COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1521-CR **Cir. Ct. No. 2012CF38**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. SWANSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rusk County: STEVEN P. ANDERSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Christopher Swanson appeals a judgment of conviction and an order denying postconviction relief. Swanson argues his trial attorney was ineffective by: (1) failing to move to sever three counts charging physical abuse of a child from other counts charging incest with a child and sexual

assault of a child; (2) failing to move for dismissal of certain counts prior to trial; and (3) failing to move for substitution or recusal of the circuit court judge. We reject these arguments and affirm.

BACKGROUND

¶2 A second amended complaint charged Swanson with ten offenses, based on allegations that he sexually and physically assaulted his twin daughters, Emily and Cathy, and sexually assaulted his girlfriend's daughter, Sue.[1] With respect to Emily, Swanson was charged with two counts of incest with a child (Counts 1 and 4), one count of repeated sexual assault of a child (Count 2), two counts of physical abuse of a child—intentional causation of bodily harm (Counts 3 and 9), and one count of sexual assault of a child under sixteen years of age (Count 5). With respect to Cathy, Swanson was charged with one count of sexual assault of a child under sixteen years of age (Count 6), one count of incest with a child (Count 7), and one count of physical abuse of a child—intentional causation of bodily harm (Count 10). With respect to Sue, Swanson was charged with one count of sexual assault of a child under sixteen years of age (Count 8).

¶3 After a preliminary hearing and bind over, an Information and Amended Information were filed charging the same ten counts alleged in the second amended complaint. Swanson pled not guilty to all counts, and a two-day trial was held in October 2012.

[1] For ease of reading, we use pseudonyms when referring to the victims, rather than their initials.

¶4 At trial, Cathy testified she and Emily moved to the City of Ladysmith to live with Swanson in June 2011, after their mother went to jail. At the time, Cathy and Emily were twelve years old and had little prior contact with Swanson. When the girls first moved in with Swanson, they also lived with his girlfriend and her daughter, Sue.

¶5 According to Emily, Swanson initially treated them "like a family." However, that changed about one month later when Swanson, Emily, and Cathy moved into the girls' great-grandmother's house. At that point, Swanson started yelling at the girls and calling Emily a loser, a bitch, a slut, and a whore. Both girls testified Swanson was physically abusive toward them while they were living with their great-grandmother. In particular, they both described an incident in which Swanson slammed Cathy's head into a wall. Emily also testified that on one occasion while they were staying with her great-grandmother, she awoke to find Swanson digitally penetrating her vagina. Cathy testified that during the same time period, Swanson tried to touch her genitals and tried to make her touch his penis.

¶6 Emily testified that she, Cathy, and Swanson moved to a motel around August 13, 2011. A few days later, they moved into a homeless shelter. Emily stated Swanson became even meaner while they lived at the shelter, hitting both girls with his hands and his crutches. She testified that on the day after her thirteenth birthday in October 2011, Swanson returned to the shelter angry and hit her repeatedly. Afterwards, he called her into his bedroom and said he wanted to give her a hug. When Emily told him she did not want a hug, he said he was sorry and asked her to rub his back. After Emily rubbed Swanson's back, he took her clothes off, asked her what color condom she wanted, and then raped her. In Emily's journal, which was admitted into evidence at trial, she wrote that after the

rape Swanson begged her not to tell anyone, and she complied with that request because she did not know what would happen to her if she told others what happened and she did not want to go into foster care. Emily also wrote that since the rape, Swanson had been "all over [Sue's mother]," and it "feels like a heartbreak or something."

¶7 Cathy testified that while living at the homeless shelter, Swanson called her a bitch, a slut, and a whore. She further testified he hit her almost every day, including hitting her in the head with his crutches. Cathy stated she was afraid of Swanson and thought he was going to kill her, but she did not call the police because she had nowhere else to go.

¶8 On about October 18, 2011, Swanson and his daughters moved into an apartment on East Worden Avenue in Ladysmith, which they shared with Sue and her mother. Cathy testified her relationship with Swanson became even worse after they moved into the Worden Avenue apartment. She stated one night she fell asleep in Swanson's room after rubbing his back and awoke to find him touching her breasts. She also testified Swanson tried to touch her vagina "over and over."

