STATE OF WISCONSIN

IN SUPREME COURT

Case 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 AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTHER ENTERED IN LINCOLN COUNTY CIRCUIT COURT, THE HONORABLE ROBERT R. RUSSELL, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did charging and prosecuting Defendant-Appellant-Petitioner Alexander M. Schultz for sexually assaulting a child on or about October 19, 2012, violate his constitutional right to be free from double jeopardy?

The circuit court answered "no."

The court of appeals answered "no."

This Court should answer "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

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 acquitted him in an earlier sexual-assault case. 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." At trial, 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.

The State later charged Schultz with sexually assaulting M.T. "on or about October 19, 2012." Days after the acquittal, M.T. informed the authorities that she had received paternity-test results, which 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. 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 to be free from double jeopardy because the two sexual-assault charges are factually distinct. Because the original charge's timeframe—"late summer to early fall of 2012"—was ambiguous, this Court may clarify that charge by looking at the entire record, including trial testimony that the time period ended in early September. 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

The original investigation into Schultz began after M.T. spoke with City of Merrill Police Officer Matthew Waid on December 4, 2012. (R. 67:206.) Officer Waid interviewed M.T. about having sex with Dominic Beckman in early to mid-October 2012. (R. 93:3; *see also* 67:61–63, 147–48; 96:5.)

Officer Waid asked M.T. if she had sex with anyone before she had sex with Beckman. (R. 93:3; *see also* 67:135.) She said that she had sex with Schultz about one month before she had sex with Beckman. (R. 93:3; *see also* 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 Lincoln County case number 2013CF110. (R. 90.) The information alleged that Schultz sexually assaulted M.T. three or more times "in the late

summer to early fall of 2012." (R. 90:1.) The State issued a criminal complaint before filing the information. (R. 93.) The complaint stated that M.T. had told Officer Waid that "she had sexual intercourse with Alex Schulz approximately one month before she had sexual intercourse with Dominic [Beckman]." (R. 93:3.) The complaint further stated that Beckman had told Officer Waid that he had sex with M.T. in "early to mid-October." (R. 93:3.)

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 so the trial could 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.) Counsel said that Schultz "would like to proceed today." (R. 67:88.)

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

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

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 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 second-degree sexual assault of a child in Lincoln County case number 2014CF68.[2] (R. 1:1–2.) The charge alleged that Schultz had sexual intercourse with M.T. "on or about October 19, 2012." (R. 1:1.)

[2] The only charge at issue in this appeal is the charge of second-degree sexual assault of a child. The State also charged Schultz with perjury before a court and obstructing an officer. 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.) Two charges included a sentence enhancer due to Schultz's status as a repeat offender. (R. 1:1.)

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.)[3] 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 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 other case, Schultz was not charged and tried for a sexual assault that occurred on October 19, 2012. (R. 96:6.)

Schultz pled guilty to second-degree sexual assault of a child.[4] (R. 100:4–5.) The circuit court accepted the pleas and convicted him. (R. 100:11.)

Schultz filed a 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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[3] The Honorable Robert R. Russell presided over most of case number 2014CF68.

[4] Schultz also pled guilty to a charge of perjury that is not at issue in this appeal. 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.)

SUMMARY OF ARGUMENT

Schultz's right to be free from double jeopardy was not violated when the State charged and prosecuted him with sexual assault in a second case. 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 entire record, not just the original charging document. The sexual-assault charge in Schultz's first prosecution alleged an ambiguous time period—"late summer to early fall of 2012." This Court must consider the entire record of Schultz's first prosecution to clarify that ambiguous charging period. The record, including evidence at Schultz's trial, shows that he was acquitted of sexually assaulting M.T. in July to September 2012. The State thus charged him with a factually distinct offense when it alleged that he sexually assaulted M.T. "on or about October 19, 2012." Because the two sexual-assault charges are factually different, the second charge did not subject Schultz to double jeopardy.

STANDARD OF REVIEW

This Court reviews de novo whether a defendant's right to be free from double jeopardy has been violated. *State v. Steinhardt*, 2017 WI 62, ¶ 11, 375 Wis. 2d 712, 896 N.W.2d 700.

ARGUMENT

The sexual-assault charge for impregnating M.T. on or about October 19, 2012, did not subject Schultz to double jeopardy.

