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

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

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A. The State ignores that Schultz's first prosecution was for a continuing offense, and as such, "a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period."

Schultz's first prosecution was for repeated sexual assault of a child. As such, he was charged with what is a "continuing crime." The State's burden at trial was to present evidence, beyond a reasonable doubt, that Schultz committed three or more acts of sexual assault against the victim within the alleged time period. The time period was chosen by the State. The State in the presentation of its case could have presented evidence of sexual assaults covering the entire time period alleged, or alternatively, it could have presented evidence showing three or more sexual assaults for only a portion of the alleged time period. Either way, had the State presented evidence of three or more sexual assaults during any portion of the timeframe that was alleged in the information, that would have been sufficient for proving the charge.

However, "[o]nly one prosecution may be had for a continuing crime. When an offense charged consists of a series of acts extending over a period of time, a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period." *State v. George*, 69 Wis.2d 92, 98, 230 N.W.2d 253 (1975). This is simply another way of stating the holdings in *State v. Van Meter*, 72 Wis.2d 754, 758, 242 N.W.2d 206 (1976) and *United States v. Roman*, 728 F.2d 846 (7th Cir. 1984). Those cases both held that if "the evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on the other' indictment," then double jeopardy will bar the second prosecution. *Roman*, 728 F.2d at 854; *Van Meter*, 72 Wis.2d at 758 (where there is "a prosecution on an indictment (or complaint), another prosecution on a different indictment (or complaint) would entail a violation of the right against double jeopardy: if ". . . 'facts alleged under either of the indictments would, if

proved under the other, warrant a conviction under the latter,' . . ." double jeopardy is involved. . . .'"; *quoting, Anderson v. State,* 221 Wis. 78, 87, 256 N.W. 210 (1936)).

A logical consequence of the holdings in *Roman, Van Meter,* and *George* is that the double jeopardy analysis is not limited to evidence that was actually presented at the first trial, but includes evidence which could conceivably have been presented. The State complains that Schultz does not cite legal authority for this proposition (State's br. 20), but *Roman, Van Meter,* and *George* are all legal authorities supporting this understanding. If evidence including sexual intercourse on or about October 19th would have been sufficient evidence to support a conviction in Schultz's first prosecution during a timeframe of "the late summer to early fall of 2012," then it would be within the scope of jeopardy. And an acquittal based upon a portion of the timeframe alleged will act as a bar to future prosecution for the whole timeframe alleged. *Roman, Van Meter,* and *George, supra.*

For the same reason, the State's argument that Wisconsin Statutes section 971.29(2) will constructively amend the information to conform with the evidence adduced at trial must fail. The whole point of section 971.29(2) is to cure "technical variances" in the charging documents, where that amendment would not prejudice the defendant. *State v. Duda*, 60 Wis.2d 431, 440, 210 N.W.2d 763 (1973). Examples of these would be variances in surnames or corporate names, or the amount of stolen money where the penalty is not affected. (*see*, examples listed in *Duda*, 60 Wis.2d at 440). But that is not what is being proposed here. The State's position is that a conviction or acquittal for a continuing crime will cover only that portion of the time period for which evidence is presented at trial. That position is in direct opposition to the holdings in *Roman, Van Meter,* and *George.*

B. The record of proceedings in the first prosecution are only relevant to the extent they shed light on the understanding of the parties concerning the scope of jeopardy *at the time jeopardy attached*.

"To determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the subsequent prosecution." *United States v. Olmeda*, 461 F.3d 271, 282 (2nd Cir. 2006) (emphasis added). Consequently, the record is only relevant to the extent it will explain how a reasonable person would have understood the scope of jeopardy "at the time jeopardy attached in the first case." The evidence adduced at a jury trial will be largely irrelevant to this understanding, simply because jeopardy attaches in a jury trial when the jury is sworn, prior to the presentation of evidence.

The State relies heavily upon the cases of *United States v. Schnittker*, 807 F.3d 77 (4th Cir. 2015) and *Olmeda, supra,* in making its "entire record" argument. (State's br.. 9). However, what the State fails to appreciate is that both *Schnittker* and *Olmeda* were plea cases, and that the proceedings of the plea hearing would naturally be relevant to parties understanding of the scope of jeopardy when it attached. Neither court felt that the proceedings after the acceptance of the plea were likely to be relevant, except in the most unusual of circumstances. "[O]ur double jeopardy inquiry focuses on how a reasonable person familiar with the totality of the facts and circumstances would interpret the first indictment at the time jeopardy attached, which in this case was when Olmeda pleaded guilty, ...[1] *not when he was sentenced*." *Olmeda*, 461 F.3d at 288 (emphasis added). The *Olmeda* court noted that "[s]entencing arguments are