¶9 Cathy further testified Swanson physically abused her while they were living at the Worden Avenue apartment, including by hitting her and pulling her hair. She specifically testified that, on about January 27, 2012, Swanson became angry because the apartment was not clean, so he picked Cathy up by her ankles, put her head under a faucet, and then used her head to mop the floor. While Cathy was lying on the floor, Swanson kicked her with his work boots. A partial video of this incident, which Sue had recorded on her MP3 player, was played for the jury.

¶10 Emily similarly testified the physical and sexual abuse continued after her family moved into the Worden Avenue apartment. In a journal entry from January 2012, Emily wrote that Swanson had sex with her at least seven times and told her "how he loves [her] so much and he doesn't care about [Sue's mother] he just needs the money." Emily wrote, "[I]t hurts that he has to have sex with her while I'm around," and "[E]very time she leaves he has sex with me, it's like he is using me. It seems that [sic] the only reason he keeps me." Emily also wrote that she had suicidal thoughts because of the abuse, but she could not tell anyone about the assaults because she loved Swanson and did not want him to get into trouble.

¶11 Both Emily and Cathy described a March 12, 2012 incident in which Swanson hit Emily and stepped on her face. Again, Sue had recorded part of that incident on her MP3 player, and the video was played at trial. After playing the video, the State asked Emily, "[T]he door is closed on the video when it first starts and we hear you scream in the background. What happened?" Emily responded, "He's hurting me." The State subsequently asked, "And in the video you say … [to Swanson,] ['Y]ou do things, nobody fucking knows.['] What are you talking about?" Emily stated she did not remember, but when the State asked her why she would say "those kind of things" to Swanson when he abused her, Emily admitted she said them "[t]o get him to stop." Emily later admitted that, when she told Swanson he did things "that nobody fucking knows," she was referring to him having sex with her.

¶12 Cathy testified that, after Sue stopped recording on March 12, 2012, Swanson put a gun to his head and threatened to kill himself if his daughters did not want to live with him anymore. Cathy stated she loved Swanson and did not want him to kill himself.

¶13 Emily testified she and Cathy rode the bus to a school choir concert in Rice Lake the day after the events depicted in the March 12, 2012 video. Cathy rode the bus home from the concert, but Emily rode home with Swanson. On the way home, Emily testified Swanson pulled the car over in an isolated area, took off her pants, and had sex with her.

¶14 Sue testified she was in Swanson's room at the Worden Avenue apartment on March 28, 2012, with Swanson, Emily, and Cathy. They were all lying on Swanson's bed, and Swanson asked Sue to rub his back. At some point, Sue fell asleep, and she later awoke to find Swanson's fingers in her vagina. Sue testified she was fourteen years old at the time. She told her mother about the assault the following day, and her mother took her to the police station to report it.

¶15 A social worker interviewed Emily and Cathy at the police station on March 29, 2012. During those interviews, both girls initially denied that Swanson had physically or sexually abused them. When the State asked Cathy why she initially denied the abuse, she responded, "Because I didn't know that my dad was in jail and I didn't know what he would do if I told or where I would go." Emily similarly testified she denied the abuse because she "didn't know where [she] would go" and she did not have any friends or family she could live with. The State asked Emily, "What did you think would happen if you told what your dad did and you had to go home to your dad?" Emily responded, "I thought that he would kill me."

¶16 The jury found Swanson guilty of all ten charges alleged in the Amended Information. However, prior to sentencing, the State informed Swanson and the circuit court that it had improperly charged Swanson with both repeated sexual assault of a child (Count 2) and sexual assault of a child under sixteen years

of age (Count 5) for acts that occurred during the same time period. *See* WIS. STAT. § 948.025(3) (2015-16).[2] Pursuant to ***State v. Cooper***, 2003 WI App 227, ¶15, 267 Wis. 2d 886, 672 N.W.2d 118, the State therefore moved to dismiss Count 5. The circuit court granted that motion during the sentencing hearing. It then sentenced Swanson to a total of thirty years' initial confinement and fifteen years' extended supervision.

