time.

In this case we have the exact opposite situation. Here the allegations contained in the information in 14CF68 fell completely within the same location, Lincoln County, and the time of the alleged crime fell fully within the timeframe that was alleged in 13CF110.

5. Whether October 19th falls within the "early fall" is a question of law, in both the legal and scientific senses. As a matter of law, October 19th falls within the "early fall."

There remains but one question to be answered, did "October 19, 2012" actually land within the "late summer of 2012 to the early fall of 2012"? If so, then Schultz must prevail in his Double Jeopardy claim. This is not a question of fact, but one of law. The "fall" has a very definite beginning and a very definite

end. These are facts which are beyond dispute; they are facts governed by the very movement of the planet Earth. Where a rule of law is applied to undisputed facts, the question presented is one of law. *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis.2d 480, 485, 373 N.W.2d 459 (1985). "This court is not bound by a trial court finding based on undisputed evidentiary facts when the finding is essentially a conclusion of law." *Id.*

"Fall" or "autumn", is "the season between summer and winter; fall. In the Northern Hemisphere it is from the September equinox to the December solstice...." See, *Autumn*. *Dictionary.com Unabridged*. Random House, Inc. http://www.dictionary.com/browse/autumn (accessed: December 15, 2017). In the northern hemisphere, the September equinox is the moment in the year when the Sun is exactly above the equator and day and night are of equal length; it is when the ecliptic (the Sun's annual pathway) and the celestial equator intersect. At this time the Sun crosses the celestial equator going south. See, *Equinox. Britannica.com.* Encyclopedia Britannica. https://www.britannica.com/topic/equinox-astronomy (accessed: December 17, 2017). The December solstice, is that moments during the year when the path of the Sun in the sky is farthest south in the Northern Hemisphere (December 21 or 22). At the winter solstice the Sun travels the shortest path through the sky, and that day therefore has the least daylight and the longest night. See, *Winter Solstice. Britannica.com.* Encyclopedia Britannica. https://www.britannica.com/topic/winter-solstice (accessed: December 17, 2017).

Trial counsel for Schultz cited the Old Farmer's Almanac for the proposition that in the year 2012, fall began around September 22nd and ended around December 21st. (R.21:1). A venerable treatise, this is also in accord with astronomical tables of the United States Naval Observatory, which indicate that in the year 2012 the September equinox was on September 22nd at 2:49 p.m., and that the December solstice fell on December 21st at 11:12 a.m. See, *Earth's Seasons. Equinoxes, Solstices, Perihelion, and Aphelion.* United States Naval Observatory.

http://aa.usno.navy.mil/data/docs/EarthSeasons.php (accessed: December 15, 2017).

The interval between September 22, 2012 and December 21, 2012 was ninety-one (91) days. The interval between September 22, 2012 and October 19, 2012 was a period of twenty-seven (27) days. Thus, October 19th would have fallen within the first third of the 2012 fall season. This court need not decide exactly when the early fall ends, and the mid-autumn begins. *Fawcett* tells us that "[i]f the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged." *Fawcett,* 145 Wis.2d at 255. Any date falling within the first third of a season would fairly be construed by any reasonable person as being the "early fall."

In a certain real sense, to deny that October 19th lands within the "early fall," is to deny the very movement of the celestial bodies; to deny that the Earth orbits the Sun. The Information in 13CF110 charged a crime in the "late summer and early fall of 2012." The circuit court could no more rule that October 19, 2012 does not land within the "early fall," than it could halt the progress of the Sun across the sky.[9]

[9] "The Bible says the earth stands still, my dears A fact which every learned doctor proves: The Holy Father grabs it by the ears and holds it hard and fast, - And yet it moves." Bertolt Brecht, *The Life of Galileo*, Scene 8.

VII. Conclusion.

Wherefore, Mr. Schultz respectfully requests that this Court vacate his Judgment of Conviction on the charge of second degree sexual assault of a child, and remand this case to the circuit court for the entry of a Judgment of Acquittal on that same charge.

Respectfully submitted December 20, 2017.

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VIII. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6783 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 December 20, 2017.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by priority mail on December 20, 2017. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: December 20, 2017.

Signature: _____