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STATE OF WISCONSIN

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

DISTRICT III

Case No. 2020AP2012-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JAMES P. KILLIAN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF DISMISSAL ENTERED IN TREMPEALEAU COUNTY CIRCUIT COURT, THE HONORABLE RIAN RADTKE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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INTRODUCTION

In a prior case, the State charged Defendant-Respondent James P. Killian with two counts stemming from his alleged sexual assaults of two children. The circuit court granted a mistrial in that case and later granted a motion to dismiss that case on grounds of prosecutorial overreaching.

The State subsequently charged Killian in a new case with ten counts regarding the two victims from the prior case. The ten new counts were legally or factually distinct from the two counts in the prior case. Yet the circuit court granted Killian's motion to dismiss this new case on double-jeopardy grounds.

This Court should reverse. The ten counts in this case are all different from the two counts in the prior case. The ten new counts allege distinct conduct, separate timeframes, or legally different crimes than what the prior case alleged. This new case thus does not implicate double-jeopardy concerns. The circuit court reached a contrary conclusion because it did not apply the right legal test.

ISSUE PRESENTED

Does this prosecution expose Killian to double jeopardy because a previous trial on different counts ended in a mistrial?

The circuit court answered "yes."

This Court should answer "no" and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this appeal can be decided based on the briefs and well-established legal principles.

STATEMENT OF THE CASE

I. Case numbers 2015CF47 and 2016CF38

A. Pretrial proceedings

In case number 2015CF47, the State charged Killian with one count of first-degree sexual assault of Britney, a child under age 12 ("the 2015 charge").[1] (R. 55:1.) The criminal complaint based this charge on Britney's statement that Killian had grabbed her buttocks at his house, with a charging period of January 2014 through August 18, 2014.[2] (R. 14; 55:1; 57:10.) During a forensic interview, Britney had said "that Killian had squeezed her butt on five different occasions starting when she was about eight years old." (R. 55:1.) She also said that Killian had "touched her 'boobies' underneath her clothes" sometime in 2014. (R. 55:1.)

Two days after the State filed a criminal complaint in case number 2015CF47, a detective talked to Killian's daughter Ashley, who was born in 1982. (R. 3:2.) Ashley told the detective that Killian began sexually assaulting her when she was six years old and stopped when she was 17. (R. 3:2.) Killian sexually assaulted her "every day for several years." (R. 3:2.) Ashley said that many of the sexual assaults occurred in Killian's bedroom at their farm home, but some of them happened in their barn or on a tractor. (R. 3:2.) When Ashley told Killian that she did not want to perform sexual acts, he

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[1] In this brief, the State refers to the victims with the pseudonyms "Ashley" and "Britney," as required by Wis. Stat. § (Rule) 809.86. Some charging documents refer to Ashley as victim "A" and Britney as victim "B." (*E.g.,* R. 24; 36.)

[2] The State originally charged an offense date of "on or about Monday, August 18, 2014." (R. 55:1.) The circuit court allowed the State to expand this count's timeframe to allege that the charged sexual assault of Britney occurred between January 2014 through August 18, 2014. (R. 14; 57:10.) The court allowed this change because Britney was a child. (R. 21:10; 75:21–22.)

kept her brothers working outside until she acquiesced, threatening to keep them outside doing chores all night. (R. 3:2.)

Ashley's disclosure led to case number 2016CF38, in which the State charged Killian with one count of repeated sexual assault of a child, Ashley, from April 1994 through November 30, 1998 ("the 2016 charge").[3] (R. 3:2; 14; 75:15.) Based on the parties' stipulation, the circuit court joined case number 2016CF38 with case number 2015CF47. (R. 8.)

In September 2016, the State filed a motion to introduce at trial other-acts evidence of Killian's uncharged sexual assaults against Ashley between January 1988 and December 1999. (R. 5.)[4] The circuit court granted this motion at an October 2016 hearing. (R. 73:61–65.) At this hearing, the State said that it did not "intend to offer any other acts [evidence]" at trial besides this evidence regarding Ashley. (R. 73:74.) The State, however, said that it intended to introduce evidence of Killian's grooming behavior toward Britney. (R. 73:70–73.) The circuit court agreed with the State that this grooming evidence was not other-acts evidence. (R. 73:73.) The State did "not object" to Killian's motion to exclude any other-acts evidence besides the evidence involving Ashley. (R. 73:74.)

In April 2017, the State filed a motion to admit other-acts evidence from Killian's niece and from Britney's brother. (R. 9.) The niece would testify about Killian putting his hand down her pants when she was less than 12 years old. (R. 9:1–

[3] The State originally charged a timeframe from "April 1994 through December 1999." (R. 3:2.) The circuit court raised an issue with this timeframe because of Ashley's birthdate. (R. 75:8–10, 12.) To resolve this issue, the court allowed the State to narrow this charge's timeframe to cover April 1994 through November 30, 1998. (R. 14; 75:15.)