¶17 Swanson moved for postconviction relief, arguing his trial attorney was ineffective by, among other things, failing to move to sever the physical abuse charges, failing to seek dismissal of Counts 2, 4, and 5 prior to trial, and failing to move for substitution or recusal of the circuit court judge. The circuit court denied Swanson's motion, following a ***Machner***[3] hearing. Additional facts are included in the discussion section as necessary.

DISCUSSION

¶18 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

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

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶19 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is sufficient to establish either deficient performance or prejudice is a question of law that we review independently. ***Id.***

I. Motion for severance

¶20 On appeal, Swanson first argues his trial attorney was ineffective by failing to move to sever the physical abuse charges from the other charges alleging sexual assault and incest. When a defendant asserts his or her trial attorney was ineffective by failing to move to sever charges that were alleged in a single complaint, we begin by considering whether the initial joinder of the charges was proper. *See* ***State v. Bellows***, 218 Wis. 2d 614, 622-24, 582 N.W.2d 53 (Ct. App. 1998). If the charges were properly joined, we then consider whether the joinder substantially prejudiced the defendant. ***Id.*** at 623-24.

A. Severance based on misjoinder

¶21 Whether criminal charges were properly joined is a question of law that we review independently. ***Id.*** at 622. WISCONSIN STAT. § 971.12 controls the joinder of crimes. It allows two or more crimes to be charged in the same complaint if they "are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or

constituting parts of a common scheme or plan." Sec. 971.12(1). Wisconsin courts favor initial joinder, particularly when the charged offenses involve the same defendant. ***State v. Salinas***, 2016 WI 44, ¶36, 369 Wis. 2d 9, 879 N.W.2d 609. Initial joinder decisions are interpreted broadly "because of the goals and purposes of the joinder statute: (1) trial economy and convenience; (2) to promote efficiency in judicial administration; and (3) to eliminate multiple trials against the same defendant, which promotes fiscal responsibility." ***Id.***

¶22 The State argues the charges in this case were properly joined in a single complaint because the sexual assaults Swanson committed were "connected together" with the physical assaults. *See* WIS. STAT. § 971.12(1). When assessing whether charges are sufficiently "connected together" for purposes of joinder, we consider a variety of factors, including:

> (1) are the charges closely related; (2) are there common factors of substantial importance; (3) did one charge arise out of the investigation of the other; (4) are the crimes close in time or close in location, or do the crimes involve the same victims; (5) are the crimes similar in manner, scheme or plan; (6) was one crime committed to prevent punishment for another; and (7) would joinder serve the goals and purposes of WIS. STAT. § 971.12.

Salinas, 369 Wis. 2d 9, ¶43.

¶23 Several of these factors support a conclusion that the sexual assault/incest charges against Swanson were "connected together" with the physical abuse charges. First, all of the crimes alleged in the Amended Information were close in time and location. *See* ***id.*** They occurred in Rusk County, between the summer of 2011 and April 2012, and generally took place in residences Swanson shared with his daughters. Second, Swanson's daughters were the victims of all of the physical abuse charges and all but one of the sexual

assault charges. The offenses therefore largely involved the same victims. *See* ***id.*** Third, the State presented evidence at trial suggesting that Swanson engaged in the physical abuse of his daughters in part to prevent them from disclosing the sexual abuse. *See* ***id.***; *see also supra* ¶15. Fourth, joinder served the goals and purposes of WIS. STAT. § 971.12, in that it permitted all of the related charges against Swanson to be resolved in a single trial, which conserved judicial resources and prevented the victims from having to testify at multiple trials. *See* ***Salinas***, 369 Wis. 2d 9, ¶44.

¶24 In addition, we observe that Swanson, Emily, and Cathy "resided together as part of the same familial unit with daily interactions." *See* ***id.***, ¶40. The trial testimony of Emily, Cathy, and Sue shows that Swanson used that closeness to "create[] an atmosphere of fear, engaging in a scheme or plan of manipulation, coercion, and intimidation to control and abuse" his victims. *See* ***id.*** The physical abuse and sexual assault charges are therefore connected because Swanson "used both to establish control over [Emily and Cathy] that allowed him to break the law without legal repercussions." *See* ***id.***

¶25 We also agree with the State that joinder was proper because the sexual assaults and physical assaults were part of a "common scheme or plan." *See* WIS. STAT. § 971.12(1); ***Salinas***, 369 Wis. 2d 9, ¶¶45-46. The State presented evidence at trial demonstrating that both the physical and sexual assaults of Emily and Cathy were part of a common scheme to control, intimidate, and manipulate the girls. The evidence showed that Swanson alternately terrified the girls and played on their sympathies in order to get what he wanted from them. In particular, we observe that both Emily and Cathy testified one of the reasons they did not reveal the abuse was because they were afraid of what Swanson would do

to them in response. Under these circumstances, joinder of the physical abuse and sexual assault/incest charges was proper under § 971.12(1).

