STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2017AP1977 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ALEXANDER M. SCHULTZ,

Defendant-Appellant-Petitioner

On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction entered
in the Circuit Court for Lincoln County,
The Honorable Robert R. Russell, presiding

BRIEF OF THE DEFENDANT-APPELLANT-PETITIONER ALEXANDER M. SCHULTZ

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I. Table of Contents.

II. Table of Authorities.

Cases

Statutes

Constitutional Provisions

Other Authorities

Autumn. *Dictionary.com Unabridged*. Random House, Inc. http://www.dictionary.com/browse/autumn (accessed: April 27, 2019). ... 16

Autumn. *Merriam-Webster.com*, Merriam-Webster, Inc., https://www.merriam-webster.com/dictionary/autumn (accessed: April 27, 2019) 16

Equinox. Britannica.com. Encyclopedia Britannica. https://www.britannica.com/topic/equinox-astronomy (accessed: December 17, 2017) 17

Getting' Squirrelly 2019; 18-Month Calendar, Willow Creek Press, 2019 31

Synonyms of Ambiguous, *CollinsDictionary.com*, HarperCollins Publishers, https://www.collins 22

The Old Farmer's Almanac, https://www.almanac.com (accessed: December 25, 2018) 31

III. Statement of issues presented for review.

This appeal presents the following issues for review:

First, when determining whether two offenses charged in successive prosecutions are the same in fact, for purposes of the Double Jeopardy Clause, may a court determine the scope of jeopardy in the first prosecution based upon testimony which was adduced at trial?

Second, if there should be any ambiguity in the timeframe of a charging document, for purposes of the Double Jeopardy Clause, who should bear the burden resulting from the ambiguity, the defendant or the State?

The circuit court and Court of Appeals both found that it was appropriate to consult the evidence that was adduced at trial in order to define the timeframe of the first prosecution, and then determined that no reasonable person familiar with facts and circumstances of Schultz's first prosecution would have understood "the early fall" to encompass October 19, 2012.

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 which provide guidance as to how you are to determine whether two offenses charged in successive prosecutions are the same in fact. As the Court of Appeals acknowledges, there appear to be no Wisconsin cases which directly answer this question. (Opinion, ¶ 18; Appx. 7). This is novel case, and one of first impression in the State of Wisconsin. *Id.* It involves a real and significant question concerning the Double Jeopardy Clause. How do you determine whether two successive prosecutions are identical in fact? This Court's decision should be published. This Court would also benefit from oral argument.

V. Statement of Case and Facts.

A. Introduction.

Alexander M. Schultz was prosecuted for the crime of second-degree sexual assault of a child, M.T.,[1] after having previously been acquitted by a jury of the crime of repeated sexual assault for the same child.[2] In the first prosecution the State alleged a timeframe of "the late summer to early fall of 2012". (R.90:1; Appx. 31). In the second prosecution the State alleged as its timeframe, "on or about October 19, 2012." (R.30:1; Appx. 43).

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, that is to say, in the "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 second prosecution of Schultz 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).

The State conceded that the offenses charged against Schultz were identical in law, given that the offense of second-degree sexual assault of a child is a lesser-included offense of repeated sexual assault of a child. (Opinion ¶ 16; Appx. 6). The only question was whether the two prosecutions were identical in fact; specifically, whether the timeframe of the first prosecution, that of "the late summer to early fall of 2012," included the date of the sexual assault alleged in the second prosecution, namely, "on or about October 19, 2012." (Opinion ¶ 16; Appx. 6).

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[1] in violation of Wis. Stat. § 948.02(2).

[2] in violation of Wis. Stat. § 948.025.

B. Proceedings below and jurisdiction.

On June 27, 2016, Alexander M. Schultz entered 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, in violation of Wis. Stat. § 946.31(1)(a). (R.39 and R.100:13; Appx. 16-18). Both counts carried a habitual criminality enhancer pursuant to Wis. Stat. § 939.62(1)(b). *Id.* Schultz's plea followed his unsuccessful motion to dismiss the sexual assault charge on the grounds that the prosecution violated the Double Jeopardy Clauses of 5th and 14th Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution.[3] (R.96 and R.5; Appx. 19-27).

On September 6, 2016, the Lincoln County circuit court, the Honorable Robert R. Russell presiding, sentenced 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.39:1 and R.101:14-15; Appx. 19). 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 extended supervision. *Id.* Each sentence was made concurrent with the other count, but consecutive to any other sentence Schultz 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, and again requested 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 the United States and Wisconsin Constitutions. (R.55). An order was entered on September 26, 2017, denying Schultz his requested relief. (R.60; Appx. 28). Schultz then filed his notice of appeal. (R.61).

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[3] 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).

On December 11, 2018, the Court of Appeals affirmed the judgment and order of the circuit court. (Opinion; Appx. 1-15). Thereafter, Schultz file a petition for review, which this Court granted on April 9, 2019. 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 § 3; and Wis. Stat. §§ 808.10 and 809.62.

C. Facts of the case.

On September 22, 2012, at 2:49 p.m., in an annual event known as the Fall Equinox, the Sun crossed the celestial equator and headed southward, marking the end of summer, and the beginning of the fall season. The fall season would last for a period of ninety-one days, until December 21st at 11:12 a.m., when the Sun reached its lowest maximum daily elevation for the year. That day would be the shortest day of the year, and its night the longest. This event, known as the Winter Solstice, marked the end of the fall season, and the beginning of winter.