[4] This motion referred to Ashley as victim "B," although charging documents referred to her as victim "A." (R. 3; 14.)

2.) Britney's brother would testify about the violent atmosphere and physical abuse in Killian's household. (R. 9:2.) The circuit court ruled that the niece's testimony would be inadmissible at trial but that the State could introduce Britney's brother's testimony at trial. (R. 21:6.)

Days before trial, the State moved to file an amended information. (R. 11.) The State wished to add one count of incest with a child for Killian's sexual intercourse with Ashley "on or about April, 1994 through December, 1999." (R. 13:1.) The circuit court denied the State's request to add this incest charge. (R. 75:15.) The court also made clear that it was not allowing the State to introduce other-acts evidence involving Britney. (R. 75:21–22.) The court explained that the State would be required to file a motion to admit such evidence but had not done so. (R. 75:22.)

B. Jury trial

The consolidated cases proceeded to trial in June 2017, with Judge Anna L. Becker presiding. The trial ended in a mistrial.

Four witnesses testified during the two days of trial. Britney's mother testified on the first two days. (R. 79:25–55; 80:5–50; 81:1–16.) Britney's grandmother, who lived with Killian, testified on the second day of the trial. (R. 81:16–38.) The jury next heard from an employee of the Family and Children's Center in La Crosse. (R. 81:39–51; 82:1–2.) This witness testified that she had interviewed Britney, but she did not testify about Britney's statements. (R. 81:44; 82:2.)

Britney was the fourth and final witness before the mistrial. (R. 82:50–51; 83:1–28.) After Britney testified about Killian's past conversations with her about sex, the State asked her, "Did you tell [your mother] something else relating to a private part of your body?" (R. 83:28.) Britney answered that Killian had "rubbed on her breasts" when they were in

bed, "[a]nd then when he was done, he rubbed on my private spot. It was just a swift rub." (R. 83:28.)

Killian objected to that answer and, outside the jury's presence, moved for a mistrial. (R. 83:28–29.) The prosecutor argued that the court should "instruct the jury to disregard the answer and I will only talk with [Britney] about the butt grab." (R. 83:29–30.) Killian argued that Britney's answer had mentioned "other acts that did not occur on the same night as the charged offense." (R. 83:30.) The court said that "we could have brought all of this [other-acts evidence] in probably in a different manner as long as [Killian] had notice." (R. 83:30–31.) But because the State had not properly moved to introduce this other-acts evidence, the court said there was "no alternative but a mistrial." (R. 83:31.) After hearing more from the parties, the court declared a mistrial and found "there was not intentional prosecutorial misconduct." (R. 83:46.)

In October 2017, Killian filed a motion to dismiss a retrial on double-jeopardy grounds. (R. 15.) Killian argued that the mistrial was caused by "prosecutorial overreaching." (R. 15:11.) The State opposed the motion. (R. 16; 20.) The circuit court, Judge Becker still presiding, held an evidentiary hearing on the motion to dismiss. (R. 74.) The prosecutor and Killian's two trial lawyers testified. (R. 74:2.)

In March 2018, the circuit court issued a written decision and order granting the motion to dismiss. (R. 21.) The court found "that the prosecutor's actions were intentional" in provoking a mistrial. (R. 21:21.) The court thus concluded "that the State is barred from retrial in this matter due to prosecutorial overreaching." (R. 21:21.) The State did not appeal that ruling.

II. Case number 2019CF163

In October 2019, the State filed a criminal complaint charging Killian with ten counts in case number 2019CF163 ("the present charges"). (R. 24.)

The first nine counts involve three sexual-assault and six incest counts related to Killian's sex crimes against Ashley and are as follows: (1) first-degree sexual assault of a child for "touching [Ashley's] vaginal area" "in or around 1990 to 1991"; (2) first-degree sexual assault of a child by causing Ashley to touch Killian's penis "in or around 1990 to 1991"; (3) incest with a child due to Killian's "sexual contact" with Ashley "in or around 1990 to 1991"; (4) first-degree sexual assault of a child by touching and placing Killian's fingers into Ashley's vagina "in or around 1992 to 1993"; (5) incest with a child by touching and placing Killian's fingers into Ashley's vagina "in or around 1992 to 1993"; (6) incest with a child by having penis to vagina sexual intercourse with Ashley "in or around 1993 to 1994"; (7) incest with a child by having "sexual intercourse (fingers and mouth to vagina)" with Ashley "in or around 1994 to 1995"; (8) incest with a child by having penis to vagina sexual intercourse with Ashley "in or around 1995 to 1996"; and (9) incest with a child by having penis to vagina sexual intercourse with Ashley "in or around 1996 to 1997." (R. 24:1–4.)

The tenth and final count relates to Britney, charging Killian with repeated sexual assault of a child "in or around June 2012, and no later than August 17, 2014." (R. 24:4.) This count alleges that Killian touched Britney's breast and pubic mound and pressed his erect penis against her body. (R. 24:4 n.8.)

