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STATE OF WISCONSIN
IN SUPREME COURT
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OF WISCONSIN

No. 2012AP393-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORTEZ LORENZO TOLIVER,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A
DECISION OF THE WISCONSIN COURT OF
APPEALS AFFIRMING THE JUDGMENT OF
CONVICTION ENTERED IN THE RACINE
COUNTY CIRCUIT COURT, THE HONORABLE
FAYE M. FLANCHER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

1. Should the court of appeals have addressed Toliver's claim raised for the first time in his reply brief that the circuit court lost subject matter jurisdiction at the preliminary hearing?

2. Did the circuit court's failure to expressly state at the preliminary hearing that it found probable cause to believe Cortez Lorenzo Toliver, a juvenile, had attempted to violate Wis. Stat. § 940.01 render the preliminary hearing required by Wis. Stat. § 973.023 defective?
3. Does a failure to comply with the statutory requirements set forth in Wis. Stat. § 973.023, the preliminary hearing statute concerning juveniles subject to criminal court jurisdiction, somehow divest the circuit court of its subject matter jurisdiction?
4. Is Toliver's challenge to the circuit court's subject matter jurisdiction more properly characterized as an attack on the circuit court's competency?
5. Does a defendant waive his challenge to competency by his failure to object contemporaneously, by entering guilty pleas, and by failing to raise the issue until his reply brief in the court of appeals?
6. Did the circuit court lose competency?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for review by the Wisconsin Supreme Court, both oral argument and publication are warranted.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

On the evening of April 11, 2009, sixteen-year old Cortez Toliver and Dontai Gorman were gambling with dice in Racine (1:1-2).¹ Gorman was winning and had taken almost all of Toliver's money when Toliver told Gorman, "I need my money back. I've got to get to Milwaukee" (1:2). When Gorman refused, Toliver pulled out a gun (1:2). Gorman then told Toliver he could have his money, but Gorman started to flee (1:2). Toliver ran after Gorman, shot Gorman in the back and ran away (1:2).

The State charged Toliver with attempted first-degree homicide and being a person under the age of eighteen in possession of a dangerous weapon (1). At the preliminary hearing, the court found probable cause to bind over Toliver (52).

In November 2009, the circuit court heard argument on Toliver's motion to reopen the preliminary hearing based on his assertion that the court failed to comply with Wis. Stat. § 973.032(1), as well as argument on Toliver's "reverse waiver" petition. (57:4-10, 28-84; 58:3-11). With regard to the preliminary hearing issue, the court expressed doubt that there was authority to reopen a preliminary hearing (57:8). Regardless, though, the court said that from a review of the preliminary hearing's transcript that "there was probable cause to support Count 1, attempted first degree intentional homicide, and Count 2, possession of a dangerous weapon by a person under the age of 18" (57:10). In addition, the

¹ The facts are taken from the criminal complaint, which Toliver agreed formed the factual basis for his pleas (66:10).

circuit court found Toliver had not met his burden to transfer the case to juvenile court so it denied the reverse waiver petition (58:11-14).

Toliver sought a petition for leave to appeal the denial of his reverse waiver petition in the court of appeals (28). The court denied leave to appeal (28).

In June 2011, Toliver pleaded guilty to first-degree reckless injury and attempted robbery with the threat of force; both counts were enhanced by Toliver's use of a dangerous weapon (3; 44; 66:4-10). On July 7, 2011, the circuit court sentenced Toliver to a total term of twenty-seven years of initial confinement to be followed by twelve and a half years of extended supervision (44).

Toliver moved for postconviction relief, arguing for sentence modification (46). Following a hearing on Toliver's motion, the circuit court denied relief (47; 68).

Toliver appealed to the court of appeals, arguing the trial court erroneously exercised its discretion in denying his petition for reverse waiver and his motion for sentence modification. Toliver's Ct. App. Br. at 1; Pet-Ap. 150. The State argued Toliver's guilty pleas waived his reverse waiver argument, but that if the court declined to apply the guilty plea waiver rule, the trial court's exercise of discretion with regard to both reverse waiver and sentencing were appropriate. State's Ct. App. Br. at i; Pet-Ap. 188. In reply, Toliver – represented by different counsel than he was in his opening brief – argued for the first time that the trial court failed to comply with Wis. Stat. § 973.032 and this failure divested the court of

subject matter jurisdiction. Toliver's Reply Br. at 1-8; Pet-Ap. 220-27. In the alternative, Toliver argued – again for the first time – that if the circuit court had not lost subject matter jurisdiction, it lost competency over his case. Toliver's Reply Br. at 8-9; Pet-Ap. 227-28. Further, Toliver argued application of the guilty plea waiver to his case “is imprudent” and the circuit court both relied on incorrect information at sentencing and failed to articulate its reasoning. Toliver's Reply Br. at 10-17; Pet-Ap. 229-36.

