STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2017AP1977-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALEXANDER M. SCHULTZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, BOTH ENTERED IN THE LINCOLN COUNTY CIRCUIT COURT, THE HONORABLE ROBERT R. RUSSELL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did a second prosecution for sexually assaulting a child violate Defendant-Appellant Alexander M. Schultz's constitutional right to be free from double jeopardy?

The circuit court answered "no."

This Court should answer "no."

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State recommends publication because the Court's opinion would enunciate a new rule of law or apply an established rule of law to a factual situation significantly different from that in published opinions. *See* Wis. Stat. § (Rule) 809.23(1)(a)1. and (1)(a)2. The State does not recommend oral argument because the briefs should adequately set forth the facts and applicable law.

INTRODUCTION

Schultz pled guilty to one count of second-degree sexual assault of a child because he impregnated his friend's 15-year-old sister, M.T. Schultz seeks to vacate that conviction on double jeopardy grounds because a jury had previously acquitted him of one count of repeated sexual assault of M.T. This Court should affirm his conviction.

The State originally charged Schultz with sexually assaulting M.T. three or more times in the "late summer to early fall of 2012." Schultz moved to admit evidence that M.T. claimed that another man impregnated her. The State opposed the motion because another man's paternity would not be relevant to the question of Schultz's guilt. But the State moved for a continuance of the trial date so the court could adequately consider Schultz's motion and because M.T. wanted the trial to take place after she received the results of a pending paternity test. Schultz withdrew his motion, so

the case went to trial as scheduled. M.T. testified that she began having sex with Schultz in July or August of 2012 and broke up with him shortly afterward, in early September. The jury acquitted Schultz.

Days after the acquittal, M.T. informed the authorities that she had received the paternity-test results earlier than expected. The test showed that Schultz was virtually 100 percent likely to be the father of M.T.'s baby. M.T.'s health-care provider told police that the date of conception was October 19, 2012. The State then charged Schultz with sexually assaulting M.T. "on or about October 19, 2012." Schultz pled guilty to this charge after the circuit court denied his motion to dismiss it on double jeopardy grounds.

Schultz's second charge of sexual assault did not violate his right against double jeopardy because the two sexual-assault charges are factually distinct. "After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial." Wis. Stat. § 971.29(2). In the first prosecution, M.T. testified about a sexual relationship with Schultz in July to September 2012. Thus, pursuant to section 971.29(2), the original charge is deemed amended to allege sexual assaults in July to September 2012. The charge in the second case, which alleged a sexual assault "on or about October 19, 2012," was based on a different time period.

STATEMENT OF THE CASE

City of Merrill Police Officer Matthew Waid interviewed M.T. on December 4, 2012. (R. 67:206.) He interviewed her about an incident that occurred in October 2012, apparently something sexual in nature. (R. 67:147–48.) The October incident did not involve Alexander Schultz. (R. 96:5.) It apparently involved Dominic Beckman. (*See* R. 67:61–63.)

Officer Waid asked M.T. if she had sex with anyone in the month before the October incident. (R. 67:135.) She said that she had sex with Schultz about one month before the October incident, which happened in early- or mid-October. (R. 67:135, 147–48, 192.) Schultz was close friends with M.T.'s brother and her family. (R. 67:128, 130.) Schultz turned 20 in the summer of 2012, but M.T. was only 15 then. (R. 90; 67:127.)

Officer Waid interviewed Schultz later in December 2012. (R. 67:204.) Schultz denied having sex with M.T. (R. 67:204.)

The State charged Schultz with one count of repeated sexual assault of a child in case number 2013CF110. (R. 91.) The information alleged that Schultz had sexually assaulted M.T. three or more times "in the late summer to early fall of 2012." (R. 90:1.)

One day before trial, Schultz filed a motion "[t]o permit the introduction of the fact of [M.T.'s] pregnancy and the fact that she claimed Dominic Beckman was the father of her child." (R. 76:1; *see also* R. 67:57–60.) Shortly after jury selection was complete, the prosecutor moved for a continuance of the trial so that the court would have adequate time to consider Schultz's motion. (R. 67:74–75.) The prosecutor expected the paternity-test results to show that Beckman was the father. (R. 67:71–72, 82.) Still, M.T. and her mother wanted a continuance because they wanted the trial to take place after they received the test results. (R. 67:81–82, 87–88.) M.T.'s mother told the court that she expected to get the test results in about six weeks. (R. 67:85.) Schultz withdrew his motion and thereby avoided a continuance. (R. 67:88–89.)

Schultz's jury trial took place on January 21 and 22, 2014. (R. 67; 69.)[1] M.T. testified that she began having sex with Schultz "around July" or sometime between July and August 2012. (R. 67:130–31, 144.) She testified that they had sex more than five times and broke up in the beginning of September 2012. (R. 67:134–35.) Schultz testified in his defense. (R. 69:21–50.) The jury acquitted Schultz. (R. 69:130.)

Five days later, on January 27, 2014, M.T. informed the authorities that she had received her paternity-test results. (R. 1:4.) The results showed a 99.99998 percent chance that Schultz was the father of M.T.'s child. (R. 1:4.) Police asked M.T. to sign a "Release of Medical Information" form so that they could interview her obstetrician. (R. 1:5.) M.T. and her mother signed the form five days later. (R. 1:5.) Police mailed the form to M.T.'s health-care provider along with a letter asking for information "related to the timeline of conception of M.T.'s child." (R. 1:6.) The health-care provider sent a letter to police stating that "M.T.'s conception date would have been October 19th, 2012." (R. 1:6.)