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[1] *Citing, United States v. Aliotta*, 199 F.3d 78, 83 (2d Cir.1999 (In a plea case, "[a]s a general rule, jeopardy attaches in a criminal case at the time the district court accepts the defendant's guilty plea"); *See also, State v. Comstoc*k, 163 Wis.2d 218, 221, 471 N.W.2d 596, 597 (Ct.App.1991)

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. By way of example, the Court wrote:

> If, for example, a prosecutor at sentencing were to state that the parties had never understood the indictment to charge, or the defendant's guilty plea to admit, certain conduct, and if the defendant were then to affirm that understanding, that evidence, developed at sentencing but reflective of the parties' common understanding at the time of the plea, would properly factor into an objective assessment of the scope of the indictment at the time jeopardy attached.

Id. Significantly, the analysis examines the "common understanding" of the parties as to the scope of jeopardy. The court found that there was no reason for an objective observer to conclude that brief comments made by the prosecutor at sentencing "constituted a complete characterization of the prosecutor's understanding of the charges or of a tacit understanding between the parties as to the meaning of the North Carolina indictment." *Id.* The Court added, "[c]ertainly, Olmeda does not concede that he understood from the government's failure to reference the Manhattan ammunition seizure at sentencing that he was still subject to prosecution for that conduct." *Id.*

In *Schnittker*, the defendant was charged with two counts of possession of child pornography, each count covering a separate hard drive on his computer. *Schnittker*, 807 F.3d at 79. Schnittker chose to plead guilty to Count 2 of the indictment, but go to trial on Count 1. *Id.* The Indictment spoke in general terms, and did not specifically identify which hard drive was covered by which count. *Id.* Later, at a bench trial Schnittker asserted a claim of double jeopardy to foreclose further prosecution on Count 1. *Id.* at 81. The Fourth Circuit Court of Appeals, wrote that:

> "To determine whether two offenses ... 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 count to which the defendant pled guilty "to cover the offense charged" later in the prosecution. See *United States v. Olmeda*, 461 F.3d 271, 282 (2d Cir.2006). This is an "objective" inquiry. Id. And it is not limited to the indictment language only, but extends to "the entire record" of the

> proceedings. *Benoit*, 713 F.3d at 17. Importantly, the inquiry must focus on what a reasonable person would understand at the time the defendant entered his plea, because that is the time at which jeopardy attaches. *Olmeda*, 461 F.3d at 282.

Id. at 82 (emphasis added). Accordingly, the court analysis was limited to events which transpired prior to the district court's accepting the plea on count two. *Id.* The court noted that "once Schnittker disclosed his intention to plead guilty to Count 2, the government made it 'express' that Schnittker's guilty plea would be based only on the child pornography on a Western Digital hard drive." *Id.* Spreadsheets were prepared which showed that Count 1, the charge for which Schnittker intended to go to trial, covered a "Maxtor" hard drive. *Id.* This understanding was then stated in open court during the plea hearing. *Id.* Finally, both Schnittker and his counsel signed a statement which made clear that he was only pleading to possession of the child pornography found on the Western Digital hard drive. *Id.* The court found, based upon these events, all of which occurred prior to the acceptance of Schnittker's plea, that a reasonable person would conclude Schnittker's plea did not cover the possession of child pornography on the "Maxtor" hard drive. *Id.*

The events which transpired in Schultz's first prosecution were markedly different. The police reports attached to the criminal complaint in Schultz's first prosecution revealed that M.T.'s statements evolved over the course of three interviews with Officer Waid. In her initial interview on December 4, 2012, M.T. claimed only one instance of sexual intercourse with Schultz, that instance taking place sometime during the month of September. (R.93:3; Appx. 34). Later, however, in her January 17, 2013, interview she claimed there were multiple (more than five) instances of her having sexual intercourse with Schultz. (R.93:5; Appx. 36). In her second and third interviews she gave no specific dates for any of these newly alleged acts of sexual intercourse. (R.93:5 and 8; Appx. 36 and 39). On the day of trial, while the State did indicate that it thought the paternity testing would show that another man, Beckman, was the father of M.T.'s child, the

victim and her mother were not certain, and told the court that they favored a continuance so that paternity testing could be completed on both Beckman and Schultz before trial. (R.67:82 and 85-88; Appx. 79 and 82-85). That would indicate that the victim was uncertain as to whether or not she had sexual intercourse with Schultz in the month of October.

If the State had no intention of presenting evidence of sexual intercourse in the month of October, the prosecutor, unlike the prosecution in *Schnittker,* kept that information to himself. Significantly, at no point in its opening statement did the State tell the jury that it believed that the sexual relationship between Schultz and M.T. had ended in September. (R.67:115-18; Appx. 87-90). The State did not offer that opinion until its closing statements, after the receipt of testimony, and long after the attachment of jeopardy. (R.69:91).

