No.

IN THE

Supreme Court of the United States

ALEXANDER M. SCHULTZ,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

APPENDIX

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TABLE OF CONTENTS

Page

APPENDIX A

2020 WI 24

SUPREME COURT OF WISCONSIN

CASE NO.:	2017AP1977-CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Respondent, v. Alexander M. Schultz, Defendant-Appellant-Petitioner.

REVIEW OF DECISION OF THE COURT OF APPEALS
Reported at 385 Wis. 2d 494,922 N.W.2d 866
PDC No:2019 WI App 3 - Published

OPINION FILED:	March 4, 2020
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	September 9, 2019
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Lincoln
JUDGE:	Robert R. Russell

JUSTICES:
REBECCA GRASSL BRADLEY, J., delivered the majority opinion of the Court, in which ROGGENSACK, C.J., ZIEGLER, and KELLY, JJ., joined. HAGEDORN, J., filed a dissenting opinion, in which ANN WALSH BRADLEY, and DALLET, JJ., joined.
NOT PARTICIPATING:

ATTORNEYS:

For the defendant-appellant-petitioner, there were briefs filed by *Frederick A. Bechtold*, Taylor Falls, Minnesota. There was an oral argument by *Frederick A. Bechtold*.

For the plaintiff-respondent, there was a brief filed by *Scott E. Rosenow*, assistant attorney general; with whom on the brief was *Joshua L. Kaul*, attorney general. There was an oral argument by *Scott E. Rosenow*.

No. 2017AP1977-CR
(L.C. No. 2014CF68)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Alexander M. Schultz,

Defendant-Appellant-Petitioner.

FILED

Mar 4, 2020

Sheila T. Reiff
Clerk of Supreme Court

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REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 REBECCA GRASSL BRADLEY, J. The State charged Alexander M. Schultz with repeated sexual assault of a child for engaging in sexual intercourse with the fifteen-year-old victim, M.T.,[1] in "late summer to early fall of 2012." A jury acquitted him of this charge. Shortly thereafter, paternity test results revealed Schultz to be the father of M.T.'s child. The State then charged Schultz with sexual assault of a child under 16 years of age

[1] For privacy purposes, we do not refer to the victim in this case by name. See Wis. Stat. § 809.86 (2017-18).

occurring "on or about October 19, 2012," the date M.T.'s obstetrician determined the child was conceived. We review whether the State exposed Schultz to multiple prosecutions for the same offense in violation of the Double Jeopardy Clauses of the United States and Wisconsin Constitutions. Schultz asks us to consider whether a court may ascertain the scope of jeopardy in the first prosecution based upon trial testimony, as well as to determine who bears the burden resulting from any ambiguity in the timeframe of a charging document——the defendant or the State.[2]

¶2 We hold 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. Because the complaint incorporated the police report, which documents a certain end date for the intercourse, and the evidence presented at Schultz's first trial did not encompass the same timeframe of the offense charged in his second prosecution, we conclude that Schultz was not twice in jeopardy for the same criminal offense. Specifically, the State's second prosecution of Schultz for sexual assault of a child under 16 "on or about October 19, 2012," did not include the same timeframe as its first prosecution for repeated sexual assault of a child in the "late summer to early fall of 2012." We affirm the court of appeals.

[2] We interpret Schultz's use of the word "burden" in the petition for review to ask which party should have the responsibility to overcome an ambiguous timeframe in a charging document. Due to our determination on the first question, we need not address the second.

I. BACKGROUND

A. Schultz's First Prosecution

¶3 In December 2012, Merrill Police Officer Matthew Waid interviewed then-fifteen-year-old M.T. after learning she was pregnant. Waid learned that M.T. had sexual intercourse with a male named "Dominic" in early to mid-October. M.T. also informed Waid that she had sexual intercourse with Schultz "approximately one month before she had sexual intercourse with Dominic." M.T. confirmed that "she had her period between the time she had sexual intercourse with Alex" and when she had intercourse with Dominic in early to mid-October. When questioned by Waid, Schultz denied having a sexual relationship with M.T.

¶4 In January 2013, Officer Waid conducted two follow-up interviews with M.T. about her sexual relationship with Schultz. In the first, M.T. claimed she and Schultz had sexual intercourse more than five times, beginning in the middle of 2012 and lasting for a few months. Schultz was either 19 or 20 years old when the intercourse began. In the second, M.T. showed Waid Facebook messages between her and Schultz on September 3, 2012. In these messages, Schultz was angry and dismissive of M.T. because he believed that she was telling other people things that "can put me in prison." Based upon these messages, the interviews with M.T., and interviews with multiple witnesses who suggested knowledge of a sexual relationship between Schultz and M.T., Waid recommended charges against Schultz.

¶5 In April 2013, the State filed charges against Schultz in Lincoln County Circuit Court[3] for repeated sexual assault of a child, a Class C felony.[4] The complaint listed the timeframe for the assaults as "late summer to early fall of 2012." Because Schultz was a repeat criminal offender with three prior convictions, the State also charged him with a penalty enhancer pursuant to Wis. Stat. § 939.62(1)(c)(2017-18).[5] The complaint "incorporated by reference" the entirety of Officer Waid's police report and attached his report to the complaint. The subsequent Information also listed "late summer to early fall of 2012" as the timeframe for the crime. During a pre-trial hearing, the parties agreed M.T.'s pregnancy was not pertinent to Schultz's trial because Dominic was presumed to be the child's father.[6]

[3] The Honorable Jay R. Tlusty presided.

[4] See Wis. Stat. § 948.025(1)(e). For the jury to convict under § 948.025(1)(e), it must find the defendant engaged in three separate sexual assaults, in violation of Wis. Stat. § 948.02(1) or (2), during the charged timeframe.

[5] All subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise indicated.

[6] Before trial, Schultz's counsel moved to introduce evidence of M.T.'s pregnancy as well as her claim that Dominic was the father, because he assumed M.T.'s pregnancy "was going to be part of this case" and "part of the context of the case." In response to that motion, the State moved for a continuance in order to prepare its response. Both M.T. and her mother supported the State's request for a continuance and expressed a desire to wait for the paternity test results. The State regarded the results as irrelevant, anticipating they would confirm Dominic to be the father. While Schultz indicated he wanted to see the test results, he also wanted to proceed with the trial and withdrew his motion. Both parties agreed to proceed with the trial as scheduled. The paternity test results were not available until after the first trial and therefore do not inform the determination of the scope

¶6 Schultz's trial took place on January 21-22, 2014. During his opening statement, the prosecutor indicated the sexual relationship between Schultz and M.T. began in the "late summer of 2012." Consistent with the prosecutor's timeframe, M.T. testified she had sexual intercourse with Schultz starting around July or between July and August, and that she and Schultz broke up around the beginning of September 2012. On direct examination, M.T. confirmed she had sexual intercourse with Schultz in the month or so leading up to the beginning of October 2012. On cross-examination, she relayed the same information she initially told Officer Waid: she had sexual intercourse with Schultz approximately one month before she had intercourse with Dominic, the latter of which took place in early to mid-October. Later in her testimony, M.T. claimed she told a friend about her sexual relationship with Schultz, and that this conversation occurred "closer to October," after she had stopped seeing Schultz.

¶7 During his testimony, Officer Waid confirmed that in the course of his initial investigation, M.T. told him she had sexual intercourse with Schultz in the month or so prior to early October 2012. He also read Facebook messages between M.T. and Schultz from September 3, 2012. These messages confirmed M.T.'s testimony regarding the relationship with Schultz ending by early September. In the messages, Schultz stated "[U]r dead to me now" and "[I] was gonna try to get back with you[.]" While not explicitly mentioning a sexual relationship, Schultz accused M.T. of breaking a promise

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of jeopardy in the first trial.

to him and telling people things that could send him to prison. M.T. responded that she "didnt tell anyone."

¶8 No evidence at trial indicated M.T. and Schultz had sexual intercourse in October 2012. One of Schultz's own witnesses, A.O., testified that she and Schultz were in a romantic relationship between September 2012 and the spring of 2013.

¶9 While instructing the jury, the circuit court reiterated that the timeframe alleged for the assaults was "late summer to early fall of 2012." In closing argument, the State argued the intercourse between Schultz and M.T. ended in September. In summarizing M.T.'s testimony regarding sexual intercourse with Schultz, the State specifically mentioned that M.T. indicated intercourse occurred in the month before October 2012; the assaults started in July and ended in September 2012; and the assaults happened during "September, August, and July." After deliberations, the jury acquitted Schultz of "repeated acts of sexual assault of a child as charged in the information," which had charged Schultz with this crime during the timeframe of "late summer to early fall of 2012."[7]

[7] The dissent claims the court's recitation of the evidence "is not a fair picture." Dissent, ¶80. It is the dissent that relies on a slanted summary of the proceedings, ignoring dispositive facts in the record. In presenting its gloss on this case, the dissent disregards any portions of the record that counter its analysis, including:

- the police report summarizing Officer Waid's investigation, which was attached to and incorporated in the initial indictment;

B. Schultz's Second Prosecution

¶10 Five days after Schultz's acquittal, Officer Waid learned from Lincoln County Victim Services that M.T. had received her paternity test results. These results indicated a 99.99998 percent certainty that Schultz, not Dominic, was the father of M.T.'s baby. Although incarcerated at the time, Schultz participated in a phone interview with Waid about the statements

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- M.T.'s statements to Officer Waid regarding the timeline of the sexual activity with Schultz and Dominic;
- the Facebook messages exchanged between M.T. and Schultz, shedding light on the nature and timeframe of their relationship;
- the withdrawal of Schultz's request for an adjournment pending receipt of the paternity test results, based on the State's representation that M.T.'s pregnancy would not be mentioned at trial, and never was;
- Schultz's pretrial admission, in a motion to dismiss the first charge for selective prosecution, that "the complainant had sexual intercourse with at least one other adult during the time period involved" and "the other adult has admitted to sexual intercourse and has been determined to be the father of the complainant's child[]"; and
- the State's acknowledgment that "Dominic [] [has been] imputed the father of the victim's child, that's been in the reports for months as well."

The dissent can conclude the record is "unclear when the alleged sexual activity . . . stopped" only because it closes its eyes to this evidence. The dissent mistakenly asserts that the State went to trial knowing Schultz could be the father of M.T.'s child. Dissent, ¶80. In fact, M.T. told law enforcement that "she had her period between the time she had sexual intercourse with Alex" and when she had intercourse with Dominic in early to mid-October, rendering it unreasonable to suggest the State knew Schultz could be the father. Finally, the dissent points to nothing in the record to support its assertion that "late summer to early fall 2012" included "on or about October 19, 2012."

from his previous trial and his relationship with M.T. Schultz continued to deny having sexual intercourse with M.T. at any point during 2012. After receiving authorization from M.T. and her mother, Waid contacted M.T.'s obstetrician to obtain information regarding the date of conception. M.T.'s obstetrician informed Waid that the conception date for the baby was October 19, 2012.

¶11 In March 2014, the State filed charges against Schultz in Lincoln County Circuit Court.[8] Count 3 charged Schultz with sexual assault of a child under 16 years of age, a Class C felony, "on or about October 19, 2012."[9] The State again charged Schultz with a penalty enhancer for being a repeat criminal offender, pursuant to Wis. Stat. § 939.62(1)(c). The complaint incorporated Officer Waid's police report detailing his investigation, which was attached to the complaint.

¶12 Schultz moved to dismiss Count 3, arguing it violated his constitutional protections against double jeopardy. Because "fall" started on September 22, 2012, and October 19, 2012 fell within the first thirty days after the September equinox, Schultz argued the date alleged for his second sexual assault charge——"on or about October 19, 2012"——fell within the timeframe alleged for his first charge, which included "early fall." The circuit court denied Schultz's motion because it found no evidence of any assault

[8] The Honorable Robert R. Russell presided.

[9] See Wis. Stat. § 948.02(2). The complaint included two other counts: Count 1 charged Schultz with perjury in violation of Wis. Stat. § 946.31(1)(a); Count 2 charged Schultz with obstructing an officer in violation of Wis. Stat. § 946.41(1).

in October in the first prosecution for repeated sexual assault of a child. The circuit court found, based on the testimony adduced in the first trial, that "late summer to early fall of 2012" meant July, August, and September 2012, but not October 19, 2012.

¶13 Schultz thereafter pled guilty to Counts 1 and 3—— perjury and sexual assault of a child under 16 years of age, respectively. The circuit court sentenced Schultz to two years of initial confinement plus two years of extended supervision for perjury, and five years of initial confinement plus five years of extended supervision for the sexual assault against M.T, both sentences to run concurrently.

¶14 Schultz moved for postconviction relief, again raising the double jeopardy argument he set forth in his motion to dismiss. Having concluded the defendant presented no new evidence for his argument, the circuit court denied the motion. Schultz appealed.

¶15 The court of appeals rejected Schultz's assertion that his second prosecution violated the constitutional proscription of double jeopardy and affirmed the circuit court. See State v. Schultz, 2019 WI App 3, ¶3, 385 Wis. 2d 494, 922 N.W.2d 866. The court of appeals held that the test to determine the scope of jeopardy in the face of an ambiguous charging document is how a reasonable person would understand the charging language, based on the evidence introduced at trial and the entire record of the proceeding. Id., ¶30. The court of appeals agreed with the circuit court's analysis of the evidence presented at Schultz's first trial: the sexual assaults were alleged to have occurred only in July, August, and September 2012, but not October. Id.,

¶¶33–34. Schultz filed a petition for review, which this court granted.

II. STANDARD OF REVIEW

¶16 Whether a defendant's convictions violate the Double Jeopardy Clauses of the Fifth Amendment and Article I, Section 8 of the Wisconsin Constitution, are questions of law appellate courts review de novo. State v. Steinhardt, 2017 WI 62, ¶11, 375 Wis. 2d 712, 896 N.W.2d 700 (citation omitted); see also State v. Sauceda, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992) (citation omitted).

¶17 As part of our analysis, we interpret Wis. Stat. § 971.29. Statutory interpretation is a "question[] of law that this court reviews de novo while benefitting from the analyses of the court of appeals and circuit court." State v. Ziegler, 2012 WI 73, ¶37, 342 Wis. 2d 256, 816 N.W.2d 238 (citation omitted).

III. ANALYSIS

A. Double Jeopardy Overview

¶18 The Fifth Amendment provides, in relevant part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The Wisconsin Constitution likewise provides protection against double jeopardy, stating "no person for the same offense may be put twice in jeopardy of punishment[.]" Wis. Const. art. I, § 8, cl. 1. We view the United States and Wisconsin Double Jeopardy Clauses as "identical in scope and purpose." State v. Davison, 2003 WI 89, ¶18, 263 Wis. 2d 145, 666 N.W.2d 1 (citation omitted). Accordingly, United States Supreme Court decisions interpreting

the Fifth Amendment's Double Jeopardy Clause are "controlling interpretations" of both the federal Constitution and the Wisconsin Constitution. Id. (citations omitted).

¶19 In order to apply the original meaning of the Double Jeopardy Clause, we interpret this provision "through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect." Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 435 (2012). Unlike other constitutional protections, the right to be free from double jeopardy does not have identifiable roots in a specific legal system or a particular point in time. Whereas the writ of habeas corpus traces its origin to English common law,[10] and the Eighth Amendment's ban on cruel and unusual punishment derives directly from the English Bill of Rights,[11] the protection against double jeopardy enshrined in the Constitution represents the amalgamation of legal principles applied throughout documented history. See David S. Rudstein, A Brief History of the Fifth Amendment Guarantee against Double Jeopardy, 14 Wm. & Mary Bill Rts. J. 193, 196-202 (2005) (stating "[t]he precise origins of the guarantee against

[10] See State ex rel. Fuentes v. Court of Appeals, 225 Wis. 2d 446, 450, 593 N.W.2d 48 (1999) (stating that habeas relief comes from the common law).

[11] See Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (Scalia, J., joined by Rehnquist, C.J.) (noting in discussion of the "cruel and unusual punishment" provision of the Eighth Amendment, "[t]here is no doubt that the [English] Declaration of Rights is the antecedent of our constitutional text.").

double jeopardy are unclear[,]" before discussing the legal systems upholding the doctrine). The guarantee against double jeopardy existed in the English common law, as evidenced by William Blackstone's characterization of it as a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, Commentaries on the Laws of England 335 (1790). Even before Blackstone's recognition of the right as a "universal maxim," the English common law included the protection through the pleas of "autrefoits acquit (a former acquittal), autrefoits convict (a former conviction), and pardon." Rudstein, 14 Wm. & Mary Bill Rts. J. at 204 (footnote omitted).

¶20 Precursors to the principle against subjecting people to punishment multiple times for the same wrongful act predate the common law and are found in ancient civilizations. See, e.g., Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times." (footnote omitted)); see also David S. Rudstein, Double Jeopardy: A Reference Guide to the United States Constitution 2-11 (2004) (tracing double jeopardy principles from the Ancient Greeks in 355 B.C.E. through Roman and canon law to the English common law, and ultimately the Fifth Amendment). In the lengthy history underlying this principle, one idea has remained constant: a subsequent prosecution must be for the "same offense" in order to violate the right to be free from double jeopardy. Rudstein,

Double Jeopardy at 2–15 ("same issue," "same offense," "same charge" in Ancient Greece; "same offense," or "one offense" in Roman law; "same thing," "same matter," or "same crime" in canon law; "same offense," "same crime," or "same identical crime" in the English common law; "one and the same crime, offence, or trespasse" in the Massachusetts Bay Colony, "same crime or offence" in the first state constitution with double jeopardy protection; "same offence" in the Fifth Amendment; "same offense" in the Wisconsin Constitution). In accord with the original meaning of the Double Jeopardy Clause, in Wisconsin, "'[t]he same offense' is the sine qua non of double jeopardy." Davison, 263 Wis. 2d 145, ¶33 (citations omitted).

¶21 The Supreme Court identified three constitutional protections provided by the Double Jeopardy Clause: (1) "against a second prosecution for the same offense after acquittal[,]" (2) "against a second prosecution for the same offense after conviction[,]" and (3) "against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989). This case involves the first of these protections.

¶22 Over 40 years ago, we held that two 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. Van Meter, 72 Wis. 2d 754, 758, 242 N.W.2d 206 (1976) (citation omitted). Offenses are not identical in law if each requires proof of an element that the other does not. See Blockburger v. United States, 284 U.S. 299,

304 (1932) (citation omitted). 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." State v. Lechner, 217 Wis. 2d 392, 414, 576 N.W.2d 912 (1998) (citing Sauceda, 168 Wis. 2d at 493-94 n.8; Van Meter, 72 Wis. 2d at 758). Offenses are also not identical in fact if they are different in nature or separated in time. State v. Anderson, 219 Wis. 2d 739, 749, 580 N.W.2d 329 (1998) (citation omitted); see also State v. Stevens, 123 Wis. 2d 303, 323, 367 N.W.2d 788 (1985) (holding offenses were not the same in fact because they were separated by a significant period in time).