The State then charged Schultz with three counts in case number 2014CF68: perjury before a court, obstructing an officer, and second-degree sexual assault of a child. (R. 1:1.) The perjury count stemmed from Schultz's false testimony at his trial. (R. 1:1.) The obstruction count stemmed from Schultz's false statements to Officer Waid. (R. 1:1.) The sexual-assault count charged Schultz with having sexual intercourse with M.T. "on or about October 19, 2012." (R. 1:1.) The last two charges included a sentence enhancer due to Schultz's status as a repeat offender. (R. 1:1.)

[1] The Honorable Jay R. Tlusty presided over the trial.

Schultz moved to dismiss the sexual-assault charge on double jeopardy grounds. (R. 5.) The circuit court held a hearing on the motion and ordered briefing. (R. 95:14.)[2] The parties filed letter briefs. (R. 19–21.)

The circuit court denied Schultz's motion to dismiss. (R. 96:6.) The court reasoned that M.T. testified at trial that she had sex with Schultz in July to September of 2012, but she did not testify about any sex with Schultz in mid-October. (R. 96:5–6.) The court thus found that in his first case, Schultz was not charged and tried for a sexual assault that occurred on October 19, 2012. (R. 96:6.)

Schultz pled guilty to the perjury count and the charge of second-degree sexual assault of a child. (R. 100:4–5.) The circuit court accepted the pleas and convicted him. (R. 100:11.) The court honored the parties' plea agreement by dismissing and reading in for sentencing purposes the obstruction count and two counts in an unrelated case. (R. 100:13.)

Schultz filed a postconviction motion to vacate his conviction for second-degree sexual assault of a child on double jeopardy grounds. (R. 55.) The circuit court denied the motion because it had "already denied a similar motion for dismissal." (R. 60.)

Schultz appeals from his conviction for second-degree sexual assault of a child and from the order denying his postconviction motion. (R. 61.)

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[2] The Honorable Robert R. Russell presided over most of case number 2014CF68.

SUMMARY OF ARGUMENT

I. Schultz's right against double jeopardy was not violated when the State charged him with sexual assault in a second case.

I.A. An acquittal protects a defendant from being subsequently charged with the same offense. To determine the scope of this double jeopardy bar, a court must decide what offense a defendant was acquitted of. In doing so, a court must consider the evidence at trial, not just the original charge. Wisconsin law provides that "[a]fter verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial." Wis. Stat. § 971.29(2). This statute means that the evidence at trial can affect the charge and thus affect the double jeopardy bar against successive prosecutions.

I.B. Applying those principles, the sexual-assault charge in Schultz's first case was factually distinct from the sexual-assault charge in his second case. In the first case, the State charged Schultz with sexually assaulting M.T. three or more times in the late summer to early fall of 2012. M.T. testified that she began having sex with Schultz in July or August of 2012 and broke up with him shortly afterward, in early September. There was no evidence at Schultz's trial that he had sex with M.T. in October. Pursuant to Wis. Stat. § 971.29(2), the original charge is deemed amended to allege three or more sexual assaults against M.T. in July to September of 2012. Double jeopardy principles protect Schultz from being prosecuted again for that amended charge. In Schultz's second case, however, the State charged him with sexually assaulting M.T. on or about October 19, 2012. Because assaults in July to September are factually distinct from an assault in mid-October, the sexual-assault

charge in Schultz's second case did not violate his right against double jeopardy.

STANDARD OF REVIEW

This Court reviews de novo whether a defendant's right against double jeopardy has been violated. *State v. Steinhardt*, 2017 WI 62, ¶ 11, 375 Wis. 2d 712, 896 N.W.2d 700. This Court upholds a circuit court's inferences from disputed facts unless they are clearly erroneous, even if they are based solely on a documentary record. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶¶ 37–39 & nn.9–10, 319 Wis. 2d 1, 768 N.W.2d 615.

ARGUMENT

The second charge of sexual assault did not violate Schultz's right against double jeopardy.

A. The State may charge a defendant after he has been acquitted of a factually distinct offense.

"The Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution guarantee the right to be free from double jeopardy." *Steinhardt*, 375 Wis. 2d 712, ¶ 13 (footnotes omitted). This right includes a "protection against a second prosecution for the same offense after acquittal" and "after conviction." *Id.* (citation omitted). This Fifth Amendment right applies to the states through the Fourteenth Amendment. *State v. Robinson*, 2014 WI 35, ¶ 21, 354 Wis. 2d 351, 847 N.W.2d 352.

For a defendant to show that a separate prosecution violated double jeopardy principles, "the offenses charged in the two prosecutions must be identical in the law and in fact." *State v. Van Meter*, 72 Wis. 2d 754, 758, 242 N.W.2d 206 (1976). Charges in two separate prosecutions are

identical in fact if the "facts alleged under either of the indictments would, if proved under the other, warrant a conviction under the latter." *Id.* (citation omitted). A second prosecution does not violate double jeopardy principles if the offenses in the two prosecutions are factually different, even if they are legally identical. *See id.* at 758–59. A greater offense and its lesser-included offense are legally identical. *State v. Stevens*, 123 Wis. 2d 303, 321–22, 367 N.W.2d 788, 797 (1985).[3]

"[A] guilty plea relinquishes the right to assert a [double jeopardy] claim when the claim cannot be resolved on the record." *State v. Kelty*, 2006 WI 101, ¶ 2, 294 Wis. 2d 62, 716 N.W.2d 886. Because Schultz's double jeopardy claim challenges a charge to which he pled guilty, that claim is waived if the Court cannot resolve it on this record.