The court of appeals affirmed Toliver's judgment of conviction. *See State v. Toliver*, No. 2012AP393-CR (Ct. App. Apr. 4, 2013); Pet-Ap. 001-12. The court concluded the circuit court properly exercised its discretion with regard to both the reverse waiver and the sentencing issue. *Id.* The court declined to address Toliver's claim that the circuit court failed to comply with Wis. Stat. § 973.032, applying the well-established rule that arguments raised for the first time in a reply brief will not be considered. *Id.*, slip op. ¶29 n.5; Pet-Ap. 012.

Toliver petitioned this court for review and review was granted. *State v. Toliver*, No. 2012AP393-CR (Wis. S. Ct., review granted Dec. 17, 2013).

STANDARD OF REVIEW

The issues before the court involve questions of law, which this court reviews independently. *See State v. Michael S.*, 2005 WI 82, ¶31, 282 Wis. 2d 1, 698 N.W.2d 673. Whether a court has jurisdiction in a particular case presents a question of law to which this court applies an

independent standard of review. *State v. LeQue*, 150 Wis. 2d 256, 262, 442 N.W.2d 494 (Ct. App. 1989).

ARGUMENT

I. THE COURT OF APPEALS APPROPRIATELY DECLINED TO ADDRESS TOLIVER'S CLAIM RAISED FOR THE FIRST TIME IN HIS REPLY BRIEF.

Toliver argues that the court of appeals erred in refusing to address his subject matter jurisdiction claim, which he raised for the first time in reply to the State's brief. He argues that despite the long-standing rule that matters raised for the first time in a reply brief need not be addressed by the court, subject matter jurisdiction may be raised at any time and is appropriately raised for the first time in a reply brief.

This court need not address the issue of whether an attack on a court's subject matter jurisdiction may be raised for the first time in a reply brief because, as the State shows below, there was no deficiency in the preliminary hearing, any deficiency that may have occurred had no effect on the court's competency, and that any possible error was waived for several reasons. Because the claim was not properly characterized as one attacking the court's subject matter jurisdiction, and was raised for the first time in a reply brief, the court of appeals' refusal to address it was appropriate. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998); *cf. State v. Sumner*, 2008 WI 94, ¶72, 312 Wis. 2d 292, 752 N.W.2d 783

(approving of the court of appeals' decision not to address issue that played no part in the conviction).

II. THE PROCEEDINGS BELOW,
WHILE NOT PERFECT,
SUFFICIENTLY SATISFIED
THE REQUIREMENTS AND
THE PURPOSE OF WIS. STAT.
§ 970.032.

A. Background and relevant
law.

In *Kleser*, this court acknowledged Wisconsin's significant legislative changes in the 1990s to its treatment of juvenile offenders. *State v. Kleser*, 2010 WI 88, ¶40, 328 Wis. 2d 42, 786 N.W.2d 144. The court noted that prior to 1995, nearly every juvenile offender between the ages of twelve and eighteen was subject to the authority of the juvenile court.² *Id.* ¶43.

That rule changed. In 1993, the legislature passed 1993 Wisconsin Act 98, which added several new offenses for which a person under sixteen could be waived into adult criminal court. *Id.* ¶44. As relevant here, this act also created Wis. Stat. § 48.183, which conferred exclusive adult court jurisdiction over juveniles alleged to

² The State notes at the outset that the nomenclature the court and parties apply with regard to juvenile and criminal law – specifically the use of the terms “criminal court” and “juvenile court” – is confusing. As shown later in its brief, the State submits that there is just one circuit “court.” Notwithstanding that, in discussing the history of Wis. Stat. § 970.032 and Wis. Stat. § 938.183, the State shall use the terms “adult court” and “juvenile court” as used by this court in *Kleser*.

have committed battery in a correctional facility.³ *Id.* ¶¶44-45. The legislature also created Wis. Stat. § 970.032, which changed the requirements for a preliminary hearing for juveniles charged under the new scheme, instructing the circuit court that it must find probable cause of the qualifying offense, but allowing a defendant to be “reverse waived” to juvenile court if certain findings are made. *Id.* ¶¶44, 46. The 1993 act “is the source of both (1) ‘exclusive original jurisdiction’ over a juvenile in criminal court; and (2) the reverse waiver provision in the criminal code.” *Id.* ¶47.

In 1994, the legislature created a committee to examine the children’s code and to recommend legislative changes in order to better address rising rates of crime among juveniles. *Id.* ¶40. 1995 Wisconsin Act 77 implemented the committee’s recommendations. *Id.* ¶48. This 1995 act repealed Wis. Stat. § 48.183 and expanded Wis. Stat. § 938.183 in place of the former § 48.183. *Id.* The act also extended the scope of Wis. Stat. § 970.032. *Id.*

At the end of 2006, a new version of Wis. Stat. § 938.183, the statute that details which charges subject a juvenile to the exclusive original authority of the criminal court, became effective. *Id.* ¶49. This time, in addition to subjecting juveniles who commit battery in a secure facility to adult court jurisdiction, juveniles alleged to have committed or attempted to commit a violation of Wis. Stat. § 940.01, or who have allegedly committed a violation of Wis. Stat. §§ 940.02 or 940.05, are also subject to the

³ As shown later in this brief, this “jurisdiction” is statutory authority, not subject matter jurisdiction.

exclusive authority of the circuit court. *Id.* Wisconsin Stat. § 970.032, the preliminary hearing statute concerned with these charges, “has evolved since 1993 to accommodate the great expansion of ‘exclusive original jurisdiction.’” *Id.* ¶52.