B. The Dispute

¶23 The parties agree that the offenses in Schultz's first and second prosecutions, repeated sexual assault of a child and sexual assault of a child under 16, are identical in law. The parties disagree as to whether the offenses are identical in fact. Schultz argues that both offenses are identical in fact because the timeframe for the offenses charged in the first prosecution, "late summer to early fall of 2012" encompasses the date for the offense charged in the second prosecution, "on or about October 19, 2012." Schultz contends the charging language is unambiguous and the proper inquiry considers how a reasonable person would construe the indictment at the time jeopardy attaches, without considering later evidence introduced at the previous trial.[12]

[12] For a jury trial, jeopardy attaches when the jury is sworn. See Wis. Stat. § 972.07(2). Under Schultz's proposed test, the circuit court would determine how a reasonable person would construe "late summer to early fall of 2012" at the time the jury

Schultz also asserts that even if the charging document is ambiguous, the State bears the burden of the ambiguity as the drafter of the document. In contrast, the State argues that when faced with ambiguous language in a charging document, courts must examine the entire record of the proceeding to clarify the scope of jeopardy.

C. Determining the Scope of Jeopardy

¶24 Whether courts may consider the record to determine the scope of jeopardy is a question of first impression in Wisconsin. In his reply brief, Schultz argued that the record's relevance is limited to considering only "how a reasonable person would have understood the scope of jeopardy 'at the time jeopardy attached in the first case.'" (quoting United States v. Olmeda, 461 F.3d 271, 282 (2d Cir. 2006)).[13] At oral argument, Schultz again conceded

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was sworn.

[13] The dissent suggests the point at which jeopardy attaches delimits the scope of jeopardy. Dissent, ¶87. This is fundamentally wrong. The time at which jeopardy attaches does not lock in the scope of jeopardy. Jeopardy attaches when the jury is sworn in order to prevent the State from conducting a full trial but then dismissing the charges before judgment only to refile the charges and retry the defendant until it is confident the jury will convict. The attachment of jeopardy when the jury is sworn protects the "valued right" of the defendant "to have his trial completed by a particular tribunal." Arizona v. Washington, 434 U.S. 497, 503 (1978) (quoted sources omitted); State v. Seefeldt, 2003 WI 47, ¶16, 261 Wis. 2d 383, 661 N.W.2d 822 (quoted sources omitted). The rationale for this rule is well-established:

> The protection against double jeopardy limits the ability of the State to request that a trial be terminated and restarted. This protection is important because the unrestricted ability of the State to terminate and restart a trial increases the financial and emotional burden on the defendant, extends the

that the record is relevant, but only to understand the minds of the parties at the time jeopardy attaches:

> The court: But counsel, isn't that . . . why we look at the rest of the record, to try to figure out what does "early fall" mean?
>
> Schultz's counsel: When . . . we look at the record, we're not looking at the record to determine whether evidence was submitted to show that there was sex in the month of October, what we're looking at is evidence of what was the common understanding of the parties as to what the timeframe was.
>
> The court: [Y]ou mentioned that we should apply the test described in Olmeda,[14]. . . it says, a court must further determine that such a conclusion would be reached by an objective arbiter. That determination will require examination of the plain language of the

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> period during which the defendant is stigmatized by an unresolved accusation of wrongdoing and may increase the risk that an innocent defendant may be convicted.

Seefeldt, 261 Wis. 2d 383, ¶17 (citation omitted). The United States Supreme Court similarly expressed the reasoning underlying this rule:

> [A] second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Washington, 434 U.S. at 503-05 (internal footnotes omitted). The point at which jeopardy attaches has nothing to say about the actual scope of jeopardy.

[14] United States v. Olmeda, 461 F.3d 271, 275 (2d Cir. 2006).

> indictments in the two prosecutions, as well as the entire record of the proceedings.
>
> Schultz's counsel: And I agree with that. . . . I do acknowledge that the entire record is relevant but only relevant to the understanding at the time of jeopardy . . . .

¶25 As Schultz conceded, the entire record of the proceedings may be relevant in determining the scope of jeopardy. Contrary to Schultz's argument, however, no binding authority limits courts to using the record only to determine the subjective understanding of the parties in the first criminal proceeding at the time jeopardy attaches. Instead, substantial authority indicates courts may review the entire record of the first proceeding to determine the scope of jeopardy.

¶26 In Van Meter, we decided there was no double jeopardy violation when, after a jury trial, the trial court convicted Van Meter of knowingly fleeing a police officer in Wood County, after he was previously convicted of knowingly fleeing a police officer in Portage County, with both charges arising from the same high speed chase across county lines, in violation of the same statute. Van Meter, 72 Wis. 2d at 755–59. The defendant argued the Double Jeopardy Clause barred the second prosecution. Id. at 757. Acknowledging the "identity of legal elements" based on both prosecutions charging violations of the same statute, this court concluded that the requisite "identity in fact[] cannot be shown" because "eluding Wood county officers in Wood county" is not the same offense as "eluding Portage county officers in Portage county." Id. at 757-58. We held a double jeopardy violation exists when "facts alleged under either of the indictments would,

if proved under the other, warrant a conviction under the latter[.]" Id. (quoting State v. George, 69 Wis. 2d 92, 98, 230 N.W.2d 253 (1975)). Applying that test, which was originally adopted in Anderson v. State, 221 Wis. 78, 87, 256 N.W. 210 (1936), this court determined "that defendant has not been put twice in jeopardy for the same offense because proof of facts for conviction for the Wood county offense would not have sustained conviction for the Portage county offense[.]" Van Meter, 72 Wis. 2d at 759. We explicitly "emphasize[d] the importance of having all of the facts in the record" to determine whether one fact alleged under an indictment would warrant a conviction under the latter. Id. at 758. Nonetheless, because the defendant did not order any trial transcripts for the appeal, this court's review was "limited to whether the pleadings, decision, findings and conclusions sustain the judgment." Id. at 756, 758 (citations omitted). Accordingly, we assumed the evidence was sufficient to support the verdict in the Wood County conviction and we relied on the facts from the Portage County Circuit Court's decision affirming Van Meter's Portage County conviction. Id. at 758–59. Van Meter establishes the relevance of the record in determining whether a double jeopardy violation occurred.

¶27 All of the federal circuit courts of appeal that have addressed this issue have also examined the record, including evidentiary facts, in determining the scope of jeopardy. For example, in United States v. Walsh, 194 F.3d 37 (2d Cir. 1999), abrogated on other grounds by Kingsley v. Henrickson, 135 S. Ct. 2466 (2015), an indictment charged a corrections officer three

times for violating the Eighth Amendment by causing "unnecessary and wanton pain" to an inmate. Walsh, 194 F.3d at 40–41. The three counts alleged conduct occurring between January 4, 1991 and March 8, 1991 (Count 1); between May 26, 1992 and December 1, 1992 (Count 2); and between May 26, 1992 and July 22, 1992 (Count 3). Id. Walsh challenged the timeframes for exposing him to double jeopardy, because each count alleged the same conduct and the timeframes overlapped. Id. at 41. The Second Circuit Court of Appeals rejected his argument that the charges violated the prohibition of double jeopardy because the "evidence presented at trial" conclusively demonstrated Counts 2 and 3 were not the same and the conduct alleged in Count 3 occurred after June 5, 1992. Id. at 46. Even though the indictment charged an offense occurring between May 26th and July 22nd and it therefore appeared that the State was charging Walsh for the same criminal act during the same timeframe, the evidence admitted at trial established a break in time between the conduct charged in each count. Id.

¶28 In United States v. Castro, 776 F.2d 1118 (3d Cir. 1985), multiple defendants were charged with and convicted of conspiracy to possess with intent to distribute more than 1,000 pounds of marijuana, among other offenses, based upon attempted drug transactions in Pennsylvania, Texas, and Florida. Id. at 1120. The appellate court acknowledged a variance between the indictment and the evidence produced at trial, with the jury finding a conspiracy and attempt to purchase marijuana in Pennsylvania only. Id. at 1123. On appeal, Castro contended this variance would expose him to prosecution in Texas for the same crime. Id. The

appellate court disagreed, noting that "[t]he scope of the double jeopardy bar is determined by the conviction and the entire record supporting the conviction." Id. (citation omitted). The appellate court concluded "[t]he record shows clearly that the jury found that Castro conspired to possess the Bristol[, Pennsylvania] marijuana, and that the evidence supporting his conviction could not be sufficient to warrant a conviction based upon . . . transactions outside Pennsylvania." Id. at 1124.

¶29 While the Castro court framed the analysis in terms of the "record supporting the conviction," courts also examine the record in cases involving an acquittal, like Schultz's, in order to determine the scope of jeopardy. For example, in United States v. Crumpler, 636 F. Supp. 396 (N.D. Ind. 1986), the defendant was charged with multiple drug offenses in Florida, of which he was acquitted. Id. at 397-98. He was subsequently charged with multiple drug offenses in Indiana, in response to which he filed a motion to dismiss on double jeopardy grounds. Id. at 398. The Crumpler court resolved the motion "based solely on the record before it which includes all pleadings, affidavits, and the evidence adduced during that evidentiary hearing[]" on the motion to dismiss. Id. at 399. Regardless of whether the first prosecution resulted in an acquittal or a conviction, "[a] defendant claiming that he has been subjected to double jeopardy bears the burden of establishing that both prosecutions are for the same offense . . . . The defendant must show that 'the evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on the other'

indictment." Id. at 403 (citing United States v. Roman, 728 F.2d 846 (7th Cir. 1984); United States v. West, 670 F.2d 675, 681 (7th Cir. 1982); United States v. Buonomo, 441 F.2d 922, 925 (7th Cir. 1971)). In Crumpler, the defendant argued that all of his drug smuggling activities were part of one scheme, so the court examined the timeframes alleged in each indictment as part of its double jeopardy analysis. Id. at 399, 404-05. In doing so, that court considered both "the face of the indictments" as well as "the evidence presented during the hearing" and found nothing in the record to establish any "overlap in the time periods charged in the indictment here and the one in Tampa." Id. at 405.

¶30 The other circuits are in accord with Walsh and Castro. See United States v. Stefanidakis, 678 F.3d 96, 100-01 (1st Cir. 2012) (in reviewing a double jeopardy challenge, courts must see if the record "contains facts sufficient to supply a rational basis for a finding that [the prosecutions] were predicated on different conduct." (citations omitted)); United States v. Bonilla, 579 F.3d 1233, 1241-44 (11th Cir. 2009) (court reviews the record to determine whether convictions violated double jeopardy); United States v. Hamilton, 992 F.2d 1126, 1130 (10th Cir. 1993) ("[F]or purposes of barring a future prosecution, it is the judgment and not the indictment alone which acts as a bar, and the entire record may be considered in evaluating a subsequent claim of double jeopardy." (citation omitted)); United States v. Vasquez-Rodriquez, 978 F.2d 867, 870-72 (5th Cir. 1992) (holding the two prosecutions were not for the same offense after reviewing the evidence admitted at trial after noting that "acts as described in

the indictment will be examined as well as the acts admitted into evidence at the trials or hearings." (citations omitted)); United States v. Pollen, 978 F.2d 78, 84, 86-87 (3d Cir. 1992) ("[E]xamin[ing] the record to determine if [separate counts were] impermissibly multiplicitous[]" under the Double Jeopardy Clause); United States v. Am. Waste Fibers Co., 809 F.2d 1044, 1047 (4th Cir. 1987) ("When a Double Jeopardy bar is claimed, the court must examine not just the indictment from the prior proceeding but the entire record." (citation omitted)); Roman, 728 F.2d 846, 853-54 (7th Cir. 1984) ("It is the record as a whole, therefore, which provides the subsequent protection from double jeopardy, rather than just the indictment[.]"); United States v. Levine, 457 F.2d 1186, 1189 (10th Cir. 1972) ("The entire record of the proceedings may be referred to in the event of a subsequent similar prosecution. In the case at bar the record contains adequate detail to protect against double jeopardy." (internal citation omitted)). See also 1 Charles Alan Wright, Federal Practice & Procedure § 125 (4th ed. 2019) ("If a defendant claims prior jeopardy in defense to a pending charge, the court is free to review the entire record of the first proceeding, not just the pleading." (footnote omitted)).

¶31 In addition to precedent from the federal courts, historical sources support examining the defendant's actual exposure to jeopardy in a prior prosecution. "The guarantee against double jeopardy became firmly entrenched in the [English] common law in the form of the pleas of autrefois acquit (a former acquittal), autrefoits convict (a former conviction), and pardon."

Rudstein, 14 Wm. & Mary Bill Rts. J. at 204 (footnote omitted). If the defendant had already been acquitted, convicted, or pardoned of the offense, he could advance the appropriate plea, backed by the facts underlying the first case. The availability of these common law pleas in defense of a second prosecution confirms the historical basis for examining the record of the first prosecution to determine the scope of jeopardy. Each of these pleas focused on the actual result of the initial prosecution. A founding era dictionary reinforces the meaning of "jeopardy" as the actual danger to which a person is exposed, as opposed to the danger a person fears, defining "jeopardy" as "[h]azard; danger; peril." 1 Thomas Sheridan, A General Dictionary of the English Language (1780). Near the time the Wisconsin Constitution was adopted, Webster's Dictionary similarly defined "jeopardy" as "[e]xposure to death, loss or injury; hazard; danger; peril." Jeopardy, Webster's Dictionary (1st ed. 1828); see also John Boag, Popular and Complete English Dictionary 749 (1848) (defining "jeopardy" with verbatim language). Similarly, the current edition of Black's Law Dictionary defines "jeopardy" as the exposure a defendant actually "faces at trial." Jeopardy, Black's Law Dictionary (11th ed. 2019) ("The risk of conviction and punishment that a criminal defendant faces at trial." (emphasis added)). None of these definitions bases jeopardy on the criminal defendant's fears, beliefs, or perceptions regarding his exposure in the first prosecution, as Schultz proposes.

¶32 In light of the common law interpretations of jeopardy, as well as its historical meaning, we apply Van Meter's holding

and join the federal circuit courts of appeal in examining the entire record, including evidentiary facts adduced at trial, in ascertaining whether a defendant's double jeopardy rights have been violated by a second prosecution. Regardless of whether the first prosecution results in an acquittal or a conviction, it is the record in its entirety that reveals the scope of jeopardy and protects a defendant against a subsequent prosecution for the same crime. See Roman, 728 F.2d at 854 ("It is the record as a whole, therefore, which provides the subsequent protection from double jeopardy, rather than just the indictment[.]"); Wright, supra ¶30 ("If a defendant claims prior jeopardy in defense to a pending charge, the court is free to review the entire record of the first proceeding, not just the pleading." (footnote omitted)).

D. The Record of Schultz's Case

¶33 In this case, we apply the test originally adopted in Anderson v. State and reaffirmed in George and Van Meter, and examine the entire record of Schultz's first prosecution for repeated sexual assault of a child to determine whether the "facts alleged under either of the indictments would, if proved under the other, warrant a conviction under the latter."[15] Van Meter, 72

[15] The dissent cites the test from State v. Anderson, 219 Wis. 2d 739, 749, 580 N.W.2d 329 (1998) but fails to apply it correctly. In conclusory fashion, the dissent simply declares that "evidence of an act of sexual assault on or around October 19 would have supported a conviction for repeated sexual assault occurring in the 'late summer to early fall[,]'" but never explains why. See dissent, ¶74. The dissent merely repeats its conclusory assertions regarding the charging language, without analysis. See dissent, ¶¶86, 90 ("evidence of an October 19 sexual assault would support a conviction" during "a timeframe including 'early fall.'"). Tellingly, the dissent ignores a critical portion of

Wis. 2d at 758; George, 69 Wis. 2d at 98; Anderson, 221 Wis. at 87 (quoted source omitted). Specifically, we determine whether the initial charge for repeated sexual assault of a child during the timeframe of "late summer to early fall of 2012" includes the date charged in the second prosecution for sexual assault of a child "on or about October 19, 2012."

1. An Unambiguous Complaint

¶34 We begin our analysis with the complaint charging Schultz in the initial prosecution. The complaint's language of "early fall," viewed alone, does not answer the question because "early fall"——standing alone——could be ambiguous.[16] However, the complaint in this case expressly incorporates by reference the attached police report of Officer Waid, which contains some detail elucidating the meaning of "early fall." The police report plainly establishes the timeframe in which Schultz was subject to jeopardy for repeated sexual assault of a child. The report identifies

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the charging document in the first prosecution——the attached and incorporated-by-reference police report——which defines the time period for the alleged assaults, thereby lending temporal specificity to what could otherwise be an ambiguous charge.

[16] We reject Schultz's argument that fall and early fall have definitive meanings based on the earth's position in relation to the sun. Dictionaries and people define the seasons differently. See, e.g., Fall, Oxford Dictionary (6th ed. 2007) (defining fall as "the time of year when leaves fall from trees; autumn" and using the following example: "In early fall, towards the end of August, they gathered berries." (emphasis added)); Autumn, Oxford Dictionary (6th ed. 2007) ("The third season of the year, between summer and winter: in the northern hemisphere freq[uently] regarded as comprising September, October, and November," before moving to the astronomical definition Schultz advances).

Dominic——not Schultz——as the person who had intercourse with M.T. in "early to mid-October." Waid's report described M.T. as having intercourse with Schultz "approximately one month before she had sexual intercourse with Dominic." One month before early to mid-October is early to mid-September. The report details M.T. having had no "sexual intercourse with anyone between Dominic and [December 4, 2012]." The police report attached to the complaint also recounted another interview during which M.T. said she had sexual intercourse with Schultz "over five times," starting in "the middle of the year of 2012" and lasting for "a couple of months." When asked at oral argument what statements in the police report indicated intercourse with Schultz during the month of October, Schultz's counsel was unable to identify any. Counsel responded, "Well, I don't have a specific quote, but . . . she claims there are multiple incidents of sexual abuse."

¶35 Nothing in the police report mentions or even suggests sexual intercourse between Schultz and M.T. during October. The attached police report unambiguously identifies the latest date of intercourse for which Schultz was charged in the first prosecution. If, as the report indicates, M.T.'s sexual intercourse with Schultz occurred one month before her sexual intercourse with Dominic in early to mid-October, and she had no sexual intercourse between her intercourse with Dominic and December 4, 2012, then the State's charging language of "early fall" means the intercourse for which Schultz was charged concluded in early to mid-September, well before October 19, 2012. Coupled with the fact that the police report indicates M.T. had her period in between the sexual activity

with Schultz in mid-September and the sexual activity with Dominic in early to mid-October, the police report attached to the complaint repudiates any suggestion that "early fall" in the first prosecution encompassed October 19.

¶36 Contrary to Schultz's assertion, none of the "five times" of sexual intercourse charged in the first prosecution occurred in October. The police report included Facebook messages between M.T. and Schultz on September 3, 2012 indicating the relationship was over on that date, offering additional confirmation that the first prosecution encompassed sexual assaults by Schultz that ended in September. The police report, incorporated by reference into the complaint, clearly identifies Schultz's scope of jeopardy in the first prosecution at the time jeopardy attached.

