STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP2012-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

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 OF PLAINTIFF-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This is a case about whether the Double Jeopardy Clause bars a second prosecution following a mistrial.

In the first prosecution, the circuit court found that the prosecutor intentionally provoked a mistrial and so the State cannot retry Defendant-Respondent James P. Killian for charges that he (1) sexually assaulted his pseudo-granddaughter Britney by grabbing her buttocks in 2014, and (2) repeatedly sexually assaulted his daughter Ashley between April 1994 and November 1998.[1]

The State commenced a second prosecution charging different crimes from the first. The State alleges that Killian repeatedly sexually assaulted Britney by touching her breast and pubic mound and pressing his erect penis against her body. This charge is factually different than the hand-to-buttocks contact charged in the first prosecution. As for Ashley, the State alleges three first-degree sexual assault charges that are separated in time from the charge in the first prosecution. It also brings six incest charges that are legally different from the crime tried in the first case, with two also being factually different because they predate the charge in the first prosecution.

It is not truly disputed that the charges in the two prosecutions are different. Indeed, the court of appeals didn't apply the double jeopardy bar based on a conclusion that the State actually charged its current offenses in the first prosecution, making the second prosecution a repeated attempt to convict Killian for the same charges. Instead, it held that a defendant can sometimes be in jeopardy for

[1] These are pseudonyms. Wis. Stat. § (Rule) 809.86.

uncharged crimes.[2] This decision is unprecedented and legally incorrect.

This Court should reverse.

ISSUE PRESENTED

Does the Double Jeopardy Clause bar this prosecution?

The court of appeals answered, "yes."

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

This is the State's second prosecution of Killian based on allegations that he sexually abused two victims, Britney and Ashley. The first trial ended in a mistrial after the prosecutor elicited testimony that violated an other-acts ruling. The circuit court determined that the prosecutor intentionally provoked a mistrial and dismissed the first action with prejudice. About 18 months later, the State brought different charges. Killian moved to dismiss those charges on double-jeopardy grounds. The lower courts agreed that the Double Jeopardy Clause bars the State's latest prosecution.

Currently, the State is precluded from prosecuting Killian for allegations that he sexually abused his daughter Ashley over a seven-year period in the 1990's. This includes accusations that Killian started fingering Ashley as early as the second grade, and by seventh grade, he forced her to

[2] Throughout this brief, the State refers to uncharged crimes that are not lesser-included offenses of charged crimes. *See State v. Jacobs*, 186 Wis.2d 219, 223–25, 519 N.W.2d 746 (Ct. App. 1994).

engage in weekly vaginal intercourse. (R. 24:10–11.) As it stands, the State also can't prosecute Killian for allegations that he repeatedly sexually assaulted his pseudo-granddaughter Britney between 2012 and 2014. Those accusations are that Killian touched Britney's breast and pubic mound and pressed his erect penis against her body when she was between the ages of eight and ten. (R. 24:4, 24–30.)

A. The State first charged Killian in 2015, for sexually assaulting Britney "on or about August 18, 2014."

In March 2015, the State charged Killian with one count of first-degree sexual assault of a child under age 12. (R. 1:2.) This case involved Britney. The complaint listed the charging period as "on or about August 18, 2014." (R 1:2.) In the probable cause section, the State alleged that on August 18, 2014, Killian grabbed Britney's buttocks while they were sleeping in the same bed. (R. 1:2.) The probable cause section further detailed Britney's forensic interview, which occurred ten days after the alleged assault. (R. 1:2.) During that interview, Britney said that Killian had squeezed her buttocks on five different occasions "starting when she was about eight years old." (R. 1:2.) And Britney reported that Killian "touched her 'boobies' underneath her clothes" one time in 2014. (R. 1:2.)

B. The State next charged Killian in 2016, for sexually assaulting Ashley "from April 1994 through December 1999."

Ashley's case started one year after Britney's case. (R. 3:2.) After 33-year-old Ashley disclosed many years of sexual abuse at the hands of her father, the State charged Killian with one count of repeated sexual assault of a child under age 16. (R. 3:2.) The charging period allegation was "April 1994

through December 1999."[3] (R. 3:2.) The probable cause section detailed Ashley's report to police, where she said that the assaults began when she was 6 years old (around January 1988) and ended when she was 17 (roughly December 1999). (R. 3:2.) The assaults included vaginal intercourse, digital penetration, and oral sex. (R. 3:2–3.)

C. Shortly before the cases joined for trial, the circuit court made other-acts rulings in Britney's case.

In Britney's case, the State wanted to introduce evidence of Killian's sexual assaults against Ashley between January 1988 and December 1999. (R. 5:1.) It argued that the other-acts evidence was permissible to show the absence of mistake or accident when Killian touched Britney "on August 18th, 2014." (R. 5:1, 6–8.)

The circuit court, the Honorable Anna L. Becker, presiding, addressed the State's motion at an October 2016 hearing. (R. 73:55.) Killian objected to the other-acts evidence, arguing that it was "very different" from the conduct charged in Britney's case, which he described as "an allegation that the defendant put his hand on [Britney's] butt." (R. 73:56–57.) Applying the greater latitude rule, the circuit court granted the State's motion, meaning that evidence of Killian's sexual assaults against Ashley between January 1988 and December 1999 would be admissible at Britney's trial. (R. 73:61–65.)

At the same hearing, the circuit court addressed Killian's motion in limine to exclude "evidence pertaining to other crimes, wrongs, or acts." (R. 73:70.) The purpose of this motion was to prevent the State from introducing evidence

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[3] The complaint stated that Ashley was "born in 1982," making her approximately 12 to 17 years old during the initial charging period. (R. 3:2.) As explained below, the charging period was later changed to account for Ashley's correct birthday.

that Killian assaulted Britney in ways other than grabbing her buttocks on August 18, 2014. (R. 75:16–17; 82:31–32.) Counsel insisted that Killian was "charged with one specific act," so other instances of him sexually assaulting Britney would be other-acts evidence that the State hadn't sought to admit at trial. (R. 73:72.) Counsel distinguished other sexual assaults from grooming behavior—like Killian's buying Britney presents—which he agreed would be admissible. (R. 73:72.)