Clearly Schultz's defense counsel did not understand the charges to exclude sexual assaults in the month of October. 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 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.*

The record in Schultz's case does not reflect a "common understanding "at the time jeopardy attached, that the scope of jeopardy would exclude any sexual assaults in the month of October. Certainly, the State never made explicit that the timeframe for the charge would be limited to the months of July, August and September. And Schultz certainly did not concede that the scope of jeopardy would be cutoff at the end of September. The argument that jeopardy did not

attach to the month of October was simply a post-trial rationalization to allow Schultz to be prosecuted a second time for the same offense.

C. If the term "early fall" is indeed ambiguous, then it is the State which should bear the burden of its imprecise language.

The State insists that the term "early fall" is ambiguous, but never explains why the burden of this ambiguity should be shouldered by Schultz. (State's br. 16). The law is clear that "as between the government and the defendant, the government, being the party that drafts indictments, should bear any burden resulting from imprecise language, *see United States v. Inmon*, 568 F.2d 326, 332 (3d Cir.1977) (`[W]e also point to the obvious fact that it is the government which has control over the drafting of indictments. Any burden imposed by the imprecision in the description of separate offenses should be borne by it.')." *Olmeda*, 461 F.3d at 283. This, of course, is merely another application of the doctrine of *contra proferentem*, the principle that when construing a written instrument "an ambiguous provision is construed most strongly against the person who selected the language." Black's Law Dictionary (6th ed. 1990).

"[T]his court has traditionally adhered to the deeply rooted doctrine of *contra proferentem*, a universally accepted legal maxim that any ambiguities in a document are to be construed unfavorably to the drafter." *Walters v. National Properties, LLC*, 2005 WI 87, ¶13, 282 Wis.2d 176, 699 N.W.2d 71 (applying the doctrine to the drafter of a lease); *see Walters* for citations to cases applying the doctrine to a variety of legal documents including contracts, settlement offers, and exculpatory clauses; *see also, State v. Kaczmarski*, 2009 WI App 117, ¶10, 320 Wis.2d 811, 772 N.W.2d 702 (applying the doctrine to deferred prosecution agreements).

The rationale underlying the doctrine of *contra proferentem* has been explained as follows:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of

> uncertainties in meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.

Maryland Arms Ltd. Partnership v. Connell, 2010 WI 64, ¶40 fn. 15, 326 Wis.2d 300, 786 N.W.2d 15, *quoting* the Restatement (Second) of Contracts § 206, comment a (1979). These concerns are exactly the same concerns that Schultz has been raising. The State and the Court of Appeal suggest that the defendant has a remedy by simply moving for a more definite statement under section 971.31, Wisconsin Statutes (State's br. 21; Decision ¶35; Appx. 14). That, however, presupposes that the defendant is aware of the uncertainties in meaning, and can ascertain which provisions the State may be leaving "deliberately obscure, intending to decide at a later date what meaning to assert." How was Schultz to realize that the State might put forward a "meteorological" definition of the seasons in opposition to what the State's own authority admits is "the *traditional* astronomical" definitions for the seasons. (State's Br. 17; emphasis added). It would take a mighty insightful defendant indeed, to perceive that the State was using a "meteorological" definition of the seasons, as opposed to the definition found in most almanacs, calendars, and in Black's Law Dictionary.[2]

What the Restatement of Contracts warns of, is exactly what happened in Alexander Schultz's case. The State either intentionally or unintentionally left the term, "early fall," imprecise,[3] only to later assert a meaning which it found more convenient to its purposes, i.e. one in which the "early fall" did not include the month of October. The doctrine of *contra proferentem* should, if anything, have more weight in a criminal case, for unlike a contract, the defendant is not a negotiating party to the Information, a defendant is the target of the Information.

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[2] "Fall. One of the four seasons of the year, embracing in the Northern Hemisphere, the three months commencing with the 21st of September and terminating with the 20th of December. Autumn." Black's Law Dictionary (6th ed. 1990).

[3] *Arguably* imprecise, Schultz continues to maintain that the definition of "fall" is quite precise, notwithstanding the State's arguments otherwise.

Schultz maintains that *State v. Fawcett*, 145 Wis.2d 244, 255, 426 N.W.2d 91 (Ct. App. 1988), had it right, "[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." A rigid double jeopardy analysis includes the application of the doctrine of *contra proferentem*.

IV. 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 charge.

Respectfully submitted July 9, 2019.

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V. 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 2994 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 July 9, 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 July 9, 2019. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: July 9, 2019.

Signature: _____