B. The evidence at trial affects the scope of the double jeopardy bar against a subsequent prosecution.

"The scope of the double jeopardy bar is determined by the conviction and the entire record supporting the conviction." *United States v. Castro*, 776 F.2d 1118, 1123 (3d Cir. 1985) (citation omitted). In other words, "[f]or purposes of barring a future prosecution, it is the judgment and not the indictment alone which acts as a bar, and the entire record may be considered in evaluating a subsequent claim of double jeopardy." *United States v. Hamilton*, 992 F.2d 1126, 1130 (10th Cir. 1993) (citation omitted).

The Supreme Court has similarly recognized that criminal defendants may rely on the entire record to protect

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[3] As explained below in section I.E.1., the State concedes that second-degree sexual assault of a child is a lesser-included offense of repeated sexual assault of a child, although not for the same reason that Schultz reaches this conclusion.

themselves from being put in jeopardy a second time for the same offense. *Russell v. United States*, 369 U.S. 749, 764 (1962). Relying on *Russell* and other Supreme Court cases, the Seventh Circuit has explained that "[i]t is the record as a whole, therefore, which provides the subsequent protection from double jeopardy, rather than just the indictment." *United States v. Roman*, 728 F.2d 846, 854 (7th Cir. 1984).

Sanabria v. United States illustrates how to determine the scope of an acquittal. In *Sanabria*, the defendant was charged with running an illegal gambling business. *Sanabria v. United States*, 437 U.S. 54, 56 (1978). The evidence at trial showed that Sanabria had been engaged "in horse betting and numbers betting." *Id.* at 57. The trial court "struck all evidence of numbers betting" and granted Sanabria's motion for a judgment of acquittal. *Id.* at 59. The government appealed and "sought a new trial on the portion of the indictment relating to numbers betting," while conceding that double jeopardy principles would bar a new trial on the horse-betting theory of liability. *Id.* at 61. The Supreme Court concluded that the acquittal covered both theories of liability. *Id.* at 66–67. It reasoned that the trial court had "issued only two orders, one excluding certain evidence and the other entering a judgment of acquittal on the single count charged. *No language in the indictment was ordered to be stricken, nor was the indictment amended*." *Id.* at 66 (emphasis added) (citation omitted).

So, to determine whether an acquittal bars a subsequent charge on double jeopardy grounds, a court must determine the scope of the acquittal. In other words, it must determine precisely what offense the defendant was acquitted of. A court makes that determination by looking at the entire record. Under *Sanabria*, an amendment to a charge would affect the scope of an acquittal.

Wisconsin has a rule that "[t]he complaint will be treated as amended, even though no amendment has been

requested, where the proof has been submitted and accepted." *Goldman v. Bloom*, 90 Wis. 2d 466, 480, 280 N.W.2d 170 (1979) (citation omitted). In other words, an appellate court will deem a complaint to be amended to conform to evidence that was not objected to. *Martineau v. State Conservation Comm'n of Wis.*, 66 Wis. 2d 439, 445, 225 N.W.2d 613 (1975). An appellate court will do so when necessary to support the judgment appealed from. *See, e.g.*, *Wulfers v. E.W. Clark Motor Co.*, 177 Wis. 497, 500, 188 N.W. 652 (1922). A court will do so even in criminal cases. *See, e.g.*, *Moore v. State*, 55 Wis. 2d 1, 8, 197 N.W.2d 820 (1972) (deeming the charge amended to conform to the proof at trial).

This longstanding amendment rule is codified in Wisconsin's criminal code. The relevant statute provides: "After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial." Wis. Stat. § 971.29(2). That statutory language "was intended to deal with technical variances in the complaint such as names and dates." *State v. Duda*, 60 Wis. 2d 431, 440, 210 N.W.2d 763 (1973). Technical defects in a charge, including "ambiguities," "are cured by verdict." *Id.* at 441 (citation omitted). Objections to such defects in a charge, "if made after verdict, come too late." *Id.* (citation omitted).

A court therefore *must* deem a pleading to be amended after verdict pursuant to section 971.29(2). The plain language of the statute compels this conclusion. When a statute uses the word "shall," it is generally presumed to be mandatory. *State v. Sprosty*, 227 Wis. 2d 316, 324, 595 N.W.2d 692 (1999). That conclusion is bolstered when a particular statutory section uses the words "may" and "shall," "indicating the legislature was aware of the distinct meanings of the words." *Id.* (citation omitted). Section 971.29(2) uses both of those words. It has two sentences, the

first of which reads, "At the trial, the court *may* allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." Wis. Stat. § 971.29(2) (emphasis added). The first sentence gives a circuit court discretion to allow amendment to a charge during trial. *See State v. Malcom*, 2001 WI App 291, ¶ 23, 249 Wis. 2d 403, 638 N.W.2d 918. The second sentence states that "the pleading *shall* be deemed amended to conform to the proof" after verdict "if no objection to the relevance of the evidence was timely raised upon the trial." Wis. Stat. § 971.29(2) (emphasis added). This plain language shows that amendment is mandatory after, but not before, the verdict if there was no objection to the evidence at issue.