The prosecutor acknowledged that "the actual incident alleged" was "one night." (R. 73:71.) But he said that he planned to introduce evidence of grooming behavior that occurred before August 18, 2014, like Killian's asking to be Britney's boyfriend, or buying her gifts, or "[n]ormalizing the behavior of sleeping . . . in the bed together." (R. 73:71.) The prosecutor stated that he didn't consider such conduct to be other-acts evidence. (R. 73:71.) When asked whether he was "alleging that [Killian] touched [Britney] outside of anything that was alleged here"—meaning the buttocks touch on August 18, 2014—the prosecutor answered, "At this time, no." (R. 73:73.)

The circuit court clarified that the State was seeking to "establish what [Killian and Britney's] relationship was, what they knew about each other, and the dynamics of the interpersonal relationship." (R. 73:73.) The court agreed that such evidence wouldn't constitute other-acts evidence. (R. 73:73–74.) The prosecutor then interjected, "And so given that it seems that defense counsel understands the state's position, we would not object [to the defense's motion in limine]." (R. 73:73–74.)

D. Days before the joint trial, the State moved to amend the information to expand the charging period in Britney's case and add an incest charge in Ashley's case.

Britney's and Ashley's cases were joined for trial. (R. 8.) Four days before the trial, the prosecutor filed a motion to amend the information in two ways. (R. 11; 12.) First, he wanted to expand the charging period allegation for Britney, from on or about August 18, 2014, to on or between January 2014 and August 18, 2014. (R. 12:1; 13.) Second, he wanted to charge Killian with one count of incest in Ashley's case, occurring "on or about April, 1994 through December, 1999." (R. 12:1; 13.)

In an affidavit in support of the motion, the prosecutor stated, "[I]n the course of witness preparation I met with [Britney]. In discussing with [her] when the sexual assault occurred, [she] disclosed that they happened over a course of time starting in January 2014 and ending on August 18, 2014." (R. 12:1.) He continued, "The State's proposed amendment conforms to the proof and reflects the accurate time frame of the charged offense." (R. 12:1.) The prosecutor's affidavit further stated that the "law permits amendments to charges . . . not only before the trial but at trial, to conform to the proof." (R. 12:2.)

E. The circuit court refused to add the incest charge but broadened the timeframe to prove the buttocks grab.

The circuit court addressed the prosecutor's motion to amend the information on the morning of the joint trial, before voir dire. (R. 75:7.) It denied the request to add the incest charge in Ashley's case, finding it "extremely prejudicial" to be "just figuring out on the eve of trial what we want to charge." (R. 75:14.) The court agreed with defense counsel that it was "inexcusable that we have this charged

this late in the game." (R. 75:14–15.) The prosecutor commented that "maybe the proof at the trial will be sufficient to convince the Court that more sexual intercourse occurred which would be a basis for this charge." (R. 75:15–16.) And the court responded that it wouldn't add the incest charge regardless of the proof adduced at trial:

> And, again, the state's lack of preparation should not prejudice the defendant. The state's had ample opportunity to make those considerations. This could have been discussed with [defense counsel] a long time ago. It was never even brought up at the motion hearing or contemplated. *So I'm not going to allow it*.

(R. 75:16 (emphasis added).)

As for the prosecutor's request to broaden the charging period in Britney's case, defense counsel expressed concern that the State was trying to "make admissible evidence of other [sexual assault] allegations *that have not been charged*." (R. 75:16–17 (emphasis added).) He said that the "original charge is . . . August 18, which corresponds perfectly to the discovery where what is alleged is a sexual contact involving the defendant allegedly touching the butt of [Britney]." (R. 75:16.) Counsel continued, "So that made perfect sense. There have been, in the discovery, references to other potential allegations of sexual contact *but they weren't charged*." (R. 75:16 (emphasis added).) He also reminded the court of its other-acts ruling precluding the State from bringing in evidence of other instances where Killian sexually assaulted Britney. (R. 75:17.) At bottom, defense counsel objected on grounds of "undue surprise" because "we came here to defend an alleged sexual contact that occurred on August 18th." (R. 75:18.)

The prosecutor responded that defense counsel was "correct. We are charging one sole act." (R. 75:20.) Then he said, "Interestingly, it appears to me that if more acts are disclosed at trial, the Information could be changed. And it

could, in fact, I think naturally prejudice the defendant more. But I don't think that's unusual." (R. 75:20.) However, the prosecutor continued to explain that he was broadening the charging period to "account [for] the child's imperfect memory." (R. 75:20.)

The circuit court interjected to clarify that the State wasn't "alleging there were additional things that happened"; rather, it was expanding the charging period to account for Britney's inability to recall the precise date of the buttocks grab. (R. 75:21.) The prosecutor responded, "Correct, Judge." (R. 75:21.) When he again raised the concept of amending the information to conform to the proof at trial, the circuit court indicated that it wouldn't allow new charges:

> [The court]: Well, it sounds to me like that's not the intent of your motion to add things because we've clearly had motions.
>
> [The State]: That is not the intent. I just want an abundance of caution. I want to be clear that that's possible.
>
> [The court]: And there were motions in limine regarding that that were ruled on.

(R. 75:21.)

Ultimately, the circuit court ruled that the State could expand the charging period for Britney's case but only to give a window for when Killian grabbed Britney's buttocks, not to allow the introduction of other sexual assaults for the jury to consider:

> [The court]: So the Court will allow it. . . . I think that this doesn't do anything other than allow a window within which that described activity that we've all been focused on occurred. . . .
>
> [Defense counsel]: And I do agree with that, Judge. But I think what I heard from [the prosecutor] is different than what the Court hears. I guess to be clear, that there can be no reference to other alleged touching that would constitute sexual assault of any

> kind. *Because I think what he's asking to do is present evidence of other sexual assault acts and then have the jury consider those.*
>
> [The court]: We've clearly had a motion in limine on that. If there were intentions to introduce those at trial, then those were required to have been addressed and they were not addressed at all. *So there's already been a ruling on that*.

(R. 75:21–22 (emphasis added).)

The circuit court's ruling on the State's motion to amend the information therefore established that Killian was being tried for grabbing Britney's buttocks "on or between January, 2014 to August 18, 2014." (R. 14; 75:16–22.) As for Ashley, Killian was facing a single charge that he repeatedly sexually assaulted her "on or about April, 1994 through November 30, 1998." (R. 14.) The charging period was shortened to account for Ashley's correct birthday. (R. 75:12–13.)