In examining the new Wis. Stat. § 970.032, this court noted that under the first subsection of the statute, a juvenile accused of a crime falling under adult court jurisdiction is entitled to a preliminary hearing at which the circuit court must find probable cause of “the violation.” *Id.* ¶57. This is in contrast to the general preliminary hearing statute, Wis. Stat. § 970.03(1), which requires the court find probable cause only of a felony. *Id.* ¶55.

Kleser noted that the purpose of the preliminary hearing under Wis. Stat. § 970.032(1), as it differs from the general preliminary hearing statute under Wis. Stat. § 970.03(1), is to ensure that the criminal court has jurisdiction over the offense and to afford the juvenile the opportunity “to introduce evidence in an effort to get the charge reduced.” *Id.* ¶¶57, 62. Its purpose is not to grant a juvenile a windfall when the circuit court fails to articulate magic words. Moreover, the court stated, “It must be recognized that if the state establishes probable cause to believe that the defendant has violated either Wis. Stat. §§ 940.01(1) or 940.05, the criminal court would still have exclusive original jurisdiction over the juvenile.”⁴ *Id.* ¶63.

⁴ The plain language of the statute also subjects a juvenile who has *attempted* to commit a violation of Wis. Stat. § 940.01 to the criminal code. Wis. Stat. § 938.183(1)(am).

B. The circuit court found probable cause to believe Toliver had attempted to murder Gorman, which subjected him to adult court jurisdiction.

1. The criminal court had exclusive original jurisdiction over Toliver.

As a preliminary matter, the State addresses Toliver's statements that "the juvenile court (i.e., the circuit court sitting as a juvenile court) has exclusive jurisdiction over charges against juveniles 10 years of age or older" and that the "status quo" is that juveniles fall within the exclusive jurisdiction of the juvenile court, as well as his argument that any deviation from that status quo "is not inherent, but a creature of statute." Toliver's Br. at 19-20.

First, the very statute Toliver cites for this sweeping position makes it clear that Toliver's "exclusive jurisdiction" argument is incorrect. The statute, found in the juvenile justice code, states, "The court has exclusive jurisdiction, *except* as provided in ss. 938.17, 938.18, and 938.183, over any juvenile 10 years of age or older who is alleged to be delinquent." Wis. Stat. § 938.12(1) (emphasis added). Wisconsin Stat. § 938.183 places exclusive original jurisdiction over juveniles alleged to have attempted to commit murder in the adult circuit court. All juveniles who are alleged to have committed, or attempted to commit, a violation of Wis. Stat. § 940.01 are subject to the *exclusive* jurisdiction of the adult court. Wis. Stat. § 938.183(1)(am). Similarly, juveniles who are

alleged to have committed violations of Wis. Stat. §§ 940.20(1) or 946.43 while in a detention facility, as well as juveniles who are alleged to have committed violations of Wis. Stat. §§ 940.02 or 940.05, are subject to the exclusive jurisdiction of the criminal court. Wis. Stat. § 938.183(1)(a) and (am). Indeed, there are several more ways in which juveniles will find themselves subject to original adult court jurisdiction as detailed in Wis. Stat. § 938.183(1)(ar)-(c). Thus, Toliver's statement that it is the "status quo" for juveniles to be in juvenile court is simply not true.⁵ Simply put, some juvenile offenders fall within the original jurisdiction of the adult court and some fall within the exclusive jurisdiction of the juvenile court.

Second, the State fails to understand Toliver's argument that original adult court jurisdiction over juveniles is a "creature of statute." Toliver's Br. at 9, 20. The entire juvenile justice code, as well as the criminal code, are statutory creations. Toliver argues the exclusive jurisdiction conferred in Wis. Stat. § 938.183 "is an exception to the otherwise prevailing jurisdictional framework" is incorrect. Toliver's Br. at 9. It appears that Toliver is asserting that there is some sort of inherent jurisdiction over him in the juvenile court – something more than statutory – whereas the jurisdiction contemplated by § 938.183 is "merely" statutory. Of course this is not so. Under § 938.183, there is authority to subject him to the criminal code. Under Wis. Stat.

⁵ Of course, Wisconsin did not even have a "juvenile court" until 1901. *Juvenile Justice: A Wisconsin Blueprint for Change* 4 (Jan. 1995). "Prior to juvenile courts, youthful offenders had essentially been treated as adult offenders." *Id.*

§ 938.12, there is authority to subject juveniles who are not subject to Wis. Stat. § 938.183 to the juvenile code. Both of these frameworks are statutory in nature and Toliver's purported attempt to elevate one to a jurisdictional level while the other remains statutory is unpersuasive.