A. Double jeopardy does not apply to factually distinct charges.

"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 second prosecution subjected him to double jeopardy, "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). Double-jeopardy principles allow a second prosecution if the offenses in the two prosecutions are factually different, even if they are legally identical. *See id.* at 758–59.

Charges in two separate prosecutions are factually identical 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; *see also State v. Lechner*, 217 Wis. 2d 392,

414, 576 N.W.2d 912 (1998) (citing *Van Meter*, 72 Wis. 2d at 758, and other cases for this test).

"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); *State v. Stevens*, 123 Wis. 2d 303, 323, 367 N.W.2d 788 (1985*)*; *State v. Davis*, 171 Wis. 2d 711, 717, 492 N.W.2d 174 (Ct. App. 1992). Indeed, it is "self-evident" that two charges "are different in fact" if they "occurred at different times." *Nommensen*, 305 Wis. 2d 695, ¶ 9.

"[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 this Court cannot resolve it on this record.

B. This court may review the entire record to decide whether the subsequent sexual-assault charge was factually identical to the prior charge.

"[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) (alteration in original) (citation omitted).

Other federal courts are in accord. 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). The Third Circuit has similarly explained that "[t]he 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). *Hamilton* and *Castro* involved challenges to a variance between a charge and the evidence at trial, and *Roman* involved a challenge to the vagueness of a charge.

Courts have applied these same principles in cases that challenged subsequent prosecutions on double-jeopardy grounds.

The Fourth Circuit, for instance, has explained that the analysis regarding a double-jeopardy challenge to a second prosecution "is not limited to the indictment language only, but extends to 'the entire record' of the proceedings." *United States v. Schnittker*, 807 F.3d 77, 82 (4th Cir. 2015) (quoting *United States v. Benoit*, 713 F.3d 1, 17 (10th Cir. 2013)).

In another case raising a double-jeopardy claim against a subsequent prosecution, the Second Circuit stated that its 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." *United States v. Olmeda*, 461 F.3d 271, 282 (2d Cir. 2006) (emphasis added). A court may use "the entire record" in making that determination. *Id.* (citations omitted). Proceedings that occurred 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.

Besides having the support of case law, looking at the entire record is a sound policy because it can protect criminal defendants from double jeopardy. The court of appeals recognized this point here, noting that "when the alleged timeframe as charged is ambiguous, the consideration of evidence introduced at trial does not prejudice a defendant by stripping away constitutional protections. Rather, it enhances constitutional protections by allowing a court to ascertain the actual jeopardy to which a defendant was exposed in a prior prosecution." (Schultz's App. 11.)

In short, a court may rely on the entire record when determining the scope of jeopardy in a previous prosecution.

C. The record shows that the subsequent sexual-assault charge was not factually identical to the ambiguous prior charge that ended in an acquittal.

When assessing a double-jeopardy challenge to a second prosecution, a court must determine the scope of jeopardy in the first prosecution and then decide whether the charges in the two prosecutions are the same. *See Schnittker*, 807 F.3d at 82–83.

Here, the prior charge was ambiguous because it "is subject to two or more reasonable interpretations." *Cashin v. Cashin*, 2004 WI App 92, ¶ 11, 273 Wis. 2d 754, 681 N.W.2d 255. In the first prosecution, the jury acquitted Schultz "of repeated acts of sexual assault of a child as charged in the information." (R. 69:130; 74.) The information charged Schultz with sexually assaulting M.T. three or more times "in the late summer to early fall of 2012." (R. 90:1.) In the second prosecution, the State charged Schultz with sexually assaulting M.T. "on or about October 19, 2012." (R. 30:1.) Schultz's original charging period and acquittal are

ambiguous because the phrase "early fall" is subject to two or more reasonable interpretations. The word "fall" is ambiguous, and even if it is not, the phrase "early fall" is still ambiguous.

As explained above, proceedings that occurred 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." *Olmeda*, 461 F.3d at 288 (emphasis added). Because the time period of Schultz's original sexual-assault charge—"late summer to early fall of 2012"—is ambiguous, this Court should consider the record to determine the scope of that charge.

The record here shows that Schultz was in jeopardy at trial for sexually assaulting M.T. only in July to September 2012. The criminal complaint stated that M.T. had sex with Schultz "approximately one month before" she had sex with Beckman in "early to mid-October." (R. 93:3.) 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 broke up in the beginning of September 2012. (R. 67:134–35.) 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.)