The State subsequently filed an information charging Killian with the same ten counts as the criminal complaint. (R. 36.)

Killian filed a motion to dismiss case number 2019CF163, arguing that this case was barred on double-jeopardy grounds. (R. 52:14–16.)[5] After the parties filed briefs on the motion to dismiss (R. 58–59),[6] the circuit court granted the motion in an oral ruling (R. 84). The court, with Judge Rian Radtke presiding, reasoned that Judge Becker's order dismissing case number 2015CF47 on grounds of prosecutorial overreaching was "meant to encompass future prosecutions involving the same facts alleged in 15-CF-47." (R. 84:10.) The circuit court entered a written order of dismissal in October 2020. (R. 62.)

The State appeals that dismissal order. (R. 66.)

SUMMARY OF ARGUMENT

The present charge regarding victim Britney does not expose Killian to double jeopardy. The 2015 charge alleged that Killian had committed first-degree sexual assault of a child based on Killian's hand-to-buttocks contact with Britney. Here, by contrast, the State charged Killian with repeated sexual assault of Britney based on his contact with her breast and pubic mound and his touching his penis against her body. The sexual contact in this present charge is factually different than the hand-to-buttocks contact that was alleged in the 2015 charge.

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[5] Killian also argued that dismissal was required under the issue-preclusion doctrine from *Ashe v. Swenson*, 397 U.S. 436 (1970), and on grounds of prosecutorial vindictiveness. (R. 52:15–25.) The circuit court did not resolve these issues, so the State does not discuss them further in this brief.

[6] The State's circuit court brief included two helpful charts summarizing the present charges, the 2015 charge, and the 2016 charge. (R. 58:5–6.) The State includes these charts in the appendix for its appellate brief. (A-App. 101.)

The nine present charges regarding victim Ashley do not implicate double jeopardy. The 2016 charge alleged that Killian had repeatedly sexually assaulted Ashley "on or about April 1994 through November 30, 1998." (R. 14.) The three sexual-assault charges allege timeframes before 1994, so they are factually different from the 2016 charge. And all six incest charges are legally different from the 2016 charge, with two also factually different because they allege timeframes before 1994.

STANDARD OF REVIEW

This Court reviews *de novo* "whether a subsequent prosecution violates a defendant's right against double jeopardy." *State v. Jacobs*, 186 Wis. 2d 219, 223, 519 N.W.2d 746 (Ct. App. 1994).

ARGUMENT

This prosecution does not expose Killian to double jeopardy.

A. A second prosecution does not create double jeopardy if the charges are factually or legally different from charges in the earlier prosecution.

"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." *State v. Steinhardt*, 2017 WI 62, ¶ 13, 375 Wis. 2d 712, 896 N.W.2d 700 (footnotes 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.

"The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the *same offense*." *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982)

(footnote omitted) (emphasis added). It includes a "protection against a second prosecution for the same offense after acquittal" and "after conviction." *Steinhardt*, 375 Wis. 2d 712, ¶ 13 (citation omitted).

The Double Jeopardy Clause can also apply where, as here, a prosecutor intentionally "goaded" a defendant into obtaining a mistrial. *Kennedy*, 456 U.S. at 676. In that situation, the Fifth Amendment "protects a criminal defendant from multiple successive prosecutions for the *same offense* that arise from prosecutorial overreaching engaged in with the deliberate intent of depriving him of having his trial completed by a particular tribunal or prejudicing the possibility of an acquittal that the prosecutor believed likely." *State v. Lettice*, 221 Wis. 2d 69, 88, 585 N.W.2d 171 (Ct. App. 1998) (emphasis added) (quoting *United States v. Pavloyianis*, 996 F.2d 1467, 1473 (2nd Cir. 1993)). A double-jeopardy challenge to a successive prosecution requires "a judgment of acquittal or conviction or a dismissal of the charges *and then a second prosecution begun on the basis of the same offense*." *State v. Clark*, 2000 WI App 245, ¶ 5, 239 Wis. 2d 417, 620 N.W.2d 435 (emphasis in original) (citation omitted).

"The *Blockburger* test is used . . . to determine 'sameness' for situations involving successive prosecutions." *State v. Davison*, 2003 WI 89, ¶ 24 n.11, 263 Wis. 2d 145, 666 N.W.2d 1 (referring to *Blockburger v. United States*, 284 U.S. 299 (1932)). This test considers whether offenses are identical in law or in fact. *State v. Sauceda*, 168 Wis. 2d 486, 493–94 & n.8, 485 N.W.2d 1 (1992).