2. The Record At Trial

¶37 Even though the incorporated and attached police report renders the complaint unambiguous, we also review the record of the first trial to see if anything suggests "early fall" extended past mid-September to include October 19, 2012. We do so in order to safeguard the defendant's constitutional right against double jeopardy. The facts alleged under the second complaint——a sexual assault "on or about October 19"——would not, if proven, support a conviction in the first prosecution. The complaint in the first prosecution alleged repeated sexual assaults during "late summer to early fall[,]" which the attached and incorporated police report clarified to have concluded in early to mid-September. Limiting our review to the complaint, however, would not protect the

defendant against double jeopardy if the State introduced evidence of a sexual assault occurring "on or about October 19" after jeopardy attached. In order to ascertain whether the defendant was exposed to double jeopardy in the second prosecution, we examine the entire record of proceedings in the first case to see if any evidence of a sexual assault occurring "on or about October 19" was introduced.[17]

¶38 The trial transcripts reveal no evidence extending the end date identified in the police report. M.T testified at Schultz's first trial that they began having intercourse in July or August and broke up in the beginning of September 2012. She also testified to having a conversation with a friend "closer to October," after she stopped seeing Schultz, during which she disclosed to her friend the previous intercourse with Schultz. A

[17] While the dissent repeatedly insists "the defendant's protection against double jeopardy must be firmly and rigidly guarded"——a principle this court heartily endorses——the dissent nevertheless restricts its double jeopardy analysis to "the charging period allegation[,]" ignoring the charging document as a whole, as well as the record. Dissent, ¶76. Although this opinion explains at great length that the defendant's double jeopardy rights cannot be fully protected without examining the record of trial proceedings, the dissent does not explain why it would circumscribe the defendant's constitutional rights by ending its analysis with a review of the "the charging period allegation" alone. Contradicting its own analysis, the dissent seems to recognize the import of reviewing the record when it hypothesizes about the consequences "if the results of the pregnancy test showing an estimated conception date of October 19 had been presented at the first trial[.]" Dissent, ¶83. Unremarkably, if the results of the pregnancy test had been presented at the trial, double jeopardy would foreclose the second prosecution, regardless of the charging language in the first complaint, hence the need to review not only the complaint but also the entire record in order to determine the scope of jeopardy.

witness for Schultz, A.O., testified that she and Schultz began a romantic relationship in September 2012, lasting until the spring of 2013. The State's closing argument stipulated that the intercourse between M.T. and Schultz ended in September 2012. In its rebuttal, the State identified the time period for the sexual assaults as "September, August, and July." The transcript of Schultz's first trial contains only 21 mentions of "October." Eight of those refer to intercourse with Dominic in early to mid-October. Of the remaining 13, seven refer to M.T. having intercourse in the month or so before "October 2012." Of the remaining six, four referenced procedural matters regarding motions or Schultz's prior convictions. One of the remaining two referred to the timing of a conversation M.T. had with a friend about the sexual relationship with Schultz after they had already broken up.

¶39 The lone remaining reference to the month of October came from Schultz's counsel during his opening statement, who mentioned a "bombshell that occurred sometime in October of 2012." Counsel indicated the "bombshell" was friends alerting Schultz that M.T. told others she and Schultz were in a sexual relationship. Immediately after, counsel said Schultz and M.T. exchanged Facebook messages in which she denied making the statements and "his contact with her ended shortly thereafter." However, as the trial evidence and police report show, the Facebook conversation occurred on September 3, 2012, not in October. Schultz's counsel offered no evidence suggesting a second conversation occurred in the month of October.

¶40 Based upon our review of the complaint and its attached police report, as well as the trial transcripts, the scope of jeopardy of Schultz's first prosecution for "late summer to early fall of 2012," ended sometime in September. We need not determine the exact date because the conduct charged in the second prosecution was "on or about October 19, 2012." It is sufficient to conclude the record does not support jeopardy attaching to Schultz for any conduct during the month of October. Because the scope of jeopardy in the first prosecution did not include the date of the assault charged in the second prosecution, the two prosecutions were separate in time and therefore not identical in fact. See Anderson, 219 Wis. 2d at 749 (holding offenses are not identical in fact if they are separated in time).

E. Schultz's Arguments

¶41 Schultz primarily relies on three cases to support a double jeopardy violation based on the State's second prosecution. For the reasons discussed below, none of them help his case.

¶42 First, Schultz encourages us to apply the test set forth in George for a continuing crime. In George, we analyzed a complaint alleging 29 counts of sports betting, with most counts alleging continuing conduct over the span of a definite time period, such as from September 15, 1971 to January 15, 1972. George, 69 Wis. 2d at 95-96. In that case, we concluded that if one prosecution charges a continuing crime, "a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period." Id. at 98 (quoting 1 Anderson, Wharton's Criminal Law and Procedure 351 (1957))

(emphasis added). We affirm this principle. In George, an acquittal for conduct on December 24, 1971, would bar the State from charging the defendant again for sports betting occurring on January 1, 1972, because it was within the time period originally described in the complaint. However, the holding in George supplies no support for Schultz's double jeopardy argument because Schultz's case requires us to compare the period of time charged in each prosecution. Because the record confirms the assaults charged in the first prosecution were alleged to have occurred before the assault charged in the second prosecution, George provides no support for Schultz's double jeopardy argument.

¶43 Schultz next contends that the double jeopardy principles espoused by our court of appeals in State v. Fawcett resolve this case in his favor. In Fawcett, the State charged the defendant with two counts of first-degree sexual assault. State v. Fawcett, 145 Wis. 2d 244, 247, 426 N.W.2d 91 (Ct. App. 1988). The complaint alleged the sexual assaults of a child occurred in the "six months preceding December [] 1985." Id. The defendant challenged this time period as a violation of his Fifth Amendment right against double jeopardy. Id. at 247. The court of appeals applied our sufficiency-of-the-charge test set forth in Holesome v. State, using the second prong of the Holesome test, which asks whether conviction or acquittal of the complained-of-charge is a bar to another prosecution for the same offense. Fawcett, 145 Wis. 2d at 251 (quoting Holesome v. State, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968)). In analyzing whether the six-month time period in the Fawcett complaint implicated double jeopardy concerns under

the Holesome test, the court of appeals concluded that double jeopardy was not "a realistic threat in this case." Id. at 255. Noting that the defendant's "double jeopardy protection can also be addressed in any future prosecution growing out of this incident[,]" the court of appeals explained that "[i]f the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged." Id. (emphasis added).

¶44 We agree with the court of appeals' statement in Fawcett but it does not support Schultz's double jeopardy argument. Fawcett expressly limited its "rigid double jeopardy analysis" to later prosecutions "based upon the same transaction during the same time frame[.]"[18] Id. (emphasis added). In this case,

[18] The dissent dodges the dispositive question in this case: were the offenses charged in each prosecution separated in time? The dissent offers no answer. Instead, the dissent merely assumes "early fall" encompasses October 19. See dissent, ¶¶83-86. The dissent would impose "a blanket bar on subsequent prosecutions involving the same victim and the same timeframe." Dissent, ¶72. So would we. But as explained at length in this opinion, the two prosecutions against Schultz involved different timeframes. The police report attached to the complaint makes this clear. The dissent claims we "construe[] the ambiguous timeframe narrowly" misstating our analysis as "implicitly conclud[ing] that 'early fall' is ambiguous." Dissent, ¶75, 85. Read in its entirety, the charging document is not ambiguous and our construction of it is reasonable, not narrow. A "rigid double jeopardy analysis" does not mean the court must pretend the police report was not part of the complaint, as the dissent apparently does. See dissent, ¶86 ("October 19 is not clearly separate and apart from a charging period that runs through 'early fall.'"). A charging document should not be read narrowly or expansively, but reasonably and fully. Without authority, the dissent espouses a heretofore unheard of "important principle" that "the tie goes to the runner—

Schultz's prosecutions involved criminal conduct separated in time. Accordingly, applying Fawcett's "rigid double jeopardy analysis" does not affect our conclusion that Schultz's second prosecution, for sexual assault of a child under 16, was beyond the end date for the repeated sexual assaults of a child charged in the first prosecution. Because the sexual assaults charged in each prosecution were separated in time, Schultz was not twice put in jeopardy for the same offense.

¶45 Finally, Schultz proposes that this court adopt the test pronounced by the Second Circuit Court of Appeals in United States v. Olmeda. In Olmeda, the defendant moved to dismiss an indictment from June 2002, charging him with unlawful possession of ammunition in Manhattan. Olmeda, 461 F.3d at 275. Olmeda had previously pled guilty to an earlier indictment charging him with ammunition possession in June 2002 "within the Eastern District of North Carolina and elsewhere." Id. Olmeda argued the conduct alleged in the North Carolina indictment, specifically the use of the word "elsewhere," subsumed the conduct alleged in the later Manhattan indictment, which therefore violated constitutional protections against double jeopardy. See id. at 277–78. The State charged Olmeda under the same statute for both offenses, leaving the determination of whether the offenses were identical in fact the central issue in the double jeopardy analysis. Id. at 279, 282.

¶46 To decide whether successive prosecutions were the same in fact, Olmeda crafted the following test: courts must decide

—in this case, the defendant." Dissent, ¶76. Even if this principle were valid, there is no "tie" in this case.

whether "a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, at the time jeopardy attached in the first case, to cover the offense that is charged in the subsequent prosecution." Id. at 282. The Olmeda court went on to say that the determination "will require examination of the plain language of the indictments in the two prosecutions, as well as 'the entire record of the proceedings.'" Id. (quoting 1 Charles Alan Wright, Federal Practice and Procedure § 125 (3d ed. 1999)). Finally, Olmeda established a burden-shifting test particularized for conspiracy. Id. Under this test, the defendant must first make a "non-frivolous" and "colorable objective showing" that the two indictments charge only one conspiracy. Id. If the defendant does so, the burden shifts to the prosecution to prove, by a preponderance of the evidence, the existence of separate conspiracies and no double jeopardy violation. Id. Applying this burden-shifting analysis, the Olmeda court held the government failed to meet its burden. Id. at 289.

¶47 We decline to adopt Olmeda's "reasonable person" test.[19] As a preliminary matter, we are not bound by Olmeda, which was

[19] At oral argument, the relevance of Olmeda's footnote 15 was in dispute. Footnote 15, in relevant part, states:

> [W]here the government constructively narrows an indictment after jeopardy attaches only to refile the dropped charge at a later date, a variation of the problem of increased exposure arises implicating due process if not double jeopardy concerns.

Olmeda, 461 F.3d 287 n.15.

This footnote is irrelevant to Schultz's case. The dissent misrepresents this court's "approach" as "endors[ing] the idea

decided by the Second Circuit Court of Appeals. On federal constitutional issues, only United States Supreme Court decisions bind the Wisconsin Supreme Court. See Thompson v. Vill. of Hales Corners, 115 Wis. 2d 289, 306-07, 340 N.W.2d 704 (1983). Supreme Court decisions on the Constitution's Double Jeopardy Clause are also "controlling interpretations" of our own. Davison, 263 Wis. 2d 145, ¶18. In contrast, decisions by the federal courts of

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that the scope of jeopardy is limited to and reduced by the evidence presented." Dissent, ¶87. Not so. As explained at length in this opinion, review of the record is necessary in order to protect the defendant from double jeopardy. As already made clear, if the first trial produced evidence of a sexual assault occurring "on or about October 19," then regardless of the mid-September end date for the assaults alleged in the first prosecution, double jeopardy would preclude the State from subsequently prosecuting Schultz for a sexual assault occurring "on or about October 19." In the first case, the State did not narrow its prosecution of Schultz after jeopardy attached only to refile a dropped charge at a later date. There was no constructive amendment by the State for the purpose of pursuing a second prosecution for conduct within the timeframe of the first prosecution. The government never dropped a charge or sought to narrow the timeframe of the first indictment. Instead, the State merely learned of similar criminal activity occurring after the activity charged in the first proceeding ended, and charged Schultz for that later conduct, which was outside the timeframe of the first prosecution.

If the complaint charged sexual assaults occurring July 1, 2012 through November 1, 2012, but no evidence of assaults beyond September was introduced at trial, double jeopardy would preclude the State from later filing a complaint against Schultz for assaults alleged to have occurred in October. Under that scenario, the State would indeed be attempting to "constructively narrow[] [the] indictment[.]" That is not what happened in this case. Misleadingly, the dissent clouds the distinction between "constructively narrow[ing] an indictment" for the purpose of refiling a "dropped charge" with determining what the original scope of jeopardy was in the first place.

appeal have only persuasive value to this court. See Thompson, 115 Wis. 2d at 307.

¶48 Secondly, Olmeda did not identify any legal authority for its "reasonable person" test. The pertinent section of the opinion reads:

> To determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, at the time jeopardy attached in the first case, to cover the offense that is charged in the subsequent prosecution. Thus, where a defendant pleads guilty . . . .

Olmeda, 461 F.3d at 282. Olmeda cites no cases from the United States Supreme Court incorporating the "reasonable person" test into the Double Jeopardy Clause of the Fifth Amendment, and we have discovered none.

¶49 Finally, we reject Olmeda's test because the "reasonable person" standard is typically applied in common law areas such as contract and tort. See John Gardner, The Many Faces of the Reasonable Person, 131 L.Q. Rev. 563, 563 (2015) (referring to the reasonable person standard as the "common law's helpmate" and "most closely associated with the law of torts"). The double jeopardy clauses of the Fifth Amendment and Article 1, Section 8 do not include the word "reasonable" and it is a seminal canon of textual interpretation that we do not insert words into statutes or constitutional text. "Nothing is to be added to what the text states or reasonably implies (casus omissus pro omisso habendus est)." Scalia & Garner, Reading Law, supra ¶19, at 93 (2012).

See generally Akhil Reed Amar, Double Jeopardy Law Made Simple, 106 Yale L.J. 1807 (1997) (advocating a plain meaning approach to the Double Jeopardy Clause, under which "'[s]ame offense' means just that[,]" and employing the Due Process Clause as a backdrop). Absent direction from the text itself or the Supreme Court, we decline to read a "reasonable person" standard into the Fifth Amendment's protections against double jeopardy. Likewise, we will not read words into Article I, Section 8 of the Wisconsin Constitution. Cf. State v. Roberson, 2019 WI 102, ¶56, 389 Wis. 2d 190, 935 N.W.2d 813 ("A state court does not have the power to write into its state constitution additional protection that is not supported by its text or historical meaning.").

¶50 Applied in this case, the Olmeda test could yield different results depending upon the geographic location of the "reasonable person" who determines what "early fall" means. The "reasonable person" in Hurley, Wisconsin might perceive "early fall" to commence in late September, coinciding with changes in the color of leaves on trees and dropping temperatures. In contrast, the "reasonable person" in Madison may associate "early fall" with the opening game of the University of Wisconsin Badgers football team. The constitutional protections against double

jeopardy cannot be conditioned upon geographic location——or any other variables influencing the judge's perspective.[20]

F. Wisconsin Stat. § 971.29

¶51 Schultz also contends the court of appeals erred in relying on Wis. Stat. § 971.29 as a basis for reviewing the entire record. He argues doing so is improper when it prejudices the defendant. We agree with the court of appeals. Wisconsin Stat. § 971.29(2) expressly allows post-verdict amendments to the pleading to conform to the proof presented at trial, with no consideration of prejudice to the defendant:

> At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

(Emphasis added.)

¶52 Only "at the trial" must the circuit court consider prejudice to the defendant of allowing an amendment to the pleading. "After verdict the pleading shall be deemed amended to

[20] Although the dissent never cites Olmeda as the source, it essentially adopts its "reasonable person" test. The dissent says "the scope of jeopardy" is "as broad as the charging language may be fairly read." Dissent, ¶72. The dissent does not explain what "fairly read" means (or by whose measure we define it). The constitutional protection against double jeopardy cannot depend upon such a vague standard. This court instead follows the rule overwhelmingly applied by other jurisdictions and reflected in the common law dating back centuries, under which courts define the scope of jeopardy by the entire record in the case, rather than how a particular judge may "fairly read" a single document filed in the matter.

conform to the proof" unless at trial, the defendant timely objected to the relevance of the evidence. The portion of Wis. Stat. § 971.29(2) addressing such post-verdict amendments of the pleading contains no prejudice qualifier. We do not read words into the statute that the legislature did not write. "Under the omitted-case canon of statutory interpretation, '[n]othing is to be added to what the text states or reasonably implies (casus omissus pro omisso habendus est). That is, a matter not covered is to be treated as not covered.'" Lopez-Quintero v. Dittmann, 2019 WI 58, ¶18, 387 Wis. 2d 50, 928 N.W.2d 480 (quoting Scalia & Garner, Reading Law, supra ¶19, at 93). "One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." Fond Du Lac Cty. v. Town of Rosendale, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989) (citation omitted); see also State v. Wiedmeyer, 2016 WI App 46, ¶13, 370 Wis. 2d 187, 881 N.W.2d 805 ("It is not up to the courts to rewrite the plain words of statutes[.]"). Based on the same principle, we reject any contention that the statute implicitly excludes the amendment of dates or times in a charging document. See State v. Duda, 60 Wis. 2d 431, 440, 210 N.W.2d 763 (1973) (construing Wis. Stat. § 971.29, "[w]e are of the opinion that the sentence regarding amendment after verdict was intended to deal with technical variances in the complaint such as names and dates." (emphasis added)).

G. Admonition

¶53 Our opinion should not be read to approve attempts by the State to use imprecise charging language in an effort to skirt

the protections against double jeopardy. As the court of appeals correctly noted, defendants faced with uncertain language in a charging document should raise the issue to the circuit court through an appropriate motion. See Wis. Stat. § 971.31 (pretrial motions including defects in the indictment); State v. Miller, 2002 WI App 197, ¶¶8–9, 257 Wis. 2d 124, 650 N.W.2d 850 (motion to dismiss based on vague or overbroad charging period and motion requesting a more definite and certain statement); Fawcett, 145 Wis. 2d at 250–51 (due process challenges to the sufficiency of an indictment).

¶54 Further, we reaffirm a principle already established in cases involving child sexual assaults: the law does not require definitive dates in charging documents in such cases. See State v. Hurley, 2015 WI 35, ¶¶33–34, 361 Wis. 2d 529, 861 N.W.2d 174. This is because children are often incapable of remembering traumatic incidents by the day, week, or month, but instead might correlate them to other events in their lives, such as holidays, birthdays, or school semesters. See id.

IV. CONCLUSION

¶55 We hold that when the State charges a defendant in a subsequent prosecution for conduct the defendant contends overlaps the first prosecution's timeframe, courts may examine the entire record of the first proceeding to determine the actual scope of jeopardy in the first proceeding. The test to determine whether the earlier timeframe included the second is not what a reasonable person would think the earlier timeframe includes. Instead, the reviewing court ascertains the parameters of the offense for which

the defendant was actually in jeopardy during the first proceeding by reviewing all of the evidence, testimony, and arguments of the parties.

¶56 The State's prosecution of Schultz for sexual assault of a child under 16, "on or about October 19, 2012," did not violate the double jeopardy provisions of the Fifth Amendment or Article I, Section 8. This second prosecution for sexual assault was not identical in fact to the first prosecution for repeated sexual assault of a child in "late summer to early fall of 2012." A court's determination of the scope of jeopardy in a prior criminal prosecution is based upon the entire record of the first proceeding, including the evidence introduced at trial. It is the entire record of the first proceeding that reveals the details of the offense for which the defendant was actually in jeopardy during the first prosecution. The record of Schultz's first criminal prosecution——including the indictments, the police report, and trial testimony——establish a scope of jeopardy that excludes any conduct occurring in the month of October. The two cases against Schultz did not involve the "same offence" under the Double Jeopardy Clause. We affirm the decision of the court of appeals.

By the Court.—The decision of the court of appeals is affirmed.