Additionally, Toliver calls the authority of the court to adjudicate criminal matters involving juveniles "special criminal jurisdiction." Toliver's Br. at 21. The State submits that the legislature's decision that serious juvenile offenders, like Toliver, are subject to the criminal code does not confer "special" jurisdiction on the court, but directs the court to apply criminal laws to the juvenile – just as the legislature has given the court authority to apply the juvenile code to juveniles in other situations.

2. The circuit court properly found probable cause of the qualifying offense.

In the instant case, there was no violation of *Kleser* or Wis. Stat. § 973.032. At the preliminary hearing, the State presented evidence that Toliver attempted to kill the victim, in violation of Wis. Stat. § 940.01 (52). The State presented the victim's testimony, along with a police investigator who testified that from a photo line-up, the victim identified Toliver as the shooter (52:3-5, 9-10). Although the court did not expressly state it found probable cause Toliver had attempted to violate Wis. Stat. § 940.01, it is clear from the record this is what the court did.

A review of the record clearly shows probable cause of attempted first-degree homicide. At the preliminary hearing, Gorman testified that Toliver had a gun to Gorman's head demanding Gorman give Toliver money. Pet-Ap. 017-020. Gorman testified that he panicked and ran. Pet-Ap. 020-021. Gorman testified that Toliver then shot him and fled the scene. Pet-Ap. 020-021. As a result of the shooting, Gorman stated he is now paralyzed and will never walk again. Pet-Ap. 017. This record more than amply supported the court's finding of probable cause of attempted first-degree homicide.

Toliver presented no evidence to support a reduced charge. Thus, when the circuit court found probable cause of a felony, it is implicit that the felonies at issue were the ones in the complaint: attempted first-degree intentional homicide and possession of a dangerous weapon by a person under the age of 18.

Toliver argues that because the circuit court failed to utter specific words he must be discharged. Toliver argues,

Here, Toliver should have been discharged because the circuit court did not do as § 970.032 requires, causing it to lose the "exclusive original jurisdiction" initially conferred by § 938.183. This being so, a second judge's subsequent, revisionist reading of the record could not and did not alter this conclusion. Any action by the court after the preliminary hearing should never have occurred and can have no legal effect. As such, Toliver's conviction is void for lack of subject matter jurisdiction.

Toliver's Br. at 21. Putting aside the fact that Toliver's bold argument is unsupported by any authority, it both misstates the record and is nonsensical.

Although the State understands that when a court finds a lack of probable cause that a juvenile committed a qualifying felony under § 970.032(1), the court shall discharge the juvenile from adult jurisdiction, this is not what happened here. The court found probable cause that Toliver committed the specific and relevant felonies at issue; it just failed to express it in the specific terms Toliver asserts are necessary. Once Toliver raised the issue of a problem with the preliminary hearing, the court noted the preliminary hearing court "clearly" found probable cause of attempted first degree intentional homicide (57:10).

Toliver seems to believe that because the court found probable cause – but failed to state on the record that it found probable cause of attempted first-degree homicide – the court had to discharge him. This is not what the statute requires. Discharge is appropriate when the court finds a *lack* of probable cause. No such finding was made here. The court's later remarks – indeed, made by a different judge – were not "revisionist," but were instead a fuller articulation of what had occurred at the preliminary hearing.

Toliver's whole argument depends upon his assertion that the trial court failed to find the necessary probable cause. Toliver's Br. at 23-25. Toliver seems to think the trial court's failure to make this finding is beyond dispute. Toliver's Br. at 24 ("Thus there cannot be any real dispute over what the circuit court did (and did not) find at the

preliminary hearing.”). To support his contention that the parties must be in agreement on this point, Toliver points to the State’s concessions – and the lower courts notations – that the trial court failed to *expressly* state that it found probable cause of a qualifying offense.

Toliver has missed the point of the State’s admission and the courts’ notations. The State, as well as the lower courts, have noted that the trial court failed to *expressly* state it found probable cause of an attempted violation of Wis. Stat. § 940.01, but a review of the record makes it clear that this is what the trial court did. Toliver argues that “even if the specific charges could be inferred from the criminal complaint, the court’s finding makes it impossible to tell which standard the court applied. The most obvious conclusion is that the court found only generic probable cause, since that is what it said it found.” Toliver’s Br. at 31. The State submits the opposite is true. The most obvious conclusion from the record, and the one the court later made, is that the circuit court found probable cause of the qualifying offense at the preliminary hearing. In fact, if the trial court *had not* made the requisite finding, Toliver would have been discharged. Because he was not discharged, and because the record more than amply supports a finding of probable cause of the qualifying offense, retaining the case in adult criminal court was appropriate. Discharge is appropriate – indeed, mandated – when a circuit court finds a *lack* of probable cause that a juvenile committed an offense for which adult court jurisdiction is exclusive. Discharge is not appropriate – and certainly not mandated – when a circuit court clearly found probable cause of an

attempted violation of Wis. Stat. § 940.01, but failed to state the finding in those specific terms.