In the late fall, it came to the attention of the City of Merrill Police Department, that M.T., a child of fifteen years of age, was pregnant with child. (R.10:3-5; Appx. 47-49). An investigation was launched to ascertain who was having sexual intercourse with M.T. during the late summer or early fall of 2012, such that she could conceive a child. *Id.* That investigation ultimately identified Alexander M. Schultz as being one of the persons who was having sexual intercourse with M.T. during this period of time. *Id.* A criminal complaint was filed on April 5, 2013, and the case was assigned the number 13CF110. (R.93:1; Appx. 32). Schultz was charged with the crime of repeated sexual assault of the same child, in violation of Wis. Stat. § 948.025(1)(e). *Id.* As a timeframe for the commission of this 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.* The Information in Schulz's first prosecution, mirrored the allegations of the criminal complaint, and again alleged a timeframe of "the late summer to early fall of 2012." (R.90:1; Appx. 31).

Attached to the criminal complaint were police reports by Officer Matthew Waid of the Merrill Police Department. (R.93:3-10; Appx. 34-41). In one of those reports Officer Waid related an interview with a suspect, one Dominic Beckman, conducted on December 4, 2012.[4] (R.93:3; Appx. 34). In that interview Beckman admitted to having sexual intercourse with M.T. in "early to mid-October." *Id.* After this interview he wrote that:

> I then made phone contact with [M.T]. at approximately 8:03pm. I asked her if she had had sexual intercourse with anyone prior to the incident and she said yes. She said that she had sexual intercourse with Alex Schulz approximately one month before she had sexual intercourse with Dominic. She informed me that this was consensual sexual intercourse that occurred at [M.T].'s residence. She said that Alex Schulz did not use a condom and that he did not ejaculate during the sexual intercourse. She said that she has not had sexual intercourse with anyone between Dominic and today's date. She also said that she had her period between the time she had sexual intercourse with Alex and the time she had sexual intercourse with Dominic. I then ended the phone conversation with [M.T.].

Id.

In her December 4, 2012, interview with Officer Waid, the victim M.T. alleged only one instance of sexual intercourse with Schultz. *Id*. However, when Officer Waid interviewed M.T. again on January 17, 2013, she claimed there were other instances, "more than five," where she had sexual intercourse with Schultz in the year 2012. (R.93:5; Appx. 36). M.T. did not give any specific dates for these other sexual assaults, and she gave no end date for her sexual relations with Schultz during this interview, nor in a third interview held on January 27, 2013. (R.93:5 and 8; Appx. 36 and 39).

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[4] We are left only with Officer Waid's recounting on the interviews. Recordings of the interviews with M.T. and Beckman on December 4, 2012 were not preserved. (R.85; R.67:206).

Lincoln County case number 13CF110 was brought to a jury trial on January 21, 2014, which would last for two days. (R.67 and R.69). After jury selection, but prior to the jury being sworn, the trial court heard a number of motions from the parties, including a defense motion to introduce evidence of M.T.'s pregnancy. (R.67:57 and R.76:1; Appx. 54). The State responded with a request for a continuance on the grounds that more time was needed for fully consider Schultz's *Pulizzano*[5] motion. (R.67:74-75; Appx. 71-72).

During the motion hearing, the State remarked that "Dominic Beckman [has been] imputed the father of the victim's child, [and] that's been in the reports for months...." (R.67:60; Appx. 57). But as to whether Beckman was indeed the father of the child, there was apparently some uncertainty amongst the parties, as DNA samples had been sought from both Beckman and Schultz. (R.67:86; Appx. 83). Further, when the Court requested the State consult with the victim's family for their views concerning a continuance, the victim and her mother both indicated that M.T. favored a continuance so that the paternity testing could be completed on both Beckman and Schultz prior to going forward with the trial. (R.67:81-82; Appx. 78-79). While the State expressed skepticism that the testing would show that Schultz was the father of the child, the victim and her mother were clearly uncertain as to whether it was Schultz or Beckman who was the actual father. (R.67:82 and 85-88; Appx. 79 and 82-85). As later events would show, that uncertainty was justified. Ultimately, Schultz indicated that he preferred to go forward with the trial and withdrew his *Pulizzano* motion. (R.67:89; Appx. 86).

After the pre-trial motions had been resolved, the jury was sworn. (R.67:110). The timeframe 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

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[5] *State v. Pulizzano*, 155 Wis.2d 633, 456 N.W.2d 325 (1990). Schultz's motion would have implicated the rape shield statute. Wis. Stat. § 972.11.

> 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. 99-104).

In it opening statement the State told the jury that "during the summer of 2012, the defendant started hanging out at the [victim's] residence," and Schultz and M.T. began having a sexual relationship. (R.67:115-16; Appx. 87-88). At no point in it opening did the State indicate to the jury when it believed that relationship ended. (R.67:115-18; Appx. 87-90).

If the State had no intention of introducing evidence of sexual relations in the month of October, that message was not received by Schultz's trial counsel, for he stated in his opening that:

> Although, Alex knew that [M.T.] had a crush on him; he didn't realize and did not expect, the bombshell that occurred sometime in October of 2012. He was advised by friends that [M.T.] was telling others that she was in a serious relationship with Alex and that it was sexual in nature.
>
> As a result, there was an exchange of messages on Facebook between them. Alex told [M.T.] that those kinds of statements might get him into trouble. She denied making the statements but his contact with her ended shortly thereafter.

(R.67:123; Appx. 95). Defense counsel also recounted the December 4, 2012, interview with Officer Wade, in which M.T. indicated that she had sexual intercourse with Schultz approximately a month before her sexual encounter with Beckman. (R.67:123-24; Appx. 95-96). But then noted that:

> Six weeks later a second interview was held at the police department between Officer Waid and [M.T.]. The interview was recorded and in that interview Mary expanded on her previous statement. As a result, Alex Schultz was charged with a crime, became a very serious crime when she expanded on her initial story and told about another five or more than five encounters with Alex Schultz.
>
> During the various interviews, [M.T.] has given a variety of explanations about the circumstances of those encounters

(R.67:124; Appx. 96; *See also* R.93:5; Appx. 36).