F. The circuit court granted a mistrial after the prosecutor elicited prohibited other-acts evidence from Britney.

During his opening statement, the prosecutor told the jury that Killian was Britney's "de facto grandfather." (R. 78:46.) He said that Killian used to take Britney on four-wheeler rides, where they would discuss sex and Killian would "rub himself on her." (R. 78:47.) "What you're going to hear," the prosecutor continued, "is that she then is confronted several times by behavior that is inappropriate and illegal." (R. 78:47.) He explained that Britney and Killian slept in bed together when her grandmother was at work. (R. 78:47.) "[O]ne night," the prosecutor detailed, the grandmother came home to find Killian and Britney sleeping "so tight" that "you couldn't put a piece of paper between them." (R. 78:48.) He described how Killian "was rubbing" his erect penis on Britney. (R. 78:48.) "It's an unmistakable

course of conduct," the prosecutor concluded, "that leads one to have no doubt that it was sexually motivated."[4] (R. 78:48.)

As for Ashley, the prosecutor told the jury that Killian had assaulted her when she was "6 or 7 years old and [it] didn't stop until she was about 17. So approximately 10 years." (R. 78:50.) He said that Ashley would detail the "long term abuse," which included hand jobs, oral sex, and sexual intercourse. (R. 78:50.)

Three of the State's witnesses completed their testimony before the circuit court declared a mistrial: Britney's mom, Britney's grandmother, and Britney's forensic interviewer. (R. 79:25–55; 80:5–50; 81:1–43; 82:1–2.) Britney's mom testified about Britney's disclosure that Killian had grabbed her buttocks one night in August 2014. (R. 79:51–53.) Britney's grandmother testified about the incident in question, stating that she came home to find Killian and Britney sleeping in bed "[e]xtremely close. Real close. . . . It was total body contact from shoulder to ankle." (R. 81:24.) She said that she later found out about the buttocks grab from Britney's mother. (R. 81:36.) The forensic interviewer testified that she conducted an hour-long recorded interview with Britney about ten days after Britney's disclosure. (R. 82:1.)

Before Britney testified, the prosecutor argued that a "course of conduct" was on trial such that he could elicit testimony that Killian touched Britney's breast or vagina, or that he rubbed his penis on her leg. (R. 82:15–20.) The prosecutor maintained that that evidence wasn't subject to the circuit court's other-acts ruling. (R. 82:15–20.) He said

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[4] During Killian's opening statement, defense counsel told the jury that Killian was being tried for touching Britney's buttocks on a single occasion. (R. 79:15–16, 23–24.)

that he was "going to have [Britney] testify to . . . what happened to her. And there are several things that happened to her." (R. 82:17.)

Defense counsel objected, saying that if such evidence came in, he'd "ask[ ] for a mistrial . . . because that's been thoroughly litigated and decided as of yesterday again." (R. 82:16.) The circuit court responded, "Correct." (R. 82:16.) Defense counsel then insisted that Killian was only on trial for the buttocks grab, at one point saying, "[W]e opened on an allegation of a butt touch that occurred on or around August 18th." (R. 82:21, 31.) Defense counsel viewed the prosecutor's opening statement similarly as referring "to one specific act because the Court ruled moments before that that's the only thing that was admissible."[5] (R. 82:42.)

The prosecutor proposed letting Britney "speak. . . . And then at the end of our case, if there's more information, more charges can be brought." (R. 82:25.) The circuit court responded, "But there was a ruling on that. . . . You're changing the game on them. If you wanted to include that, then we should have addressed that." (R. 82:25.) The prosecutor said that "[a]nything could happen" when Britney testified, and that if she talked about a "vagina rub or [Killian] rubbing his penis on her leg . . . . [T]hen I guess [defense counsel is] going to move for a mistrial." (R. 82:26–27.) The court responded, "*It will be a mistrial* because you didn't . . . prepare for trial adequately until the last moment." (R. 82:27 (emphasis added).)

During this discussion, the circuit court admonished the prosecutor for "changing how you want to try the case." (R. 82:27–28.) When the prosecutor insisted that he charged a course of conduct such that the jurors could "take their pick"

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[5] The circuit court also viewed "the opening statement" as addressing the buttocks grab on a single occasion. (R. 82:30.)

among several acts to support a single conviction, the court repeatedly disagreed:

- "If you look at your Complaint, the Complaint talks about the butt touch on August 18th."
- "The one charged in the Complaint was the butt."
- "[C]learly, the act that's being alleged as the offense is the August 18th butt grab, for the lack of a better description."
- "[N]ow you're talking a range of activities that happened between A and August 18th. When, in fact, originally you were only alleging something occurred about the 18th of August."

(R. 82:31–33, 39, 44.)

Given its "concern[ ] about a mistrial," the circuit court again ruled "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 because those should have been properly dealt with when we talked about the motions that were filed for other acts." (R. 82:48.) The court said that it wanted to ensure that the jurors understood the "exact" charge at issue, "which is the one dating back to August 18th."[6] (R. 82:48–49.) The court also sought to avoid prejudice to Killian, something that was top of mind throughout the lengthy discussion of this issue:

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[6] Despite the clear ruling before voir dire that Killian was being tried for grabbing Britney's buttocks, the preliminary jury instructions defined sexual contact to mean "an intentional touching of the vagina or breast of [Britney] by the defendant." (R. 78:38.) There was no objection to this preliminary instruction. (R. 75:24–26; 78:38–39.) The prosecutor later flagged that the final instructions would need to be changed to reflect that Killian was only on trial for the buttocks grab. (R. 82:37–38, 43.)

- "You don't change your charging document until a day before the trial. That's the problem here."
- "The target keeps moving is the problem."
- "But now we're at trial and defense is basically blindsided."
- "[I]t's a bit disingenuous to pull the rug out from counsel based on those prior rulings."
- "They would like to know what they're supposed to defend against. That is the real issue."
- "So now you've changed the parameter of the charge . . . . That's the concern."

(R. 82:27, 31–33, 37, 46.)

Britney then took the stand. She testified that Killian used to take her on four-wheeler rides on his farm, where they'd talk about sex. (R. 83:8, 11, 15–16.) Britney detailed those sexual conversations for the jury. (R. 83:16–23.)