Moreover, Toliver's protestation that "the entire purpose of the special preliminary hearing ... is to ensure that there is a continuing basis for the 'exclusive original jurisdiction' [of the criminal court]" is incorrect. Toliver's Br. at 20. The purpose of Wis. Stat. § 970.032, according to this court, is both to ensure that it is proper to treat the case as criminal and to afford the juvenile the opportunity "to introduce evidence in an effort to get the charge reduced." *Kleser*, 328 Wis. 2d 42, ¶¶57, 62. It is clear that the case was appropriately treated as criminal and nothing about the preliminary hearing reduced Toliver's opportunity to present mitigating evidence.⁶

In *Kleser*, the defendant waived his right to a preliminary hearing, effectively conceding the State had the right to try him in criminal court. *Id.* ¶66. Here, while Toliver did not waive the preliminary hearing, he made little effort to show how the charges merited reduction to an offense that would not qualify for adult court jurisdiction (52; 57). As shown, the purpose of the statutory scheme set forth in Wis. Stat. § 970.032 was satisfied.

⁶ Several months after the hearing, the court heard extensive argument on Toliver's claim that he should be "reverse waived" into juvenile court (57). Thus, this additional purpose of Wis. Stat. § 970.032 was satisfied, as well.

III. THE FAILURE OF A CIRCUIT COURT TO STRICTLY COMPLY WITH THE STATUTORY REQUIREMENTS OF WIS. STAT. § 973.032 HAS NO BEARING ON THE COURT'S SUBJECT MATTER JURISDICTION.

A. Relevant law.

“[S]ubject matter jurisdiction is vested by the constitution in the courts of the State of Wisconsin. No circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.” *Mueller v. Brunn*, 105 Wis. 2d 171, 176, 313 N.W.2d 790 (1982). “The circuit courts possess ‘plenary’ jurisdiction by virtue of Wisconsin Constitution art. VII, sec. 8, and that jurisdiction . . . does not depend on legislative authorization.” *In Interest of L.M.C.*, 146 Wis. 2d 377, 390, 430 N.W.2d 352 (Ct. App. 1988). “The circuit court lacks criminal subject-matter jurisdiction *only* where the complaint does not charge an offense known to law.” *State v. Schroeder*, 224 Wis. 2d 706, 714, 593 N.W.2d 76 (Ct. App. 1999) (quoting *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994) (emphasis in *Schroeder*)).

- B. The circuit court's failure to expressly state it found probable cause to believe Toliver had attempted to murder Gorman did not divest the court of subject matter jurisdiction.

Toliver argues that when the circuit court failed to fully articulate its probable cause finding, as contemplated by Wis. Stat. § 973.032, the circuit court lost jurisdiction over his case. Toliver argues the failure to comport with the statute divests the court of jurisdiction. Toliver is incorrect.

Circuit courts in Wisconsin have plenary subject matter jurisdiction in civil and criminal matters. *Mueller*, 105 Wis. 2d at 176; *In Interest of Michael J.L.*, 174 Wis. 2d 131, 137, 496 N.W.2d 758 (Ct. App. 1993); *In Interest of L.M.C.*, 146 Wis. 2d at 390-91.

In *Mack v. State*, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1979), this court noted that a circuit court must have subject matter jurisdiction in order to try a person for a criminal offense and that subject matter jurisdiction is derived from law and cannot be waived or granted by consent. The court concluded that the Wisconsin Constitution gives circuit courts plenary subject matter jurisdiction over all matters, civil and criminal. *Mack*, 93 Wis. 2d at 294-95.

In *Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981), this court addressed the question of whether the circuit court had jurisdiction to authorize the guardian of

a mentally retarded adult ward to consent to sterilization of the ward. This court held that the circuit court had jurisdiction, but that absent legislative direction the circuit court should refrain from exercising it. *Eberhardy*, 102 Wis. 2d at 541-42. This court rejected the view that the circuit court only has such jurisdiction as the legislature has conferred on it by statute. *Id.* at 548-51. This court explained that, in Wisconsin, circuit courts have been granted extremely broad jurisdiction by the constitution. *Id.* at 548-51.

In *Schroeder*, 224 Wis. 2d at 711-14, the court of appeals discussed the broad subject matter jurisdiction recognized in *Mack*. The court noted that the only time courts have found a lack of subject matter jurisdiction in the circuit court is when a complaint contains a charge not known in law. *Schroeder*, 224 Wis. 2d at 714. The court stated, “We are not aware of any case subsequent to *Mack* that has held any other type of deficiency to be non-waivable.” *Id.* In other words, there is no other type of defect that divests the circuit court of subject matter jurisdiction.

More recently, in *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶2, 30, 273 Wis. 2d 76, 681 N.W.2d 190, this court held that noncompliance with statutory mandates can affect only the circuit court’s competency to exercise jurisdiction, not its subject matter jurisdiction, and this court held that challenges to the circuit court’s competency are waived if not timely raised. In perhaps its broadest language to date, this court stated, “Circuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over ‘all matters civil and criminal.’ Wis. Const. art. VII, § 8. Accordingly, a circuit

court is never without subject matter jurisdiction.” *Mikrut*, 273 Wis. 2d 76, ¶1 (emphasis added).