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. 108-09). She stated that they broke up around the beginning of September of 2012. (R.67:134; Appx. 112). There was no testimony, however, as to whether they may have had sexual intercourse at any point after they broke up, as apparently they did. Other than the one instances of sexual intercourse in September, M.T. did not give a date, specific or otherwise, for any of the other alleged acts of sexual intercourse. (R.67:153; Appx. 131). She claimed that they had sexual intercourse more than five times, (R.67:134; Appx. 112), but could not specify how many times she had sexual intercourse with Schultz, much less identify three specific occasion on which she had sexual intercourse with Schultz. (R.67:153; Appx. 131). M.T. did not keep a diary, take notes, or send texts which would allow her to give a precise date for when any of the alleged sexual assaults occurred. (R.67:146; Appx. 124). She could not remember the dates on which she told the other witnesses about her sexual relations with Schultz. (R.67:153; Appx. 131). At no point in her testimony at trial does M.T. categorically state that she did not have sexual intercourse with Schultz in the month of October 2012. (R.67:127-63; Appx. 105-41).

Other witnesses were, if anything, even more imprecise concerning when M.T. told them she was having sexual intercourse with Schultz. The witness Jessica Nowak testified to receiving a text from M.T. admitting she was having sexual intercourse with Schultz, but could not specify the time period when she received this text more accurately than "summer/fallish of `12". (R.67:169-70). In response to the question "did you become aware in the late summer and early fall of 2012 that [M.T.] was developing a romantic relationship with the defendant Alexander Schultz?" the witness Lance Nowak stated that M.T. "told me they were dating." (R.67:173).

The instructions given to the jury did not limit the timeframe for the crime from 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. 103 and 51-53). The jury returned a verdict of not guilty. (R.69:130 and R.74; Appx. 30). 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 read 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. 30). A judgment of acquittal on the charge was entered on January 23, 2014. (R.89; Appx. 29).

On January 27, 2014, five days after Schultz's acquittal in 13CF110, Officer Waid was informed by the Lincoln County Victim/Witness Coordinator, that she had received the paternity results showing that Alexander Schultz was the father of M.T.'s child. (R.10:3; Appx. 47). On January 28, 2014, the day after receiving this information, Officer Waid received an email from the assistant District Attorney, directing him to have M.T. sign a Release of Medical Information so that her obstetrician could be interviewed. (R.10:4; Appx. 48). 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. 48-49). 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. 45-50). The new case was assigned the number 14CF68. *Id.*

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. 46). The Information and an Amended Information would allege the same timeframe. (R.26:1 and R.30:1; Appx. 43). 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 the United States Constitution and the Wisconsin Constitution. (R.5). 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. *Id*.

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 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 alleged in the Information for 13CF110, namely, "the late summer 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. 21-22). 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).

Schultz's reply to the State's letter brief was to deny the State's argument that the timeframe in 14CF68, "on or about October 19, 2012," was a different timeframe from that alleged in 13CF110, namely, that of "the late summer to early fall of 2012." (R.21). In his reply brief, Schultz relied heavily upon *State v. Fawcett*, 145 Wis.2d 244, 426 N.W.2d 91 (Ct. App. 1988). In *Fawcett*, the Court of Appeals held that the State enjoys considerable flexibility in charging the timeframe in child sexual abuse cases, but 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 argument 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. 24).

The Court of Appeal took a slightly different approach from the circuit court, and began with a determination that the timeframe of "late summer to early fall of 2012" was "ambiguous." (Opinion ¶ 18; Appx. 7). The Court then concluded that where the timeframe is ambiguous, the court should determine the scope of jeopardy in light of the entire record of the proceedings, including testimony which was adduced at trial after jeopardy had attached. (Opinion ¶ 19-22; Appx. 7-9). The Court of Appeals then found after its own examination of the record, including testimony that was adduced during trial, that a "reasonable person familiar with the circumstances of [Schultz's] prosecution would not understand the phrase `early fall of 2012' to include any dates beyond September 30, 2012." (Opinion ¶ 32; Appx. 13).

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 previously being acquitted at a jury trial of repeated sexual assault of the same child. In the first prosecution the State alleged in the Information a timeframe of "the late summer to the early fall of 2012." In the second prosecution the State alleged a timeframe of "on or about October 19, 2012." In the year 2012, the fall began on September 22nd and ended on December 21st; a period of ninety-one days. The interval between September 22, 2012, and October 19, 2012, was a period of twenty-seven days. Thus, October 19th would have fallen clearly and unambiguously within the first third of the 2012 fall season, that is to say, in the "early fall."

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. To meet his burden, "[t]he defendant must show 'the evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on the other' indictment.'" *United States v. Roman*, 728 F.2d 846 (7th Cir. 1984). That is, Schultz needed to show that evidence of a sexual assault on October 19, 2012, would have been sufficient to support a conviction on the earlier information which charged a timeframe of "the late summer to the early fall of 2012."

The circuit court and the Court of Appeals, however, found that a "reasonable person familiar with the circumstances of [Schultz's] prosecution

would not understand the phrase `early fall of 2012' to include any dates beyond September 30, 2012." This finding was based in large part upon the circuit court's finding that the timeframe that the victim testified to at trial was July, August, and September of 2012. The courts below were in error when they narrowed the scope of jeopardy based upon facts that were adduced at trial. Schultz's conviction for second-degree sexual assault of a child should be vacated, and this case should be remanded to the circuit court for the entry of a judgment of acquittal.