"[T]wo prosecutions are for the 'same offense,' and therefore violate the Double Jeopardy Clause, when the offenses in both prosecutions are 'identical in the law and in fact.'" *State v. Schultz*, 2020 WI 24, ¶ 22, 390 Wis. 2d 570, 939 N.W.2d 519, *cert. denied sub nom. Schultz v. Wisconsin*, 141 S. Ct. 344 (2020) (citation omitted). "Offenses are not identical in law if each requires proof of an element that the other does

not." *Id.* "Offenses are not identical in fact when 'a conviction for each offense requires proof of an additional fact that conviction for the other offenses does not.'" *Id.* (citation omitted). "Offenses are also not identical in fact if they are different in nature or separated in time." *Id.*[7]

B. The present charges are factually or legally different from the charges in the earlier case.

The question on appeal is whether the present charges are factually or legally different from whichever charge in the earlier case involved the same victim. For the following reasons, these charges are factually or legally different, so the Double Jeopardy Clause does not bar this prosecution.

1. The present charge regarding Britney is factually different from the 2015 charge.

The present charge involving Britney satisfies the Double Jeopardy Clause. As noted, "[o]ffenses are . . . not identical in fact if they are different in nature or separated in time." *Schultz*, 390 Wis. 2d 570, ¶ 22. Although the charging timeframes overlap to an extent, the two charges involving Britney are factually different offenses.

[7] A multiplicity analysis considers legislative intent after applying the *Blockburger* test because a legislature may authorize cumulative punishments for charges that constitute the same offense. *State v. Davison*, 2003 WI 89, ¶¶ 28–32, 263 Wis. 2d 145, 666 N.W.2d 1. But the Double Jeopardy Clause bars a second prosecution if the new charges and old charges are the same under the *Blockburger* test, regardless of legislative intent. *State v. Henning*, 2004 WI 89, ¶ 18, 273 Wis. 2d 352, 681 N.W.2d 871. Legislative intent is irrelevant in this appeal because Killian raised a successive-prosecution challenge, not a multiplicity claim.

"[W]hether the charged acts are significantly different in nature is not limited to a straightforward determination of whether the acts are of different types." *State v. Multaler*, 2002 WI 35, ¶ 57, 252 Wis. 2d 54, 643 N.W.2d 437. "Acts may be 'different in nature' even when they are the same types of acts as long as each required 'a new volitional departure in the defendant's course of conduct.'" *Id.* (citation omitted).

State v. Ziegler is highly instructive here. In *Ziegler*, the State alleged that the defendant had committed five acts against the victim: "fellatio, digital penetration of [the victim's] vagina, the touching of [the victim's] breasts, the touching of Ziegler's penis, and the striking of [the victim's] buttocks." *State v. Ziegler*, 2012 WI 73, ¶ 73, 342 Wis. 2d 256, 816 N.W.2d 238. Addressing a double-jeopardy claim, the supreme court concluded that these five acts "are significantly different in nature, involving different methods of intrusion and contact and different areas of Ziegler and [the victim's] bodies." *Id.* Although "the five alleged acts took place in the course of the same evening, each act is distinct and hence 'required a new volitional departure' in Ziegler's course of conduct." *Id.* (citation omitted). The court thus "conclude[d] that the five alleged acts are sufficiently different in fact to demonstrate that Ziegler committed five separate crimes." *Id.*

The *Ziegler* court relied on *State v. Eisch*, 96 Wis. 2d 25, 291 N.W.2d 800 (1980). In *Eisch*, the State alleged that the defendant committed a "continuous" attack against a single victim that "took place between 1:00 a.m. and 3:30 a.m." *Ziegler*, 342 Wis. 2d 256, ¶ 68. The State charged the defendant with four counts based on the following four acts that he committed during the attack: "(1) genital intercourse, (2) anal intercourse, (3) fellatio, and (4) insertion of a beer bottle into the victim's genitals." *Id.* ¶ 69. The *Eisch* court concluded that the four charges were not multiplicitous in violation of the Double Jeopardy Clause. *Id.* ¶ 71. It reasoned that "although identical in law," the four counts "were

sufficiently different in fact to demonstrate that four separate crimes had been committed." *Id.* (citing *Eisch*, 96 Wis. 2d at 31). It further "reasoned that each of the alleged acts required a separate volitional act; involved a different method of bodily intrusion; required a separate application of force and threat; and resulted in a new and different humiliation, danger, and pain." *Id.* (citing *Eisch*, 96 Wis. 2d at 37).

Here, under *Ziegler* and *Eisch*, the two charges involving Britney are factually different. They have overlapping charging periods, so they are not separated in time.[8] But they are still factually different because they are different in nature. The present charge alleges that Killian had "touched the breast and pubic mound of [Britney], and pressed his erect penis on and against her body." (R. 36:4 n.8.) The 2015 charge, by contrast, alleged that Killian had "grabbed her buttocks." (R. 55:1.) These allegations "are significantly different in nature" because they "involv[e] different methods of intrusion and contact and different areas of [Killian's] and [Britney's] bodies." *Ziegler*, 342 Wis. 2d 256, ¶ 73. Killian's act of grabbing Britney's buttocks is factually distinct from his touching her breast and pubic mound and his touching her body with his erect penis. The defendant in *Ziegler* likewise committed factually distinct acts by striking the victim's buttocks and having her touch his penis. *Id.* The two charges against Killian regarding Britney are factually different. The present charge thus does not expose Killian to jeopardy for the same offense.