M.T.'s testimony about her statements to one of her friends further shows that Schultz was not in jeopardy at trial for a sexual assault in October. M.T. testified that she had told a friend 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.

M.T. gave similar testimony about her statements to Police Officer Matthew Waid. 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.) 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 early October 2012—in other words, in September 2012.

Officer Waid testified to the same effect. He told the jury 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.) 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.

Wisconsin law has long allowed an ambiguous charging date to be clarified based on the evidence at trial. Pursuant to Wis. Stat. § 971.29(2), the ambiguous charging period of "late summer to early fall of 2012" is deemed amended to allege sexual assaults in July to September 2012. This statute 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 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; objections to such a defect, if made after verdict, come too late." *Id.* at 441 (citation omitted). So, the ambiguous dates charged in Schultz's first prosecution are deemed amended to conform to the evidence at his trial.

In short, the record for the prior charge had no evidence that M.T. had sex with Schultz after September 2012. The ambiguous charging dates—"late summer to early fall of 2012"—must be deemed amended to cover July to September 2012. The federal case law discussed above supports this approach.

D. Schultz's arguments are unavailing.

1. Schultz asks this court to ignore the record.

Relying on the Second Circuit *Olmeda* case, Schultz argues that because "jeopardy attaches prior to the presentation of evidence," "[e]vidence that was later adduced at trial is irrelevant to question [sic] of whether the scope of jeopardy in the second prosecution was encompassed within the scope of jeopardy in the first prosecution." (Schultz's Br. 15.)

Schultz's reliance on *Olmeda* is misplaced because he ignores the language from *Olmeda* quoted above on page 9. As the court of appeals here correctly explained, "*Olmeda* actually undermines Schultz's proposed test." (Schultz's App. 8.)

Schultz is also wrong to rely on the attachment of jeopardy. He has not cited any legal authority to support his view that events after the attachment of jeopardy are irrelevant to a double-jeopardy analysis. *Olmeda* and other precedent reject that proposition. Events after jeopardy attached are relevant because a court must determine "whether the jeopardy ended in such a manner that the defendant may not be retried." *Martinez v. Illinois*, 572 U.S. 833, 841 (2014) (per curiam).

Schultz's argument ignores how looking at the entire record can protect criminal defendants from double jeopardy. For example, had M.T. testified that Schultz sexually assaulted her from June through December 2012 and the jury acquitted Schultz, double-jeopardy principles would bar the State from later charging Schultz with sexually assaulting M.T. in December 2012. The evidence at trial would protect Schultz from that new charge, although the original charging language ("late summer to early fall") would not include December even under Schultz's logic. If a court were unable to consider the entire record, a prosecution for a sexual assault in December 2012 could unconstitutionally go forward in this hypothetical example.

Schultz apparently tries to avoid that problem by arguing that a court may consider the entire record when a defendant relies on it. (Schultz's Br. 18–19.) That self-serving argument contradicts his earlier assertion that "[e]vidence that was later adduced at trial is irrelevant." (Schultz's Br. 15.) Further, Schultz's new argument has no basis in the law. He argues that the case law that the State

has cited only allows *a defendant* to rely on the entire record when raising a double-jeopardy claim. (Schultz's Br. 18–19.)

Schultz is wrong. Courts often rely on the entire record *when rejecting* a defendant's double-jeopardy argument. *See, e.g.*, *Schnittker*, 807 F.3d at 82 (rejecting the defendant's double-jeopardy challenge to a second prosecution because the record showed the limited extent of the defendant's previous guilty plea); *Hamilton*, 992 F.2d at 1130 (rejecting the defendant's argument that a variance between the charge and the evidence at trial would put him at risk of double jeopardy, reasoning that "under the record in this case, [Hamilton] cannot be prosecuted again for [the same offense]"); *Castro*, 776 F.2d at 1124 (rejecting the defendant's variance argument because he "may rely upon the record to raise a double jeopardy bar if the government attempts to prosecute him of [the same offense]"); *Roman*, 728 F.2d at 854 ("hold[ing] that the indictment is not deficient . . . since the record will protect Roman against any further jeopardy for the illegal conduct involved in the present case").