B. The scope of jeopardy in Schultz's second prosecution fell within the scope of jeopardy in his 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 Schultz believes applies to his case. "For whatever else that constitutional guarantee may embrace, ..., it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) *quoting, Green v. United States*, 355 U.S. 184, 190 (1927); (internal citations omitted). 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).

The State has conceded 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). The issue then for appeal is whether the offenses charged in 13CF110 and 14CF68 were the same in fact.

2. 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.

"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 ... 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. Therefore, in a jury trial, jeopardy attaches prior to the presentation of 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. Evidence that was later adduced at trial is irrelevant to question of whether the scope of jeopardy in the second prosecution was encompassed within the scope of jeopardy in the first prosecution. This is so for the simple reason that this evidence did not exist "at the time jeopardy attached in the first case."

Moreover, to meet his burden, "[t]he defendant must show 'the evidence required to support a conviction on one indictment would have been sufficient to

warrant a conviction on the other' indictment.'" *United States. v. Roman*, 728 F.2d 846 (7th Cir. 1984). This is an objective test, which considers more than the specific evidence that was adduced at trial, but also encompasses any evidence that the State could conceivably have presented in the first prosecution. Thus in Schultz's case the inquiry is not whether the State presented evidence in the first prosecution of sexual assaults in the month of October 2012. The evidence actually presented by the State in the first prosecution is irrelevant to the analysis. What Schultz needed to show is that evidence of a sexual assault "on or about October 19, 2012" would have been sufficient to support a conviction in the first prosecution which charged a timeframe of "late summer to the early fall of 2012."

3. The timeframe alleged in the first prosecution was not ambiguous; as a matter of scientific fact, October 19th landed within the first third of the 2012 fall season, that is to say, in the "early fall."

If the defendant's burden is to show that "'the evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on the other' indictment," (*See*, *Roman*, 728 F.2d at 854), then the question which must be answered is whether evidence of sexual intercourse "on or about October 19, 2012," would have been sufficient to support a conviction in the first prosecution for repeated sexual assault in "the late summer to the early fall of 2012"? If so, then Schultz must prevail in his Double Jeopardy claim.

The "fall" has a very definite beginning and a very definite end. "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[6]; *see also, Autumn*. *Merriam-Webster.com*, Merriam-Webster, Inc.[7] ("the season between summer and

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[6] *Autumn*. *Dictionary.com Unabridged*. Random House, Inc. http://www.dictionary.com/browse/autumn (accessed: April 27, 2019).

[7] *Autumn*. *Merriam-Webster.com*, Merriam-Webster, Inc., https://www.merriam-webster.com/dictionary/autumn (accessed: April 27, 2019).

winter comprising in the northern hemisphere usually the months of September, October, and November or as reckoned astronomically extending from the September equinox to the December solstice — called also fall").

In the northern hemisphere the September, or fall 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.[8] The December, or winter 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.[9]

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). This is a venerable treatise long accepted in courts.[10] The almanac 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.[11]

The interval between September 22, 2012 and December 21, 2012 was a period of ninety-one (91) days. The interval between September 22, 2012 and

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8 *Equinox. Britannica.com.* Encyclopedia Britannica. https://www.britannica.com/topic/equinox-astronomy (accessed: December 17, 2017).

9 *Winter Solstice. Britannica.com.* Encyclopedia Britannica. https://www.britannica.com/topic/winter-solstice (accessed: December 17, 2017).

10 *See* footnote 15, *infra*.

11 *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).

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. When jeopardy attached in this case, any reasonable person would have construed October 19th as falling within timeframe of "the late summer to early fall of 2012." A court can no more decree that October 19th lies outside the "early fall," than it can command the Sun to halt its progression across the sky. 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.

C. The Court of Appeals and the circuit court erred in holding that the scope of jeopardy in a jury trial may be narrowed through an examination of the entire record.

1. While *Russell, Roman, Castro,* and *Hamilton* all held that a defendant may introduce parol evidence in order to prove his double jeopardy claim; none of these cases support narrowing the scope of jeopardy in an earlier prosecution based upon evidence which was adduced at trial.

What the circuit court and the Court of Appeals did in Schultz's case is completely unprecedented. The State and the Court of Appeals rely upon the cases of *Russell v United States*, 369 U.S. 749 (1962), *United States v. Roman*, 728 F.2d 846 (7th Cir. 1984), *United States v. Castro*, 776 F.2d 1118 (3rd Cir. 1985) and *United States v. Hamilton*, 992 F.2d 1126 (10th Cir. 1993), for the proposition that the entire record must be considered when ascertaining the scope of jeopardy in the first prosecution. What these cases actually hold, though, is that a *defendant* may introduce parol evidence in order to make his double jeopardy claim. None of these cases hold that the State may narrow the scope of jeopardy in an initial prosecution by citing evidence which was later adduced at a jury trial.

In *Russell*, the United States Supreme Court, in a case concerning the adequacy of an indictment, wrote that "it can hardly be doubted that the [defendants] would be fully protected from again being put in jeopardy for the same offense, particularly when it is remembered that they could rely upon other parts of the present record in the event that future proceedings should be taken

against them." *Russell,* 369 U.S at 764. For this proposition *Russell* cited *Bartell v. United States*, 227 U.S. 427, 433 (1913). In *Bartell,* another case concerning the adequacy of an indictment, the Supreme Court wrote that

> As to the objection that the charge was so indefinite that the accused could not plead the record and conviction in bar of another prosecution, it is sufficient to say that in such cases it is the right of the accused to resort to parol testimony to show the subject-matter of the former conviction, and such practice is not infrequently necessary.