Further, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). The State's view avoids rendering the second sentence in section 971.29(2) surplusage in light of the first.

A charge may even be amended after an acquittal to allow a conviction on a different charge. In *La Fond v. State*, 37 Wis. 2d 137, 140, 154 N.W.2d 304 (1967), the circuit court acquitted the defendant of a charge of sexual assault of a child, sua sponte amended the charge to contributing to the delinquency of a minor, and then convicted the defendant of the amended charge. The supreme court concluded that the circuit court had properly amended the charge to conform to the proof pursuant to Wis. Stat. § 957.16(1). *Id.* at 143–44. Section 957.16(1) was the predecessor of current section 971.29(2). *Duda*, 60 Wis. 2d at 439.

In short, section 971.29(2) affects the scope of a conviction or an acquittal because it deems a charge to be amended to conform to the evidence after verdict. This view

is consistent with the federal case law noted above, which holds that the double jeopardy bar against a subsequent charge hinges on the evidence at trial. When determining the scope of the double jeopardy bar, a court must not rely on the charging document as it read when the trial started. Instead, a court must deem the charge to be amended to conform to the evidence after verdict pursuant to section 971.29(2). The court must then consider whether the conviction or acquittal on the *amended* charge bars a subsequent prosecution.

C. Schultz incorrectly urges this Court to ignore the evidence at his trial when determining the scope of the double jeopardy bar.

Schultz argues that a court determines the scope of the double jeopardy bar against successive prosecutions by looking at the charging document when jeopardy attached, not by looking at evidence that was later introduced at trial. (Schultz's Br. 16–18.) He relies heavily on *United States v. Olmeda*, 461 F.3d 271 (2d Cir. 2006), to support that view. (Schultz's Br. 1, 4, 13, 16.) The court in *Olmeda* stated 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." *Olmeda*, 461 F.3d at 282. This Court should decline to follow *Olmeda* for three reasons.

First, Schultz initially relied on *Olmeda* in his postconviction motion, which the circuit court treated as a motion for reconsideration of the order denying dismissal. (*See* R. 55:4, 5–6; 60.) "To prevail on a motion for reconsideration, a party must either present newly discovered evidence or establish a manifest error of law or

fact." *State v. White*, 2008 WI App 96, ¶ 8, 312 Wis. 2d 799, 754 N.W.2d 214 (citation omitted). "A manifest error of law occurs when the circuit court disregards, misapplies, or fails to recognize *controlling precedent*." *Id.* (emphasis added) (citation omitted). Decisions by federal circuit courts are not binding on state courts. *State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993). Thus, Schultz's reliance on *Olmeda* does not satisfy the manifest-error standard. Because *Olmeda* is not binding on Wisconsin state courts, the circuit court did not overlook *controlling* precedent when it denied Schultz's motion to dismiss the sexual-assault charge in the second prosecution.

Second, *Olmeda* wrongly focuses on the "initial indictment, at the time jeopardy attached in the first case." *Olmeda*, 461 F.3d at 282. "[J]eopardy attaches when the jury is empaneled and sworn." *Martinez v. Illinois*, 134 S. Ct. 2070, 2074 (2014) (per curiam) (citations omitted). "'[T]he conclusion that jeopardy has attached,' however, 'begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.'" *Id.* at 2075 (alteration in original) (citation omitted). "The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried." *Id.* (citation omitted). "[A] verdict of acquittal . . . is a bar to a subsequent prosecution for the same offence." *Serfass v. United States*, 420 U.S. 377, 392 (1975) (second alteration in original) (citations omitted).

As explained above, the double jeopardy bar hinges on the judgment of conviction or acquittal and the entire record supporting it. The reason why is that the judgment, not the charge or the attachment of jeopardy, creates the double jeopardy bar. A court should thus rely on the entire record to

determine what the *judgment* meant, not to determine what the *charging document* meant when jeopardy attached.[4]

Third, the *Olmeda* court gave short shrift to the notion that an amendment to a charge could affect a double jeopardy analysis. It stated in a footnote that "[t]o the extent the government suggests that the lack of any mention of [a particular accusation during] plea proceedings implicitly narrowed or constructively amended the indictment, we are not persuaded." *Olmeda*, 461 F.3d at 287 n.15. The court noted the well-established rule that a charge may be constructively narrowed but not broadened. *Id.* Yet it stated—without any analysis or citation to authority—that "where the government constructively narrows an indictment after jeopardy attaches only to refile the dropped charge at a later date, a variation on the problem of increased exposure arises implicating due process if not double jeopardy concerns." *Id.*

The *Olmeda* court's concerns are misplaced. To be sure, a variance between a charge and the proof at trial can create due process and double jeopardy concerns. Specifically, a variance can create risks that the defendant was not put on notice of the charge and might be subjected to double jeopardy in a later prosecution. *See, e.g.*, *United States v. Tello*, 687 F.3d 785, 796 (7th Cir. 2012); *United States v. Smith*, 789 F.2d 196, 200 (3d Cir. 1986). But "[i]f it is clear from the record that the accused was not misled by the evidence presented and could not be retried for the same events, the 'notice' and 'double jeopardy' concerns underlying the variance between the charge and the evidence will have been satisfied." *Wooley v. United States*, 697 A.2d 777, 779 (D.C. 1997) (citations omitted). When the proof at trial *narrows* the charge, the defendant was given adequate

[4] As explained later, contrary to Schultz's suggestion, *Olmeda* does not prohibit a court from considering the evidence at trial.

notice of the charge. *See United States v. Trennell*, 290 F.3d 881, 889 (7th Cir. 2002) (relying on *United States v. Miller*, 471 U.S. 130, 137 (1985)). As for the double jeopardy concern, a defendant may rely on the entire record when moving to dismiss a subsequent prosecution, as explained above.