The subject then shifted to what Britney disclosed to her mom about Killian. (R. 83:23–28.) The prosecutor asked her to focus on the "time when you told your mom about everything." (R. 83:27.) He questioned, "When you told your mom, do you remember what you told her?" (R. 83:27–28.) Britney stated that she could give a summary of what she reported, and the prosecutor responded, "That's what I'd like." (R. 83:28.) Britney then testified, "I told her I had something to tell [her]. Why I don't really like going to [Killian's] anymore and what he told me. And then I told her everything." (R. 83:28.) The prosecutor tried to shift Britney away from her conversations about sex with Killian, ultimately leading to the admission of the prohibited other-acts evidence:

> [The State]: So so far, we've talked about mostly conversations about sex, right?
>
> [Britney]: Yes.

> [The State]: Did you tell [your mom] something else relating to a private part of your body?
>
> [Britney]: When I told her that one day when we were in bed he was rubbing my back and he rubbed -- he was rubbing my stomach. So he rubbed up and he rubbed on my breasts. And then when he was done, he rubbed on my private spot. It was just a swift rub.

(R. 83:28.)

Defense counsel immediately objected and asked for a mistral because of the violation of the other-acts ruling. (R. 83:28–29.) He said, "[W]hat we all know based on the Complaint and the discovery is that there were references to other acts that did not occur on the same night as the charged offense. . . . I think this was basically clearly a violation of exactly what we discussed." (R. 83:30.) Counsel argued that Killian was "extremely prejudiced because of having no notice at the time of our opening statement." (R. 83:30.)

The prosecutor repeatedly opposed the mistrial, arguing that he "misspoke" and could "redirect [Britney] to define what special spot meant." (R. 83:29.)

The circuit court granted the mistrial because of prejudice to Killian, stating numerous times that its other-acts ruling was "clear." (R. 83:36–37, 46.) However, the court found that "there was not intentional prosecutorial misconduct," stating, "I don't think that what happened here on the stand was the state trying to underhandedly throw this. I think it was an error." (R. 83:44, 46.)

G. The circuit court later dismissed the State's first prosecution with prejudice.

The circuit court changed its mind about prosecutorial misconduct following an evidentiary hearing on Killian's motion to dismiss the case with prejudice. (R. 21.) After hearing testimony from the prosecutor and defense counsel, the court found "that the prosecutor's actions were

intentional" in provoking a mistrial. (R. 21:21.) Specifically, the court concluded that the prosecutor's conduct "was designed to create another chance to convict . . . a chance to prepare more thoroughly and with a better understanding of the issues, a chance to file different motions and obtain more favorable pretrial rulings, and a chance to add more charges" to increase the likelihood of conviction. (R. 21:21.) The court held that "the State is barred from retrial in this matter." (R. 21:21.)

The State didn't appeal the circuit court's decision.

H. The State brought different charges against Killian in 2019, and they were dismissed on double-jeopardy grounds.

In October 2019, the State charged Killian with ten crimes concerning Britney and Ashley. (R. 24:1–4.)

The first nine counts involve three sexual-assault and six incest counts related to Killian's sex crimes against Ashley. (R. 24:1–4.) The three sexual-assault charges (counts one, two, and four) have charging periods that predate the repeated-sexual-assault-of-a-child charge that Killian faced in the first prosecution. (R. 14; 24:1–2.) Two of the six incest charges (counts three and five) also allege timeframes that predate the charge at issue in the first prosecution. (R. 14; 24:2.) The four remaining incest charges (counts six through nine) have overlapping time periods with the repeated-sexual-assault-of-a-child charge from the first prosecution. (R. 14; 24:3–4.)

The tenth charge covers Britney. (R. 24:4.) It alleges repeated sexual assault of the same child. (R. 24:4.) The complaint specifies that Killian "touched [Britney's] breast and pubic mound . . . and pressed his erect penis on and against her body." (R. 24:4.) The charging period allegation is "in or around June 2012, and no later than August 17, 2014." (R. 24:4.) Therefore, this time period overlaps to an extent

with the charge involving Britney from the first prosecution. (R. 14; 24:4.)

Killian moved to dismiss the complaint on double-jeopardy grounds, arguing that Judge Becker's order dismissing the first case with prejudice "prohibits refiling . . . even under a different charging scheme." (R. 52:13.) The State opposed Killian's motion, contending that it was prosecuting Killian for different offenses, which the Double Jeopardy Clause doesn't prohibit. (R. 58:3.)

The circuit court, the Honorable Rian W. Radtke, presiding, granted Killian's motion. (R. 84:12.) The court acknowledged that a "strict comparison" of the old complaints and the new complaint "would pass the [*Blockburger*[7]] test" for determining whether two prosecutions are for the same offense. (R. 84:7–8.) But it said that there was "more to this case" and appeared to interpret Judge Becker's order as barring the State from bringing different charges against Killian. (R. 84:8, 10–12.) Specifically, the court rejected the State's argument that "the scope of Judge Becker's ruling should be limited to the charged offenses only contained in [the first prosecution]." (R. 84:9.) It stated, "It's clear from Judge Becker's order that its scope is meant to encompass future prosecutions involving the same facts alleged in [the first prosecution] where additional charges may be added in future prosecutions." (R. 84:10.) "[E]ssentially," the court said, "the Court here today is affirming and following Judge Becker's order." (R. 84:11.)

The court of appeals affirmed, but not because it believed that Judge Becker had the power to prevent, on double-jeopardy grounds, the State from charging Killian with different offenses. Rather, the court of appeals held that Killian already risked conviction for the State's current

[7] *Blockburger v. United States*, 284 U.S. 299 (1932).

charges—even though they weren't charged in the first prosecution. (Pet-App. 5, 21–29.)

The court of appeals based its holding that Killian already risked conviction for the State's current charge involving Britney on the prosecutor's talking about adding charges to conform to Britney's possible testimony, even though the circuit court said he couldn't add them; his mentioning of conduct other than Killian touching Britney's buttocks during opening statements; and his eliciting testimony about uncharged conduct while questioning Britney, even though that testimony led to the mistrial. (Pet-App. 21–25.)

The court of appeals based its holding that Killian already risked conviction for the State's current charges involving Ashley on the prosecutor's attempting to add a single incest charge before trial, even though the circuit court ruled that he could not add it; his talking about adding the incest charge based on possible testimony, even though the court made clear that he could not add it; and his mentioning of Killian's long-term abuse of Ashley during opening statements, even though that was admissible other-acts evidence in Britney's case. (Pet-App. 25–29.)

The court of appeals stated that this result is "consistent with *Blockburger* and *Schultz*[8], as well as the constitutional protections afforded to all individuals charged with crimes." (Pet-App. 31.)

This Court granted the State's petition for review.