Bartell, 227 U.S. at 433 (citations omitted; emphasis added). Nowhere in *Russell* or *Bartell* did the Supreme Court suggest that the State can cite evidence adduced at a jury trial for the purpose of narrowing the scope of jeopardy in the first prosecution.

Roman, Castro, and *Hamilton,* also involved challenges to the adequacy of an indictment. All are in accord that *the defendant* can rely upon the entire record of the first prosecution in order to make his double jeopardy claim in a second prosecution. *Roman,* 728 F.2d at 854; *Castro,* 776 F.2d at 1123; *Hamilton,* 992 F.2d at 1130. However, none of these cases suggest that the State can cite evidence adduced at a jury trial for the purpose of narrowing the scope of jeopardy in the first prosecution. Rather, both *Roman* and *Castro* make clear that while the entire record may used to enlarge the scope of jeopardy, it will not narrow the scope which was alleged in the charging documents:

> It is the record as a whole, therefore, which provides the subsequent protection from double jeopardy, rather than just the indictment since:
>
> > "A defendant claiming that he has been subjected to double jeopardy bears the burden of establishing that both prosecutions are for the same offense.... The defendant must show that 'the evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on the other' indictment."

Roman, 728 F.2d at 854 (citations omitted; emphasis added); *See also, Castro,* 776 F.2d at 1124 (the two offenses are the same "when the evidence required to support a conviction upon one of [the indictments] would have been sufficient to warrant a conviction upon the other.") (citations omitted).

Schultz's burden, therefore, was to establish that evidence of a sexual assault on October 19, 2012, would have been sufficient to support a conviction on the earlier information charging repeated sexual assault during a timeframe of "the late summer to the early fall of 2012." This test does not require that the evidence be actually presented in the first prosecution. If that were the case, the defendant's burden would be to show that the evidence of the second prosecution had already been introduced in the first prosecution. But that is not the law. The defendant's burden, by its design, encompasses any evidence that could conceivable have been presented in the first prosecution. Thus, if M.T. had testified in the first prosecution that she had sexual intercourse with Schultz "on or about October 19, 2012," (which she did), that evidence would surely have been competent to support a conviction for repeated sexual assaults during "the late summer to the early fall of 2012." No court would find a conviction support by such evidence defective. And certainly not because a police report attached to the criminal complaint stated that the interviewing officer thought the sexual encounters ended in September. The court would ask if objectively the "early fall" could be reasonably understood to encompass October 19th, which it certainly can.

The State is given considerable flexibility in charging the timeframe in child sexual assault cases. *Fawcett*, *supra*. This is because "[c]hild molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind." *Id.* at 254. In the real world, a child's testimony at trial may in fact differ from earlier statements given to investigators. That goes to the credibility of the testimony, not the sufficiency of the Information. Given the "vagaries of a child's memory" there will always be uncertainty as to the exact date on which specific events may have occurred, and that uncertainty can exist right to the day of trial. Consequently, the State is allowed to charge a broad timeframe, as it did in Schultz's case. *See*, *State v. Hurley*, 2015 WI 35, ¶ 34, 361 Wis.2d 529, 861 N.W.2d 174 ("Because `[t]ime is not of the essence in [child] sexual assault cases' when the date of the

commission of the crime is not a material element of the offense, it need not be precisely alleged." *citing, Fawcett, supra*).

With regard to the timeframe charged in the first prosecution, Schultz believes that it is significant that the State did not tell the jury in its opening statement that M.T. and Schultz ceased having sexual relations in the month of September. (R.67:115-18; Appx. 87-90). It was only in its closing, after all the evidence had been received, that the State argued to the jury that Schultz and M.T. ceased having relations in September. (R.69:91). If the State had been certain that M.T. would testify that sexual relations with Schultz ended in the month of September it could have limited the timeframe of sexual encounters to the months of July, August and September. But the State had reason to be uncertain about M.T.'s potential testimony. As late as the morning of the trial, M.T. and her family were expressing uncertainty as to who was the father of her child, Beckman or Schultz. (R.67:81-82; Appx. 78-79). They even told the court that they favored a continuance so that the paternity testing could be completed prior to trial. *Id* The only reasonable inference from this position is that M.T. was uncertain as to whether or not she had sexual intercourse with Schultz in the month of October 2012. Not knowing for certain what M.T. would testify to on the witness stand, the State would obviously not want to limit the timeframe in the Information to the months of July, August and September. When the jury was sworn, the State may not have had an intention to elicit testimony of sexual assaults in the month of October, but is was clearly relying upon the broader timeframe of "the late summer to the early fall of 2012" in the event such testimony were adduced.

Greater flexibility comes at a price, "[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 Court of Appeal attempts to skirt this consequence by asserting that the timeframe alleged in Schultz's case was "ambiguous." (Opinion ¶ 18; Appx. 7). Schultz strenuously contests this

characterization. But even if this were so, "[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). The Court of Appeals writes that Schultz "conflates the clarification of an ambiguous timeframe with the narrowing of an unambiguous one." (Opinion ¶ 24; Appx. 10). But, "ambiguous" is a simply a synonym for "imprecise".[12] In clarifying an ambiguous or imprecise timeframe, Schultz should at the very least be able to rely on the unambiguous and precise definition of fall to be found in any almanac or calendar. The circuit court and Court of Appeal in "clarifying" the imprecise language of the Information in the first prosecution, did indeed narrow the scope of protection that would ordinarily attach to the term "early fall." If there was any ambiguity in the timeframe alleged in Schultz's first prosecution, then it was the State, not Schultz, who should have borne the burden for the imprecision in the Information's language.