¶57 BRIAN HAGEDORN, J. *(dissenting)*. Alexander Schultz was charged with repeated sexual assault, a criminal offense that encompasses any and all sexual assaults committed within a specified period of time. Based on the vague witness statements as well as a still-outstanding paternity test, the State chose a broad and imprecise charging period: "late summer to early fall." While it could have waited until it had all the evidence——most notably, the results of the paternity test——the State went forward anyway, and the jury acquitted. When the paternity test later showed Schultz was the father, the State tried again, this time charging Schultz for committing sexual assault "on or about October 19."

¶58 Our state and federal constitutions protect against two prosecutions for the same offense. When asking whether a second charge is based on the same facts, the test is whether the facts alleged under the second complaint would, if proved, support a conviction under the first complaint. See Anderson v. State, 221 Wis. 78, 87, 265 N.W. 210 (1936).

¶59 Applying this test, evidence of sexual assault on October 19 would have supported a conviction for repeated sexual assault during "late summer to early fall." Because those charges are for the same offense, the subsequent prosecution violated Schultz's constitutional protection against double jeopardy and should have been dismissed. I respectfully dissent.

I

¶60 Both the United States and Wisconsin Constitutions protect against a second prosecution for the same offense after acquittal.[1] The constitutional protection against double jeopardy features both front-end and back-end safeguards; that is, our double jeopardy cases examine whether the protection is secure both at the time an original complaint is filed and when a subsequent prosecution is brought.

¶61 On the front end, a defendant charged with a crime is entitled to be informed of "the nature and cause of the accusation against him." Holesome v. State, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968) (citing U.S. Const. amends. V, VI; Wis. Const. art. I, §§ 7, 8(1)). When a defendant claims these rights have been violated, the court reviews the allegations in the charging document to determine "whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense." Id.

¶62 In child sexual assault cases, these due process protections——though still required——are viewed through a "more flexible" lens. State v. Hurley, 2015 WI 35, ¶34, 361 Wis. 2d 529, 861 N.W.2d 174 (quoting State v. Fawcett, 145 Wis. 2d 244, 254, 426 N.W.2d 91 (Ct. App. 1988)). This is so because of the unique nature of these offenses. In particular, the "vagaries of a

[1] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. "[N]o person for the same offense may be put twice in jeopardy of punishment . . . ." Wis. Const. art. I, § 8(1).

child's memory"——i.e., the difficulty for child victims to testify regarding specific dates and details——should not allow offenders to escape punishment. See id., ¶¶33-34 (quoting Fawcett, 145 Wis. 2d at 254). Therefore, the complaint need not set forth precise allegations regarding the date any alleged crimes were committed.

¶63 Given all this, complaints alleging child sexual assault generally pass constitutional muster despite featuring more expansive and imprecise charging periods than other criminal offenses. For example, in Hurley, we concluded that a complaint charging the defendant with repeated sexual assault of the same child "on and between" 2000 and 2005 was constitutionally sufficient. Id., ¶¶10, 53; see also State v. Kempainen, 2015 WI 32, ¶¶1, 4, 361 Wis. 2d 450, 862 N.W.2d 587 (holding sufficient notice provided with charging periods of "on or about August 1, 1997 to December 1, 1997," and "on or about March 1, 2001 to June 15, 2001").

¶64 But it is also true that this charging flexibility necessitates a counterbalancing assurance——that is, because the prosecution is held to a less-exacting standard for charging period precision, the defendant's protection against double jeopardy must be firmly and rigidly guarded.

¶65 In Fawcett, the court of appeals reviewed the sufficiency of two sexual assault charges alleged to have occurred "during the six months preceding December A.D. 1985." 145 Wis. 2d at 247. In conducting its double jeopardy analysis, the court explained:

> [W]e do not conclude that double jeopardy is a realistic threat in this case. In its brief, the state concedes that Fawcett may not again be charged with any sexual assault growing out of this incident. Courts may tailor double jeopardy protection to reflect the time period charged in an earlier prosecution. Therefore, Fawcett's double jeopardy protection can also be addressed in any future prosecution growing out of this incident. If the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged.

Id. at 255 (emphasis added) (citing State v. St. Clair, 418 A.2d 184, 189 (Me. 1980)). In other words, as long as the State enjoys front-end pleading flexibility, defendants are deserving of equally extensive back-end protection against any threat of double jeopardy that could arise from such flexibility.

¶66 Other jurisdictions have recognized the same dynamic in cases involving broad and vague charging language, and provide guidance for what a "rigid double jeopardy analysis" looks like.

¶67 In State v. Martinez, the Nebraska Supreme Court affirmed the need for pleading flexibility in child sexual assault cases: "It is preferable to allow the State to conduct one vigorous prosecution to protect a child rather than to bar any prosecution at all because of a child's natural mnemonic shortcomings."[2] 550 N.W.2d 655, 658 (Neb. 1996). To compensate for that, however, the State must face a "blanket bar" against any

[2] The Nebraska Supreme Court affirmed a lower court decision that itself cited Fawcett for the premise that "courts may tailor double jeopardy protection to reflect the time period involved in the charge in the earlier prosecution." State v. Martinez, 541 N.W.2d 406, 414–15 (Neb. Ct. App. 1995) (citing State v. Fawcett, 145 Wis. 2d 244, 255, 426 N.W.2d 91 (Ct. App. 1988)).

further prosecutions arising from the broad timeframe alleged in the earlier prosecution:

> The State may allege a timeframe for its allegations of sexual assault of a child in its first prosecution; as a quid pro quo to ensure that this liberty is not abused, the State must survive double jeopardy scrutiny if it attempts a second prosecution based upon the same transaction during the same timeframe. Unless the offense charged in the second prosecution is clearly separate and apart from the offense charged in the first prosecution, the timeframe alleged in the first prosecution acts as a "blanket bar" for subsequent prosecutions. This is the only viable means of balancing the profound tension between the constitutional rights of one accused of child molestation against the State's interest in protecting those victims who need the most protection.

Id. at 658 (emphasis added). Again, the blanket bar extends to all subsequent offenses unless they are "clearly separate and apart" from the timeframe charged in the first offense.

¶68 Similarly, the Maine Supreme Court decision cited in Fawcett explained, "[w]hen an offense charged consists of a series of acts extending over a period of time, a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period." St. Clair, 418 A.2d at 189 (quoted source omitted). This meant that an indictment broadly alleging the commission of embezzlement "during and between the months of November, 1973, and December, 1975," would bar a prosecution across that whole period even though the evidence presented at trial was limited to a transaction occurring on November 1, 1973. Id. at

188-90. These cases are not unique. This concept is a common, well-understood theme in sister courts around the country.[3]

¶69 Our repeated sexual assault statute also embodies the notion of a blanket bar unless the second charge is clearly separate and apart from the first. It expressly prohibits the State from charging a defendant with repeated acts of sexual assault (under Wis. Stat. § 948.025) and sexual assault of the same child (under Wis. Stat. § 948.02) "unless the other violation occurred outside the time period" used for the repeated acts charge. § 948.025(3) (2017-18) (emphasis added).[4]

[3] See, e.g., State v. D.B.S., 700 P.2d 630, 633, 635 (Mont. 1985) (explaining, in reference to charging period of "January 1, 1983 to October 28, 1983," that less charging period specificity required in cases involving sexual abuse of a child but also that double jeopardy concerns are alleviated because "[t]he State is barred by [the state constitution] from retrying the defendant for the offense to this particular victim during the time in question"), overruled on other grounds by State v. Olson, 951 P.2d 571, 577 (Mont. 1997); State v. Lakin, 517 A.2d 846, 847 (N.H. 1986) (explaining that the broad timeframe alleged in a sexual assault does not implicate fear of the possibility of double jeopardy because "[c]ourts may tailor double jeopardy protection to reflect the scope of the time period charged in an earlier prosecution"); State v. Altgilbers, 786 P.2d 680, 695 (N.M. Ct. App. 1989) ("Because of the scope of the indictment in this case, the state would not be permitted in the future to charge defendant with any sexual offenses involving his two children during the time encompassed by the counts in the indictment."); State v. Wilcox, 808 P.2d 1028, 1030, 1033–34 (Utah 1991) (explaining, in reference to charging period of "on or between January, 1985, and September 4, 1987," that although less charging period specificity is required when young children are involved, "[o]nce a prosecutor chooses to prosecute on such vague allegations, a necessary quid pro quo under our constitutional notice provision is that to protect the defendant from double jeopardy, the prosecutor should be precluded from bringing further charges that fall within the general description of the charging allegations").

[4] All references to the Wisconsin Statutes are to the 2017-18 version.

¶70 The same front-end flexibility authorizing broad charging periods in child sexual assault cases also supports vague or imprecise charging periods. See, e.g., People v. LaPage, 53 A.D.3d 693, 694–95 (N.Y. App. Div. 2008) (finding child sex offense charging period of "late summer or early fall of 2006" provided constitutionally sufficient notice). It appears that cases stemming from vague charging language are rare. Even so, the same complementary principles should apply. When imprecise allegations are considered for double jeopardy purposes, any imprecision must be read at its broadest to ensure that the subsequent offense is clearly separate and apart. This guarantees that the State's pleading flexibility is not acting as both a sword and a shield against the defendant.

¶71 The Maine Supreme Judicial Court applied this principle in a case where a defendant challenged a sexual assault indictment on double jeopardy grounds because the indictment charged him with a "sexual act," a general statutory term that was elsewhere statutorily defined as any of several different forms of behavior. State v. Hebert, 448 A.2d 322, 326 (Me. 1982). The court rejected the defendant's front-end double jeopardy claim based on the indictment. The vague charge, the court explained, means the scope of jeopardy in any subsequent prosecution is commensurately vast, encompassing anything fairly included within the charging document:

> Because that statutory language may mean, under [the statutory definition], several different forms of behavior, that allegation in this indictment is ambiguous. It is clear, however, that when a defendant is placed in jeopardy under a valid indictment, he or

> she may not thereafter be placed in jeopardy for any offense of which he properly could have been convicted under that indictment. The scope of jeopardy created by an indictment is therefore as broad as that indictment may be fairly read. The ambit of the constitutional bar to subsequent prosecution is co-extensive with the scope of jeopardy created in the prior prosecution. Thus, if the allegations in one prosecution describe an offense which is shown to be within the scope of the charging allegations of a prior prosecution, then the defendant may successfully raise a defense of former jeopardy to the subsequent proceedings.

Id. at 326 (second and third emphases added) (citations omitted).

¶72 Putting this all together, a "rigid double jeopardy analysis" necessarily depends on the specific charging language of a given case. This case-specific approach recognizes that the State has more pleading flexibility in child sexual assault cases because of the unique nature of such offenses. Where that relaxed standard leads to expansive and imprecise allegations, the State must be held responsible for any flexibility it exercises when those same allegations are considered from a double jeopardy perspective. This means a broad charging period must be paired with a blanket bar on subsequent prosecutions involving the same victim and the same timeframe. And vague allegations should likewise be coupled with a scope of jeopardy as broad as the charging language may be fairly read.

II

¶73 This common-sense approach matches the test we set forth 84 years ago in Anderson. Where the issue is whether the charges are identical in fact, double jeopardy is violated if the facts alleged under the second complaint would, if proved, support a conviction under the first complaint. See Anderson, 221 Wis. at

87; see also State v. George, 69 Wis. 2d 92, 98, 230 N.W.2d 253 (1975) (applying Anderson); State v. Van Meter, 72 Wis. 2d 754, 758, 242 N.W.2d 206 (1976) (same). The logic of this test is apparent. If allegations of a subsequent prosecution describe an offense that falls within the scope of jeopardy in an earlier prosecution, the defendant is twice subject to conviction and punishment for the same conduct. This the constitution does not allow.

¶74 Applying this test, the proper question is whether evidence of an act of sexual assault on or around October 19 would have supported a conviction for repeated sexual assault occurring in the "late summer to early fall." Reading "early fall" as broad as it may be fairly read, with the whole record in view, the answer is yes.

¶75 The majority comes out the other way, its logic proceeding in three steps. First, although it doesn't explicitly say so, it implicitly concludes that "early fall" is ambiguous. Then, it determines that this ambiguity should be resolved by looking to the entire record to determine what "early fall" meant in the context of the original prosecution. Finally, it concludes that the police report attached to the complaint and evidence presented at trial show "early fall" meant, in effect, mid-September.[5]

[5] The majority says it is not concluding the charging language is ambiguous. Majority op., ¶44 n.18. We can quibble over the descriptor for what the majority is doing, but there would be no need to explore the record to define an end date not chosen by the State if the complaint was clear on its face.

¶76 I agree with the majority that the whole record may be consulted to determine the scope of jeopardy defined by ambiguous charging language.[6] But the important principle the majority loses sight of is that the tie goes to the runner——in this case, the defendant. This is so because any imprecision in the phrase "early fall" is a product of the pleading flexibility that allows vague charging language like this in the first place. Looking to the record of the original proceeding shows that it was unclear when the alleged sexual activity between M.T. and Schultz stopped. This in turn led the State to allege a broad and imprecise end point for the repeated sexual assault charge consistent with the very lack of precision reflected in the evidence it had. Although the majority finds a date certain (mid-September) in the police report and testimony, that's not the charging period allegation. The

[6] As the majority aptly points out, examining the record is appropriate and necessary to determine the scope of jeopardy in certain circumstances. For instance, the entire record has been used to define the parameters of an underlying offense like a conspiracy that "seldom will be clear" from the charging document alone. See, e.g., United States v. Crumpler, 636 F. Supp. 396, 403 (N.D. Ind. 1986) (quoting United States v. Castro, 629 F.2d 456, 461 (7th Cir. 1980)). Or it may assist when the evidence at trial presents a variance from the language in the charging document. See, e.g., United States v. Hamilton, 992 F.2d 1126, 1129-30 (10th Cir. 1993) (explaining that the whole record would protect against double jeopardy where a variance existed between charging language and the evidence produced at trial); United States v. Castro, 776 F.2d 1118, 1123 (3d Cir. 1985) (discussing a defendant's broader double jeopardy protection when the evidence supporting his conviction was considerably narrower than the language in the indictment).

The parties in this case do not disagree on whether the record may be consulted; they simply part ways over how such information can be used.

State instead chose an undefined seasonal end point ("early fall"), one that matched the temporally imprecise information that was shared by witnesses throughout the underlying investigation. The State's strategic decision to select a vague end point for the charging period should not be newly defined by this court to be a narrower date certain.

¶77 The investigation into sexual assault against fifteen-year-old M.T. began in December 2012 precisely because she was pregnant. The investigating officer turned his attention to twenty-year-old Alexander Schultz after M.T. stated in interviews that the two of them had sex multiple times. Schultz denied a sexual relationship with M.T. He stuck with that story even after the investigating officer informed him that M.T. was pregnant and "may believe that [he] is the father of the child."

¶78 Schultz was eventually charged with committing at least three acts of sexual assault against M.T. in the "late summer to early fall of 2012." As part of his defense against that charge, Schultz moved the court to order a paternity test. On the morning of trial, the results of that test were still an open question. M.T. wanted the trial to be continued until the father's identity was known. Her mother supported that plan.

¶79 Schultz previously had also hoped to postpone the trial in anticipation of the paternity test results. However, after M.T. and her mother made their desires known, Schultz reversed course and asked to proceed with trial that day. The court agreed, and a jury found Schultz not guilty. Four days later, the paternity test results came in, revealing that Schultz was the

father of M.T.'s child, with an apparent conception date of October 19, 2012.

¶80 As an initial matter, the conception-inducing sexual assault is what commenced the investigation that led to Schultz's original prosecution in the first place. The majority's assertion that everyone agreed the pregnancy was not pertinent at trial is not a fair picture. Majority op., ¶5. While the State seemingly entered trial presuming that Schultz was not the father, it was certainly not certain about that. Instead, the State went to trial with the evidence it had, knowing all the while that Schultz could be the father.

¶81 Moreover——and this is important——if the evidence was clear that no sexual activity occurred after mid-September, the State could have charged Schultz accordingly. As the majority tells it, the police report itself definitively excludes any conduct occurring in the month of October. Majority op., ¶34. Yet, instead of so charging, the State chose to use the vaguer and less precise language, "early fall." Why? Because that is the imprecise language witnesses used throughout the initial investigation,[7] and undoubtedly the State hoped to capture the full array of evidence that could have emerged at trial to support a conviction.

[7] For instance, M.T.'s neighbor informed the investigating officer that she had seen Schultz at M.T.'s residence numerous times "around the summer to early fall area" of 2012. Another friend of M.T.'s told the officer she was aware of sexual interactions between M.T. and Schultz that had "occurred during the late summer, early fall area of 2012."

¶82 By casting a wider net, the State was empowered to present evidence of any and all acts occurring during the entire charging period that supported its charge of repeated sexual assault. But it must also live with the reality that any new evidence of sexual assault during that time period would be unavailable for a second prosecution. Again, case after case after case explains that charging flexibility on the front end equals exacting double jeopardy protection on the back end.

¶83 Returning to our long-established test, charges are factually identical if facts alleged under the second complaint would, if proved, support a conviction under the first complaint. See Anderson, 221 Wis. at 87. Applying this test, the benchmark that proves the point is this: if the results of the paternity test showing an estimated conception date of October 19 had been presented at the first trial, that evidence would have supported a conviction for repeated sexual assault during the charging period without any need for the State to amend its complaint. The same would be true if M.T. testified that she and Schultz had sex through the middle of October——that is, testimony that merely days later would be proven true by way of the paternity test results.

¶84 The majority dismisses this as a hypothetical, and then says that if evidence of an October 19 sexual assault was introduced at the first trial, Schultz's second prosecution would be barred under double jeopardy. Majority op., ¶37 n.17. This is true, but misses the point being made in this dissent. If the majority is correct that the ambiguous phrase "early fall" meant nothing beyond mid-September, then an effort by the State to

introduce evidence of an October 19 sexual assault would have required amending the complaint. Why? Because that date, the majority concludes, was outside the original charging period.

¶85 The key difference between the majority and my own view is that the majority draws on the record to establish a date certain that the State did not delineate for what was actually a deliberately vague and imprecise charging period. The majority construes the ambiguous timeframe narrowly, whereas I believe a proper protection of Schultz's constitutional right to be free from double jeopardy requires us to construe such ambiguity against the State. This is the "rigid double jeopardy analysis" that the State must endure. Fawcett, 145 Wis. 2d at 255. While this seems deferential to the defendant, that is precisely the point.

¶86 Reading the charging language as broad as it may be fairly read, evidence of an October 19 sexual assault would support a conviction during a timeframe including "early fall." As Schultz points out, October 19 is, from an astronomical perspective, early fall; it occurs in the first full month of the astronomical season of fall. While this is not conclusive, it is a fair reading of how early fall can be understood. October 19 is not clearly separate and apart from a charging period that runs through "early fall."[8]

[8] The majority responds that a "charging document should not be read narrowly or expansively, but reasonably and fully." Majority op., ¶44 n.18. As explained above, however, a reasonable and full reading of vague and imprecise charging language requires ensuring that the defendant is given the benefit of the State's imprecision. While the majority may describe what it is doing as reasonably reading the charging language, it is in fact identifying a narrower date certain the State never chose.