B. Severance due to substantial prejudice

¶26 Even if criminal charges were properly joined, a circuit court may grant a motion for severance "[i]f it appears that a defendant or the state is prejudiced" by the joinder. WIS. STAT. § 971.12(3); *see also* ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). When a motion for severance is made, the circuit court "must determine what, if any, prejudice would result due to a trial on the joined charges. The court must then weigh this potential prejudice against the interests of the public in conducting a trial on the multiple counts." ***State v. Bettinger***, 100 Wis. 2d 691, 696, 303 N.W.2d 585, *amended,* 100 Wis. 2d 691, 305 N.W.2d 57 (1981). "Under Wisconsin law, the proper joinder of criminal offenses is presumptively non-prejudicial." ***State v. Prescott***, 2012 WI App 136, ¶13, 345 Wis. 2d 313, 825 N.W.2d 515. To rebut that presumption, a defendant must show "substantial prejudice" to his or her defense. ***Id.*** The determination of whether a defendant has demonstrated sufficient prejudice to outweigh the public's interest in conducting a single trial is committed to the circuit court's discretion. ***Bettinger***, 100 Wis. 2d at 696.

¶27 Swanson argues that, in his case, conducting a single trial on both the sexual assault/incest charges and the physical abuse charges was prejudicial because the testimony and videos regarding the physical abuse "painted awful images of Swanson in a violent rampage against his daughters." He asserts this evidence was intended to "inflame the jury's passions" and would have poisoned even the most open-minded juror against him. In other words, Swanson argues he was prejudiced by the joinder because the jury's verdicts on the sexual

assault/incest charges were likely impacted by the evidence regarding his physical abuse of Emily and Cathy.

¶28 However, "[i]n evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant." ***Locke***, 177 Wis. 2d at 597. Whether Swanson was substantially prejudiced by the joint trial of the sexual assault/incest charges and physical abuse charges therefore hinges on whether evidence regarding the physical assaults would have been admissible in a separate trial regarding the sexual assaults. In its oral ruling denying Swanson's postconviction motion, the circuit court stated evidence regarding the physical abuse would have been admissible at a separate trial regarding the sexual assaults as "background of how these particular events were taking place." The court therefore concluded Swanson was not prejudiced by the joinder of the charges, and, accordingly, it would have denied a motion to sever them.

¶29 We agree with the circuit court that evidence regarding the physical abuse would have been admissible at a separate trial regarding the sexual assault/incest charges, and, as a result, joinder of the charges did not substantially prejudice Swanson. We employ a three-step analysis to determine whether other acts evidence is admissible. ***State v. Sullivan***, 216 Wis. 2d 768, 771, 576 N.W.2d 30 (1998). First, we ask whether the evidence is offered for a permissible purpose. ***Id.*** at 772. Second, we ask whether the evidence is relevant. ***Id.*** Third, we consider whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ***Id.*** Notably, "in sexual assault cases, especially those

involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." ***Id.***

¶30 Turning to the first step of the ***Sullivan*** analysis, we conclude there would have been at least two permissible purposes for offering evidence regarding Swanson's physical abuse of Emily and Cathy at a separate trial on the sexual assault/incest charges. One permissible purpose for the admission of other acts evidence is to furnish context for the crime or allow for a full presentation of the case. *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983).[4] Here, in order to present the full story of the sexual assaults to the jury, the State needed to start with the events that occurred in the summer of 2011, when Emily and Cathy moved to Ladysmith and began living with Swanson. The State's theory of the case was that Swanson started out acting normally toward the girls but quickly escalated his verbal, physical, and sexual abuse. In addition, Emily's trial testimony shows that at least two of the incidents of sexual abuse followed shortly after incidents of physical abuse. *See supra* ¶¶6, 11-13. For these reasons, we agree with the circuit court that evidence regarding the physical