2. An information cannot be constructively amended after a not guilty verdict if that amendment would prejudice a defendant's constitutional protections under the Double Jeopardy Clause

Both the State and the Court of Appeals rely upon section 971.29(2), of the Wisconsin Statutes to narrow the timeframe alleged in Schultz's first prosecution. (Opinion ¶ 22; Appx. 9). The State and the Court of Appeals focus on the second sentence of that statute which 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." *Id.* Consequently, the Court of Appeals held that where the timeframe in the first prosecution is "ambiguous," the statute will by operation of law amend the information to conform with the evidence which was adduced at trial. *Id.* This would be the case even if such an

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[12] *Synonyms of Ambiguous*, *CollinsDictionary.com*, HarperCollins Publishers, https://www.collins dictionary.com/us/dictionary/english-thesaurus/ambiguous (accessed: April 29,2019).

amendment would narrow the scope of double jeopardy protection provided to the defendant by the Information. This holding ignores a long line of cases which have held that an information will not be amended if it prejudices the defendant.

"Prejudice has always been a consideration with regard to amending a charging document." *State v. Gerard*, 189 Wis.2d 505, 517 fn. 9, 525 N.W.2d 718 (1995), *citing State v. Wickstrom*, 118 Wis.2d 339, 348 N.W.2d 183 (Ct. App. 1984) and *Whitaker v. State*, 83 Wis.2d 368, 265 N.W.2d 575 (1978); *see also*, *Wagner v. State*, 60 Wis.2d 722, 726, 211 N.W.2d 449 (1973) ("The rule in this state is then that the trial court may allow amendment of an information at any time in the absence of prejudice to the defendant."); *State v. DeRango*, 229 Wis.2d 1, 26, 599 N.W.2d 27 (1999) ("Section 971.29(2), stats., permits the amendment of criminal charges at trial in order `to conform to the proof where such amendment is not prejudicial to the defendant.'"); and *see In re Tawanna H.*, 223 Wis.2d 572, 577, 590 N.W.2d 276 (1998) ("Case law supports the statutorily mandated `absence of prejudice' requirement."). The absence of prejudice requirement is not simply a statutory requirement. "Due process protects an accused against unfair prejudice in conducting an adversarial proceeding." *In re Tawanna H.*, 223 Wis.2d at 579. Accordingly, in *Tawanna H.* this Court held that "the case law developed under *Wagner* and its progeny (most recently affirmed in *Koeppen*,[13] relating to § 971.29(2), STATS.) applies with equal force to juvenile proceedings." *Id.* at 580. The court further held that the trial judge violated the juvenile's due process rights by amending the petition, sua sponte and without notice, to conform with the evidence, where that amendment prejudiced the juvenile. *Id.* at 581.

While most cases examining the "prejudice requirement" focus on whether the amendment will prejudice the accused's ability "to understand the offense charged so he can prepare his defense" (*e.g. see Wickstrom*, 118 Wis.2d at 348),

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[13] *State v. Koeppen*, 195 Wis.2d 117, 536 N.W.2d 386 (1995).

whether the amendment will prejudice to the defendant's constitutional protections under the Double Jeopardy Clause is also a consideration. *Holesome v. State*, 40 Wis.2d 95, 102, 161 N.W.2d 283, 287 (1968); *see also United States v. Stoner*, 98 F.3d 527, 536 (10th Cir. 1996) ("In addition to prejudicing a defendant's Sixth Amendment right to notice of the charges against her, a variance [to an indictment] can be so great as to violate the defendant's Fifth Amendment right against double jeopardy because `a conviction based on the indictment would not bar a subsequent prosecution for the same offense.'"); *Berger v. United States*, 295 U.S. 78, 83 (1935) (holding that a variance between the facts proven at trial and charges alleged in the indictment is impermissible where it deprives the defendant of the right against double jeopardy); and *United States v. DiPasquale*, 740 F.2d 1282, 1294 (3rd Cir. 1984) (holding that a variance between overt acts is impermissible when it violates the defendant's right against double jeopardy)..

The Court of Appeal's reliance on section 971.29(2) is also in conflict with the holding in *Olmeda* that the scope of jeopardy is to be determined as it could be reasonably understood "at the time jeopardy attached in the first case." *Olmeda*, 461 F.3d at 282. To constructively amend the information to conform with the evidence presented at trial is not consistent with determining the scope of jeopardy as it would be understood by a reasonable person "at the time jeopardy attaches." In a jury trial jeopardy attaches when the jury is sworn, before any evidence which may constructively amend the information has been presented. To apply section 971.29(2) as it is being applied in Schultz's case is to narrow the protections provided by the double jeopardy clause. The lower courts have ignored that the charging document itself provides protection against subsequent jeopardy for the same offense.

Of course, the most relevant case for this appeal is *Fawcett*, *supra*. In *Fawcett*, the Court of Appeals wrote that:

> In order to determine the sufficiency of the charge, two factors are considered. They are, whether the accusation is such that the defendant can determine whether it states an offense to which he is able to plead and prepare a defense

> *and whether conviction or acquittal is a bar to another prosecution for the same offense*.

Id. at 251 *quoting Holesome*, 40 Wis.2d 95, at 102 (emphasis added). That is, the information serves two functions, the first is to ensure that the defendant understands the offense charged so he can prepare his defense, and the second is to preserve the defendant's constitutional protections under the Double Jeopardy Clause. In *Fawcett*, it was held that the State is given considerable flexibility in charging the timeframe in child sexual abuse cases. *Id.* at 255. 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." *Id.* Now it appear that the State wants a flexible double jeopardy analysis as well, it should not have it both ways.