STANDARD OF REVIEW

This Court reviews de novo "whether a subsequent prosecution violates a defendant's right against double

[8] *State v. Schultz*, 2020 WI 24, 390 Wis.2d 570, 939 N.W.2d 519.

jeopardy." *State v. Jacobs*, 186 Wis.2d 219, 223, 519 N.W.2d 746 (Ct. App. 1994).

SUMMARY OF ARGUMENT

This prosecution does not expose Killian to double jeopardy.

The well-established and historically rooted *Blockburger* test is used to decide sameness in situations involving successive prosecutions. The test requires a comparison of the actual charges in the two prosecutions to see if they are identical in law or in fact. In this case, the present charges are factually or legally different from the actual charges in the first prosecution.

The present charge regarding Britney does not expose Killian to double jeopardy. The 2015 charge alleged that Killian sexually assaulted Britney by grabbing her buttocks. 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.

The nine present charges regarding 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.

The court of appeals' application of the double jeopardy bar wasn't really premised on a comparison of the actual charges in the two prosecutions, as *Blockburger* analysis

requires. Instead, the court of appeals applied the bar based on its belief that a defendant can sometimes be in jeopardy for uncharged conduct. This novel application of the Double Jeopardy Clause is legally incorrect. The Double Jeopardy Clause doesn't immunize Killian from prosecution for charges that the State indisputably didn't bring in the first case: Killian must suffer jeopardy before he can suffer double jeopardy, and a defendant isn't in jeopardy for uncharged conduct. Only actual danger of conviction and punishment triggers the Double Jeopardy Clause, so courts shouldn't be allowed to hypothesize and thereby broaden the scope of jeopardy to include uncharged conduct.

Even if jeopardy could ever be based on hypothetical danger of conviction and punishment, the court of appeals' decision is wrong because the chances that Killian would have faced the State's current offenses in the first prosecution were slim to none. If courts are permitted to speculate about the scope of jeopardy absent a mistrial, they should be required to consider the parts of the record that directly bear on the likelihood that charges would have been added at the close of the evidence. Here, those parts of the record make it abundantly clear that Killian wasn't going to face additional charges had this trial completed.

This Court should reverse.

ARGUMENT

This prosecution does not expose Killian to double jeopardy.

A. The Double Jeopardy Clause prohibits a second prosecution for the same offense after conviction, acquittal, or a goaded mistrial.

1. The double jeopardy bar and when it's triggered.

Both the federal and Wisconsin Constitutions protect against double jeopardy. *State v. Schultz*, 2020 WI 24, ¶ 18, 390 Wis.2d 570, 939 N.W.2d 519. This Court "view[s] the United States and Wisconsin Double Jeopardy Clauses as 'identical in scope and purpose.'" *Id.* (citation omitted) Thus, "United States Supreme Court decisions interpreting the Fifth Amendment's Double Jeopardy clause are 'controlling interpretations' of both the federal Constitutional and the Wisconsin Constitution." *Id.* (citation omitted).

"At its root, the Double Jeopardy Clause forbids the duplicative prosecution of a defendant for the 'same offence.'" *United States v. Felix*, 503 U.S. 378, 385 (1992) (citation omitted). It's often said that the "Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.'" *Oregon v. Kennedy*, 456 U.S. 667, 671–72 (1982) (citation omitted). But that doesn't mean that the government must bring all viable charges against a defendant in a single prosecution. It's "entirely free to bring them separately, and can win convictions in both." *United States v. Dixon*, 509 U.S. 688, 705 (1993). Rather, the "valued right" recognized in double jeopardy cases is the ability to insist—when faced with a particular charge—"on having the issue of guilt submitted to the first trier of fact." *United States v. Scott*, 437 U.S. 82, 93, 96 (1978).

The Double Jeopardy Clause includes a "protection against a second prosecution for the same offense after acquittal" and "after conviction." *State v. Steinhardt*, 2017 WI 62, ¶ 13, 375 Wis.2d 712, 896 N.W.2d 700 (citation omitted). Where the first prosecution ends in a *mistrial*, a few different rules come into play. If the defendant opposes the mistrial, double jeopardy bars a second prosecution for the same offense absent a manifest necessity for the mistrial. *Kennedy*, 456 U.S. at 672. But when the defendant requests the mistrial, the general rule is "that the Double Jeopardy Clause is no bar to retrial." *Id.* at 673.

There's a "narrow exception" to the general rule that a defendant can't later claim double jeopardy after winning a mistrial. *Kennedy*, 456 U.S. at 673. And that is where—as here—a court finds that the prosecutor's conduct was "intended to 'goad' the defendant into moving for a mistrial." *Id.* at 676. In that situation, the Fifth Amendment "protects a criminal defendant from multiple successive prosecutions for the same offense." *State v. Lettice*, 221 Wis.2d 69, 88, 585 N.W.2d 171 (Ct. App. 1998) (citation omitted). For this exception to apply, the prosecutor must have intended to abort the trial "to get another 'kick at the cat' because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, *i.e.*, to harass him by successive prosecutions." *State v. Quinn*, 169 Wis.2d 620, 624, 486 N.W.2d 542 (Ct. App. 1992). Unless the prosecutor "is trying to abort the trial, his misconduct will not bar a retrial. . . . The only relevant intent is intent to terminate the trial, not intent to prevail at this trial by impressible means." *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993).

To summarize, 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 (citation omitted).

2. How to determine whether two prosecutions are for the same offense.

"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).

"Offenses 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).

"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.'" *Schultz*, 390 Wis.2d 570, ¶ 22 (citation omitted). "Offenses are also not identical in fact if they are different in nature or separated in time." *Id.* "[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).

For example, 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. Applying the *Blockburger* test for sameness to resolve the defendant's multiplicity challenge, this 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.* ¶¶ 59–60, 73. 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). This Court thus "conclude[d] that the five alleged acts are sufficiently different in fact to demonstrate that Ziegler committed five separate crimes." *Id.*

Though seemingly self-evident, the *Blockburger* test requires a comparison of the actual charges in the two prosecutions. *See Felix*, 503 U.S. at 385 (comparing the "actual crimes charged in each case"); *Dixon*, 509 U.S. at 696 (describing the *Blockburger* test as comparing "the two offenses for which the defendant is . . . tried"); *Grady v. Corbin*, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting) ("This test focuses on the statutory elements of the two crimes with which a defendant has been charged . . . ."), *overruled by Dixon*, 509 U.S. at 704. This exercise allows a court to decide whether the government is making a "repeated attempt[ ] to convict an individual for an *alleged offense*." *Serfass v. United States*, 420 U.S. 377, 388 (1975) (emphasis added).