For double-jeopardy purposes, it does not matter that Britney briefly testified at trial about uncharged sexual acts that Killian had committed against her. Specifically, she

[8] The 2015 charge proceeded to trial with a charged timeframe of "on or between January, 2014 to August 18, 2014." (R. 14:1.) The present charge regarding Britney alleges a timeframe of "in or around June 2012, and no later than August 17, 2014." (R. 36:4.)

testified that Killian had rubbed her breasts and "rubbed on [her] private spot." (R. 83:28.) But Killian was not prosecuted for those other acts in case number 2015CF47. Killian is judicially estopped from arguing otherwise on appeal. The doctrine of judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." *State v. Ryan*, 2012 WI 16, ¶ 32, 338 Wis. 2d 695, 809 N.W.2d 37 (citation omitted). "For judicial estoppel to be available, three elements must be satisfied: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *Id.* ¶ 33. "Judicial estoppel has been properly invoked 'mostly in criminal appeals where the defendant asserts one position at trial and a contrary position on appeal,' because they present the clearest cases of inconsistent arguments." *Olson v. Darlington Mut. Ins. Co.*, 2006 WI App 204, ¶ 10 n.4, 296 Wis. 2d 716, 723 N.W.2d 713 (citation omitted).

The doctrine of judicial estoppel will apply here if Killian argues in his response brief that the 2015 charge prosecuted him for conduct besides touching Britney's buttocks. That argument would be inconsistent with the position that Killian and the circuit court took. On the first day of trial, before the jury was selected, Killian said that the 2015 charge "alleged . . . a sexual contact involving the defendant allegedly touching the butt of [Britney]. . . . There have been, in the discovery, references to other potential allegations of sexual contact but they weren't charged." (R. 75:16.) Killian argued that the State should not be allowed to admit "evidence of other allegations that have not been charged." (R. 75:17.) The court said that, based on its pretrial ruling, the State could not introduce other-acts evidence about Britney. (R. 75:21–22.) Shortly after Britney testified about Killian rubbing her breasts and "private spot"

(R. 83:28), Killian argued that any sexual contact besides the "butt touch" was inadmissible other-acts evidence (R. 82:31). Killian argued it would be "duplicitous" to allow the jury to convict him based on "either the touching the breast or the butt rub." (R. 82:31.) The court agreed with Killian, saying that "[t]he one charged in the Complaint was the butt." (R. 82:33.) The court reiterated that, "clearly, the act that's being alleged as the offense is the August 18th butt grab, for the lack of a better description. That's the way I would read this as that's the one he's being prosecuted for." (R. 82:39.) Because the court was "concerned about a mistrial," it said that "the state can bring in anything that they would like to regarding other acts that are grooming type activities but not other sexual assaults." (R. 82:48.) The court later declared a mistrial because the State elicited inadmissible other-acts evidence from Britney. (R. 83:43–46; *see also* R. 21:20–21; 84:8–9.) Killian is judicially estopped from arguing on appeal that he was previously charged with any sexual contact with Britney besides touching her buttocks.

And, significantly, Killian was not in jeopardy for this inadmissible other-acts evidence in case number 2015CF47. A defendant is not in jeopardy for conduct mentioned in other-acts evidence. *See, e.g.*, *United States v. Felix*, 503 U.S. 378, 385–87 (1992).

In *Felix*, the government prosecuted the defendant for drug offenses in Missouri federal court, it introduced other-acts evidence of his prior drug activity in Oklahoma, and he was convicted of the Missouri charges. *Id.* at 381–82. The government subsequently charged him with that Oklahoma drug activity in Oklahoma federal court. *Id.* at 382–83.

The Supreme Court held that this second prosecution did not violate the Double Jeopardy Clause. *Id.* at 384. It reasoned that "the Government did not in any way *prosecute* Felix for the Oklahoma methamphetamine transactions [in the Missouri case]; it simply introduced those transactions as

prior acts evidence under [Federal Rule of Evidence] 404(b)."[9] *Id.* at 387. The Court explained "that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Id.* The Court *rejected* the notion "that if the Government offers in evidence in one prosecution acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution, the latter prosecution is barred under the Double Jeopardy Clause." *Id.* at 386. Rather, "a mere overlap in proof between two prosecutions does not establish a double jeopardy violation." *Id.*

Here, similarly, the State did not *prosecute* Killian in case number 2015CF47 for any crimes against Britney except for the one allegation of hand-to-buttocks contact. This conclusion is even stronger here than it was in *Felix* because the other-acts evidence concerning Britney was inadmissible, and its admission resulted in a mistrial. Killian was not in jeopardy in case number 2015CF47 for the (inadmissible) other-acts evidence regarding Britney. The State was not prosecuting Killian for those other acts, as the mistrial ruling showed.