Moreover, in narrowing the scope of jeopardy to conform to the evidence which was adduced at trial, the lower courts have 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.74 and R.69:130; Appx. 30). The jury did not limit its verdict to the months July, August and September of 2012. Recall that M.T. testified to having sexual intercourse with Schultz on more than five occasions, but did not specify the dates on which these acts occurred. (R.67:134; Appx. 112). It is not incredible that the jury might have intended its verdict to cover the whole of the "early fall," and not just the narrow sliver of time that the State would have the verdict cover. By the

State's calculations, the "early fall" of 2012 would have lasted only nine days, that is, from September 21st to the 30th. That result which is far more incredible than simply interpreting the verdict in accordance with the plain meaning of its words. In narrowing the scope of jeopardy by testimony adduced at trial, the lower courts were substituting there own findings of fact, for those of the jury. That is to say, the courts determined that the jury's verdict was something other than the verdict which the jury actually delivered.

3. The Court of Appeals decision will encourage the use of ambiguous and imprecise timeframes.

The Court of Appeals writes to stress that its decision is limited to the interpretation of ambiguous timeframes, and does not apply to unambiguous timeframes. (Opinion ¶ 35; Appx. 14). Ironically though, this decision will only encourage the State to use imprecise and ambiguous timeframes when charging crimes. Run through the possible scenarios in Schultz's case and you will see that this is so. Consider for example, if the State had alleged an unambiguous and precise timeframe of "July through September of 2012." In that scenario, Schultz would have no Double Jeopardy argument against a subsequent charge during a timeframe of "on or about October 19th." However, if evidence were to come in at trial that one the repeated acts of sexual assault actually occurred in October, Schultz would then have an argument for reversal because the evidence did not conform to the pleadings. So to avoid that possibility the State might allege instead a broader timeframe of "July through October of 2012." This would guard against any vagaries in the victim's memory. However, this would come at a price. Any attempt to prosecute Schultz in the future for a sexual assault committed "on or about October 19th," would be foreclosed by the Double Jeopardy Clause. Pleading an imprecise and ambiguous timeframe provides the State with an escape from this conundrum. By pleading a timeframe of "the late summer to early fall of 2012" the State can allege a timeframe which is broad enough to cover any unexpected testimony of the crime occurring in October;

while having the confidence that section 971.29(2), Wisconsin Statutes, will narrow the scope of jeopardy back to the confines of the evidence adduced at trial. So why allege a precise and unambiguous timeframe? The Court of Appeals decision is bad policy as well as bad law.

D. Even by the Court of Appeals entire record analysis, the record below hardly justifies narrowing the scope of jeopardy as the courts did below.

The Court of Appeals concluded that a reasonable person familiar with the circumstances of Schulz's first prosecution would not understand the phrase "early fall of 2012" to include any dates beyond September 30, 2012. (Opinion ¶ 30; Appx. 12-13). The record is not so clear. Both the State and the Court of Appeals relied heavily upon a police report by Officer Waid, in which he related interviews with Dominic Beckman and M.T. that were conducted on December 4, 2012. Beckman admitted to having sexual intercourse with M.T. in "early to mid-October. (R.93:3; Appx. 34). After this interview Officer Waid wrote that:

> I then made phone contact with [M.T]. at approximately 8:03pm. I asked her if she had had sexual intercourse with anyone prior to the incident and she said yes. She said that she had sexual intercourse with Alex Schulz approximately one month before she had sexual intercourse with Dominic. ... She said that she has not had sexual intercourse with anyone between Dominic and today's date. She also said that she had her period between the time she had sexual intercourse with Alex and the time she had sexual intercourse with Dominic.

Id. For the Court of Appeals, this report, along with a statement by the prosecutor that it had been "imputed ... for months" that Beckman was the father of M.T.'s child, meant the only reasonable inference was that the State was not alleging that M.T. had sex with anyone besides Beckman in early-to-mid October. (Opinion ¶ 31-32; Appx. 13).

What the Court of Appeals overlooks, however, is that M.T.'s statements evolved over the course of her three interviews with Officer Waid.. In her initial interview on December 4, 2012, M.T. claimed only one instance of sexual intercourse with Schultz. (R.93:3; Appx. 34). Later, in her January 17, 2013,

interview with Officer Waid she claimed there were multiple (more than five) instances of her having sexual intercourse with Schultz. (R.93:5; Appx. 36). While her first interview implied they had intercourse in September, her second and third interviews did not give a specific dates for these new acts of alleged sexual intercourse with Schultz. (R.93:5 and 8; Appx. 36 and 39). And while the State was confident that that the testing would show that Beckman was the father of the child, the victim and her mother were not so certain, and told the court that they favored a continuance so that the paternity testing could be completed on both Beckman and Schultz, prior to going forward with the trial. (R.67:82 and 85-88; Appx. 79 and 82-85). Given her evolving story, and her uncertainty as to who was the father of her child, how could any reasonable person have been confident as to *what* M.T. was going to testify to on the day of trial?

Clearly Schultz's defense counsel was not certain. He told the jury that "sometime in October of 2012 [Schultz] was advised by friends that [M.T.] was telling others that she was in a serious relationship with Alex and that it was sexual in nature." (R.67:123; Appx. 95). He recounted that on December 4, 2012, M.T. claimed she had sexual intercourse with Schultz approximately a month before her sexual encounter with Beckman. (R.67:123-24; Appx. 95-96). But he then noted that "she expanded on her initial story and told about another five or more than five encounters with Alex Schultz...During the various interviews, [M.T.] has given a variety of explanations about the circumstances of those encounters." *Id.*

As for the State, it told the jury that "during the summer of 2012, the defendant started hanging out at the [victim's] residence," and that Schultz and M.T. began having a sexual relationship. (R.67:115-16; Appx. 87-88). But significantly, at no point in its opening did the State tell the jury when it believed that sexual relationship had ended. (R.67:115-18; Appx. 87-90). The only reasonable inference from this non-statement is that the State was also uncertain as to what exactly M.T. was going to testify to.