B. The present charges are factually or legally different from the actual charges in the first prosecution.

Because the circuit court found that the prosecutor intentionally provoked a mistrial when questioning Britney in the first prosecution, the State cannot retry Killian for the same charges. *See Lettice*, 221 Wis.2d at 88. A comparison of

the charged crimes in the two prosecutions reveals that the charges aren't the same.

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

The present charge regarding Britney is repeated sexual assault of a child "in or around June 2012, and no later than August 17, 2014." (R. 24:4.) The allegations are that Killian touched Britney's breast and public mound and pressed his erect penis against her body. (R. 24:4.)

As for the first prosecution, it should be beyond dispute that the actual—not hypothetical—charge that Killian faced was first-degree sexual assault of a child for grabbing Britney's buttocks "between January, 2014 to August 18, 2014." (R. 1:2; 14.) Certainly, that's how Killian understood the charged crime:

- "[T]here's an allegation that the defendant put his hand on the complainant's butt."
- "[H]e's charged with one specific act."
- "[T]he defendant is charged with touching buttocks over clothing in regards to count I."
- "[T]he original charge is . . . August 18, which corresponds perfectly to the discovery where what is alleged is 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."
- "[W]e opened on an allegation of a butt touch that occurred on or around August 18th."[9]

[9] As explained in greater detail in Section C., below, the State's position is that when there's a mistrial, courts should be

(R. 10:3; 73:56, 72; 75:16–18; 82:31.)

And the circuit court unequivocally agreed with Killian's position on the charged offense, saying things like, "The one charged in the Complaint was the butt," or, "[C]learly, the act that's being alleged as the offense is the August 18th butt grab." (R. 82:33, 39.) Over and over, the court ruled that the only assault on trial was the buttocks grab. (R. 73:70–74; 75:21–22; 82:16, 25, 27–28, 48–49.) Indeed, defense counsel later described this as the "clear rule" of the case—"very clear and relatively elementary." (R. 15:10; 74:11, 22, 44.) Further—and this is important—Killian obtained a mistrial precisely because he wasn't on trial for anything other than touching Britney's buttocks. (R. 83:28–30, 46.)

After identifying the actual charges in the two prosecutions, the court compares them to see if they're the same in law or in fact. *See Davison*, 263 Wis.2d 145, ¶ 24 n.11. 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.

Here, as to Britney, although the charging timeframes overlap to an extent, the two charges are different in nature. Notably, on this point, the court of appeals agreed: "The current charge[ ] involving Britney [is] indeed different in nature from the allegation that Killian had touched Britney's buttocks." (Pet-App. 18.)

That conclusion was correct. As in *Ziegler*, the two charges involving Britney are factually different. The present charge alleges that Killian had "touched the breast and pubic

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able to consider the entire record to decide what the *actual charges* were in the first prosecution. *See Schultz*, 390 Wis.2d 570, ¶ 2. However, *Schultz*'s entire-record test shouldn't be used as a tool to hypothesize and thereby broaden the scope of jeopardy to include uncharged conduct, which is what the court of appeals did here.

mound of [Britney], and pressed his erect penis on and against her body." (R. 24:4.) The 2015 charge, by contrast, alleged that Killian "had grabbed her by the 'butt.'" (R. 1:2) 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. Like the defendant in *Ziegler*, who committed factually distinct acts by striking the victim's buttocks and having her touch his penis, 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. *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.

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

The present charges regarding Ashley are three counts of first-degree sexual assault of a child (ranging from 1990 to 1993) and six counts of incest with a child (ranging from 1990 to 1997). (R. 24:1–4.)

The actual—not hypothetical—charge in the first prosecution was repeated sexual assault of a child "on or about April, 1994 through November 30, 1998." (R. 14.) Unlike the charge regarding Britney, there wasn't significant discussion in the first prosecution about the actual charge concerning Ashley. While the complaint detailed Killian's long-term abuse of Ashley, some of which predated the unambiguous charging period allegation (R. 3:2), Killian never appeared to question what he was on trial for. To be sure, the prosecutor told the jury during opening statements that Killian abused Ashley from 1988 through 1999, but that was fair game in *Britney's* case because of an other-acts ruling. (R. 73:61–65.)

The charged crimes in the two prosecutions aren't the same. All nine of the present charges are factually or legally different from the 2016 charge. Again, on this point, the court of appeals agreed. (Pet-App. 26.)

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.) 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. 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).[10] 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).[11] 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 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

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[10] 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.

[11] 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.

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).

C. The court of appeals' novel application of the Double Jeopardy Clause is legally incorrect.

The court of appeals treated the *Blockburger* test as an afterthought because its application of the double jeopardy bar wasn't really premised on a comparison of the actual charges in the two prosecutions, as a typical *Blockburger* analysis would run. Instead, the court of appeals applied the bar based on its belief that a defendant can sometimes be in jeopardy for an uncharged crime. (Pet-App. 21–29.)

Put differently, the court of appeals didn't conclude that the State actually charged the current offenses in the first prosecution, making this an impermissible second attempt "to convict an individual for an alleged offense." *Serfass*, 420 U.S. at 388. This is evident from its heavy reliance on the prosecutor's statements about the possibility of amending the information to add charges to conform to possible trial evidence. (Pet-App. 22–25, 27–29 ("Killian was therefore exposed to the risk that the jury might find him guilty of offenses that had not yet been charged but which the State likely would have later sought to include in an amended Information.").) Plainly, if the State's current charges were on trial in the first prosecution, the prosecutor wouldn't have

needed the court's permission to submit them to the jury for deliberation. The court of appeals therefore necessarily concluded that a defendant can sometimes be in jeopardy for uncharged conduct, and apparently the test is whether it's possible that charges would have been added if there hadn't been a mistrial. (Pet-App. 21–29.)

The court of appeals' decision is unprecedented and legally incorrect.