Schultz further argues that the case law on which the State relies does not allow a court to use the evidence at trial to narrow the scope of jeopardy. (Schultz's Br. 18–19.) The court of appeals here correctly rejected that argument "because it conflates the clarification of an ambiguous timeframe with the narrowing of an unambiguous one." (Schultz's App. 10.) A judgment of acquittal protects a defendant from a future prosecution for the same offense. *Evans v. Michigan*, 568 U.S. 313, 318 (2013). "If a judgment is ambiguous, construction is allowed and the court will consider the whole record, including pleadings, findings of fact, and conclusions of law." *In re Estate of Flejter*, 2001 WI App 26, ¶ 28, 240 Wis. 2d 401, 623 N.W.2d 552. A clarification of a judgment is not an impermissible modification. *Cashin*, 273 Wis. 2d 754, ¶ 10; *see also State v.*

Greene, 2008 WI App 100, ¶¶ 18–20, 313 Wis. 2d 211, 756 N.W.2d 411 (finding no double-jeopardy violation because the circuit court clarified, rather than amended, the defendant's ambiguous sentence). To clarify means "to free from ambiguity." *Dickau v. Dickau*, 2012 WI App 111, ¶ 20, 344 Wis. 2d 308, 824 N.W.2d 142 (citation omitted). The record here clarifies, rather than amends, the ambiguous charging period in Schultz's earlier case.

2. Schultz fails to recognize "early fall" as an ambiguous phrase.

Schultz's double-jeopardy claim hinges on whether the time period alleged in his prior sexual-assault charge is ambiguous. He argues that his astronomical definition of "fall" is the only reasonable one. He claims that "[a]ny reasonable person would construe October 19th as being in the 'early fall.'" (Schultz's Br. 32.) He asserts that it "would be arbitrary" to think that fall begins, for example, at "the beginning of the school year." (Schultz's Br. 31.)

Schultz further argues that "[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." (Schultz's Br. 18.) "In a certain real sense," according to Schultz, "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." (Schultz's Br. 18.)

Schultz is wrong because the word "fall" has multiple reasonable interpretations. The four seasons have two major definitions: astronomical and meteorological. As one federal agency has explained, "astronomical seasons are based on the position of Earth in relation to the sun, whereas the meteorological seasons are based on the annual temperature cycle." Nat'l Ctrs. For Envtl. Info., *Meteorological Versus Astronomical Seasons*, Nat'l Oceanic & Atmospheric Admin.

(Sept. 22, 2016), https://www.ncei.noaa.gov/news/meteorological-versus-astronomical-seasons (hereafter "NOAA").

Under the meteorological approach, each season consists of "three months based on the annual temperature cycle as well as our calendar." *Id.* "Meteorological spring includes March, April, and May; meteorological summer includes June, July, and August; meteorological fall includes September, October, and November; and meteorological winter includes December, January, and February." *Id.*

By contrast, "the traditional astronomical seasons begin on varying dates during the 3rd week of March, June, September, and December." Don Lipman, *Meteorological vs. Astronomical Seasons: Which is More Useful?*, Wash. Post (Sept. 5, 2014), https://www.washingtonpost.com/news/capital-weather-gang/wp/2014/09/05/meteorological-vs-astronomical-seasons-which-is-more-useful/?utm_term=.33e436946091. Under this approach, spring begins on the spring equinox ("on or around March 21"), summer begins on the summer solstice ("on or around June 21"), fall begins on the autumnal equinox ("on or around September 22"), and winter begins on the winter solstice ("on or around December 21"). NOAA, *supra.*

The meteorological approach has many advantages. It "portrays a far more accurate reflection of the seasons" in terms of temperatures. Lipman, *supra.* It is also simpler because it has clear and consistent start dates and is "more closely tied to our monthly civil calendar than the astronomical seasons are." NOAA, *supra.* The meteorological seasons make it "much easier to calculate seasonal statistics from the monthly statistics, both of which are very useful for agriculture, commerce, and a variety of other purposes." *Id.* Indeed, people "organize [their] lives more around months than astronomical seasons." Lipman, *supra.*

Schultz's argument supports the meteorological approach. He quotes the *Merriam-Webster* dictionary, which defines "autumn" as "the season between summer and 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.'" (Schultz's Br. 16–17 (emphasis added).) So, Schultz cites a dictionary that recognizes the meteorological definition of "autumn" as the usual one. This dictionary definition greatly undercuts Schultz's claim that the astronomical definition of "fall" is the only reasonable one.