And M.T.'s testimony at trial was in fact very uncertain and imprecise. She testified that she began having sexual intercourse with Schultz in July of 2012. (R.67:130-31). She stated that they broke up around the beginning of September 2012. (R.67:134). Unlike her statement to Officer Waid on December 4, 2012, at the trial there was no testimony that they didn't have sexual intercourse after they broke up, which of course, the paternity testing would later establish that they had. (R.10:3; Appx. 47). M.T. claimed that she and Schultz had sexual intercourse more than five times, (R.67:134), but could not specify exactly how many times she had sexual intercourse with the defendant, nor identify three specific occasion on which she had sexual intercourse with the defendant. (R.67:153). Other than the one incident in September, M.T. could not give a date, specific or otherwise, for any of the other alleged acts of sexual intercourse. (R.67:153). M.T. did not keep a diary, take notes, or send texts which would allow her to give a precise date for when any of the alleged sexual assaults occurred. (R.67:146). She could not remember the dates on which she told the other witnesses about her sexual relations with Schultz. (R.67:153).

The charges that were read to the jury prior to the presentation of evidence were 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) (emphasis added). These charges were not limited to the months of July, August, and September of 2012. Nor did the final jury instructions given to the jury limit the timeframe for the commission of the crime to the months of July, August and September of 2012. 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)(emphasis added). Nor did the jury in its verdict limit the timeframe to a period of time prior to October of 2012; rather the jury gave its verdict in accordance with the allegations contained in the Information. *Id.* The verdict made no reference to the criminal complaint, pre-trial statements of the State (of which the jury knew nothing), nor to the testimony which was adduced at trial. The verdict referred only to the Information.

"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." *Olmeda*, 461 F.3d at 282. After the jury was sworn in Schultz's first prosecution, neither the prosecutor nor defense counsel ventured an opinion in their opening statements as to when Schultz and M.T. ceased having sexual relations. The truth is, when the jury was sworn, no one knew for sure what M.T. was going to testify to. That is probably why the State chose to allege a timeframe of "late summer to early fall," rather than "during the months of July through September." "Late summer to early fall," was a broader timeframe than "during the months of July through September," which better accommodated the vagaries of M.T.'s memory.

Given the timeframe that was actually alleged in the Information in Schultz's first prosecution, how might a reasonable person determine when the fall begins and when it ends? The undersigned counsel would suggest that a reasonable person might consult a calendar. If we were to consult the calendar which hangs at this very moment on the undersigned counsel's office wall, we

would see that in the month of September 2019, the "Fall Equinox" will occur on September the 23rd. *See, Getting' Squirrelly 2019; 18-Month Calendar,* Willow Creek Press, 2019. Turn to the month of December and we will see, that the "Winter Solstice" shall take place on December 21st. *Id.* The seasons indicated on this calendar, like all calendars and almanacs, are based upon the Earth's orbit around the Sun. Any other system for marking the seasons, (for example, our summer vacation plans, the beginning of the school year, the sleeping patterns of groundhogs), would be arbitrary. It is the position of the Earth's axis to the Sun which cause the northern hemisphere of the Earth to warm in the spring and cool in the fall. The undersigned counsel would submit to this Court that even the squirrels on his wall calendar likely understand the seasons in this way. Those squirrels likely understand that the fall has something to do with Sun in the sky. During the fall they likely perceive that each day the Sun's rise halts a little lower in the sky, closer toward the horizon. And they see that the days are getting shorter and the nights are getting longer. And like all creatures who live under the Sun, those squirrels will understand that we have entered the fall season, and now is time to gather our harvest and put it in store, for the winter will soon descend upon us.

There is nothing "hypertechnical and arbitrary" in consulting a calendar or an almanac in order to ascertain the start or conclusion of a season. Farmers have been consulting the Old Farmer's Almanac for the start and conclusion of the seasons since 1792.[14] No less a lawyer than Abraham Lincoln famously relied upon an almanac in a murder trial to establish the phases of the moon.[15] Was consulting an almanac "hypertechnical and arbitrary" there as well? As for

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[14] See, The Old Farmer's Almanac, https://www.almanac.com (accessed: December 25, 2018).

[15] *See, Abraham Lincoln, The Almanac, And A Murder Trial; When Lincoln Famously Used The Almanac.* The Old Farmer's Almanac, https://www.almanac.com/lincoln-almanac-murder (accessed: December 25, 2018).

consulting the movement of the Sun through the sky to mark the seasons, this is practice that has been known to humans since the Stone Age; it is practice that was known to the builders of Stonehenge.[16] Schultz has presented a definition of "fall" that is very old, logical, and indisputably scientific. How is that unreasonable? In 2012 the fall began on September 22nd and ended on December 21st. October 19th fell within the first third of the 2012 fall season. Any reasonable person would construe October 19th as being in the "early fall."

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[16] *See*, *Archaeoastronomy and Stonehenge*, Wikipedia, https://en.wikipedia.org/wiki/Archaeoastronomy_and Stonehenge (accessed: December 25, 2018).

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 May 8, 2019.

This brief has been electronically signed by:

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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 10,822 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 May 8, 2019.

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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 May 8, 2019. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: May 8, 2019.

Signature: _____