¶87 Problematically, the majority's approach in this case seems to endorse the idea that the scope of jeopardy is limited to and reduced by the evidence presented. But jeopardy is "[t]he risk of conviction and punishment that a criminal defendant faces at trial." See Jeopardy, Black's Law Dictionary (11th ed. 2019) (emphasis added). Here, that jeopardy attached when the jury was sworn. State v. Moeck, 2005 WI 57, ¶34, 280 Wis. 2d 277, 695 N.W.2d 783. Schultz was therefore at risk of conviction and punishment based not solely on the evidence presented at trial, but on the evidence that could have been presented under the charge as brought. On the other hand, if the scope of jeopardy is now defined simply by "the evidence, testimony, and arguments of the parties," nothing stops that definition from shrinking until it resembles only the evidence presented. Majority op., ¶55. That is not consistent with the protections provided by our state and federal constitutions.[9]

¶88 The Second Circuit emphasized the danger of constructive amendments of this kind in United States v. Olmeda, warning that double jeopardy is threatened when broad or imprecise charging language is implicitly narrowed after the fact based on the lack of certain evidence:

> The law recognizes constructive amendment of an indictment to broaden a defendant's criminal exposure as a "serious error." In general, a constructive amendment

[9] Moreover, it makes little sense for our courts to determine whether the allegations in a charging document are sufficient to protect against a subsequent prosecution on the front end if the ensuing proceedings will effectively redefine those allegations based on the evidence presented. Holesome v. State, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968).

> narrowing the scope of an indictment is not troublesome because it does not similarly increase a defendant's criminal exposure. But where the government constructively narrows an indictment after jeopardy attaches only to refile the dropped charge at a later date, a variation on the problem of increased exposure arises implicating due process if not double jeopardy concerns.

461 F.3d 271, 287 n.15 (2d Cir. 2006) (citations omitted).

¶89 The majority suggests that fear of this threat is misplaced because the State never sought to narrow or amend its first charge against Schultz. Majority op., ¶47 n.19. No formal amendment occurred; this is true, but it's not the danger Olmeda flags. Olmeda's warning is aimed at exactly what the majority does here——not formal amendment, but constructively narrowing a charge based on evidence presented after jeopardy attaches.

¶90 In short, because evidence of a sexual assault on or about October 19 would have supported a conviction in his first trial without the need to amend the charging period in the complaint, the State's second prosecution violated Schultz's constitutional protection against double jeopardy. The State chose to charge Schultz for repeated sexual assault over a time period with a vague and ambiguous end point. It is inconsistent with a vigorous protection against double jeopardy to construe that ambiguity to conform to the more limited evidence presented, rather than to construe it broadly to encompass the very evidentiary indeterminacies that caused the State to pick an indeterminate timeframe in the first place. Reading the charging language as broad as it may be fairly read, evidence of an October 19 sexual assault would support a conviction over a timeframe

including "early fall." Accordingly, Schultz's conviction should be vacated and the charge dismissed.

¶91 I am authorized to state that Justices ANN WALSH BRADLEY and REBECCA FRANK DALLET join this dissent.

APPENDIX B

2019 WI App 3

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2017AP1977-CR

†Petition for Review Filed

Complete Title of Case:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER M. SCHULTZ,

DEFENDANT-APPELLANT.†

Opinion Filed:	December 11, 2018
Submitted on Briefs:	April 24, 2018
Oral Argument:	

JUDGES:	Stark, P.J., Hruz and Seidl, JJ.
Concurred:	
Dissented:	

Appellant ATTORNEYS:	On behalf of the defendant-appellant, the cause was submitted on the briefs of *Frederick A. Bechtold*, Taylors Falls, Minnesota.
Respondent ATTORNEYS:	On behalf of the plaintiff-respondent, the cause was submitted on the brief of *Brad D. Schimel*, attorney general, and *Scott E. Rosenow*, assistant attorney general.

2019 WI App 3

COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

Appeal No. 2017AP1977-CR **Cir. Ct. No. 2014CF68**

STATE OF WISCONSIN **IN COURT OF APPEALS**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER M. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lincoln County: ROBERT R. RUSSELL, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. Alexander Schultz appeals a judgment, entered upon his guilty plea, convicting him of second-degree sexual assault of a child contrary to

WIS. STAT. § 948.02(2) (2015-16).[1] He also appeals an order denying postconviction relief. The issue on appeal is whether the State's prosecution of Schultz for sexually assaulting a child "on or about October 19, 2012" violated Schultz's constitutional right to be free from double jeopardy because he was previously prosecuted for, and acquitted of, the repeated sexual assault of the same child "in the late summer to early fall of 2012."

¶2 To resolve this issue, we must determine the proper test to ascertain the scope of jeopardy when it is unclear whether successive prosecutions are the same in fact. Schultz argues that we should look to a reasonable person's understanding of the scope of jeopardy at the time jeopardy attached in the first prosecution, and disregard all proceedings after that time. The State responds that we should look to how a reasonable person would understand the scope of jeopardy in light of the entire record in the first prosecution, including the trial.

¶3 We agree with the State and conclude that the proper test to ascertain the scope of jeopardy is to look at the entire record in the first prosecution. We further conclude that a reasonable person familiar with the facts and circumstances of the entire record in the first prosecution against Schultz would understand "early fall of 2012" to mean no later than September 30, 2012. Accordingly, Schultz's subsequent prosecution for a sexual assault on October 19, 2012, did not

[1] Schultz was also convicted of perjury, pursuant to his guilty plea to that crime. However, Schultz does not appeal his perjury conviction, and neither it nor an acquitted charge against him for obstruction of justice is implicated by his double jeopardy challenge. Accordingly, we will not discuss those charges further.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

violate his constitutional right to be free from double jeopardy. We therefore affirm.

BACKGROUND

¶4 In December 2012, City of Merrill police officer Matthew Waid learned that fifteen-year-old Melanie[2] was pregnant. He began a sexual assault investigation and discovered that Melanie had sexual intercourse with then eighteen-year-old Dominic Beckman in mid-October 2012. Waid asked Melanie if she had had intercourse with anyone else prior to this incident with Beckman. She responded that approximately one month before having intercourse with Beckman, she had intercourse with then twenty-year-old Schultz.

¶5 In a follow-up interview, Melanie made additional disclosures to Waid regarding her sexual relationship with Schultz. She stated that she and Schultz had sexual intercourse "more than five times" and that the "intercourse started at the middle of the year of 2012 and had gone on for a couple of months." Accordingly, the State charged Schultz with repeated sexual assault of a child. In that case, an Information alleged that Schultz had sexually assaulted Melanie at least three times "in the late summer to early fall of 2012."

¶6 One day prior to the start of trial, Schultz filed a motion to "permit the introduction of the fact of [Melanie's] pregnancy and the fact that she claimed Dominic Beckman was the father of her child." The next day, prior to swearing in the jury, the circuit court heard arguments on this motion. The State moved for a

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86, we refer to the victim using a pseudonym.

continuance of the trial, arguing that, pursuant to Wisconsin's rape shield statute,[3] the court would need to conduct a hearing before allowing evidence of Melanie's pregnancy to be introduced at trial. The State also stated that it had not yet received the results of a paternity test from Melanie, but her pregnancy was not relevant because "it had been in the reports for months" that "Dominic Beckman [was] imputed the father of the victim's child."

¶7 Defense counsel responded that "up until [the Friday before trial], I was under the assumption that … the complainant's pregnancy was going to be part of this case." However, counsel then told the circuit court that Schultz "would like to proceed today" and withdrew the motion to introduce evidence concerning Melanie's pregnancy. Consequently, the jury was sworn in and the trial began.

¶8 At trial, Melanie testified that she began having sex with Schultz "[s]ometime between July and August" 2012. She said that she could not recall how many times they had sex, but it was definitely more than five times. She also testified that she and Schultz broke up in the beginning of September 2012.

¶9 The jury ultimately acquitted Schultz. Five days later, Melanie informed the State that she had received her paternity-test results. The results showed a "99.99998" percent probability that Schultz was the father of Melanie's child. The State then obtained Melanie's medical records, which indicated that her conception date was on or about October 19, 2012.

[3] Referring to WIS. STAT. § 972.11(2).

¶10 Based on this new information, the State charged Schultz with second-degree sexual assault of a child. Schultz filed a motion seeking to dismiss the charge on the grounds that his prosecution violated his constitutional right to be free from double jeopardy. Schultz argued that October 19, 2012, was a date in the "early fall of 2012," and therefore he had already been charged with, and acquitted of, sexually assaulting Melanie on October 19, 2012.

¶11 The State responded by arguing that in its first prosecution of Schultz, Melanie testified that she had stopped having sex with Schultz the month prior to October 2012—in other words, Melanie did not testify that she had sex with Schultz after September 2012. The State argued that its first prosecution of Schultz therefore concerned "sexual assaults which occurred at different times" than its second prosecution, and, as a result, "double jeopardy does not apply."

¶12 The circuit court denied Schultz's motion. The court relied upon transcripts of Melanie's trial testimony and made a finding that "the timeframe [Melanie] testified to was July, and August, and September of 2012." The court concluded that "Schultz was not charged and not tried for an alleged sexual assault that occurred on October 19, 2012."

¶13 Consequently, Schultz pled guilty to, and was convicted of, second-degree sexual assault of a child. He subsequently filed a motion seeking postconviction relief, again arguing that his prosecution violated his constitutional right to be free from double jeopardy. The circuit court denied the motion in a written order, concluding that it had "already denied a similar motion for dismissal … [and Schultz] has not presented any new evidence." Schultz now appeals.

DISCUSSION

¶14 Schultz argues that his second prosecution violated his right to be free from double jeopardy. A defendant is guaranteed the right to be free from double jeopardy by the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution. ***State v. Steinhardt***, 2017 WI 62, ¶13, 375 Wis. 2d 712, 896 N.W.2d 700. Whether this right has been violated presents a question of law that we review de novo. ***Id.***, ¶12.

¶15 The right to be free from double jeopardy provides three protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. ***Id.***, ¶13. In this case, Schultz argues that the State violated his right to be free from a second prosecution for the same offense after acquittal.

¶16 For purposes of a double jeopardy analysis, separate prosecutions are for the "same offense" if the charged offenses are identical both in law and in fact. ***Id.***, ¶14. The parties do not dispute that the offenses charged against Schultz are identical in law, as the offense of second-degree sexual assault of a child is a lesser-included offense of repeated sexual assault of a child. *See* ***State v. Stevens***, 123 Wis. 2d 303, 321-22, 367 N.W.2d 788 (1985). Rather, they dispute whether the charged offenses were identical in fact.

¶17 Offenses are different in fact if they are either significantly different in nature or are separated in time. ***State v. Eaglefeathers***, 2009 WI App 2, ¶8, 316 Wis. 2d 152, 762 N.W.2d 690 (2008). When the State charges a defendant with the repeated sexual assault of a child, subsequent prosecutions against that defendant are not separated in time if they allege a sexual assault of the same child

that occurred "during the same time frame" as the assaults alleged in the original prosecution. ***State v. Fawcett***, 145 Wis. 2d 244, 255, 426 N.W.2d 91 (Ct. App. 1988). Here, the parties dispute whether the scope of jeopardy in the first prosecution—specifically, the time frame of "late summer to early fall 2012"—includes the alleged date of the sexual assault in the second prosecution, October 19, 2012.

¶18 To resolve this dispute, we must first address a threshold question: namely, how does a court ascertain the scope of jeopardy when the charged timeframe is ambiguous?[4] The parties point to no Wisconsin cases that address this issue, and our own review of the case law likewise reveals no controlling authority. Thus, it is an issue of first impression in Wisconsin.

¶19 Schultz first argues that we should consider the language of the charging document and determine how a reasonable person, familiar with the facts and circumstances of the case, would construe that language at the time jeopardy attaches.[5] Further, Schultz argues that any proceedings that occur after jeopardy attaches are irrelevant to this analysis and cannot be considered. The State agrees

[4] Schultz also raises an argument that October 19 unambiguously occurs in the early fall. He reasons that fall is a ninety-one-day season and October 19, as the twenty-seventh day of fall, is in the first third of the season. Accordingly, he argues that concluding October 19 is not in early fall would be "to deny the very movement of the celestial bodies; to deny that the Earth orbits the Sun." Nevertheless, we reject Schultz's hypertechnical and arbitrary definition of early fall. Schultz fails to explain why we should consider the first third—and not, say, the first fourth of the fall season, of which October 19 falls outside—to be "early fall." Moreover, in common vernacular, when "fall" begins varies based on one's perception. For example, many people consider "fall" to begin after the Labor Day holiday in early September. We conclude the phrase "early fall" is ambiguous and not susceptible to Schultz's categorical, solar-calendar argument.

[5] In Wisconsin, jeopardy attaches "[i]n a jury trial when the selection of the jury has been completed and the jury sworn." WIS. STAT. § 972.07(2).

with the first part of Schultz's proposed test, but it argues that proceedings occurring after jeopardy attaches are relevant and may be considered to clarify any ambiguity in the language of the charging document. For the following reasons, we agree with the State.

¶20 First, the federal case upon which Schultz primarily relies, ***United States v. Olmeda***, 461 F.3d 271 (2d Cir. 2006), does not support his position. The ***Olmeda*** court held:

> To determine whether two offenses charged in successive prosecutions are the same in fact, a court must ascertain whether a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, at the time jeopardy attached in the first case, to cover the offense that is charged in the subsequent prosecution.

Id. at 282. The Second Circuit then stated that this objective inquiry "will require examination of the plain language of the indictments in the two prosecutions, as well as *the entire record* of the proceedings." ***Id.*** (emphasis added). The court further explained that proceedings that take place after jeopardy attaches "are relevant to double jeopardy analysis only insofar as they assist an objective observer in clarifying any ambiguities in the scope of the [charging document] at the time jeopardy in fact attached." ***Id.*** at 288. Thus, ***Olmeda*** actually undermines Schultz's proposed test.

¶21 Moreover, as the State correctly notes, a test that considers the entire record of a prosecution to ascertain the scope of jeopardy is consistent with the approach of federal appellate courts outside the Second Circuit. For example, the Seventh Circuit has held:

> There can be no doubt that [a charging document] plays a part in protecting a defendant against double jeopardy,

> however, the defendant's attack on the present [charging document] falls wide of the mark since it is the record as a whole that protects an accused from being "twice put in jeopardy of life or limb."

United States v. Roman, 728 F.2d 846, 853 (7th Cir. 1984); *see also* ***United States v. Castro***, 776 F.2d 1118, 1123 (3d Cir. 1985) ("The scope of the double jeopardy bar is determined by the conviction and the entire record supporting the conviction."); ***United States v. Hamilton***, 992 F.2d 1126, 1130 (10th Cir. 1993) ("[F]or purposes of barring a future prosecution, it is the judgment and not the indictment alone which acts as a bar, and the entire record may be considered in evaluating a subsequent claim of double jeopardy.") (citation omitted).

¶22 Second, we agree with the State that WIS. STAT. § 971.29—the statute addressing the amendment of a charge—supports our adoption of a test that looks to the entire record to clarify any ambiguity regarding the scope of double jeopardy. Section 971.29(2) provides:

> At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

Our supreme court has held that the second sentence of § 971.29(2) operates to "deal with technical variances in the complaint such as names *and dates*." ***State v. Duda***, 60 Wis. 2d 431, 440, 210 N.W.2d 763 (1973) (emphasis added). Thus, when a case proceeds to trial, "ambiguities … in an indictment or [I]nformation, are cured by verdict." ***Id.*** at 441 (citation omitted).

¶23 Schultz argues, for several reasons, that the State's reliance on WIS. STAT. § 971.29(2) to support a test that considers the entire record when clarifying

an ambiguous charging document is misplaced. First, Schultz argues that by focusing on the second sentence of § 971.29(2), the State ignores the requirement of the first sentence that a court should only allow an amendment to a pleading document "where such amendment is not prejudicial to the defendant." Sec. 971.29(2). He further argues that the consideration of evidence introduced after jeopardy attached in his case prejudiced him because it narrowed the scope of jeopardy that applied to his case.

¶24 We reject Schultz's argument because it conflates the clarification of an ambiguous timeframe with the narrowing of an unambiguous one.[6] The State's reliance on WIS. STAT. § 971.29(2) to support a test that considers the entire record applies only to the former, not the latter. For instance, if the Information in Schultz's first prosecution had alleged that his crimes occurred during the time period from July 2012 to October 2012, the evidence introduced at trial could not be used to narrow the scope of jeopardy to only July 2012 to September 2012 and thus permit the State to try Schultz for the October 2012 offense in a subsequent prosecution. The subsequent prosecution would be barred because, under those circumstances, a reasonable person familiar with the totality of the facts and circumstances would construe the initial complaint, at the time jeopardy attached in the first prosecution, to cover the offense that is charged in the subsequent prosecution.

¶25 However, in situations like here, where the phrase "early fall" is ambiguous, it is appropriate to look at the entire record to clarify the meaning of

[6] Although not at issue in this appeal, we note that a defendant facing an ambiguous charged timeframe has an existing remedy under Wisconsin law. *See infra*, ¶¶35-36.

that phrase as it was used in the Information. And Schultz's argument that this ignores the prejudice analysis required by the first sentence of WIS. STAT. § 971.29(2) does not account for the difference between the first and second sentences of the statute. Specifically, the first sentence applies during trial, and allows for the exercise of discretion by the circuit court to weigh the prejudice to the defendant in granting the amendment request. Conversely, the second sentence applies after verdict and does not allow for the exercise of discretion by the court. Instead, it states "the pleading shall be deemed amended to conform to the proof." ***Id.*** Thus, if either party fails to clarify an issue or object to dates used at trial, that party forfeits any objection when the complaint is amended after the verdict.

¶26 Moreover, when the alleged timeframe as charged is ambiguous, the consideration of evidence introduced at trial does not prejudice a defendant by stripping away constitutional protections. Rather, it enhances constitutional protections by allowing a court to ascertain the actual jeopardy to which a defendant was exposed in a prior prosecution. To that end, we note that by allowing a court to review the entire record to determine the scope of jeopardy, a defendant as well as the State has the right to argue that a subsequent prosecution is barred by evidence introduced after jeopardy attached at a previous trial.

¶27 Relatedly, Schultz argues that reliance on WIS. STAT. § 971.29(2) would lead to an absurd, erroneous, and unconstitutional construction of that statute. This argument fails for the same reason as Schultz's first argument: it rests on the faulty premise that consideration of evidence after jeopardy attaches can be used to narrow an unambiguous scope of jeopardy. Again, this notion is incorrect, and we do not hold so here. Instead, we hold only that evidence

introduced after jeopardy attaches may be considered to clarify an ambiguity related to the scope of jeopardy that existed at the time jeopardy attached.

¶28 Finally, Schultz points to ***United States v. Crowder***, 346 F.2d 1 (6th Cir. 1964), which he insists is "particularly instructive" as to why facts adduced at trial cannot narrow the scope of jeopardy. In ***Crowder***, the defendant was prosecuted for conspiracy to transport stolen and forged money orders in interstate commerce. ***Id.*** at 2. The indictment filed against the defendant specifically listed only twelve money orders that the defendant was alleged to have possessed, even though 235 money orders had been recovered and "offered in evidence." ***Id.*** at 2-3. The defendant raised a due process challenge, arguing that the indictment, by failing to list all 235 money orders, failed to protect him "against subsequent jeopardy for the same offense." ***Id.*** at 3. The Sixth Circuit rejected this argument, concluding that the record as a whole, which included evidence of all 235 money orders, protected against a subsequent prosecution related to all of the money orders, not just the twelve listed in the indictment. ***Id.***

¶29 In other words, the Sixth Circuit held that the scope of jeopardy that applied to an unambiguous set of facts in the record—the 235 money orders—could not be narrowed, even though the government focused only on twelve of those money orders in prosecuting its case. That situation is unlike here, where the charged timeframe was ambiguous. Accordingly, ***Crowder*** has no bearing on Schultz's case.