The Wisconsin Constitution endows circuit courts with plenary subject matter jurisdiction over all criminal and civil matters; subject matter jurisdiction is conferred by the constitution, not by an act of the legislature. This concept cannot be reconciled with Toliver’s assertion that a circuit court’s failure to comply with the preliminary hearing statute in the strictest terms divests the court of subject matter jurisdiction. Toliver appears to understand this, as his argument frequently complains that the preliminary hearing in this case violated the legislature’s statutory scheme. Toliver’s Br. at 33-34. However, it is not the legislature, but the Wisconsin Constitution, that gives the circuit courts general, original subject matter jurisdiction over all civil and criminal matters. A court’s failure to comply with a statute in the manner Toliver suggests cannot remove the subject matter jurisdiction endowed by the constitution.

Mack, Eberhardy, Mueller, Schroeder and *Mikrut* are correct that a circuit court in Wisconsin is never without subject matter jurisdiction. Accordingly, this court must reject Toliver’s argument that any failure to strictly comply with Wis. Stat. § 970.032 divested the court of subject matter jurisdiction.

IV. TOLIVER’S CLAIM OF ERROR
IS MORE PROPERLY
FRAMED AS A CLAIM THAT
THE COURT LOST
COMPETENCY TO PROCEED.

Toliver’s argument is more properly framed as a challenge to the circuit court’s competency.

A. Relevant law.

This court “has recognized that a circuit court has subject matter jurisdiction to consider and determine any type of action.” *Michael J.L.*, 174 Wis. 2d at 137. “A circuit court also has lesser powers conferred upon it by the legislature.” *Id.* “‘Competency’ reasonably describes the lesser power to exercise subject matter jurisdiction.” *L.M.C.*, 146 Wis. 2d at 391-92.

In Wisconsin, a circuit court’s jurisdiction is conferred by our state constitution and not by acts of the legislature. It logically follows from these principles that the failure to comply with any statutory mandate, such as the time a certain procedure must take place, in no way negates a circuit court’s ability to adjudicate the kind of controversy before it; rather, it only prevents it from adjudicating the specific case before it. For lack of a better word, we have chosen to label this loss of the court’s lesser power, where it does not involve errors affecting personal jurisdiction, as a loss of competence.

In re B.J.N., 162 Wis. 2d 635, 655-56, 469 N.W.2d 845 (1991) (citation omitted). “As we have noted, for each specific case courts require competency for adjudication and for the valid exercise of other powers.” *Michael J.L.*, 174 Wis. 2d at 139.

B. The term “jurisdiction” has been misused with respect to the probable cause determination pertaining to juveniles under adult court jurisdiction and should be replaced with the concept of “competency.”

Toliver relies on *Kleser* to support his argument that the circuit court lost subject matter jurisdiction over his case when it failed to expressly state it found probable cause of the qualifying offense. Toliver’s Br. at 22-23. Toliver’s argument relies language in the court’s decision concerning the necessary probable cause showing embodied in Wis. Stat. § 970.032(1). Toliver’s Br. at 22-23. The State admits that this court employed the term “jurisdiction” in *Kleser*, but that this term did not refer to the circuit court’s subject matter jurisdiction. *Kleser*, 328 Wis. 2d 42, ¶¶57, 62.

A circuit court always has subject matter jurisdiction. *L.M.C.*, 146 Wis. 2d at 390. A circuit court may lose its competency to consider a case, though, when it fails to follow the contours of a statute, which is what Toliver alleges happened here. *B.J.N.*, 162 Wis. 2d at 655-56.

The State believes an examination of several cases will shed light on the differences between subject matter jurisdiction and competency, and illustrate how the terms have been confused.

In *State v. Becker*, 74 Wis. 2d 675, 247 N.W.2d 495 (1976),

this court held that before an adult defendant could be tried for an offense committed before he was eighteen years of age where no juvenile proceedings were instituted, the State was required to show at a due process hearing that the prosecution was not delayed manipulatively so as to avoid the juvenile justice system.

State v. Annala, 168 Wis. 2d 453, 459, 484 N.W.2d 138 (1992). In *Schroeder*, the court of appeals addressed the defendant's claim that the circuit court's failure to hold a *Becker* hearing divested the court of subject matter jurisdiction. 224 Wis. 2d at 711-22.

The *Schroeder* court began its analysis of whether the circuit court had lost subject matter jurisdiction by turning to *Mack*. *Id.* at 712. Reviewing *Mack*, the court concluded that circuit courts are never without subject matter jurisdiction with one exception: when a complaint sets forth a charge unknown to law. *Id.* at 714.

The court then turned to the defendant's argument that because the *Becker* court and courts applying *Becker* employed terms like "jurisdiction of the juvenile court" and "jurisdiction of the criminal court," the failure to hold the hearing divested the court of subject matter jurisdiction. *Id.* at 715. The court acknowledged that the court of appeals and this court "used the terms 'subject matter jurisdiction' and 'jurisdiction' to describe the authority of the 'juvenile court' under Chapter 48, Stats., and the authority of the 'adult court' or 'criminal court.'" *Id.*

at 717. The court noted, though, that this court “has recognized that the terms ‘jurisdiction’ and ‘competence’ have been inconsistently used by the courts, with the terms ‘subject matter jurisdiction’ and ‘jurisdiction’ used when the error should properly have been classified as affecting a court’s competency to exercise its jurisdiction.” *Id.* (emphasis added).