In sum, the present charge alleging a crime against Britney satisfies the Double Jeopardy Clause. This charge is significantly different in nature than the 2015 charge because these two charges allege factually different acts. Killian was not in jeopardy in case number 2015CF47 for the inadmissible other-acts evidence regarding Britney.

[9] Rule 404(b) is the federal counterpart to Wis. Stat. § 904.04(2), Wisconsin's rule on other-acts evidence.

2. The present charges regarding Ashley are factually or legally different from the 2016 charge.

Counts 1 through 9 in the present case allege Ashley as the victim. (R. 24:1–4.) All nine of these charges are factually or legally different from the 2016 charge.

Counts 1 through 5—three sexual-assault and two incest charges—are factually different from the 2016 charge because of their charging periods. The 2016 charge alleged that Killian had repeatedly sexually assaulted Ashley "on or about April 1994 through November 30, 1998." (R. 14.)[10] In the present case, Counts 1 through 5 charge Killian with three acts of first-degree sexual assault and two acts of incest against Ashley from 1990 through 1993. (R. 36:1–2.) Because the 2016 charge "did not include the date[s] of" Counts 1 through 5 "in the second prosecution, the two prosecutions were separate in time and therefore not identical in fact." *Schultz*, 390 Wis. 2d 570, ¶ 40. Because these charges are factually different, they "did not involve the 'same offence' under the Double Jeopardy Clause." *Id.* ¶ 56.

In addition, the 2016 charge is legally different from all six incest charges in the present case. Count 3 and Counts 5 through 9 charge Killian with incest against Ashley between 1990 and 1997. (R. 24:2–4.) Incest is legally distinct from repeated sexual assault of a child.

As noted, "[o]ffenses are not identical in law if each requires proof of an element that the other does not." *Schultz*, 390 Wis. 2d 570, ¶ 22. This analysis "focuses on the language of the statutes defining the offenses, rather than on the charging documents or the specific facts of the case." *State v. Nelson*, 146 Wis. 2d 442, 448, 432 N.W.2d 115 (Ct. App. 1988).

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[10] The original charging documents alleged a timeframe "from April 1994 through December 1999." (R. 3:2; 4.)

When performing this analysis, a court simply compares the elements of the relevant statutes defining the crimes charged. *State v. Carrington*, 134 Wis. 2d 260, 266, 397 N.W.2d 484 (1986).

Incest with a child and repeated sexual assault of a child are legally different because each crime requires proof of an element that the other does not require. To prove repeated sexual assault of a child, the State must show that a defendant repeatedly had sexual contact or intercourse with a person who was less than 16 years old. *See* Wis. Stat. §§ 948.025(1), 948.02(2) (1993–94).[11] To prove incest with a child, the State must show that a defendant had sexual contact or intercourse with a child he knew was related to him in a degree of kinship closer than second cousin. *See* Wis. Stat. § 948.06(1) (1989–90). The statutory term "child" is defined as "a person who has not attained the age of 18 years." Wis. Stat. § 948.01(1) (1989–90).[12] The crime of incest with a child does not require that the child be under age 16, while the crime of repeated sexual assault of a child does not have a kinship element.

In other words, it is possible to commit incest with a child without also committing repeated sexual assault of a child, and vice versa. "[F]or one crime to be included in another, it must be 'utterly impossible' to commit the greater crime without committing the lesser." *Carrington*, 134 Wis. 2d at 265 (citation omitted). A person can commit incest with a child without also committing repeated sexual assault of a child, such as by having sexual intercourse with one's 17-year-old first cousin. And a person can commit repeated

[11] The language in Wis. Stat. §§ 948.025(1) and 948.02(2) has not changed in any way relevant to this appeal between 1994 and 1998, the timeframe alleged in the 2016 charge.

[12] The language in Wis. Stat. §§ 948.01(1) and 948.06(1) has not changed in any way relevant to this appeal between 1990 and 1997, the timeframes for the incest charges.

sexual assault of a child without also committing incest with a child, such as by having sexual intercourse three times with a 15-year-old child who has no familial connection. Incest with a child and repeated sexual assault of a child are legally distinct crimes; neither is included in the other. These incest charges thus do not implicate the Double Jeopardy Clause.

To summarize, the 2016 charge is not the "same offense" as any of the present nine charges regarding Ashley. The present charges of first-degree sexual assault of Ashley (Counts 1, 2, and 4) are factually different than the 2016 charge because they involve different charging time periods. For the same reason, two incest charges (Counts 3 and 5) are factually different than the 2016 charge. And all six incest charges are legally different than the 2016 charge because each of these two crimes has a statutory element that the other does not have. "Once it is determined that the offenses are different in law or fact, double jeopardy concerns disappear." *State v. Grayson*, 172 Wis. 2d 156, 159 n.3, 493 N.W.2d 23 (1992). The nine present charges involving Ashley are legally or factually different than the 2016 charge. These nine charges thus do not expose Killian to double jeopardy.