Not surprisingly, *Olmeda* is an outlier. Maryland might be the only state with a rule like *Olmeda*. Maryland courts ignore the evidence at trial when determining the scope of the double jeopardy bar against successive prosecutions. *Warren v. State*, 130 A.3d 1128, 1133–35 (Md. Ct. Spec. App. 2016). According to *Warren*, "[t]he scope of jeopardy is not measured by the evidence offered in the trial or by the arguments made or by the instructions given. It is measured by the words of the indictment or criminal information." *Id.* at 1134. In defending its narrow focus, the *Warren* court reasoned that a double jeopardy claim "is asserted and decided before a trial even begins. If successful, it prevents a trial from ever taking place." *Id.* at 1135. "[B]ecause jeopardy attaches before any evidence is offered and before any argument is made, how could one possibly measure the scope of the jeopardy other than by examining the pleadings?" *Id.*

The answer to the *Warren* court's question is simple: by examining the evidence at the trial in the previous prosecution. In a case like Schultz's, double jeopardy is an asserted defense against a *second* prosecution—after a trial has already taken place. A court can look at the evidence at the trial to determine whether double jeopardy principles prohibit a second prosecution from taking place.

In sum, a court considers the evidence at a previous trial when determining the scope of the double jeopardy bar against successive prosecutions. Pursuant to Wis. Stat. § 971.29(2), the charge from the previous trial is deemed amended to conform to the evidence. A conviction or an

acquittal on that amended charge precludes a subsequent charge for the same offense.

D. In light of the evidence at trial, Schultz's original sexual-assault charge is factually distinct from the subsequent sexual-assault charge.

Charges in two separate prosecutions are identical in fact if the "facts alleged under either of the indictments would, if proved under the other, warrant a conviction under the latter." *Van Meter*, 72 Wis. 2d at 758 (citation omitted). In other words, "[c]harges are not the same in fact if each requires proof of a fact that the other does not." *State v. Nommensen*, 2007 WI App 224, ¶ 8, 305 Wis. 2d 695, 741 N.W.2d 481 (citation omitted).

"Offenses are different in fact if the offenses 'are either *separated in time* or are significantly different in nature.'" *State v. Eaglefeathers*, 2009 WI App 2, ¶ 8, 316 Wis. 2d 152, 762 N.W.2d 690 (emphasis added) (citation omitted). Two charges are thus different in fact if they are based on different dates. *See, e.g.*, *State v. Anderson*, 219 Wis. 2d 739, 749–50, 580 N.W.2d 329 (1998); *Stevens*, 123 Wis. 2d at 323.[5]

Here, the two sexual-assault charges are different in fact. In the first prosecution, the State charged Schultz with

[5] *Eaglefeathers*, *Anderson*, and *Stevens* are controlling here even though they involved multiplicity claims, not successive-prosecution claims. "Multiplicity" refers to multiple punishment for the same offense, which is one of the things against which the Double Jeopardy Clause protects. *State v. Steinhardt*, 2017 WI 62, ¶ 13, 375 Wis. 2d 712, 896 N.W.2d 700. It also protects against a second prosecution for the same offense after acquittal or conviction. *Id.* The Double Jeopardy Clause's "'successive punishment' strand" and "'successive prosecution' strand" use the same analysis for determining whether two offenses are the same. *United States v. Dixon*, 509 U.S. 688, 704 (1993).

sexually assaulting M.T. three or more times "in the late summer to early fall of 2012." (R. 90:1.) But pursuant to Wis. Stat. § 971.29(2), that charge is deemed amended after verdict to cover only July through September 2012. That statute's language "regarding amendment after verdict was intended to deal with technical variances in the complaint such as names and dates." *Duda*, 60 Wis. 2d at 440. Technical defects in a charge, including "ambiguities," "are cured by verdict." *Id.* at 441 (citation omitted). M.T. testified at trial that she began having sex with Schultz "around July" or sometime between July and August 2012. (R. 67:130–31, 144.) She testified that they broke up in the beginning of September 2012. (R. 67:134–35.) Schultz did not object to any of that testimony. There was no evidence that M.T. had sex with Schultz after September 2012. The ambiguous charging dates—late summer to early fall of 2012—therefore must be deemed amended to July through September 2012.

That amended charge is factually distinct from the sexual-assault charge in the second prosecution, where the State charged Schultz with sexually assaulting M.T. "on or about October 19, 2012." (R. 1:1; 10:2; 26:1; 30:1.) Mid-October is separate from July through September. Because the sexual-assault charges in the two prosecutions were based on different dates, they were different in fact and thus not the same offense. In other words, the sexual-assault charge in the second prosecution did not violate Schultz's right against double jeopardy.

E. Schultz's arguments are without merit.

Schultz raises six arguments as to why his two sexual-assault charges are the same offense. His arguments are unavailing.

1. It is immaterial that the two sexual-assault charges are identical in law.

Schultz argues that his two sexual-assault charges are identical in law. (Schultz's Br. 14–16.) He contends that second-degree sexual assault of a child is a lesser-included offense of repeated sexual assault of a child because the repeated assault statute expressly incorporates the sexual assault statute as an element. (Schultz's Br. 15–16.)