¶30 To summarize, we conclude that the proper test to ascertain the scope of the jeopardy bar when the charging language of an Information is ambiguous is to consider how a reasonable person familiar with the facts and circumstances of a particular case would understand that charging language. To

make this determination, it is proper to consider the entire record, including proceedings that take place after jeopardy attaches and the evidence introduced at trial. Having articulated the proper test, we now apply it to the facts of Schultz's first prosecution and conclude that a reasonable person familiar with the circumstances of that prosecution would not understand the phrase "early fall of 2012" to include any dates beyond September 30, 2012.

¶31 We begin with the original complaint in Schultz's first prosecution. Attached to that complaint was a police report written by officer Waid on December 4, 2012. Waid wrote that he was investigating an alleged sexual assault of Melanie by Beckman—which he then believed resulted in Melanie's pregnancy—that occurred in "early to mid-October." Waid then wrote that he asked Melanie if she had had sexual intercourse with anyone prior to this incident, and she told him she had had intercourse with Schultz "approximately one month before" the incident with Beckman—i.e., in September 2012.

¶32 Next, on the first morning of trial, before the jury was sworn, the State informed the circuit court that although Melanie had not yet received the results of a paternity test, it had been "imputed … for months" that Beckman was the father of Melanie's child. The only reasonable inference from this statement is that, consistent with the complaint, the State was not alleging that Melanie had had sex with anyone besides Beckman, including Schultz, in early-to-mid-October.

¶33 Finally, as the circuit court found in its oral decision denying Schultz's postconviction motion, "the timeframe that [Melanie] testified to [at the first trial was July, and August, and September of 2012." In his brief-in-chief, Schultz stated that Melanie's testimony regarding her sexual history with Schultz was "very imprecise," and he appeared to argue that the circuit court's finding in

this regard was clearly erroneous. However, in his reply brief, Schultz conceded that the State "failed to present any evidence of sexual assaults by Schultz for the month of October 2012."

¶34 Based on all of the above evidence, we conclude that a reasonable person, familiar with the facts and circumstances of the first prosecution against Schultz, would not consider the phrase "early fall of 2012" to include October 19, 2012. There is no indication in the record that the State ever alleged that Schultz and Melanie had sexual intercourse in October 2012. In fact, the State did not even believe it possible that Schultz had impregnated Melanie in that month. Only after the trial did the State become aware that a paternity test showed a "99.99998" percent chance that Schultz had impregnated Melanie on or about October 19, 2012. The State then charged him for that offense. The alleged date of commission for this charge was separated in time from the charges in the first prosecution and, therefore, was not barred by double jeopardy.

¶35 We stress that, in this case, we adopt a test that allows a circuit court to clarify an ambiguity that exists in a charging document for purposes of a retrospective double jeopardy analysis. We thus emphasize an important point, lest our decision be read to encourage the use of ambiguous charging language to manipulate double jeopardy protections in future prosecutions: well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge. Specifically, a defendant may move for the dismissal—or, in the alternative, move to make more definite and certain the allegations against him or her—of charges based on allegedly overbroad or ambiguous timeframes in a charging document. *See generally* WIS. STAT. § 971.31; *see also* ***Fawcett***, 145 Wis. 2d at 250-21; ***State v. Miller***, 2002 WI App 197, ¶¶8-9, 257 Wis. 2d 124, 650 N.W.2d 850.

¶36 By doing so, a defendant requires a circuit court to consider whether the charged timeframe is definitive enough to provide double jeopardy protections to the defendant. *See* ***Fawcett***, 145 Wis. 2d at 255. Here, Schultz did not do so. Even if he had, our review of the entire record makes it clear that the State's allegations against him extended no further than September 30, 2012, which can be considered "early fall." His subsequent prosecution for sexually assaulting Melanie on October 19, 2012, was outside this timeframe and did not violate his constitutional right to be free from double jeopardy.

By the Court.—Judgment and order affirmed.

APPENDIX C

STATE OF WISCONSIN CIRCUIT COURT LINCOLN COUNTY

Branch 2

STATE OF WISCONSIN,

Plaintiff,

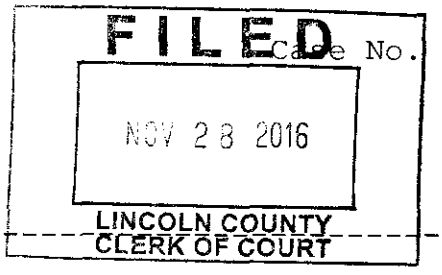
vs.

ALEXANDER M. SCHULTZ,

Defendant.

ORAL RULING

Case No. 14-CF-68



HONORABLE ROBERT R. RUSSELL

Judge Presiding

ORIGINAL

Date of Hearing:

December 10, 2014

Leslie M. Johnson, RMR, CRR, CPE

Official Court Reporter

APPEARANCES

Kurt Zengler, ADA,

appearing for the State.

Karl Kelz, Attorney at Law,

appearing for the Defendant.

Defendant not present.

THE COURT: This is 14-CF-68, State of Wisconsin versus Alexander Schultz. The State appears by Assistant District Attorney Kurt Zengler.

Mr. Schultz does not appear. His attorney, Karl Kelz, appears in court.

Mr. Kelz, it is my understanding that your client is incarcerated at Green Bay Correctional Institute. Is that correct?

MR. KELZ: Yes, Judge.

THE COURT: This is the date and time scheduled for an oral ruling on the motion to dismiss count three that was filed by Mr. Kelz.

The Court has heard oral arguments on this motion, and I have also received and reviewed the letter briefs that were filed in this matter.

Mr. Kelz, you had sent a letter brief to the Court dated October 23, 2014, which I have reviewed, and Mr. Zengler responded to that letter brief with a letter and attachment of his own dated October 31, 2014.

Mr. Kelz, you then responded to that letter with a supplemental brief that was received by the Court on November 13, 2014.

So the Court has reviewed that material. The Court has also reviewed the file and partial trial transcript from case 13-CF-110.

This is a case where Mr. Schultz was charged with repeated sexual assault of a child in case 13-CF-110. The alleged dates of the sexual assaults took place in late Summer, early Fall of 2012.

Ultimately, Mr. Schultz was acquitted of those charges, and this new matter has been filed by the State, which is case number 14-CF-68 in this matter.

In count three, Mr. Schultz is charged with sexual assault of a child, and the alleged incident or date of incident is October 19, 2012.

Mr. Kelz, you have filed a motion to dismiss count three. Your position is that double jeopardy is attached in this matter because October 19, 2012 is a date that fell into the timeframe for which your client was charged and tried in case 13-CF-110.

Mr. Zengler, you have opposed that motion. I think the State's position is that, no, the incidents for which Mr. Schultz was tried do fall into the late Summer, early Fall timeframe, and you have attached copies from the trial transcript, which support your position.

Mr. Kelz, you have relied on the Blockburger (ph) case, which the Court has reviewed, and I would agree.

Really, Mr. Zengler, correct me if I'm wrong, but I don't think you are disagreeing with the legal

support for Mr. Kelz's motion. You're just saying that, no, these are separate incidents?

MR. ZENGLER: Yes, that's correct.

THE COURT: So I think that is the issue. Mr. Kelz, you have cited the legal authority for your motion and, Mr. Zengler, I have also reviewed your letter, which cites the Nominson (ph) case that I think factually is close to the facts of the present matter.

The only difference with Nominson is that the defendant was charged in two separate counties for a sexual assault and that the timeframe for which the defendant was charged, there was some overlap.

I think the charges involve alleged sexual assaults over a 3-month period, and there was some overlap in the month of April, and the defendant was charged in two separate counties for separate incidents, separate allegations of sexual assault.

The present case, of course, is different, because we're looking at separate dates, not separate counties, but the Court does feel that the issue here is, do we have separate incidents, separate alleged incidents of sexual assault?

Meaning a separate incident in the present case, which is different than the incidents that were alleged in case number 13-CF-110 and for which Mr. Schultz was tried

for.

Mr. Kelz, you in your motion and in your brief, you have argued that, when you look at Fall, and you cited the Farmer's Almanac, which is fine, Fall begins around mid-September, and Fall ends around December 21.

I think your position is that October 19 falls into what could be classified as early Fall. When the Court looked at the victim's testimony in case 13-CF-110, I don't think that's what the victim was referring to.

The victim talked about her relationship with Mr. Schultz beginning in late Summer. Her testimony, and this is on page 7 of the partial transcript from that trial.

Her testimony is that her relationship with Mr. Schultz became more than just friends, and this started around July.

Mr. Zengler, then you attach page 11 to your brief, which indicates the victim's testimony that she had sex with Mr. Schultz a month or so prior to an incident she had with another individual in October of 2012.

The Court would also note that on page 21 of that transcript, when the victim was asked when she first had sexual intercourse with Mr. Schultz, she indicated that it was in July and August.

So when the Court views the partial transcript

and looks at the victim's testimony regarding when she had sexual intercourse with Mr. Schultz, the Court finds that the timeframe that the victim testified to was July, and August, and September of 2012.

The Court maintained that October 19 was not a date that Mr. Schultz was charged for, and the Court finds that mid-October, 2012, is not a timeframe that the victim testified to.

So when we look at late Summer, early Fall of 2012, Mr. Kelz, under your argument of when Fall starts and when Fall ends, but the Court finds that the victim, when she testified to late Summer, early Fall, the victim was looking at July, August, and September of 2012, and the victim did not testify to any alleged incidents of sexual assault that took place in mid-October, certainly October 19, 2012.

Given the Court's findings, the Court finds that Mr. Schultz was not charged and not tried for an alleged sexual assault that occurred on October 19, 2012.

Therefore, the Court finds that double jeopardy does not attach. The Court will deny the defense's motion to dismiss count three, and that is the ruling of the Court.

Now, procedurally, Counsel -- Mr. Zengler, did you have a question?

MR. ZENGLER: No, I was just thinking along the same lines you were.

Procedurally, I think we need to have a settlement conference now that you made your ruling.

THE COURT: Have we even proceeded to a preliminary hearing yet?

MR. ZENGLER: I think the preliminary hearing was waived, because the defense was conceding that, even if this motion was granted, that there was still a felony.

THE COURT: I think you are correct.

MR. KELZ: We haven't had a prelim.

THE COURT: There was not a waiver.

MR. KELZ: Not yet, no time limits were waived.

MR. ZENGLER: Okay.

THE COURT: Why don't we put this on for a scheduling conference for purposes of scheduling the preliminary hearing unless Counsel feels it would be worthwhile to schedule a pretrial conference beforehand?

MR. ZENGLER: Mr. Dunphy doesn't want me doing pretrials before preliminary hearings.

THE COURT: That's fine. We will put this on for a scheduling conference then.

MR. ZENGLER: This isn't a settlement.

MR. KELZ: I know. Just seeing where I am going to be.

THE COURT: December 18. But that will work?

MR. KELZ: I think so.

THE COURT: December 18 at 10:00 for a scheduling conference.

The Court will schedule the matter for a preliminary hearing at that time. Is there anything further, Counsel?

MR. ZENGLER: Maybe we could put it in the notes, since Mr. Kelz has a tight schedule, for Nat to call him first.

THE COURT: That's fine.

THE COURT: Okay. If there's nothing further, we are adjourned. Thank you.

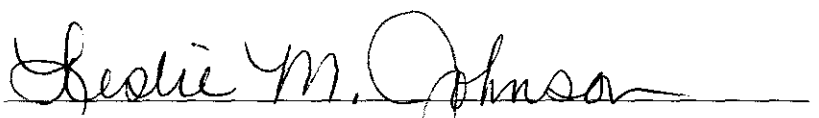
MR. KELZ: Thank you.

(Hearing adjourned).

STATE OF WISCONSIN)
) SS:
COUNTY OF RACINE)

I, Leslie M. Johnson, RMR, CRR, CPE, District II Court Reporter, do hereby certify that the foregoing transcript constituting of 9 pages inclusive is a true and accurate transcript of the proceedings taken on the 10th day of December, 2014.

Dated this 16th day of November, 2016.



Leslie M. Johnson, RMR, CRR, CPE
District II Court Reporter

APPENDIX D

STATE OF WISCONSIN **CIRCUIT COURT** **LINCOLN COUNTY**

STATE OF WISCONSIN

-vs-

CRIMINAL COMPLAINT AND SUMMONS

Alexander M. Schultz
W3125 HWY K
Merrill, WI 54452
DOB: 07/29/1992
Sex/Race: M/W
Eye Color: Hazel
Hair Color: Brown
Height: 5 ft 10 in
Weight: 180 lbs

Case No. 13-CF- 110
D.A. Case No. 2013LI000221

LINCOLN COUNTY FILED APR - 5 2013 CLERK OF COURT

Corey Bennett, being first duly sworn, on oath states as follows:

Count 1: REPEATED SEXUAL ASSAULT OF A CHILD, REPEATER

The above-named defendant in the late summer to early fall of 2012, at 1709 A Water Street, in the City of Merrill, Lincoln County, Wisconsin, did commit repeated sexual assaults involving the same child, MJT, DOB 05/03/1997 where at least three of the assaults were violations of sec. 948.02(1) or (2) Wis. Stats., contrary to sec. 948.025(1)(e), 939.50(3)(c), 939.62(1)(c) Wis. Stats., a Class C Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars ($100,000), or imprisoned not more than forty (40) years, or both.

And further, invoking the provisions of sec. 939.62(1)(c) Wis. Stats., because the defendant is a repeater, the maximum term of imprisonment for the underlying crime may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

Attached as Exhibit "A" and incorporated by reference is the report of Matthew Waid, of the Merrill Police Department and prays that the defendant be dealt with according to law. That the basis for your complainant's charge of such offense is as follows: Complainant is a Captain with the Merrill Police Department and has reviewed the attached report of Matthew Waid, of the Merrill Police Department. Your complainant believes the reports and/or statement to be trustworthy and reliable.

Your complainant has reviewed the records and files of the Lincoln County District Attorney's Office, Wisconsin Circuit Court Automation Project, (CCAP), and NCIC and CIB which are made and kept in the ordinary course of business. Those records and files show the following convictions for the defendant, said convictions are of record and un-reversed as of this date

OFFENSE:	DATE OF CONVICTION:	CASE NO./JURISDICTION:
Escape-Criminal Arrest	01-03-2012	11-CF-134/Lincoln County
3RD Degree Sexual Assault	11-30-2010	10-CF-43/Lincoln County
Strangulation and Suffocation	12-01-2010	09-CF-226/Lincoln Count

02/28/2013

Subscribed and sworn to before me
and approved for filing on:

4-4-13
Dated:

KURT B. ZENGLER
Assistant District Attorney
State Bar No. 1006096
Lincoln County Courthouse
1110 East Main Street
Merrill, Wisconsin 54452
(715) 536-0339

Corey A Bess
COMPLAINANT

SUMMONS

THE STATE OF WISCONSIN TO SAID DEFENDANT:

The original of the above Complaint having been issued, accusing the defendant of committing the above named crime(s).

You are, therefore, summoned to appear before the Circuit Court at the Lincoln County Courthouse, 1110 E. Main Street in the City of Merrill, to answer said Complaint on May 2nd, 2013 at 1:30 p.m. and in case of your failure to appear, a warrant for your arrest may be issued.

Dated: 4-04-13

Kurt B. Zengler, Assistant District Attorney

INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #:	REPORT DATE:	CASE NUMBER:
MERRILL POLICE DEPARTMENT	WI0350100	12/04/2012 3:52:32 PM	13-00044

OFFICER WAID

had sexual intercourse with M.J.T. and he said yes. He said that this occurred early to mid-October. He stated that it occurred in the front passenger seat of his vehicle in the cemetery by the fairgrounds. I asked him to explain to me what he believed sexual intercourse was. He said "the physical act of love". I informed him that I was looking for a detailed explanation of body parts, etc. in his explanation. He said "Put a man's penis in a women's vagina". I asked him if he put his penis in M.J.T.'s vagina on the night in question and he said yes. I asked him if he was wearing a condom and he said he was not. I asked him if he had ejaculated during or after the sexual intercourse and he said that he did not.

I asked him to explain the event to me. He said that he was with M.J.T. and "let her come onto me". He said that the sexual intercourse was consensual both ways. I asked him if his penis was erect during the sexual intercourse and he said that it was for approximately the first 10 seconds. He said that he stopped because he felt guilty about what he was doing because he had a girlfriend at the time. He said he was thinking "This is wrong, what am I doing?" He also informed me that he thought that the age of consent was 14 years of age. He said that it was an error in judgment on his part.

I explained to him that M.J.T. believed that he had ejaculated during or after the sexual intercourse as she stated that there was semen on his passenger seat. He said that there was no semen on his passenger seat that he recalled. I asked him how old M.J.T. was and he said that at the time he believed she was 15 or 16. He said that approximately a few weeks prior to the incident, she told him that she was 16 years old. I asked him if there was any other information he needed to tell me and he said that prior to the incident, they were with Samantha Yeskis-West.

I then ended the interview with Dominic.

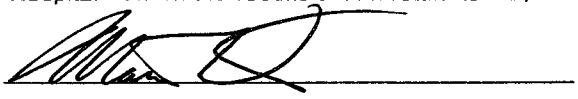
After I exited the interview room, I brought him to the lobby and he informed me that M.J.T. had told him approximately a week before the incident that she had sex with a male party who he believed the first name was Tyler. I then released Dominic from the Police Department.

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

I then spoke with her mother Carey during the same phone call and informed her that a report would be forwarded to the District Attorney's office in reference to this case.

Based on the fact that at the time of the incident, M.J.T. was 15 years of age and Dominic was 18 years of age, I will be forwarding this report to the Lincoln County District Attorney's office for their review for possible charges of Second Degree Sexual Assault of a Child.

A copy of the Authorization of Medical Release is attached to this report. I have requested that day shift bring a copy of the form to Good Samaritan Hospital. When the results of that return to me, I will forward them to the District Attorney's office for their review.

Officer signature 
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INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #:	REPORT DATE:	CASE NUMBER:
MERRILL POLICE DEPARTMENT	WI0350100	12/04/2012 15:52:32	13-00044A

OFFICER WAID #2

Officer Waid reporting:

On December 22, 2012, at approximately 6:40pm, I went to the Lincoln County Jail to interview Alex Schultz about the allegations M[redacted] T[redacted] made about the two having sexual intercourse.

Alex was brought to the interview room at the jail and I asked him to have a seat in the chair at the interview table. I then read to him verbatim his Miranda warning. When asked if he understood the rights, he said yes. When asked if he would answer questions knowing his rights, he said yes.

I then informed him that I was there to investigate a sexual assault where he was the suspect and M[redacted] T[redacted] was the victim. I asked him if he and M[redacted] had sexual intercourse during the summer of 2012. He said no. I asked him why M[redacted] would tell me that the two had sexual intercourse and he said that they did not. He informed me that M[redacted] had a crush on him and wanted to be in a relationship with him, however, he did not. He said that he is friends with Jacob Torkelson and would never do that to Jacob.

I informed him that the allegations were that the sexual intercourse was consensual between the two. I asked him if he was worried about the allegations being a nonconsensual sexual assault. I asked him if he was telling me something different because of those allegations and he said no. He informed me that he was telling me what he was because the two did not have sex. I could tell by his answers that he was very adamant that the two did not have sexual intercourse and did not feel that he was lying to me.