To begin, this decision is unprecedented. The court of appeals offered no authority for the proposition that a defendant can sometimes be in jeopardy for uncharged conduct. (Pet-App. 14–29.) Nor has Killian ever cited such authority (R. 52; 59), and the State is aware of none. To be sure, the court of appeals used *Schutlz*'s entire-record test as a tool to hypothesize and thereby broaden the scope of jeopardy to include uncharged conduct. (Pet-App. 17–31.) But as discussed below, *Schultz* hardly supports the notion that hypothetical danger triggers the Double Jeopardy Clause—it flatly rejects that concept. *See Schultz*, 390 Wis. 2d 570, ¶¶ 31, 55.

That leads to the second point, which is that the court of appeals' novel application of the Double Jeopardy Clause is legally incorrect. An "accused must suffer jeopardy before he can suffer double jeopardy." *Serfass*, 420 U.S. at 393. "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528 (1975). More specifically, it's "the risk or hazard of trial and conviction." *Price v. Georgia*, 398 U.S. 323, 331 (1970). And risking conviction presupposes the existence of a criminal charge—after all, a "defendant cannot be convicted of a crime for which he is not charged." *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 553, 249 N.W.2d 791 (1977). That's why "[d]ouble-jeopardy analysis focuses on the individual 'offence' charged." *Smith v. Massachusetts*, 543 U.S. 462, 469 n.3

(2005). Putting it all together, "The 'twice put in jeopardy' language of the Constitution . . . relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." *Price*, 398 U.S. at 326.

All this shows that the court of appeals should have confined its analysis to the "actual crimes charged in each case" because a defendant isn't in jeopardy for uncharged conduct. *Felix*, 503 U.S. at 385.

Indeed, in *Felix*, the U.S. Supreme Court rejected a double-jeopardy analysis that "concentrated not on the actual crimes prosecuted in the separate trials, but instead on the type of evidence presented by the Government during the two trials." *Felix*, 503 U.S. at 385. There, the government first prosecuted Felix for drug offenses in Missouri federal court and introduced other-acts evidence of his drug activity in Oklahoma to secure convictions 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.

After comparing the indictments in the two prosecutions to discern the "actual" charges, the U.S. Supreme Court held that the second prosecution didn't violate the Double Jeopardy Clause. *Felix*, 503 U.S. at 384–85. It reasoned that Felix "was not *prosecuted* in the Missouri trial for any offense other than the Missouri attempt offense with which *he was charged*." *Id.* at 386 (emphasis added). That the government introduced other-acts evidence regarding Oklahoma conduct into the Missouri trial didn't change the analysis.[12] *Id.* at 387. The Supreme Court explained "that the introduction of relevant evidence of particular misconduct in

[12] *Felix* dealt with Federal Rule of Evidence 404(b), the federal counterpart to Wis. Stat. § 904.04(2), Wisconsin's rule on other-acts evidence.

a case is not the same thing as prosecution for that conduct." *Id.* It 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 (emphasis added).

The specific takeaway from *Felix* is that a defendant isn't in jeopardy for conduct mentioned in other-acts evidence because that conduct isn't charged. *Felix*, 503 U.S. at 385–87. More broadly, then, *Felix* shows that a defendant isn't in jeopardy for an uncharged offense.

Plenty of other courts have made that common-sense observation. *See, e.g.*, *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)) ("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."); *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").

In response to the above authorities, the court of appeals acknowledged that it "may generally be true" that "a defendant cannot be put in jeopardy for an uncharged offense." (Pet-App. 28.) But using *Schultz* as its guide, it created an exception for cases where the reviewing court

deems it possible that uncharged conduct would have turned into charged conduct absent a mistrial. (Pet-App. 21–29.) Exactly what level of likelihood is unclear, as the court of appeals never even assessed the chances that the circuit court would have allowed an amendment of the information.[13] What's clear, though, is that *Schultz* in no way supports the court of appeals' approach.

Schultz holds that "a court may examine the entire record of the first proceeding, including the evidence admitted at trial, when determining the scope of jeopardy in a prior criminal prosecution." *Schultz*, 390 Wis. 2d 570, ¶ 2. Schultz had wanted a rule that "considers how a reasonable person would construe the indictment at the time jeopardy attaches, without considering later evidence introduced at the previous trial." *Id.* ¶ 23. Under that proposed rule, Schutlz argued that a prosecution for sexual assault "on or about October 19, 2012" violated his double-jeopardy rights because he was previously tried for sexual assault in the "late summer to early fall of 2012." *Id.*

This Court rejected Schultz's argument because it "base[d] jeopardy on the criminal defendant's fears, beliefs, or perceptions regarding his exposure in the first prosecution." *Schultz*, 390 Wis. 2d 570, ¶ 31. After surveying numerous sources, this Court concluded that jeopardy means "the actual danger to which a person is exposed, as opposed to the danger a person fears." *Id.* Because a review of the record of the first prosecution revealed that Schultz was never actually in danger of conviction for the charge in the second prosecution, this Court found no constitutional violation. *Id.* ¶¶ 33–40.

Although *Schultz* and the authorities it discussed didn't deal with prior prosecutions ending in a mistrial, the court of

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[13] The chances were slim to none, as discussed in Section D., below.

appeals assumed that it could consider the entire record in determining the scope of jeopardy in Killian's first prosecution. (Pet-App. 17.) The State agrees that when there's a mistrial, courts should be able to consider the entire record to decide what the *actual charges* were in the first prosecution. This rule will "safeguard the defendant's constitutional right against double jeopardy," *Schultz*, 390 Wis. 2d 570, ¶ 37. For example, if the circuit court here had agreed with the prosecutor's argument at trial that he charged a "course of conduct" in Britney's case (R. 82:15, 32–33), that certainly should be considered in determining the actual scope of jeopardy in the first prosecution.

But *Schultz*'s entire-record rule shouldn't be used as a tool to hypothesize and thereby broaden the scope of jeopardy to include uncharged conduct. Far from being "consistent with *Blockburger* and *Schultz*" (Pet-App. 31), the court of appeals didn't focus on the actual charges or the actual danger that Killian faced in the first prosecution, *see Felix*, 503 U.S. at 385 (comparing the "actual crimes charged in each case"); *Schultz*, 390 Wis. 2d 570, ¶ 31 (jeopardy means "the actual danger to which a person is exposed"). Rather, it engaged in a speculative exercise that based jeopardy on the possibility that Killian would have faced particular charges if there hadn't been a mistrial. (Pet-App. 21–29.) That sounds a lot like basing jeopardy "on the criminal defendant's fears . . . regarding his exposure in the first prosecution," which a court can't do. *Schultz*, 390 Wis. 2d 570, ¶¶ 31, 55. *Schultz* simply doesn't license what the court of appeals did here.