C. The circuit court's reasoning is wrong because it did not apply the well-established *Blockburger* test.

The circuit court got two things right, despite erroneously granting Killian's motion to dismiss this case. The court noted that the *Blockburger* test "applies" here. (R. 84:5–6.) It was correct because this test applies to challenges to "successive prosecutions." *Davison*, 263 Wis. 2d 145, ¶ 24 n.11. The court also noted that "[i]n a strict comparison of the Complaints in 15-CF-48 (sic) and 19-CF-163, . . . the times frames and elements are different and would pass the *Blockburger* test." (R. 84:7–8.) The court was correct again, and it should have ended its analysis there. If

"the offenses are different in law or fact, double jeopardy concerns disappear." *Grayson*, 172 Wis. 2d at 159 n.3. Because the court correctly determined that the charges in this case "would pass the *Blockburger* test" (R. 84:8), the court should have found no double-jeopardy violation.

The circuit court stated that, "[h]owever, there is more to this case." (R. 84:8.) It relied on three reasons for finding a double-jeopardy violation. Its reasoning is wrong on all three points.

First, the circuit court reasoned that the State's plan was to introduce other-acts evidence about Britney at trial "and then seek to amend the Information after testimony to conform to the evidence." (R. 84:8.) But, as explained above, even *admissible* other-acts evidence does not put a defendant into jeopardy for the other acts. *Felix*, 503 U.S. at 385–87. And here, as the circuit court recognized, the court had ruled this other-acts evidence about Britney *inadmissible* and its introduction at trial led to a mistrial. (R. 84:8–9.) Killian was not in jeopardy for those other acts at his trial.

The State's failed plan to amend the information during the trial is irrelevant to the double-jeopardy analysis. Because "[d]ouble-jeopardy analysis focuses on the individual 'offence' charged," *Smith v. Massachusetts*, 543 U.S. 462, 469 n.3 (2005), the circuit court was wrong to rely on other-acts evidence that was never charged as an offense in the prior case. "'Jeopardy' means exposure to the risk of determination of guilt." *State v. Williams*, 2004 WI App 56, ¶ 23, 270 Wis. 2d 761, 677 N.W.2d 691 (citation omitted). A defendant is not in jeopardy for an uncharged crime unless it is a lesser-included offense of a charged crime. *See State v. Jacobs*, 186 Wis. 2d 219, 223–25, 519 N.W.2d 746 (Ct. App. 1994). During the trial on the 2015 charge, Killian was not exposed to jeopardy for

inadmissible other-acts evidence that did not form the basis of any charge.[13]

Second, the circuit court reasoned that "the State attempted to amend the Information on the eve of trial to add a count of incest[with Ashley], which was denied by the Court." (R. 84:9; *see also* R. 75:15.) Again, however, "[d]ouble-jeopardy analysis focuses on the individual 'offence' charged." *Smith*, 543 U.S. at 469 n.3. Incest was not an offense charged in case number 2015CF47, so it is irrelevant to the double-jeopardy analysis. Killian was never in jeopardy for an incest charge in that earlier case. In addition, incest with a child is legally different than first-degree sexual assault of a child. *See* Argument Section B.1., *supra*. It is thus unclear why the circuit court would point to a proposed incest charge in the earlier case as a ground for dismissing the entire present case, including the legally distinct sexual-assault charges involving Ashley. The State's failed attempt to add an incest charge in

[13] It is axiomatic that a defendant is not in jeopardy for an uncharged offense. "One cannot be put in jeopardy on account of an offense with which he is not charged and that without regard to whether the evidence in the case tends to prove that he is also guilty of other offenses." *United States v. Gilbert*, 31 F. Supp. 195, 201 (S.D. Ohio 1939) (quoting *United States v. Brimsdon*, 23 F. Supp. 510, 512 (W.D. Mo. 1938)). "There is no constitutional guaranty against a second incidental proving of the same offense if that offense be an offense which has not heretofore been charged and prosecuted." *Id.* (quoting *Brimsdon*, 23 F. Supp. at 512). *See also, e.g.*, *Davidson v. United States*, 48 A.3d 194, 206 n.17 (D.C. 2012) ("Involuntary manslaughter was not charged in the first indictment, so appellant has never been in jeopardy for that offense."); *State v. Maisch*, 880 N.E.2d 153, 160 (Ohio Ct. App. 2007) (holding defendant was not in jeopardy because he "was never charged with an offense"); *State v. B.J.D.*, 799 So. 2d 563, 568 (La. Ct. App. 2001) (holding defendant was not in jeopardy for an offense to which he pled guilty because "he was never charged with that offense"); *State v. Tresenriter*, 4 P.3d 145, 149 (Wash. Ct. App. 2000) (noting "conviction of a crime not charged is a nullity and a defendant so convicted has never been in jeopardy").

the earlier case has no bearing on the double-jeopardy analysis.