And there are other reasonable definitions of the seasons besides the astronomical and meteorological approaches. As the court of appeals aptly explained here, "in common vernacular, when 'fall' begins varies based on one's perception. For example, many people consider 'fall' to begin after the Labor Day holiday in early September." (Schultz's App. 7 n.4.) Other societies use different seasonal definitions, including "the Celtic calendar system" and the "'traditional reckoning system' in which solar insolation determines each season." Lipman, *supra*. These competing definitions show that the word "fall" is ambiguous.

Indeed, some other definitions of "fall" are more reasonable in certain contexts. For example, if a child reports that he was a victim of a crime in "early fall," it would be reasonable to think that the child was referring to a time near the start of a school year. It is reasonable to assume that a child defines "fall" in reference to the school year rather than based on astronomy.

So, there are at least two reasonable definitions of the seasons. The meteorological view of the seasons is reasonable—and it does not deny Earth's orbit around the sun. The word "fall" is therefore ambiguous.

To support his astronomical view of the seasons, Schultz argues that "[f]armers have been consulting the Old Farmer's Almanac for the start and conclusion of the seasons since 1792." (Schultz's Br. 31.) But the *Old Farmer's Almanac* acknowledges the competing astronomical and meteorological definitions of the seasons, and its notes that "[a]nother definition of fall is 'nights of below-freezing temperatures combined with days of temperatures below 70 degrees Fahrenheit (21°C).'" *Autumnal Equinox 2019: The First Day of Fall*, The Old Farmer's Almanac (May 21, 2019), https://www.almanac.com/content/first-day-fall-autumnal-equinox. In fact, "to the farmer," the summer solstice is called Midsummer Day because "it is the midpoint of the growing season, halfway between planting and harvesting." *Daily Calendar for June 24th, 2018*, The Old Farmer's Almanac, https://www.almanac.com/calendar/date/2018-06-24 (last visited June 25, 2019). Schultz's reliance on the *Old Farmer's Almanac* hurts his argument that the astronomical view of the seasons is the only reasonable one.

Further, even under Schultz's preferred astronomical definition of "fall," the phrase "early fall" is still ambiguous. Without explanation, Schultz argues that October 19 is early fall because it is within the first third of that astronomical season. (Schultz's Br. 13, 18, 32.) The court of appeals correctly "reject[ed] Schultz's hypertechnical and arbitrary definition of early fall." (Schultz's App. 7 n.4.) As the court noted, "Schultz fails to explain why [the court] should consider the first third—and not, say, the first fourth of the fall season, of which October 19 falls outside—to be 'early fall.'" *Id.* The word "early" means "[b]elonging or happening near the beginning of a particular period." *Early*, Lexico.com, https://en.oxforddictionaries.com/definition/early (last visited June 25, 2019). Even if fall in 2012 began on September 22 as Schultz argues, reasonable minds could disagree over

whether October 19 was near the beginning of fall. So, October 19 is not clearly part of early fall even if fall only starts on the September equinox.

In short, the time period of Schultz's prior sexual-assault charge—"late summer to early fall of 2012"—is ambiguous. Under the meteorological definition of "fall," Schultz pled guilty to sexually assaulting M.T. in mid-fall, not early fall. October 19 is just past the halfway point through the meteorological season of fall. So, according to at least one reasonable view of "fall" (the meteorological definition), Schultz's second prosecution fell outside the scope of his prior one.

3. Schultz's final five arguments are unpersuasive.

Schultz raises five arguments besides those addressed above, but they are unpersuasive.

First, Schultz argues that the double-jeopardy analysis considers "any evidence that the State could conceivably have presented in the first prosecution." (Schultz's Br. 16; *see also id.* at 20.) But he does not cite any legal authority for support. "Arguments unsupported by references to legal authority will not be considered." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Besides, "as a matter of public policy, charges growing out of the same incident should be tried together. . . . [But] the violation of that admonition does not result in double jeopardy." *Perkins v. State*, 61 Wis. 2d 341, 348, 212 N.W.2d 141 (1973) (citation omitted). So, even if the paternity-test results were available before Schultz's trial—which they were not—the State could have separately prosecuted him based on those test results.