[4] Swanson asserts that some federal courts and at least one state supreme court have "begun to denounce" context as a permissible purpose for the admission of other acts evidence. Be that as it may, in ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), this court expressly held that context is a permissible purpose. We are bound by our own precedent, *see* ***Skrupky v. Elbert***, 189 Wis. 2d 31, 56, 526 N.W.2d 264 (Ct. App. 1994), and have no power to overrule, modify, or withdraw language from one of our previously published opinions, *see* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

assaults was necessary to provide context for the sexual assaults in order to give the jury a full presentation of the case.

¶31 In addition, we note the State asserted at trial that Emily and Cathy failed to report the sexual assaults in part because they were afraid of Swanson due to the physical abuse he committed against them. Evidence regarding the physical abuse therefore also goes to Swanson's plan for committing the sexual assaults. *See* WIS. STAT. § 904.04(2) (listing "plan" as a permissible purpose for the admission of other acts evidence). Specifically, it shows he used physical abuse to deter his daughters from reporting the sexual assaults, which allowed him to continue perpetrating the sexual assaults without legal repercussions.

¶32 As for the second step of the ***Sullivan*** analysis, evidence regarding the physical assaults would have been relevant at a separate trial on the sexual assault/incest charges. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Evidence regarding the physical assaults would have been relevant to prove that the sexual assaults occurred because it demonstrated the control Swanson had over Emily and Cathy and explained why they delayed reporting the sexual assaults.

¶33 Under the third prong of the ***Sullivan*** analysis, Swanson argues the probative value of evidence regarding the physical abuse would have been outweighed by the danger of unfair prejudice. We disagree.

¶34 Evidence is unfairly prejudicial when it "has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to

base its decision on something other than the established propositions in the case." ***Sullivan***, 216 Wis. 2d at 789-90. Here, evidence regarding the physical assaults was highly probative of whether the sexual assaults occurred because it illustrated the atmosphere in which the sexual assaults were committed—particularly the degree of control Swanson exercised over his daughters—and provided a plausible reason for the girls' delayed reporting of the sexual assaults. In addition, some of the sexual assaults are nearly impossible to describe without reference to the physical abuse—for instance, the assault that occurred the day after Emily's birthday, which was immediately preceded by an episode of physical violence. *See supra* ¶6. Although Swanson argues evidence regarding the physical assaults would have improperly aroused the jury's sympathies and sense of horror during a separate trial on the sexual assaults, under the circumstances of this case, and particularly given the application of the greater latitude rule, *see* ***Davidson***, 236 Wis. 2d 537, ¶51, we cannot conclude the danger of unfair prejudice to Swanson would have outweighed the evidence's probative value.

¶35 For the foregoing reasons, we conclude evidence regarding the physical abuse of Emily and Cathy would have been admissible as other acts evidence at a separate trial on the sexual assault/incest charges. Accordingly, Swanson has failed to show that he was substantially prejudiced by the joinder of the sexual assault/incest charges and the physical abuse charges. Because the joinder of the charges was proper and Swanson cannot demonstrate substantial prejudice, a motion to sever the physical abuse charges would have been properly denied. As a result, Swanson cannot establish either deficient performance or prejudice with respect to counsel's failure to file a severance motion. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (counsel does not perform deficiently by failing to raise a legal challenge that would have been

properly denied); ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (defendant is not prejudiced by counsel's failure to make a motion that would have been denied).[5]

II. Motion to dismiss Counts 2, 4, and 5

¶36 Swanson next argues his trial attorney was ineffective by failing to move to dismiss Counts 2, 4 and 5 of the Amended Information prior to trial, pursuant to WIS. STAT. § 948.025(3).[6] Section 948.025(1) prohibits the repeated sexual assault of a child, which is defined as three or more sexual assaults involving the same child within a specified period of time. Section 948.025(3), in turn, provides that the State may not charge a defendant, in a single action, with repeated sexual assault of a child under § 948.025(1) and a violation of WIS. STAT. § 948.02 (sexual assault of a child) or WIS. STAT. § 948.10 (exposing genitals, pubic area, or intimate parts) involving the same child, unless the violation of § 948.02 or § 948.10 occurred outside the time period specified in the repeated-sexual-assault-of-a-child charge.