Schultz's conclusion is correct, but it does not matter because the two offenses at issue are factually distinct for the reasons stated above. Again, a second prosecution does not violate double jeopardy principles if the offenses in the two prosecutions are factually different, even if they are legally identical. *See, e.g.*, *Stevens*, 123 Wis. 2d at 321–23.

The State will explain its concession that the two sexual-assault charges are legally identical because Schultz's analysis is overly simplistic. "[F]or one crime to be included in another, it must be 'utterly impossible' to commit the greater crime without committing the lesser." *State v. Carrington*, 134 Wis. 2d 260, 265, 397 N.W.2d 484 (1986). A court looks at the statutory elements of both crimes to determine whether the lesser offense is included in the greater. *Id.* at 265–66. When a greater offense has alternative elements, a court must look at the charging documents to see which alternative element was alleged. *Id.* at 270–73.

Sometimes a greater offense has an alternative element that is itself a lesser offense. *See, e.g.*, *State v. Martin*, 156 Wis. 2d 399, 404, 456 N.W.2d 892 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 883, 470 N.W.2d 900 (1991). In that situation, the lesser offense is *not* included in the greater if (1) the charging document did not specify which alternative element the defendant allegedly committed and (2) it is

possible to commit the greater offense without committing the lesser offense. *See id.* at 405.

In *Martin*, the defendant was convicted of second-degree sexual assault. *Id.* at 401. He argued on appeal that the circuit court erred by refusing to give a lesser-included-offense jury instruction on battery. *Id.* at 402. This Court rejected that argument. *Id.* It concluded that "battery is not a lesser-included offense of second degree sexual assault." *Id.* at 406. It reasoned that battery was one of four alternative methods for satisfying the "sexual contact" element of sexual assault, the charging documents did not specify which of those alternatives Martin had committed, and it was possible for a person to commit second-degree sexual assault without committing battery. *Id.* at 404–05.

Here, the State charged Schultz in his first case with violating Wis. Stat. § 948.025(1)(e), which requires at least three first- or second-degree sexual assaults of a child. (R. 90.) But the charge did not specify whether Schultz had committed first- or second-degree assaults. (R. 90.) Under *Martin*, those facts suggest that the second-degree assault charge in Schultz's second case was *not* legally included in the repeated assault charge from his first case.

But, under *Martin*, one dispositive fact points the other way: it is *not* possible to commit repeated sexual assault of a child without committing second-degree sexual assault of a child. Second-degree sexual assault of a child is a lesser-included offense of first-degree sexual assault of a child. *State v. Moua*, 215 Wis. 2d 511, 519–20, 573 N.W.2d 202 (Ct. App. 1997). Thus, it is impossible to commit the first-degree offense without committing the second-degree offense—which means that it is also impossible to repeatedly assault a child without committing the second-degree offense. The second-degree offense is thus a lesser-included offense of repeated sexual assault under section 948.025(1)(e). Although these two offenses are legally

identical, they were factually distinct in Schultz's two prosecutions for the reasons stated above.

2. There was no trial testimony that Schultz assaulted M.T. in October 2012.

In the factual-background section of his brief, Schultz seems to argue that there was trial testimony that he sexually assaulted M.T. in October 2012. (Schultz's Br. 10–11.) He quotes three pieces of testimony and claims that they related "to whether M.T. had sexual intercourse with Schultz in the month of October." (*Id.* at 10.) He is wrong.

As an initial matter, the postconviction court determined that M.T. did *not* testify that she had sex with Schultz in October. (R. 96:5–6.) An appellate court upholds a circuit court's inferences from disputed facts unless they are clearly erroneous, even if they are based solely on a documentary record. *Phelps*, 319 Wis. 2d 1, ¶¶ 37–39 & nn.9–10. Here, the circuit court's inference as to what the testimony meant was not clearly erroneous.

Even under de novo review, the circuit court was correct. Schultz misunderstands the testimony that he highlights. That testimony referred to an incident in October 2012 that did *not* involve Schultz. Police Officer Matthew Waid interviewed M.T. on December 4, 2012. (R. 67:206.) He interviewed her about an incident that occurred in October 2012, apparently something sexual in nature. (R. 67:147–48.) As the prosecutor repeatedly pointed out during his closing argument, that October incident did not involve Schultz. (R. 69:88, 92–93, 114–15.) The postconviction court made the same point, saying that M.T. testified "that she had sex with Mr. Schultz a month or so prior to an incident she had with *another individual* in October of 2012." (R. 96:5 (emphasis added).) The prosecutor repeatedly said during closing argument that M.T.'s relationship with Schultz

ended in September and lasted from July to September. (R. 69:91, 94, 95, 117.) Defense counsel also seemed to understand that the October incident did not involve Schultz. While cross-examining M.T., defense counsel asked her whether she continued talking with Officer Waid after she "finished talking about *some other business* that [she] had down there." (R. 67:147 (emphasis added).) M.T. said, "Yes," and testified that she told Officer Waid that she had sex with Schultz one month before that other incident. (R. 67:147–48.) In short, M.T. did not testify that she had sex with Schultz in October 2012.