The court noted that subject matter jurisdiction is conferred by the constitution and competency, a lesser power than subject matter jurisdiction, is conferred by the legislature. *Id.* at 718. Failure to comply with a statute concerns the court’s competency, not its subject matter jurisdiction. *Id.*

Further, the court noted that the “exclusive jurisdiction” language set forth in Wis. Stat. § 48.12(1), which concerned delinquency and was repealed by 1995 Wisconsin Act 77, referred only to statutory jurisdiction, which is a matter of a court’s competency, not its subject matter jurisdiction. *Id.* at 719. The court acknowledged that some of the confusion over the meaning of “jurisdiction” in these contexts comes from the courts’ use of terms like “juvenile court” and “adult” or “criminal court.” *Id.* The court stated that any understanding that this means the courts are different courts with different powers is wrong. *Id.* Due to the 1977 court reorganization and corresponding statutory and constitutional changes, there are no longer “juvenile courts” and “adult courts.” *Id.* at 720-21. There are now only circuit courts that adjudicate matters pertaining to the criminal code or the juvenile code. *Id.* at 721. “In other words, ‘juvenile,’ ‘adult’ and ‘criminal’ in this context refer to the statutes

governing the filing and adjudication of the case, not to the type of court.”⁷ *Id.*

Similarly, in *Michael J.L.*, the court of appeals addressed the defendant’s claim that the circuit court’s failure to comply with the statutory time requirements set forth in Wis. Stat. § 48.25(2)(a), relating to a delinquency petition, deprived the court of jurisdiction to hear the motion. 174 Wis. 2d at 134. The court declared that the question was not one of jurisdiction, but of competence. *Id.* at 136-37. The *Michael J.L.* court stated that the “exclusive jurisdiction” language contained in the juvenile code referred to statutory jurisdiction – or competence – not to subject matter jurisdiction. *Id.* at 137.

Just recently, the court of appeals noted that a juvenile court’s competency to waive the juvenile to adult court is often referred to as subject matter jurisdiction. *State v. Phillips*, 2014 WI App 3, ¶6 n.3, ___ Wis. 2d ___, ___ N.W.2d ___ (R-Ap. 104).⁸ The court noted, however, that “competency is the more accurate characterization as it refers to whether a court can adjudicate the specific case before it rather than whether it can adjudicate the kind of case before it.” *Id.* (R-Ap. 104).

The State submits that under *B.J.N.*, *Michael J.L.*, *Schroeder* and all of the other cases that discuss subject matter jurisdiction and

⁷ In other words, Toliver’s statement that the circuit court in this case was “sitting as a criminal court” is incorrect. Toliver’s Br. at 2.

⁸ On January 29, 2014, the court of appeals ordered the *Phillips* opinion to be published in the official reports (R-Ap. 101-06).

competency, the question of whether a circuit court fails to follow the contours of a statute – which is what Toliver argues here – is a question that goes to the court’s competency, not its jurisdiction.

V. TOLIVER FORFEITED OR
WAIVED ANY ARGUMENT
WITH RESPECT TO THE
COURT’S COMPETENCY.

Because Toliver’s claim pertains to the circuit court’s competency, not its jurisdiction, his claim is waived by his failure to raise it contemporaneously, his guilty pleas, and his failure to raise it before his reply brief in the court of appeals.

- A. Toliver forfeited review of any competency claim by failing to make a contemporaneous objection to the court’s probable cause finding at the preliminary hearing.

Toliver complains that the circuit court failed to expressly find probable cause of the qualifying offense at the preliminary hearing, but Toliver ignores that he stood silent on the matter at the time (52; 57). Had Toliver objected, it seems likely the court would have said the magic words Toliver now claims are lacking. Instead, though, Toliver made no objection.⁹ Because Toliver failed

⁹ In fact, even Toliver’s later circuit court motion to reopen the preliminary hearing made no mention of competency. Pet-Ap.146-48. Further, despite Toliver’s decision to raise a claim that the circuit court lacked competency in his reply

to object, he may not complain of any error now. *See State v. Davis*, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996) (adopting the contemporaneous objection rule for constitutional, as well as evidentiary, errors).

“[T]he common-law waiver rule applies to the circuit court’s competency, such that a challenge to the court’s competency will be deemed waived if not raised in the circuit court[.]” *Mikrut*, 273 Wis. 2d at 96; *State v. Starks*, 2013 WI 69, ¶38, 349 Wis. 2d 274, 833 N.W.2d 146. A failure to challenge competency in the circuit court forfeits review of the decision. *Mikrut*, 273 Wis. 2d at 96-97; *Starks*, 349 Wis. 2d 274, ¶38. It does not appear Toliver ever challenged the circuit court’s competency while in the circuit court, and he certainly failed to challenge it at the preliminary hearing.