[5] Based on trial counsel's testimony at the ***Machner*** hearing, the circuit court concluded counsel performed deficiently by failing to file a severance motion. Nevertheless, the court concluded counsel was not ineffective because a motion to sever would have been denied, and, as a result, Swanson was not prejudiced by counsel's failure to file such a motion. We agree with the circuit court that a motion to sever would have been properly denied. However, as we note above, that conclusion means that counsel's failure to file a severance motion was neither deficient nor prejudicial. *See supra* ¶35; *see also* ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325 (we independently review whether defendant's proof is sufficient to establish deficient performance and prejudice).

[6] In his postconviction motion, Swanson argued trial counsel was ineffective by failing to move to dismiss Counts 1, 2, 4, and 5. On appeal, however, he does not argue counsel should have moved to dismiss Count 1. He has therefore abandoned that argument. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the circuit court, but not raised on appeal, is deemed abandoned.).

¶37 WISCONSIN STAT. § 948.025(3) provided no basis for trial counsel to move to dismiss Count 4. Count 4 charged Swanson with incest with a child, contrary to WIS. STAT. § 948.06(1). It alleged that Swanson had sexual intercourse with his daughter, Emily, on October 5, 2011. Count 2 charged Swanson with repeated sexual assault of a child, contrary to § 948.025(1), alleging he sexually assaulted Emily at least three times between "the summer of 2011 and March 13, 2012." Although Count 4 alleged an act of sexual intercourse that fell within the time period specified in Count 2, § 948.025(3) does not prohibit the State from charging the defendant with incest with a child for an act that occurred during the same period specified in a repeated-sexual-assault-of-a-child charge. Consequently, any motion to dismiss Count 4 pursuant to § 948.025(3) would have been properly denied, and trial counsel did not perform deficiently by failing to file such a motion. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.

¶38 With respect to Counts 2 and 5, Swanson cannot show that he was prejudiced by trial counsel's failure to move for dismissal under WIS. STAT. § 948.025(3). As noted above, Count 2 charged Swanson with repeated sexual assault of Emily based on acts that occurred between "the summer of 2011 and March 13, 2012." Count 5 charged Swanson with sexual assault of a child under sixteen years of age, contrary to WIS. STAT. § 948.02(2), for a sexual assault of Emily that occurred on October 5, 2011. The jury was instructed at trial that, for purposes of the repeated sexual assault of a child charge, it could not consider the alleged October 5, 2011 assault. Nevertheless, after Swanson's trial, but before his sentencing, the State conceded it had improperly charged Swanson with both repeated sexual assault of Emily and sexual assault of Emily based on acts that occurred during the same time period. The State therefore moved to dismiss Count 5, pursuant to ***Cooper***, and the circuit court granted that motion. *See*

Cooper, 267 Wis. 2d 886, ¶15. Accordingly, Swanson cannot demonstrate that he was prejudiced by trial counsel's failure to seek dismissal of Count 2 or Count 5 prior to trial because, in the end, he was only convicted and sentenced on one of those charges.[7]

¶39 Swanson nevertheless argues his trial counsel was ineffective by failing to move to dismiss Counts 2, 4, and 5 because his trial on those three counts violated his right to be free from double jeopardy.[8] As a preliminary matter, we observe that Swanson was not convicted and sentenced on Count 5. As a result, any double jeopardy claim he may have had regarding that count is now moot. *See* ***State v. Parr***, 182 Wis. 2d 349, 362-63, 513 N.W.2d 647 (Ct. App. 1994) (holding a defendant's acquittal on one of two charges claimed to be multiplicitous rendered his double jeopardy claim moot because the jury had "already accorded [him] the relief to which he would otherwise be entitled … on