In the first piece of testimony that Schultz highlights, the prosecutor asked M.T., "Did [Officer Waid] initially interview you about an incident that happened in the beginning of October of 2012?" (R. 67:135.) M.T. said, "Yes." (R. 67:135.) The prosecutor asked M.T., "And after [Officer Waid] 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*?" (R. 67:135 (emphasis added).) M.T. said, "Yes," and then the prosecutor asked, "And what did you tell him?" (R. 67:135.) M.T. said, "I told him that I had sex with Alex." (R. 67:135.) So, M.T. told Officer Waid that she had sex with Schultz in the month leading up to October 2012—in other words, in September 2012.

In the second piece of testimony that Schultz highlights, M.T. testified that she had told one of her friends that she "was in a relationship with Alex and that we had sex before." (R. 67:157.) The prosecutor asked M.T. when that conversation happened, but M.T. did not remember. (R. 67:157.) M.T. said that the conversation did not happen in July or August. (R. 67:157.) When the prosecutor asked whether she told her friend in September, M.T. said, "Probably closer to October." (R. 67:157.) The prosecutor asked, "Was it after you had stopped seeing Alex?"

(R. 67:157.) M.T. said, "Yes." (R. 67:157.) In other words, M.T. had sex with Schultz, stopped seeing him, and then in September or October told her friend about the sex. This testimony does not suggest that M.T. had sex with Schultz in October.

In the third piece of testimony that Schultz highlights, Officer Waid testified that he had investigated an incident involving M.T. that occurred in early October 2012. (R. 67:192.) The prosecutor asked Officer Waid, "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*?" (R. 67:192 (emphasis added).) Officer Waid said yes. (R. 67:192.) The prosecutor asked what M.T.'s response was. (R. 67:192.) Officer Waid said, "She stated that she had sexual intercourse with Alexander Schultz." (R. 67:192.) So, M.T. told Officer Waid that she had sex with Schultz in the month before early October 2012—in other words, in September. Like M.T.'s testimony, Officer Waid's testimony does not suggest that Schultz had sex with M.T. in October.

3. Schultz incorrectly focuses solely on the original charging language.

Relying heavily on *Olmeda*, Schultz argues that the evidence at his trial is not relevant to the scope of the double jeopardy bar. (Schultz's Br. 16–17.) This Court should decline to follow *Olmeda* for the reasons stated above.

Further, Schultz's double jeopardy claim fails even under the *Olmeda* test. That test looks at "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." *Olmeda*, 461 F.3d at 282 (emphasis added). A court may use "the entire record" in making that determination. *Id.* (citations

omitted). Proceedings that took place *after* jeopardy attached "are relevant to double jeopardy analysis only insofar as they assist an objective observer in clarifying any ambiguities in the scope of the indictment at the time jeopardy in fact attached." *Id.* at 288.

Under that test, the initial sexual-assault charge against Schultz did not cover mid-October 2012. That charge alleged that Schultz sexually assaulted M.T. three or more times "in the late summer to early fall of 2012." (R. 90:1.) In the subsequent prosecution, the State charged Schultz with sexually assaulting M.T. "on or about October 19, 2012." (R. 30:1.) The State concedes that a reasonable person would generally construe "early fall" to include October 19 for the reasons stated in Schultz's brief. (*See* Schultz's Br. 19–21.) But a reasonable person would *not* think that the sexual-assault charge in Schultz's first case covered October 19, 2012. M.T. told one of her friends and Officer Waid that she had sex with Schultz about *one month before* an unrelated incident that happened in early- or mid-October 2012—in other words, that she had sex with Schultz in early- or mid-September 2012. (R. 67:135, 147–48, 157, 192.) In light of M.T.'s pretrial statements to her friend and Officer Waid, a reasonable person would interpret "late summer to early fall" to cover September but not October 19.

Schultz also relies on *Martinez*, where the "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*." (Schultz's Br. 17.) *Martinez* does not help Schultz. In *Martinez*, after the jury was sworn, the prosecutor refused to call any witnesses or otherwise participate in the trial because it could not locate the two alleged victims. *Martinez*, 134 S. Ct. at 2072–73. The trial court granted the defense motion for acquittal. *Id.* The Supreme Court first rejected the argument that because "the defendant was not genuinely at risk of conviction," jeopardy

did not attach when the jury was sworn. *Id.* at 2074–75. It next rejected the argument that the trial court's dismissal of the case did not amount to an acquittal. *Id.* at 2075–76.

Those two holdings do not help Schultz. The two disputed issues in *Martinez* are undisputed here. The State concedes that jeopardy attached in Schultz's trial when the jury was sworn and that he was acquitted at his trial. The disputed issue here is whether a court may look at the evidence at trial in determining the scope of the double jeopardy bar against successive prosecutions. Because no evidence was introduced at the trial in *Martinez*, that case sheds no light on this issue.