B. Toliver waived review of any competency claim by pleading guilty.

“The general and often-stated rule is that the knowing, voluntary and intelligent entry of a guilty plea waives all ‘non-jurisdictional defects’ preceding the entry of a plea, including constitutional violations and objections to personal jurisdiction, but does not waive objections to subject matter jurisdiction.” *Schroeder*, 224 Wis. 2d at 711 (quoting *Pillsbury v. State*, 31 Wis. 2d 87, 93-94, 142 N.W.2d 187 (1966)).

Toliver pleaded guilty to first-degree reckless injury and attempted robbery with the

brief, he failed to include the issue in his petition for review in this court.

threat of force after a full plea colloquy (66). At the plea hearing, Toliver indicated he understood the charges against him and that he was giving up his right to a trial and the rights a trial includes (66:4-7). Toliver stated he understood the penalties he faced by entering the pleas (66:7-8). He stated he had had enough time to discuss the plea offer with his attorney and that no one had coerced him into entering the guilty pleas (66:8). In short, Toliver knowingly, intelligently and voluntarily entered his guilty pleas. *See* Wis. Stat. § 971.08; *State v. Lopez*, 2010 WI App 153, ¶8, 330 Wis. 2d 487, 792 N.W.2d 199.

Toliver does not contend his pleas were invalid, but instead challenges the preliminary hearing. Toliver is not entitled to review of this claim because he pleaded guilty (44). A guilty plea precludes raising a claim related to any event occurring before the plea was entered, unless the claim is related to subject matter jurisdiction. *See Schroeder*, 224 Wis. 2d at 711. As stated *supra*, a claim the circuit court failed to expressly state it found probable cause of attempted murder is not related to the court's subject matter jurisdiction. "The circuit court lacks criminal subject-matter jurisdiction *only* where the complaint does not charge an offense known to law." *See id.* at 714 (emphasis in original) (citing *Aniton*, 183 Wis. 2d at 129). Thus, Toliver waived review of his preliminary hearing claim.

Further support for the application of the guilty plea waiver rule to claims regarding a court's competence is found in *Schroeder*, 224 Wis. 2d 706.¹⁰ As shown *supra*, the *Schroeder*

¹⁰ In the recent *Phillips* decision, the court of appeals declined to address whether the defendant's no contest

court offered a detailed analysis of subject matter jurisdiction versus statutory jurisdiction, or competency. 224 Wis. 2d at 715-19. After determining that the error the defendant complained of went to the court's competency, the court deemed any objection to competency waived by the defendant's guilty plea. *Id.* at 722.

C. Toliver forfeited review of any competency claim by not raising it here and raising it for the first time in his reply brief.

Finally, Toliver failed to challenge the preliminary hearing in the court of appeals in his brief-in-chief. Pet-Ap. 149-86. His opening brief was devoted exclusively to challenges to the circuit court's exercise of discretion. Pet-Ap. 149-86. It was not until his reply brief that he asserted the circuit court was without subject matter jurisdiction over his case. Pet-Ap. 216-40. The court of appeals declined to address the issue, citing *A.O. Smith*, 222 Wis. 2d at 492. *See Toliver*, No. 2012AP393-CR, slip op. ¶29 n.5 (Ct. App. Apr. 4, 2013). In *A.O. Smith*, the court noted the well-established rule that a party is not permitted to raise an argument for the first time in a reply brief. 222 Wis. 2d at 492. The court stated the reason for this rule is "fundamental fairness." *Id.* "It is inherently unfair for an appellant to withhold an argument from its main brief and argue it in its reply brief because such conduct would prevent any response from the opposing

pleas waived his challenge to the circuit court's competency because the circuit court had allowed him to withdraw the pleas and on appeal the State did not argue that that decision was wrong. 2014 WI App 3, ¶6 n.3 (R-Ap. 104).

party. . . . It prevents the opposing party from having an adequate opportunity to respond.” *Id.*

Toliver attempts to immunize his claim for relief from this long-standing rule of fairness by deeming his claim one of subject matter jurisdiction, which, he argues can be raised at any time. This court need not decide whether a claim of subject matter jurisdiction may be raised for the first time in a reply brief because, as shown, Toliver’s complaint regarding the preliminary hearing does not concern the circuit court’s subject matter jurisdiction, but its competency. *Mueller*, 105 Wis. 2d at 176 (“No circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.”). As such, this court should apply the well-established rule that arguments raised for the first time in a reply brief are forfeited. *See A.O. Smith*, 222 Wis. 2d at 492-93.

VI. THE CIRCUIT COURT NEVER LOST ITS COMPETENCY.

In the event this court finds Toliver did not waive his claim, or chooses to address the merits of the claim regardless of waiver, the State submits that the circuit court never lost competency. As shown in section I of this brief, the court implicitly found the probable cause required by Wis. Stat. § 970.032; thus, there was no statutory error affecting the court’s competency.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the decision of the court of appeals.

Dated this 5th day of February, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,924 words.

Dated this 5th day of February, 2014.

Katherine D. Lloyd
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of February, 2014.

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