In the end, the court of appeals took an overly expansive view of when the Double Jeopardy Clause applies. Given the finding of prosecutorial misconduct in the first prosecution, the Double Jeopardy Clause prohibits the State from prosecuting Killian for the same charges in a second prosecution. But that's all. The Double Jeopardy Clause doesn't immunize Killian from prosecution for charges that

the State indisputably didn't bring in the first prosecution: an "accused must suffer jeopardy before he can suffer double jeopardy," *Serfass*, 420 U.S. at 393, and a defendant isn't in jeopardy for uncharged conduct, *see Felix*, 503 U.S. at 385–87. It is actual danger of conviction and punishment, not hypothetical danger, that triggers the Double Jeopardy Clause. *Schultz*, 390 Wis. 2d 570, ¶ 31; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) ("The protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy."). The court of appeals failed to apply that test.

D. The court of appeals' decision is wrong even if jeopardy can ever be based on hypothetical danger of conviction and punishment.

Finally, even if this Court were to break new ground and hold that a defendant can sometimes be in jeopardy for uncharged conduct, it should still reverse because the chances that Killian would have faced the State's current offenses in the first prosecution were slim to none.

Presumably, if this Court gets this far in the analysis, it's because it has no problem with courts using *Schultz*'s entire-record test as a tool to speculate about the scope of jeopardy when a first prosecution ends in a mistrial. But if that's the rule, the entire record should mean exactly that—a reviewing court shouldn't be able to disregard aspects of the record that directly bear on the likelihood that charges would have been added absent the mistrial.

That's exactly what happened here. Again, critical to the court of appeals' application of the double jeopardy bar were the prosecutor's statements about the possibility of amending the information to add charges to conform to possible trial evidence. (Pet-App. 22–25, 27–29.) For Britney's case, the court of appeals noted that "the prosecutor had

repeatedly referenced the possibility of amending the Information to add new charges based on Britney's testimony." (Pet-App. 23–25.) For Ashley's case, it flagged that "the prosecutor explicitly told the court that the evidence presented at trial might support later amending the Information to include a count of incest." (Pet-App. 28.) Given such statements, the court of appeals seemingly found it "likely" that the prosecutor would have asked to amend the information to include all the State's current charges. (Pet-App. 22–25, 27–29.)

But—as the court of appeals acknowledged in a footnote—the circuit court could have allowed amendment of the information only in the absence of prejudice to Killian. (Pet-App. 23); Wis. Stat. § 971.29(2). Therefore, aspects of the record that shed light on the chances of *that* happening would be important for purposes of speculating about the scope of jeopardy absent a mistrial. That would mean that the circuit court's staunch refusal to allow last-minute changes to the State's case on account of prejudice to Killian would matter to assessing the chances of amendment—a refusal that included the theoretical addition of charges or the alteration of the criminal theory.

When the prosecutor tried to add a single incest charge in Ashley's case days before trial, the circuit court wouldn't allow it because it was "extremely prejudicial" to Killian. (R. 75:14–15.) And after the prosecutor said that "maybe the proof at the trial" would change the court's mind, the court rejected that proposition in no uncertain terms: "And, again, the state's lack of preparation should not prejudice the defendant. . . . So I'm not going to allow it." (R. 75:15–16.) Although this appears to definitively answer the question whether the court would have added not one *but six* incest charges (three of which predated the actual charge and proposed amendment) had there not been a mistrial in the

first prosecution, it played no role in the court of appeals' analysis. (Pet-App. 27–29.)

Further, the circuit court's refusal to allow the State to add "a transactionally-related charge of incest" in Ashley's case also bears on the likelihood that it would have added the State's current first-degree sexual assault charges absent a mistrial. (R. 12:1; 75:15–16.) Unlike the proposed incest charge (which had the same charging period allegation as the actual charge that Killian faced at trial), the State's current first-degree sexual assault charges all predate the actual charge from the first prosecution. (R. 13; 14; 24:1–2.) If the court found it extremely prejudicial to add a transactionally-related charge to Ashley's case at the last minute, it is hard to imagine that it would have added three charges that predated the actual charge on trial. The court of appeals didn't confront this improbability.[14] (Pet-App. 27–29.)

As to Britney's case, the circuit court steadfastly refused to let Killian be tried for anything other than grabbing her buttocks. On the morning of trial, when Killian expressed concern that the prosecutor was asking to "present evidence of other sexual assault acts and then have the jury consider those," the court responded that it was too late to do that. (R. 75:22 ("[T]here's already been a ruling on that.").) Then, at trial, it repeatedly denied the prosecutor's attempts to add to his criminal theory because of prejudice to Killian. (R. 82:15–48.) The court went so far as to guarantee that it would grant a mistrial due to prejudice if other acts of sexual assault came in. (R. 82:16, 26–28, 31–33, 37, 46, 48.) And true to its word, it declared a mistrial as soon as that happened. (R. 83:46.)

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[14] Further, the prosecutor never even discussed the possibility of amending the information to add first-degree sexual assault charges in Ashley's case. But that didn't factor into the court of appeals' analysis either. (Pet-App. 27–29.)

Given the above record, the chances were slim to none that the circuit court would have allowed the State to charge Killian for touching Britney's breast and pubic mound and for pressing his erect penis against her body. And notably, the court of appeals didn't even reach a contrary conclusion; it asked a different question, focusing on whether it was more than an "unlikely hypothetical" that the prosecutor would have *asked* to amend the information. (Pet-App. 23–24.)

Even under the court of appeals' novel analysis, that question is irrelevant. The circuit court, not the prosecutor, was the decision maker as far as adding charges at the close of the evidence. *See* Wis. Stat. § 971.29(2). The chances that the prosecutor would have asked for something wouldn't be the test. The question is what the court would have done. But in an analysis purportedly aimed at assessing the likelihood that Killian would have faced additional charges absent the mistrial, the court of appeals failed to address the parts of the record that indicate how the circuit court would have handled any request to amend the information. (Pet-App. 21–29.)

If it's true that a defendant can sometimes be in jeopardy for uncharged conduct, surely this isn't the case when considering more than just the prosecutor's statements and actions.

CONCLUSION

This Court should reverse the court of appeals.

Dated this 20th day of February 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 11,000 words.

Dated this 20th day of February 2023.

Electronically signed by:

Kara L. Janson
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of February 2023.

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