Based on the amount of vague information that M[redacted] had given me during the interview, I was unable to continue the interview by anymore facts. I then ended the interview.

Based on the above information, I did not feel there was probable cause to charge Alex with sexual assault at that time. Further follow up will be conducted.

Officer signature _____

crb

INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #:	REPORT DATE:	CASE NUMBER:
MERRILL POLICE DEPARTMENT	WI0350100	12/04/2012 15:52:32	13-00044A

OFFICER WAID #3

Officer Waid reporting:

On January 16, 2013 at approximately 3:25 p.m. I made phone contact with M[redacted] T[redacted]. I asked her if she would be willing to come to the Police Department to speak with me further about the alleged sexual assault that occurred between her and Alex Schultz. She said that she was not available on that day, however said she would be in after 3:00 p.m. on January 17.

On January 17, 2013 at approximately 3:21 p.m. M[redacted] T[redacted] came to the Merrill Police Department. I escorted her into the interview room of the Merrill Police Department and informed her that I was closing the door for privacy reasons. I then began the recorded interview with M[redacted]. I began the interview and asked her if she had told anyone in person or by phone about the alleged sexual contact that her and Alex Schultz had together. She said that she told Sam Yeskis, Emma Smith, and possibly Jessica Nowak in person but not by phone. I asked her if she had sent any text messages back and forth between her and Alex or anyone else regarding any details about the alleged sexual contact and she said she was not sure. She gave me her cell phone number of 921-2088 and said that she has had the phone since the alleged sexual contact. She described her phone as a Samsung Trac phone through AT & T. She also informed me that the sexual intercourse between her and Alex occurred more than once. She said that it occurred more than five times, however she did not know an exact number. She said that it all occurred at her residence on Water Street. She said that at one time the sexual contact occurred on a back porch of a separate apartment that was vacant at the time. I also confirmed with her that the sexual contact was in fact sexual intercourse and that it was consensual without a condom which she told me in an earlier interview. She said yes. She said that the sexual intercourse started at the middle of the year of 2012 and had gone on for a couple of months. She also said that Sam Yeskis was present in a separate room of her apartment during one of the times that the two had sexual intercourse. She said that each time the sexual intercourse occurred at her residence it was in her bedroom. I asked her if there were any text messages between her and Alex inviting him over or him requesting to come over to have sexual intercourse and she said there probably were. She also informed me that she had spoke with Alex's probation agent and said that there may be messages on facebook between her and Alex regarding the sexual intercourse. I informed M[redacted] that if I needed to speak with her again I would contact her. I then ended the interview with her.

Myself and Lt. Bacher went to probation and parole and met with Patti Malm. We asked them if there was any information regarding an alleged sexual assault obtained by their office and she said yes. Based on the fact that the evidence may not be admissible in court, we did not request to see any of the information.

I made phone contact with District Attorney Donald Dunphy and he also stated that any information received from Probation and Parole from Alex, whether it be statements or "voluntarily given information" from facebook, the information would not be admissible in court since it would not have been voluntarily given by Alex.

I spoke with Investigator Pat Wunsch about the facebook content as well as the possible text messages. He informed me that through his training and experience he knows that the text messages will no longer be on the phone as they are too old. I was also advised to contact facebook to see if any of the messages would be able to be retrieved. It is also believed that Alex's facebook account may be deleted at this time and the message content may not be available even if the records were subpoenaed.

At approximately 4:59 p.m., I called S[redacted] Y[redacted] at 539-2782. There was no voicemail set up and I was not able to leave a message. At 5:01 p.m. I made phone contact with Jessica Nowak at 551-7801. She agreed to come to the Police Department to speak with me about the incident at that time.

At approximately 5:12 p.m. Jessica Nowak came to the Police Department and spoke with me. I escorted her into the interview room and began the recorded interview. I informed her that the investigation I was investigating was between Alex Schultz and M[redacted] T[redacted]. I asked her if M[redacted] had spoke with her about any sexual contact between her and Alex and she said no. She said that she has seen Alex Schultz at M[redacted]'s residence and on the apartment complex property numerous times. She said that this was around the summer to early fall area. She said that she saw Alex there one time at night and the other times during the day when M[redacted]'s mother was at work. Jessica said that she assumed that the two were dating and may be having sexual contact. Jessica said that from the first time she saw Alex on the property at M[redacted]'s to the last time, was approximately a few weeks to a month long. She said that M[redacted] never told Jessica that the two had sexual intercourse nor did they ever discuss any sexual contact between her and Alex. She did say that her husband, Lance Nowak, had picked up Alex Schultz at one time and brought him to M[redacted]'s residence. I spoke to Lance during the interview on the phone and explained why I wanted to talk to him. He said that he was not able to come to the Police Department today, however said he would be in on Monday at some time to speak with me about any conversation the two had about sexual contact with M[redacted]. I then ended the interview with Jessica Nowak.

At approximately 5:21 p.m. I called E[redacted] S[redacted] at 218-8785. I left a voicemail on the message for her to contact me back. At approximately 5:33 p.m., E[redacted] S[redacted] contact me at the Merrill Police Department. I informed her of what I was investigating and she said she has not talked to M[redacted] in quite some time and has never talked to her about any sexual contact with anybody by the name of Alex. I felt it was unnecessary to ask her to come to the Police Department for an interview based on the fact that she

INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #:	REPORT DATE:	CASE NUMBER:
MERRILL POLICE DEPARTMENT	WI0350100	12/04/2012 15:52:32	13-00044A

OFFICER WAID #3

did not have any information for me. I then ended contact with M[redacted].

Further follow up will be conducted with this case in the near future in reference to possible messages on facebook as well as speaking with S[redacted] Y[redacted] and Lance Nowak. I have no further information at this time.

Officer Signature_____

jjt

INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #:	REPORT DATE:	CASE NUMBER:
MERRILL POLICE DEPARTMENT	WI0350100	12/04/2012 3:52:32 PM	13-00044

OFFICER MATTHEW WAID

Officer Waid reporting:

On January 21, 2013 at approximately 3:00 p.m. I made phone contact with Lance Nowak. He agreed to come to the Police Department between 7:00 and 7:30 for an interview. At approximately 7:10 p.m. he came to the Merrill Police Department. I escorted him into the interview room and thanked him for coming to the Police Department to speak with me. I then closed the door and informed him it was for privacy reasons only. I then began speaking to him about the information that he had possibly given Alex Schultz a ride to M[redacted] T[redacted]'s residence. He informed me he had given Alex Schultz a ride to M[redacted] T[redacted]'s house one time during the evening on a day in the late summer time. He said that M[redacted] had asked Lance if he would be able to pick up Alex and bring him to her residence and in return she would give him gas money. He agreed and went north of town to Alex's residence and picked him up. He said that he then brought him back to M[redacted]'s residence. I asked him if there was any conversation on the way to M[redacted]'s residence about why he was going there and Lance said that there was not any conversation pertaining to that. Lance then said that at one time, not the same day he had given him a ride, he had seen Alex and M[redacted] on a back porch area of a vacant apartment. He said that he saw M[redacted] taking off her shirt. He said that M[redacted] looked towards Lance, saw him, and she then ran inside. He said that was the only thing he had seen. I asked him if M[redacted] has ever mentioned to Lance that her and Alex Schultz have had sexual intercourse. He said that M[redacted] had told Lance that if Alex does not get sex from M[redacted] he gets very "pissed off". Lance also said that M[redacted] had told him many times that her and Alex have had sexual intercourse. This concluded my interview with Lance as he had no further information for me.

Please note that the fact he had informed me he had seen M[redacted] and Alex on the back porch of a vacant apartment coincides with M[redacted]'s statement about her and Alex Schultz having sexual intercourse on the back porch of a vacant apartment around the same time frame. Further follow up will be conducted with this case in the near future.

Officer Signature _____

jjt

INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #:	REPORT DATE:	CASE NUMBER:
MERRILL POLICE DEPARTMENT	WI0350100	12/04/2012 15:52:32	13-00044A

OFFICER MATTHEW WAID #5

Officer Waid reporting:

On January 27, 2013 at approximately 3:00 I made phone contact with M[redacted] T[redacted]. She voluntarily came to the Police Department at approximately 3:20 p.m. to speak with me about this case. When she arrived, I escorted her into the interview room and began the interview which was recorded. M[redacted] immediately stated that she recalled telling another person that her and Alex were together, that persons name was Tim Meyer. She also said that she looked back at her facebook and found that there were in fact messages sent between her and Alex on facebook that were still preserved. It was at that time that I asked her if she would voluntarily log into facebook and show me the messages. She agreed to and logged into her facebook account. She then brought me to the message portion of facebook and showed me the messages. It was at that time that I read through the messages and photographed them on the screen. The messages that caught my attention were from September 3, 2012. Please note that the user name that M[redacted] has is Jennifer Lloyd. She informed me that this is her account and she does not have her real name listed on the account. She said that Alex Schultz's account is Bane Schultz. These are the two names that I see on the messages. The messages are as follows:

BANE: "The very thing i told you n not to ever do"
JENNIFER FLOYED: "What was that?"
BANE: "Just dont talk to me ur dead to me now"
JENNIFER FLOYED: "plz just tell me wut i did.. we were just getting along alex, do u know how hard i try for u? ive been trying rlly hard not to make u hate me. i rlly want this to work, atleast as friends. whatd i do?"
BANE: "u know so stopiing acting stupid people tell me things, what was agreed upon about us? and what promis did you break?"
JENNIFER FLOYED: "I didnt tell anyone if thats it. And i really dont care anymore. Im done crying over you. Done bein depressed, done cryin, done spending every day wishing you wer still mine, wishing i could have done things different, done. Im over it"
BANE: "k but others ay different that you told them if i didn't hear about that i was gonna try to get back with you but if your over good"
JENNIFER FLOYED: "Well i didnt tell anyone. I wouldnt do that to you.."
BANE: "they seemed pretty convinced i did, im sorry but that shit can put me in prison so i hope not"
JENNIFER FLOYED: "Tommy might hav figureed it out by accident, but i didnt tell him intentionally"
BANE: "no it wasnt him"
JENNIFER FLOYED: "And ur not gunna believe me anyway cuz i know u trust him more. but if i thought for one second tht u wud believe me, id still want to try to get u back.But ik its pointless.."
BANE: "whatever you seem to think iguess, when i hear shit like that what am i suppossed to think? youre the only person that knows anyway i apologoized and i regret being a dick to you but i guess whats done is done, love you bye"
JENNIFER FLOYED: "i do still love you alex, im just tired of crying over someone thats just gnna brake up with me evrytime his friends tht dnt like me tell him something he dont wanna hear.. i wish this cud b fixd.."
BANE: "well it could but you dont seem to want to"
JENNIFER FLOYED: "and cherish is the only other one who might hav figured it out so i can tell u fer sure that if it wasnt tommy or cherish, then whoever told us was absolutly lying. i do want to i just dnt want to gt hurt everytime u hear somethin tht aint true, and u dnt evn ask me about u just start yellin at me aint true, and u dnt evn ask me about u just start yellin at me"
BANE: "well you have to understand i can go to prison...but im sorry ill ask next time"

I began speaking to M[redacted] about the allegations of her and Alex having sexual intercourse on the porch of the vacant apartment. I asked her how her and Alex went to the apartment. She said that Alex wanted to go over there and their intentions were to hide from M[redacted]'s mother. She said that the two never attempted to enter the apartment, however Alex tried entering the apartment but could not get in. I asked her if either of the two had intentions of having sexual intercourse at that time and she said that there were no intentions from her at that time of having sexual intercourse. I asked her if she ever saw Alex's genitals and she said that she never did. She did tell me that one time she sent a picture via text message to Alex of her breasts. I asked her if anyone had seen the two on the porch and she said that Lance Nowak had saw her. She said that she waved to him when they were on the porch.

She also described the porch as being the northeast corner of the apartment complex. To the rear of that porch is a wooded area. I know this from past experience with the apartment building. This concluded my interview with M[redacted].

I then went to the jail and interviewed Alex Schultz. Upon arrival at the jail, the jail staff allowed Alex out of his cell and he walked to the interview room alone. I had him have a seat in the interview room and I obtained a recorder for the interview from jail staff. I then began the interview by reading him is miranda rights verbatim from a miranda warning card. When asked if he understood his rights he said yes. When asked if he would answer the questions having his rights in mind, he said "sure".

I informed Alex why I was there and informed him that the evidence I was gathering was pointing to the fact that he and M[redacted] have had sexual intercourse. He immediately said, "nope". I informed him that he and M[redacted] were seen behind the vacant apartment on the porch and that I had also reviewed the facebook messages between the two on facebook. I informed him that we were not talking about a forcible rape, and that we were talking about a consensual sexual intercourse-type situation. He said that

INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #:	REPORT DATE:	CASE NUMBER:
MERRILL POLICE DEPARTMENT	WI0350100	12/04/2012 15:52:32	13-00044A

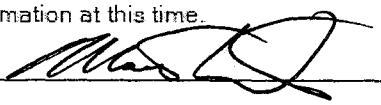
OFFICER MATTHEW WAID #5

he understood that. I asked Alex how many times her and M[redacted] had sexual intercourse and he said, "I'm still stickin with never". He said that he did not care what anyone else had said, he said that the two have never had sexual intercourse. He also said that he did not care what evidence I saw on facebook and said that he did not believe that facebook messages were admissable in court. I informed him that they were. He also said that I could not prove that it was him on facebook sending the messages. I asked him what facebook account he had and what his most recent facebook account was. He said that it was Bane Schultz. I showed him the picture of the messages between Bane Schultz and M[redacted]'s account. He asked me why his picture was not on there and I told him that it was because his account was deleted after probation and parole had him delete his account because he was a sex offender and is not supposed to have one. I asked him if that was correct and he said yes. I told Alex that we both knew where we were at with this situation and he said, "It doesn't mean that I'm going to admit anything. You can ask questions but I'm not going to admit anything". I told him that in the messages it discusses M[redacted] and Alex talking about sexual intercourse and Alex potentially going to prison for it. Alex said that I could not prove who was typing those messages and could not prove that he was typing those messages to M[redacted]. Alex said that lots of people have access to his account which may have been typing messages to M[redacted] I then confirmed with Alex that the two were in fact on the vacant porch as described. Alex informed me that he admitted being on the porch but would not admit to something that he did not do, being having sex with M[redacted]. He said that every cop on the department should know that he does not admit to things that he did not do. I informed him that I was aware of a case where he had lied to officers initially, however then admitted that he was lying and admitted guilt about that situation. He informed me that the reason he admitted his guilt was because he was pressured into the admission because there were three cops interrogating him. I also informed Alex that M[redacted] is pregnant and she may believe that Alex is the father of the child. Alex said he will not be the father of the child. He also put his arm down as if he wanted me to draw blood from his arm for potential DNA evidence. I informed him that I would not be drawing blood from him. I also informed Alex that the witness had seen M[redacted] take off her clothes on the porch. Alex said that this did not happen and agreed that it was a flat out lie. Alex said that, that whole area does not like him, meaning the apartment complex, which is why someone would have said that about him. I asked Alex about the time that Lance Nowak had dropped him off at M[redacted]'s apartment and he said that the visit was brief and that he was supervised by either Lance or M[redacted]'s mother. I informed him that neither were present. He said that he was not aware of that.

I asked Alex if he would be willing to take a stress analysis test and he said that he would. I also confronted Alex about his arms being crossed throughout most of the interview and that he appeared to be in a defensive stance throughout the interview. Alex told me that simple psychology did not prove his guilt. I informed him that he has been in a defensive stance throughout the entire interview. At that time I informed him that I would be charging him with the crimes that allegedly occurred in which I have probable cause to charge him for.

I then returned to the Police Department and completed the criminal complaint summonsing him into court for sexual assault of a child second degree, child enticement, and engaging in repeated acts of sexual assault with the same child. Also, Alex is a registered sex offender and has a prior adult conviction for sexual assault.

I have no further information at this time.

Officer Signature 

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INCIDENT REPORT
NARRATIVE

AGENCY NAME:	ORI #:	REPORT DATE:	CASE NUMBER:
MERRILL POLICE DEPARTMENT	WI0350100	12/04/2012 3:52:32 PM	13-00044A

OFFICER MATTHEW WAID #6

Officer Waid reporting:

On February 8, 2013 at approximately 7:08 p.m., S[redacted] came to the Merrill Police Department to speak with me about this incident. I had called her earlier in the day and she had agreed to come to the Police Department to speak with me.

I escorted her into the interview room and informed her that I was closing the door for privacy reasons only. I then began speaking with her about the alleged incident. She immediately informed me that she knew that Alex Schultz and M[redacted] were having sex. I asked her how she knew this and she said that M[redacted] had told her this numerous times. She also said that Alex had come over to M[redacted]'s residence numerous times. Sam said that she was present one of these times. She said she had spent the night at M[redacted]'s residence one night and had woke up the next morning. She said that Alex was still there at around 8:00 to 9:00 a.m. She said that Alex arrived while she was still sleeping and did not know what time he had arrived. She said that this had all occurred during the late summer, early fall area of 2012. I asked her about the morning in question and she said that Alex, M[redacted], and S[redacted] were the only people present in the residence. Please note that Alex is a sex offender and both S[redacted] and M[redacted] are under the age of 18. She said that M[redacted]'s mother and M[redacted]'s brother were not at the residence at that time. S[redacted] also told me that M[redacted] told her the sexual intercourse between her and Alex normally occurred in her bedroom. S[redacted] said that she also believed that M[redacted] had told her one time that her and Alex had sexual intercourse in the shower. S[redacted] informed me that this was the only information that she was able to give me. I then ended the interview. Please note that the interview was recorded with audio and video.

Officer Signature_____

jjt

NOTICE OF RIGHT TO ATTORNEY

You have been arrested and/or charged with a crime. You may go to jail or prison if you are convicted of what you have been charged with.

YOU HAVE THE RIGHT TO TALK TO AN ATTORNEY BEFORE ANSWERING ANY QUESTIONS AND TO HAVE AN ATTORNEY PRESENT WITH YOU WHEN YOU ARE QUESTIONED BY THE POLICE. YOU ALSO HAVE THE RIGHT TO HAVE AN ATTORNEY PRESENT WITH YOU DURING ANY AND ALL PROCEEDINGS. You also have the right to not be represented by an attorney. You can give up your right to an attorney at any time, even after one has been appointed for you. However, you should not do so unless and until you have thought over the effect of such a decision.

If you feel you cannot afford an attorney, one with be appointed for you by the State Public Defenders' Office for any scheduled court proceeding or if you are charged with a crime, IF YOU QUALIFY.

If you want to apply for an attorney though the Public Defenders' Office, you should contact them at the telephone number listed below between 8:00 AM and 4:30 PM, Monday though Friday, or by writing to them at the address indicated below. You should contact AS SOON AS POSSIBLE after you are charged. Waiting until just before your court appearance will hamper their ability to help you.

The Public Defenders' Office discourages people who are not in custody from calling their office collect and asks that you not do so if at all possible. Emergencies are, of course, accepted.

The Public Defenders' Office will NOT accept person-to-person calls under any circumstances.