[7] Swanson appears to argue that, under the circumstances of this case, the circuit court should have dismissed both Count 2 and Count 5 after the State's violation of WIS. STAT. § 948.025(3) became apparent. However, in ***State v. Cooper***, 2003 WI App 227, ¶15, 267 Wis. 2d 886, 672 N.W.2d 118, we held that, "[i]f a violation of § 948.025(3) does arise, the State should choose which charge or charges it will pursue." Here, consistent with ***Cooper***, the State chose to pursue Count 2, and it therefore moved to dismiss Count 5. While Swanson argues ***Cooper*** is limited to situations in which the defendant directly contributed to the violation of § 948.025(3), the ***Cooper*** court did not indicate its holding was limited to that specific fact scenario. *See* ***Cooper***, 267 Wis. 2d 886, ¶15. Moreover, Swanson's argument that the circuit court should have dismissed both Counts 2 and 5 ignores the fact that Swanson's attorney at the sentencing hearing indicated Swanson did not object to the dismissal of Count 5. Sentencing counsel did not argue that both Counts 2 and 5 should be dismissed. Swanson does not argue on appeal that sentencing counsel was ineffective in that respect.

[8] In addition, Swanson states he was "prejudiced" by counsel's failure to move to dismiss Counts 2, 4, and 5 "in that his right to due process and a fair trial was impacted." However, Swanson completely fails to develop a cognizable legal argument regarding due process. We need not address undeveloped arguments or arguments that are unsupported by references to legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

appeal"). We therefore address Swanson's double jeopardy argument only as it pertains to Counts 2 and 4.[9]

¶40 Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that we review independently. ***State v. Nommensen***, 2007 WI App 224, ¶5, 305 Wis. 2d 695, 741 N.W.2d 481. Both the state and federal constitutions protect against the imposition of multiple punishments for the same offense. ***State v. Ziegler***, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. "When a defendant is charged in more than one count for a single offense, the counts are deemed impermissibly multiplicitous." ***Id.*** Offenses are the same, for double jeopardy purposes, when they are identical in law and in fact. *See* ***id.***, ¶60.

¶41 Here, Swanson makes a conclusory assertion that his right to be free from double jeopardy was violated because the "acts in Count Four … are the same acts underlying the repeated-acts charge in Count Two." He does not, however, provide any legal analysis of whether the two counts are identical in law and in fact. We could reject his double jeopardy argument for that reason alone. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶42 In any event, Swanson's double jeopardy argument also fails on the merits because he cannot show that Counts 2 and 4 are identical in law—that is, that "one offense does not require proof of any fact in addition to those which

[9] We observe Swanson's trial attorney did, in fact, file a pretrial motion to dismiss six counts on multiplicity grounds. However, in that motion, counsel alleged Counts 1 and 2 were multiplicitous of each other, Counts 4 and 5 were multiplicitous of each other, and Counts 6 and 7 were multiplicitous of each other. Counsel did not allege, as Swanson does on appeal, that Counts 2 and 4 were multiplicitous of each other.

must be proved for the other offense." ***Id.*** (citing ***Blockburger v. United States***, 284 U.S. 299, 304 (1932)). To prove Count 2 (repeated sexual assault of a child), as charged in the Amended Information, the State had to show that Swanson repeatedly had sexual contact or intercourse *with a person who was less than sixteen years old*. *See* WIS. STAT. §§ 948.025(1)(e), 948.02(2). To prove Count 4 (incest with a child), the State had to show that Swanson had sexual contact or intercourse with a child *he knew was related to him in a degree of kinship closer than second cousin*. *See* WIS. STAT. § 948.06(1). The statutory term "child" is defined as a person who is less than eighteen. WIS. STAT. § 948.01(1).

¶43 Thus, while Count 2 alleged that Swanson sexually assaulted a child under the age of sixteen, and the same sexual assault was the basis for the incest charge in Count 4, the counts are not identical in law because Count 2 required the State to prove the victim was under sixteen—a fact not required for conviction on Count 4—and Count 4 required the State to prove Swanson knew that the victim was related to him—a fact not required for conviction on Count 2. Because Counts 2 and 4 are not identical in law, they do not allege the same offense for double jeopardy purposes. As a result, Swanson's convictions on Counts 2 and 4 did not violate his right to be free from double jeopardy, and trial counsel did not perform deficiently by failing to move to dismiss those counts. *See* ***Berggren***, 320 Wis. 2d 209, ¶21.[10]

[10] If a defendant fails to show that allegedly multiplicitous offenses are identical in law and fact, "we are no longer concerned with a double jeopardy violation but instead a due process violation." ***State v. Ziegler***, 2012 WI 73, ¶62, 342 Wis. 2d 256, 816 N.W.2d 238. As noted above, Swanson completely fails to develop an argument regarding due process. *See supra* n.8. We therefore limit our analysis to his double jeopardy claim.