Second, Schultz argues that "[t]he lower courts have ignored that the charging document itself provides protections against subsequent jeopardy for the same offense." (Schultz's Br. 24.) Schultz, however, does not cite any legal authority for that proposition. To the contrary, double-jeopardy "protection [is] afforded by a prior conviction or acquittal," *Sanabria v. United States*, 437 U.S. 54, 70 (1978), not by a charging document.

Third, Schultz argues that the court of appeals' decision here will promote ambiguous charging periods. (Schultz's Br. 26–27.) The court of appeals correctly rejected that argument, reasoning that "well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge." (Schultz's App. 14.) As the court of appeals explained, "a defendant may move for the dismissal—or, in the alternative, move to make more definite and certain the allegations against him or her—of charges based on allegedly overbroad or ambiguous timeframes in a charging document." (Schultz's App. 14.)

Schultz's argument rests on undeveloped assumptions. (Schultz's Br. 26–27.) For example, he argues that if he had been charged with repeated sexual assault from July to September 2012, and "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." (Schultz's Br. 26.) It is unclear what Schultz means—after all, he was acquitted at trial. Perhaps he means that he would have grounds for reversal in that scenario if he had been convicted at trial. But he does not develop that idea. Nor does he explain his apparent assumption that the State knew, when it tried him, that it would later want to prosecute him for a sexual assault in October 2012. Contrary to Schultz's suggestion, if the State

had strong evidence of a sexual assault in October 2012, it would have introduced that evidence at his trial.

Fourth, Schultz argues that an ambiguous charge should be construed against the State, relying on *State v. Fawcett*, 145 Wis. 2d 244, 255, 426 N.W.2d 91 (1988). (Schultz's Br. 21, 24–25.) Schultz's reliance on *Fawcett* is misplaced.

The defendant in *Fawcett* was charged with two counts of sexual assault "during the six months preceding December A.D. 1985." *Fawcett*, 145 Wis. 2d at 247. He argued on appeal "that the six-month period of time alleged in the complaint and information [wa]s too expansive to allow him to prepare an adequate defense." *Id.* at 249. The court of appeals applied a two-part test to determine the sufficiency of the charge: "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 v. State*, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968)).

In addressing the second part of the test, the court of appeals concluded that the six-month charging period did not put the defendant at risk of double jeopardy, reasoning that the State conceded "that Fawcett may not again be charged with any sexual assault growing out of this incident." *Id.* at 255. The court noted 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 (emphasis added) (citing *State v. St. Clair*, 418 A.2d 184, 189 (Me. 1980)).

In other words, if the State charged the defendant in *Fawcett* with another count of sexual assault against the same victim during the *same six-month period*, the State would have had difficulty proving that the new charge was different than the ones for which the defendant had already been convicted.

Schultz's situation is not like the hypothetical one in *Fawcett*. Schultz's case involves a threshold double-jeopardy issue that was absent in *Fawcett*: how does a court determine the scope of a previous charge for double-jeopardy purposes? The court of appeals correctly held that Schultz's conviction for a sexual assault on or about October 19, 2012, was *not* part of the charging period at issue in Schultz's previous case. (Schultz's App. 2–3.) In other words, Schultz's two sexual-assault charges were *not* "based upon the same transaction during the same time frame." *Fawcett*, 145 Wis. 2d at 255.

Fifth, Schultz argues that his original sexual-assault charge should not be deemed amended after his acquittal pursuant to Wis. Stat. § 971.29(2). He argues that this statute requires a circuit court to consider the prejudice of an amendment and that amending his charge would prejudice him by violating his double-jeopardy rights. (Schultz's Br. 22–24.)

The court of appeals correctly rejected that argument. This statute provides:

> 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. 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). The court of appeals rightly noted that Schultz's argument "does not account for the difference between the first and second sentences of the statute." (Schultz's App. 11.) The first sentence allows a circuit court to amend a charge during a trial if the amendment would not prejudice the defendant, while the second sentence deems a charge amended after verdict to conform to evidence that was not objected to. *See, e.g.*, *Moore v. State*, 55 Wis. 2d 1, 7–8, 197 N.W.2d 820 (1972). In *Moore*, this Court held that a circuit court properly amended a robbery charge to a theft charge during trial because the amendment was not prejudicial. *Id.* at 7–8. The circuit court's amendment did not "involve any factual changes" to the charge, so this Court deemed the factual allegations in the charging document amended to conform to the proof at trial. *Id.* at 8. This Court did not consider the issue of prejudice when it deemed the factual allegations amended. *See id.*