4. Schultz's criticism of the prosecutor is baseless.

Schultz accuses the State of inadequately preparing for his trial. (Schultz's Br. 17–18.) He tells this Court to "be under no illusions" that "there was incompetence on the State's part in preparing for trial. " (*Id.*) Schultz argues that the prosecutor should have known that M.T.'s paternity-test results would be available soon and thus should have asked for a continuance of the trial date. (*Id.* at 18.) Because there was "no request for a continuance," the prosecutor must have been "blithely unaware" of the existence of the paternity test. (*Id.*)

Schultz's argument has no factual basis. The prosecutor *did* ask for a continuance so that the trial could take place after the paternity test was complete. The parties extensively discussed this issue at the start of trial. (R. 67:57–89.) One day before trial, on a legal holiday, Schultz filed a motion under *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), "[t]o permit the introduction of the fact of [M.T.'s] pregnancy and the fact that she claimed Dominic Beckman was the father of her child." (R. 76:1; *see also* R. 67:57–60.) Shortly after jury selection was complete,

the prosecutor moved for a continuance of the trial so that the court would have adequate time to consider the *Pulizzano* motion. (R. 67:74–75.) The prosecutor expected the paternity-test results to show that Beckman was the father. (R. 67:71–72, 82.) Beckman had been the "imputed" father for months. (R. 67:60.) The prosecutor thought that the test results would be irrelevant because Beckman's paternity would not show that Schultz was innocent of the crime charged. (R. 67:71–72, 82.) Even though the prosecutor explained those views to M.T. and her mother, they still wanted a continuance because they wanted the trial to take place after the test results. (R. 67:81–82, 87–88.) M.T.'s mother told the court that she expected to get the test results in about six weeks. (R. 67:85.) Schultz withdrew his *Pulizzano* motion, thereby avoiding a continuance. (R. 67:88–89.)

Even if Schultz's criticism of the prosecutor was factually accurate, it would have no legal basis. Charging a defendant in successive prosecutions does not result in a double jeopardy violation if each charge required proof of a fact not required by the other charge. *Perkins v. State*, 61 Wis. 2d 341, 347–48, 212 N.W.2d 141 (1973). Schultz has not cited any authority limiting that rule to cases where the prosecutor diligently prepared for the first trial. Litigants are required to make legal, not emotional, arguments. *See State v. Armstead*, 220 Wis. 2d 626, 641–42, 583 N.W.2d 444 (Ct. App. 1998). Schultz's factually inaccurate, emotionally charged criticism of the prosecutor does not help his double jeopardy claim.

5. The circuit court did not usurp the jury's role.

Schultz argues that the circuit court improperly substituted its own findings for the jury's and limited the jury's verdict. (Schultz's Br. 18.) He is wrong about what the

court did. Courts, not juries, resolve double jeopardy issues. *State v. Koller*, 2001 WI App 253, ¶¶ 35, 37, 248 Wis. 2d 259, 635 N.W.2d 838. A jury determines whether testimony is true. *State v. Padilla*, 110 Wis. 2d 414, 424, 329 N.W.2d 263 (Ct. App. 1982). The circuit court did not determine whether M.T. was telling the truth when she testified that she had had sex with Schultz. Instead, the court at most interpreted the trial testimony to resolve Schultz's double jeopardy claim. As explained above, the circuit court correctly interpreted the trial testimony to mean that M.T. was alleging that she had sex with Schultz no later than September 2012. Pursuant to Wis. Stat. § 971.29(2), the circuit court implicitly amended the charge to conform to that evidence. The circuit court correctly determined the scope of Schultz's acquittal as it related to his double jeopardy claim.

6. Distinguishing *Nommensen* does not help Schultz.

Schultz argues that "[t]he circuit court's reliance on [*Nommensen*] was misplaced." (Schultz's Br. 19.) He argues that the successive prosecutions in *Nommensen* were based on offenses in different times at different locations, but his two sexual-assault charges occurred at "the same location" and in the same "timeframe." (*Id.*) The circuit court, however, recognized that *Nommensen* was "different" from Schultz's case. (R. 96:4.)

In *Nommensen*, the State charged Nommensen with one count of repeated sexual assault of a child in Fond du Lac County and one count of repeated sexual assault of the same child in Washington County. *Nommensen*, 305 Wis. 2d 695, ¶ 2. The time periods alleged in both counts overlapped one month. *Id.* A jury acquitted Nommensen in the Fond du Lac County case. *Id.* ¶ 3. He moved to dismiss the Washington County charge on double jeopardy grounds. *Id.*

¶ 4. This Court rejected the double jeopardy claim because Nommensen's two charges were different in fact. *Id.* ¶¶ 12, 21. Despite the "overlap" of one month in the charges, the charged conduct in Fond du Lac County necessarily occurred in a different location—and thus at different times—than the charged conduct in Washington County. *Id.* ¶ 9.

Nommensen thus is relevant here because it supports the well-established principle that two charges are factually distinct if they are separated in time. *See also, e.g.*, *Eaglefeathers*, 316 Wis. 2d 152, ¶ 8. In other words, two charges are factually distinct if they are based on different dates. *See, e.g.*, *Anderson*, 219 Wis. 2d at 749–50; *Stevens*, 123 Wis. 2d at 323. The rationale in *Nommensen*—that offenses that occurred in different locations necessarily occurred at different times—has no application here. But this Court does not need to rely on that type of reasoning here because, unlike in *Nommensen*, the charges at issue here did not overlap in time. As explained above, the sexual-assault charge in Schultz's first case is deemed amended, pursuant to Wis. Stat. § 971.29(2), to allege three or more sexual assaults between July and September 2012. By contrast, the sexual-assault count in Schultz's second case charged him with sexually assaulting M.T. "on or about October 19, 2012." (R. 30:1.) The charging periods are thus different, not overlapping. Because they are based on different time periods, the second prosecution did not violate Schultz's right to be free from double jeopardy.

CONCLUSION

This Court should affirm Schultz's judgment of conviction and the order denying his postconviction motion.

Dated this 23rd day of February, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,952 words.

Dated this 23rd day of February, 2018.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of February, 2018.

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