III. Motion for substitution or recusal

¶44 Swanson next argues his trial attorney was ineffective by failing to file a motion for substitution or recusal regarding the Honorable Steven P. Anderson, the circuit court judge who presided over Swanson's case. At the ***Machner*** hearing, trial counsel testified Swanson made it clear "early on" in her representation of him that he did not want Judge Anderson to preside over his case because Judge Anderson had been the prosecuting attorney in previous criminal cases against him. Counsel testified she and Swanson discussed filing a motion to substitute, and, after she gave Swanson her opinion on that issue, he "did not insist on it." Counsel stated, "If [Swanson] would have [insisted], I would have filed it, but he seemed to be okay with my explanation of why we should not file that substitution. But again, if he would have insisted on it, I would have."

¶45 When asked whether she had ever considered asking Judge Anderson to recuse himself, counsel responded, "No, and again for the same reasons. I believe the prosecution by Judge Anderson with Mr. Swanson was somewhat remote, and again, for the same reasons as filing the substitution, I did not think that was a good trial strategy." On cross-examination, counsel explained she knows which judges typically replace Judge Anderson when he is removed from a case, and those judges tend to be "more harsh." She therefore testified it is her "professional opinion not to remove Judge Anderson in most cases."

¶46 Swanson confirmed he told his trial counsel to file a substitution motion in the early stages of his case. Postconviction counsel asked Swanson, "Did you ever back off on your desire to have Judge Anderson removed from the case? In other words, were you convinced not to do that?" Swanson responded, "I really wasn't convinced, but I was trying to take the word of my attorney's

advice." Swanson testified he again raised concerns regarding Judge Anderson as the trial approached, but trial counsel "kept reassuring [him] that [he] need[ed] to keep Judge Anderson" because he might otherwise end up with a judge who would not be as fair. When asked whether he took counsel's opinion "as the final word on it," Swanson responded, "I guess, yeah. Yes."

¶47 The circuit court concluded trial counsel did not perform deficiently by failing to move for substitution or recusal. We agree. Counsel testified she advised Swanson against filing a substitution motion because she believed the judges likely to replace Judge Anderson were "more harsh," and it was her "professional opinion" not to seek removal of Judge Anderson in most cases. We will not second-guess this reasonable strategic decision. *See* ***Strickland***, 466 U.S. at 690. In addition, counsel testified Swanson did not insist on filing a motion for substitution, and if he had insisted, she would have filed such a motion. The circuit court expressly found counsel's testimony on that point credible and found that counsel "legitimately thought that Mr. Swanson had acquiesced and was willing to waive his right to substitution because of her explanations and discussions about the potential other judges that may be assigned to this case." These findings are not clearly erroneous. *See* ***Nielsen***, 247 Wis. 2d 466, ¶14. Because Swanson acquiesced in trial counsel's reasonable strategic decision not to file a motion for substitution or recusal of Judge Anderson, counsel did not perform deficiently by failing to file those motions.

IV. Cumulative Prejudice

¶48 Finally, Swanson argues the cumulative effect of his trial attorney's alleged errors prejudiced his defense. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 395 ("[P]rejudice should be assessed based on the

cumulative effect of counsel's deficiencies."). We disagree. We have already determined Swanson's attorney did not perform deficiently by: (1) failing to file a severance motion; (2) failing to move to dismiss Count 4; and (3) failing to move for substitution or recusal of Judge Anderson. Accordingly, we need not consider those alleged errors in our cumulative prejudice analysis. *See* ***id.***, ¶61 ("[E]ach alleged error [by trial counsel] must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness—in order to be included in the calculus for [cumulative] prejudice."). We have also concluded Swanson was not prejudiced by the only other alleged deficiency—counsel's failure to move to dismiss Count 2 or Count 5. We therefore reject Swanson's cumulative prejudice argument.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.