Third, the circuit court relied on its previous order, Judge Becker presiding, where it dismissed case number 2015CF47 due to prosecutorial overreaching. (R. 84:10–12.) In doing so, however, the court effectively applied a same-conduct test that has not been the law since the Supreme Court overruled it in 1993.

The Supreme Court adopted the same-conduct test in 1990, holding "that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 495 U.S. 508, 510 (1990), *overruled by United States v. Dixon*, 509 U.S. 688 (1993). A successive prosecution would be barred under that rule even if it was "not barred by the *Blockburger* test." *Id.*

This same-conduct test was short-lived, getting overruled three years later in *Dixon*, 509 U.S. at 704, 712. Shortly after *Dixon*, our supreme court interpreted the Wisconsin Constitution consistently with *Dixon*, rejecting an argument to follow *Grady* on state-law grounds. *State v. Kurzawa*, 180 Wis. 2d 502, 523–24, 509 N.W.2d 712 (1994). Under federal and state constitutional law, the *Blockburger* test—not the same-conduct test—determines whether a successive prosecution violates the Double Jeopardy Clause. *Dixon*, 509 U.S. at 703–12; *Kurzawa*, 180 Wis. 2d at 523–26.

Here, the circuit court correctly recognized many of these points. The court said that the *Blockburger* test applies here. (R. 84:6.) The court noted that Killian's brief "purports to set forth the *Blockburger* test but actually sets forth the same-conduct test" from *Grady*. (R. 84:6.) Because *Dixon* overruled *Grady*, the circuit court said it would "disregard[]

any arguments related to the same-conduct or the essential elements test." (R. 84:6.)

The circuit court, though, made the same error as Killian. The court purported to apply the *Blockburger* test but effectively applied *Grady*'s same-conduct test. Tellingly, the court correctly recognized that the *Blockburger* test "applies" here and that the charges in this case "would pass the *Blockburger* test." (R. 84:6, 8.) But then the court found a double-jeopardy violation because it applied something besides the *Blockburger* test, i.e., the same-conduct test.

The circuit court's repeated references to "facts" were an application of the defunct same-conduct test. The court said that Judge Becker's order dismissing the 2015 and 2016 charges was "meant to encompass future prosecutions involving the *same facts* alleged in 15-CF-47 where additional charges may be added in future prosecutions." (R. 84:10 (emphasis added).) It said that Judge Becker's dismissal order "includes *all facts* contained in the Complaints that were later joined and amended, *including acts in the Complaints that were not specifically the basis for the charged offenses* in 15-CF-47, and also *facts raised at trial*." (R. 84:11 (emphases added).) The court also said that "all *facts* alleged and all the time frames alleged" in the present case "were previously alleged in 15-CF-47 or raised at trial, *even if the facts were not tied to a specific charge*." (R. 84:11 (emphases added).) The court repeated its view that Judge Becker's "order essentially found the scope of jeopardy extended to future prosecutions from the *facts* that were part of 15-CF-47; and, therefore, the Court finds that double jeopardy bars . . . 19-CF-163 consistent with Judge Becker's ruling." (R. 84:12 (emphasis added).)

So, the circuit court found a double-jeopardy violation because, in its view, this case charges Killian with the *same conduct* that was alleged in the 2015 and 2016 charges. The

court applied the same-conduct test, substituting the word "facts" for "conduct."

Indeed, the circuit court used reasoning that is broader than the same-conduct test from *Grady*. Many of the present charges would survive under *Grady* because they do not require the State to "prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 495 U.S. at 510, *overruled by Dixon*, 509 U.S. 688. Counts 1 through 5 allege timeframes from 1990 through 1993 and thus do not require the State to prove the same offense against Ashley that it prosecuted in the earlier case, which alleged the repeated sexual assault of Ashley in April 1994 through November 1998. *See* Argument Section B.1., *supra*. Count 10 does not require the State to prove that Killian grabbed Britney's buttocks—the offense for which he has already been prosecuted. *See* Argument Section B.2., *supra*. Only Counts 6 through 9 would be problematic under *Grady*, if it were still good law, because they require the State to prove that Killian had repeated sexual contact with Ashley in 1994 through 1999.

The circuit court thus essentially applied the *Grady* same-conduct test on steroids, barring a prosecution for any conduct similar to what was already prosecuted. In other words, the circuit court applied a *similar*-conduct test, which is even broader than *Grady*'s defunct *same*-conduct test.

There is no legal basis for this amorphous view of the Double Jeopardy Clause. The circuit court did not cite any legal authority to support its view that Judge Becker had the power to foreclose, on double-jeopardy grounds, future charges that survive a *Blockburger* analysis.

In sum, all ten present charges "survive *Blockburger* analysis, and they can be prosecuted separately." *Kurzawa*, 180 Wis. 2d at 526. The circuit court reached a contrary conclusion because it strayed beyond the *Blockburger* test.

CONCLUSION

This Court should reverse the order dismissing this case and remand for further proceedings.

Dated this 9th day of March 2021.

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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 7022 words.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 9th day of March 2021.

Electronically signed by:

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