State Public Defender
2402 E. Main Street, Suite #2
Merrill, WI 54452-2736
(715) 536-9105

When a defendant allows sexual contact initiated by a child, the defendant is guilty of intentional touching as defined in sub. (5). State v. Traylor, 170 Wis. 2d 393, 489 N.W.2d 626 (Ct. App. 1992).

The definition of "parent" in sub. (3) is all−inclusive; a defendant whose paternity was admitted but had never been adjudged was a "parent." State v. Evans, 171 Wis. 2d 471, 492 N.W.2d 141 (1992).

A live−in boyfriend can be a person responsible for the welfare of a child if he was used by the child's legal guardian as a caretaker for the child. State v. Sostre, 198 Wis. 2d 409, 542 N.W.2d 774 (1996), 94−0778.

The phrase "by the defendant or upon the defendant's instruction" in sub. (6) modifies the entire list of acts and establishes that for intercourse to occur the defendant either had to perform one of the actions on the victim or instruct the victim to perform one of the actions on himself or herself. State v. Olson, 2000 WI App 158, 238 Wis. 2d 74, 616 N.W.2d 144, 99−2851.

A person under 18 years of age employed by his or her parent to care for a child for whom the parent was legally responsible can be a person responsible for the welfare of the child under sub. (3). State v. Hughes, 2005 WI App 155, 285 Wis. 2d 388, 702 N.W.2d 87, 04−2122.

Petrone established guidelines for defining "lewd" and "sexually explicit." It did not require that a child be "unclothed" in order for a picture to be lewd. Instead, the visible display of the child's pubic area and posing the child as a sex object with an unnatural or unusual focus on the child's genitalia should inform the common sense determination by the trier of fact regarding the pornographic nature of the image. It follows that when a child's pubic area is visibly displayed, the lack of a full opaque covering is a proper consideration that should inform the common sense determination by the trier of fact. State v. Lala, 2009 WI App 137, 321 Wis. 2d 292, 773 N.W.2d 218, 08−2893.

948.015 Other offenses against children. In addition to the offenses under this chapter, offenses against children include, but are not limited to, the following:

(1) Sections 103.19 to 103.32 and 103.64 to 103.82, relating to employment of minors.

(2) Section 118.13, relating to pupil discrimination.

(3) Section 125.07, relating to furnishing alcohol beverages to underage persons.

(4) Section 253.11, relating to infant blindness.

(5) Section 254.12, relating to applying lead−bearing paints or selling or transferring a fixture or other object containing a lead−bearing paint.

(6) Sections 961.01 (6) and (9) and 961.49, relating to delivering and distributing controlled substances or controlled substance analogs to children.

(7) Section 444.09 (4), relating to boxing.

(8) Section 961.573 (3) (b) 2., relating to the use or possession of methamphetamine−related drug paraphernalia in the presence of a child who is 14 years of age or younger.

(9) A crime that involves an act of domestic abuse, as defined in s. 968.075 (1) (a), if the court includes in its reasoning under s. 973.017 (10m) for its sentencing decision the aggravating factor under s. 973.017 (6m).

History: 1987 a. 332; 1989 a. 31; 1993 a. 27; 1995 a. 448; 2005 a. 263; 2011 a. 273.

948.02 Sexual assault of a child. (1) FIRST DEGREE SEXUAL ASSAULT. (am) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm to the person is guilty of a Class A felony.

(b) Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony.

(c) Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.

(d) Whoever has sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years of age when the sexual contact occurs.

(e) Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

(3) FAILURE TO ACT. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class F felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

(4) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(5) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

History: 1987 a. 332; 1989 a. 31; 1995 a. 14, 69; 2001 a. 109; 2005 a. 430, 437; 2007 a. 80; 2013 a. 167.

Relevant evidence in child sexual assault cases is discussed. In Interest of Michael R.B. 175 Wis. 2d 713, 499 N.W.2d 641 (1993).

Limits relating to expert testimony regarding child sex abuse victims is discussed. State v. Hernandez, 192 Wis. 2d 251, 531 N.W.2d 348 (Ct. App. 1995).

The criminalization, under sub. (2), of consensual sexual relations with a child does not violate the defendant's constitutionally protected privacy rights. State v. Fisher, 211 Wis. 2d 665, 565 N.W.2d 565 (Ct. App. 1997), 96−1764.

Second degree sexual assault under sub. (2) is a lesser included offense of first degree sexual assault under sub. (1). State v. Moua, 215 Wis. 2d 510, 573 N.W.2d 210 (Ct. App. 1997).

For a guilty plea to a sexual assault charge to be knowingly made, a defendant need not be informed of the potential of being required to register as a convicted sex offender under s. 301.45 or that failure to register could result in imprisonment, as the commitment is a collateral, not direct, consequence of the plea. State v. Bollig, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, 98−2196.

Expert evidence of sexual immaturity is relevant to a preadolescent's affirmative defense that he or she is not capable of having sexual contact with the purpose of becoming sexually aroused or gratified. State v. Stephen T. 2002 WI App 3, 250 Wis. 2d 26, 643 N.W.2d 151, 00−3045.

That the intended victim was actually an adult was not a bar to bringing the charge of attempted 2nd degree sexual assault of a child. The fictitiousness of the victim is an extraneous factor beyond the defendant's control within the meaning of the attempt statute. State v. Grimm, 2002 WI App 242, 258 Wis. 2d 166, 653 N.W.2d 284, 01−0138.

Section 939.22 (19) includes female and male breasts as each is "the breast of a human being." The touching of a boy's breast constitutes "sexual contact" under sub. (2). State v. Forster, 2003 WI App 29, 260 Wis. 2d 149, 659 N.W.2d 144, 02−0602.

Sub. (2), in conjunction with ss. 939.23 and 939.43 (2), precludes a defense predicated on a child's intentional age misrepresentation. The statutes do not violate an accused's rights under the 14th amendment to the U. S. Constitution. State v. Jadowski 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 418, 03−1493.

The consent of the child in a sub. (2) violation is not relevant. Yet if the defendant asserts that she did not consent to the intercourse and that she was raped by the child, the issue of her consent becomes paramount. If the defendant was raped, the act of having sexual intercourse with a child does not constitute a crime. State v. Lackershire, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d 23, 05−1189.

"Sexual intercourse" as used in this section does not include bona fide medical, health care, and hygiene procedures. This construction cures the statute's silence regarding medically appropriate conduct. Thus the statute is not unconstitutionally overbroad. State v. Lesik, 2010 WI App 12, 322 Wis. 2d 753, 780 N.W.2d 210, 08−3072.

The elements of the offense under sub. (1) (e), are: 1) that the defendant had sexual contact with the victim; and 2) that the victim was under the age of 13 years at the time of the alleged sexual contact. It is these elements that the jury must unanimously agree upon. The exact location of the assault is not a fact necessary to prove the sexual contact and does not require jury unanimity. State v. Badzinski, 2014 WI 6, 352 Wis. 2d 329, 843 N.W.2d 29, 11−2905.

The constitutionality of this statute is upheld. Sweeney v. Smith, 9 F. Supp. 2d 1026 (1998).

Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform. Olszewski. 89 MLR 693 (2005).

948.025 Engaging in repeated acts of sexual assault of the same child. (1) Whoever commits 3 or more violations under s. 948.02 (1) or (2) within a specified period of time involving the same child is guilty of:

(a) A Class A felony if at least 3 of the violations were violations of s. 948.02 (1) (am).

(b) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1) (am), (b), or (c).

(c) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1) (am), (b), (c), or (d).

(d) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1).

(e) A Class C felony if at least 3 of the violations were violations of s. 948.02 (1) or (2).

(2) (a) If an action under sub. (1) (a) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) (am) occurred within the specified period of time but need not agree on which acts constitute the requisite number.

(b) If an action under sub. (1) (b) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) (am), (b), or (c) occurred within the specified period of time but need not agree on which acts constitute the requisite number and need not agree on whether a particular violation was a violation of s. 948.02 (1) (am), (b), or (c).

(c) If an action under sub. (1) (c) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) (am), (b), (c), or (d) occurred within the specified period of time but need not agree on which acts constitute the requisite number and need not agree on whether a particular violation was a violation of s. 948.02 (1) (am), (b), (c), or (d).

(d) If an action under sub. (1) (d) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) occurred within the specified period of time but need not agree on which acts constitute the requisite number.

(e) If an action under sub. (1) (e) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) or (2) occurred within the specified period of time but need not agree on which acts constitute the requisite number and need not agree on whether a particular violation was a violation of s. 948.02 (1) or (2).

(3) The state may not charge in the same action a defendant with a violation of this section and with a violation involving the same child under s. 948.02 or 948.10, unless the other violation occurred outside of the time period applicable under sub. (1). This subsection does not prohibit a conviction for an included crime under s. 939.66 when the defendant is charged with a violation of this section.

History: 1993 a. 227; 1995 a. 14; 2001 a. 109; 2005 a. 430, 437; 2007 a. 80.

This section does not violate the right to a unanimous verdict or to due process. State v. Johnson, 2001 WI 52, 243 Wis. 2d 365, 627 N.W.2d 455, 99−2968.

Convicting the defendant on 3 counts of first−degree sexual assault of a child and one count of repeated acts of sexual assault of a child when all 4 charges involved the same child and the same time period violated sub. (3). A court may reverse the conviction on the repeated acts charge under sub. (1) rather than the convictions for specific acts of sexual assault under s. 948.02 (1) when the proscription against multiple charges in sub. (3) is violated even if the repeated acts charge was filed prior to the charges for the specific actions. State v. Cooper, 2003 WI App 227, 267 Wis. 2d 886, 672 N.W.2d 118, 02−2247.

The state may bring multiple prosecutions under sub. (1) when two or more episodes involving "3 or more violations under s. 948.02 (1) or (2) within a specified period of time involving the same child" are discrete as to time and venue. State v. Nommensen, 2007 WI App 224, 305 Wis. 2d 695, 741 N.W.2d 481, 06−2727.

948.03 Physical abuse of a child. (1) DEFINITIONS. In this section, "recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.

(2) INTENTIONAL CAUSATION OF BODILY HARM. (a) Whoever intentionally causes great bodily harm to a child is guilty of a Class C felony.

(b) Whoever intentionally causes bodily harm to a child is guilty of a Class H felony.

(c) Whoever intentionally causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class F felony.

(3) RECKLESS CAUSATION OF BODILY HARM. (a) Whoever recklessly causes great bodily harm to a child is guilty of a Class E felony.

(b) Whoever recklessly causes bodily harm to a child is guilty of a Class I felony.

(c) Whoever recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class H felony.

(4) FAILING TO ACT TO PREVENT BODILY HARM. (a) A person responsible for the child's welfare is guilty of a Class F felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused great bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of great bodily harm by the other person or facilitates the great bodily harm to the child that is caused by the other person.

(b) A person responsible for the child's welfare is guilty of a Class H felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child that is caused by the other person.

(6) TREATMENT THROUGH PRAYER. A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981 (3) (c) 4. or 448.03 (6) in lieu of medical or surgical treatment.

History: 1987 a. 332; 2001 a. 109; 2007 a. 80; 2009 a. 308.

To obtain a conviction for aiding and abetting a violation of sub. (2) or (3), the state must prove conduct that as a matter of objective fact aids another in executing the crime. State v. Rundle, 176 Wis. 2d 985, 500 N.W.2d 916 (Ct. App. 1993).

To overcome the privilege of parental discipline in s. 939.45 (5), the state must prove beyond a reasonable doubt that only one of the following is not met: 1) the use of force must be reasonably necessary; 2) the amount and nature of the force used must be reasonable; and 3) the force used must not be known to cause, or create a substantial risk of, great bodily harm or death. Whether a reasonable person would have believed the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. State v. Kimberly B. 2005 WI App 115, 283 Wis. 2d 731, 699 N.W.2d 641, 04−1424.

The definition of reckless in this section is distinct from the general definition found in s. 939.24 and does not contain a state of mind element. Because the defense of mistake defense applies only to criminal charges with a state of mind element the trial court properly exercised its discretion in refusing to give an instruction on the mistake defense. State v. Hemphill, 2006 WI App 185, 296 Wis. 2d 198, 722 N.W. 2d 393, 05−1350.

Reckless child abuse requires the defendant's actions demonstrate a conscious disregard for the safety of a child, not that the defendant was subjectively aware of that risk. In contrast, criminal recklessness under s. 939.24 (1) is defined as when the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk. Thus, recklessly causing harm to a child is distinguished from criminal recklessness, because only the latter includes a subjective component. State v. Williams, 2006 WI App 212, 296 Wis. 2d 834, 723 N.W. 2d 719, 05−2282.

Testimony supporting the defendant father's assertion that he was beaten with a belt as a child was not relevant to whether the amount of force he used in spanking his daughter was objectively reasonable. A parent may not abuse his or her child and claim that conduct is reasonable based on his or her history of being similarly abused. State v. Williams, 2006 WI App 212, 296 Wis. 2d 834, 723 N.W. 2d 719, 05−2282.

The treatment−through−prayer provision under sub. (6) by its terms applies only to charges of criminal child abuse under this section. On its face, the treatment−through−prayer provision does not immunize a parent from any criminal liability other than that created by the criminal child abuse statute. No one reading the treatment−through−prayer provision should expect protection from criminal liability under any other statute. State v. Neumann, 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560, 11−1044.

The second−degree reckless homicide statute, s. 940.06, and this statute are sufficiently distinct that a parent has fair notice of conduct that is protected and conduct that is unprotected. The statutes are definite enough to provide a standard of conduct for those whose activities are proscribed and those whose conduct is protected. A reader of the treatment−through−prayer provision, sub. (6), cannot reasonably conclude that he or she can, with impunity, use prayer treatment as protection against all criminal charges. The statutes are not unconstitutional on due process fair notice grounds. State v. Neumann, 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560, 11−1044.

948.04 Causing mental harm to a child. (1) Whoever is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well−being of the child is guilty of a Class F felony.

971.29 Amending the charge. (1) A complaint or information may be amended at any time prior to arraignment without leave of the court.

(2) At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

(3) Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

When there is evidence that a jury could believe proved guilt, the trial court cannot sua sponte set aside the verdict, amend the information, and find defendant guilty on a lesser charge. State v. Helnik, 47 Wis. 2d 720, 177 N.W.2d 881 (1970).

A variance was not material when the court amended the charge against the defendant to charge a lesser included crime. Moore v. State, 55 Wis. 2d 1, 197 N.W.2d 820 (1972).

Sub. (2), in regard to amendments after verdict, applies only to technical variances in the complaint, not material to the merits of the action. It may not be used to substitute a new charge. State v. Duda, 60 Wis. 2d 431, 210 N.W.2d 763 (1973).

The refusal of a proposed amendment of an information has no effect on the original information. An amendment to charge a violation of a substantive section as well as a separate penalty section is not prejudicial to a defendant. Wagner v. State, 60 Wis. 2d 722, 211 N.W.2d 449 (1973).

Sub. (1) does not prohibit amendment of the information with leave of the court after arraignment, but before trial, provided that the defendant's rights are not prejudiced. Whitaker v. State, 83 Wis. 2d 368, 265 N.W.2d 575 (1978).

Notice of the nature and cause of the accusations is a key factor in determining whether an amendment at trial has prejudiced a defendant. The inquiry is whether the new charge is so related to the transaction and facts adduced at the preliminary hearing that a defendant cannot be surprised by the new charge since the preparation for the new charge would be no different than the preparation for the old charge. State v. Neudorff, 170 Wis. 2d 608, 489 N.W.2d 689 (Ct. App. 1992).

Failure of the state to obtain court permission to file a post−arraignment amended information did not deprive the court of subject matter jurisdiction. State v. Webster, 196 Wis. 2d 308, 538 N.W.2d 810 (Ct. App. 1995), 93−3217.

That the court's jurisdiction is invoked by the commencement of a case and that the legislature has granted prosecutors sole discretion to amend a charge only prior to arraignment means that the prosecutor's unchecked discretion stops at the point of arraignment. State v. Conger, 2010 WI 56, 325 Wis. 2d 664, 797N.W.2d 341, 08−0755.

The trial court cannot after trial amend a charge of sexual intercourse with a child to one of contributing to the delinquency of a minor since the offenses require proof of different facts and the defendant is entitled to notice of the charge against him. LaFond v. Quatsoe, 325 F. Supp. 1010 (1971).

971.30 Motion defined. (1) "Motion" means an application for an order.

(2) Unless otherwise provided or ordered by the court, all motions shall meet the following criteria:

(a) Be in writing.

(b) Contain a caption setting forth the name of the court, the venue, the title of the action, the file number, a denomination of the party seeking the order or relief and a brief description of the type of order or relief sought.

(c) State with particularity the grounds for the motion and the order or relief sought.

History: Sup. Ct. Order, 171 Wis. 2d xix (1992).

971.31 Motions before trial. (1) Any motion which is capable of determination without the trial of the general issue may be made before trial.

(2) Except as provided in sub. (5), defenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment, invalidity in whole or in part of the statute on which the prosecution is founded, or the use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived. The court may, however, entertain such motion at the trial, in which case the defendant waives any jeopardy that may have attached. The motion to suppress evidence shall be so entertained with waiver of jeopardy when it appears that the defendant is surprised by the state's possession of such evidence.

(3) The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial.

(4) Except as provided in sub. (3), a motion shall be determined before trial of the general issue unless the court orders that it be deferred for determination at the trial. All issues of fact arising out of such motion shall be tried by the court without a jury.

(5) (a) Motions before trial shall be served and filed within 10 days after the initial appearance of the defendant in a misdemeanor action or 10 days after arraignment in a felony action unless the court otherwise permits.

(b) In felony actions, motions to suppress evidence or motions under s. 971.23 or objections to the admissibility of statements of a defendant shall not be made at a preliminary examination and not until an information has been filed.

(c) In felony actions, objections based on the insufficiency of the complaint shall be made prior to the preliminary examination or waiver thereof or be deemed waived.

(6) If the court grants a motion to dismiss based upon a defect in the indictment, information or complaint, or in the institution of the proceedings, it may order that the defendant be held in custody or that the defendant's bail be continued for not more than 72 hours pending issuance of a new summons or warrant or the filing of a new indictment, information or complaint.

(7) If the motion to dismiss is based upon a misnomer, the court shall forthwith amend the indictment, information or complaint in that respect, and require the defendant to plead thereto.

(8) No complaint, indictment, information, process, return or other proceeding shall be dismissed or reversed for any error or mistake where the case and the identity of the defendant may be readily understood by the court; and the court may order an amendment curing such defects.

(9) A motion required to be served on a defendant may be served upon the defendant's attorney of record.

(10) An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint.

(11) In actions under s. 940.225, 948.02, 948.025, 948.051, 948.085, or 948.095, or under s. 940.302 (2), if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5), evidence which is admissible under s. 972.11 (2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

(12) In actions under s. 940.22, the court may determine the admissibility of evidence under s. 972.11 only upon a pretrial motion.

(13) (a) A juvenile over whom the court has jurisdiction under s. 938.183 (1) (b) or (c) on a misdemeanor action may make a motion before trial to transfer jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938. The motion may allege that the juvenile did not commit the violation under the circumstances described in s. 938.183 (1) (b) or (c), whichever is applicable, or that transfer of jurisdiction would be appropriate because of all of the following:

1. If convicted, the juvenile could not receive adequate treatment in the criminal justice system.

2. Transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.

3. Retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (b) or (c), whichever is applicable.

(b) The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence that he or she did not