An amendment after verdict thus has no consideration of prejudice. "Rights of the defendant which may be prejudiced by an amendment [to a charge] are the rights to notice, speedy trial and the opportunity to defend." *State v. Neudorff*, 170 Wis. 2d 608, 615, 489 N.W.2d 689 (Ct. App. 1992). An amendment "before trial" is not prejudicial if those rights are not violated. *State v. Bonds*, 2006 WI 83, ¶ 17, 292 Wis. 2d 344, 717 N.W.2d 133. Those rights cannot be violated by an amendment to a charge *after verdict*. An amendment after verdict does not delay a trial or impair a defendant's ability to prepare a defense. Once a jury reaches its verdict, a defendant is done defending himself.

Citing *Holesome*, 40 Wis. 2d at 102, Schultz argues that double jeopardy is a consideration when a charge is amended. (Schultz's Br. 24.) But this Court in *Holesome* simply held that double jeopardy is a consideration when a defendant challenges "the sufficiency of the charge."

Holesome, 40 Wis. 2d at 102. Schultz has not challenged the sufficiency of his original sexual-assault charge.

Schultz is wrong to suggest that he would be exposed to double jeopardy if his prior sexual-assault charge were deemed amended to conform to the evidence at his trial. "A court may tailor double jeopardy protection by tracking the time period of an earlier prosecution." *State v. Chambers*, 173 Wis. 2d 237, 253, 496 N.W.2d 191 (Ct. App. 1992). The court of appeals here correctly expressed a similar sentiment, noting that the evidence at a trial "allow[s] a court to ascertain the actual jeopardy to which a defendant was exposed in a prior prosecution." (Schultz's App. 11.) Because M.T. testified about having sex with Schultz in July to September 2012, his charge is deemed amended to reflect those dates. So, for example, the State could not re-prosecute Schultz with sexually assaulting M.T. in early July 2012—even if M.T.'s child was conceived then. Yet under Schultz's logic, he could be so prosecuted because early July is not "late summer to early fall." Deeming Schultz's prior sexual-assault charge amended based on the evidence at his trial will *protect* him from double jeopardy.

Besides citing *Holesome*, Schultz also string cites to federal cases noting that double jeopardy is a consideration in a challenge to a variance between a charge and the evidence at trial. (Schultz's Br. 24.) That line of cases does not help Schultz. Challenges to variances are based on the Fifth Amendment right to a grand jury in federal criminal cases. *See, e.g.*, *United States v. Thompson*, 23 F.3d 1225, 1229 (7th Cir. 1994). A variance that narrows a charge is not reversible error if, among other things, it does not put the defendant at risk of double jeopardy. *Id.* at 1230.

Significantly, a variance does not expose a defendant to double jeopardy if the record would bar a future prosecution for the same offense. *See, e.g.*, *Hamilton*, 992

F.2d at 1130 (finding no fatal variance because "under the record in this case, [Hamilton] cannot be prosecuted again for [the same offense]"); *United States v. Leichtnam*, 948 F.2d 370, 387 (7th Cir. 1991) (finding no double-jeopardy risk due to a variance because "[t]he evidence of the handguns spread across the record would bar Leichtnam from being charged again on the firearms count"); *Castro*, 776 F.2d at 1124 (finding no fatal variance because the defendant "may rely upon the record to raise a double jeopardy bar if the government attempts to prosecute him of [the same offense]").

So, Schultz's reliance on federal cases involving variances is misplaced. Those cases show that deeming Schultz's ambiguous charge amended based on the evidence at his trial would not expose him to double jeopardy. The record of Schultz's earlier prosecution, including the trial testimony, protects him from another prosecution for a sexual assault of M.T. during the same time period.

* * * * *

The two sexual-assault charges here are different in fact. In the earlier prosecution, the State charged Schultz with sexually assaulting M.T. three or more times "in the late summer to early fall of 2012." (R. 90:1.) As explained, that charge covered July to September 2012. That time period is factually distinct from the sexual-assault count 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 to 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. The sexual-assault charge in the second prosecution thus did not expose Schultz to double jeopardy.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 26th day of June 2019.

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 7278 words.

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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 26th day of June 2019.

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