STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP830-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TINA M. JACOBSEN,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, THE HONORABLE MARK J. MCGINNIS PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts. Publication is requested to clarify that discrete acts that may be aggregated to form a single continuing offense may be subdivided into multiple continuing offenses without violating the multiplicity doctrine.

STATEMENT OF FACTS

On May 31, 2011, the Outagamie County District Attorney filed an eight-count criminal complaint against defendant-appellant Tina M. Jacobsen (2, R-Ap. 101-05). The charges arose from Jacobsen's multi-year embezzlement from the Community Blood Center ("CBC") where she worked as an account specialist (2:3, R-Ap. 103). An information filed against Jacobsen on July 12, 2011 contained the same counts (5, R-Ap. 106-08).

Counts 1, 2, 3, 4, 5, 7 and 8 charged Jacobsen with theft in a business setting in violation of Wis. Stat. § 943.20(1)(b) (2:1-2, R-Ap. 101-02). Counts 1 through 4 alleged that she stole over $10,000 in the time indicated, and Count 5 alleged that she stole between $5,000 and $10,000 in the stated timeframe (*id.*). Counts 7 and 8, which charged Jacobsen with misdemeanor theft, did not specify the amount stolen (2:2-3, R-Ap. 102-03). Count 6 charged Jacobsen with fraudulent writings in violation of Wis. Stat. § 943.39(1) (2:2, R-Ap. 102).

The narrative portion of the complaint set out the basis for each count. Most of Jacobsen's thefts were accomplished by Jacobsen's practice of "adding large amounts of money to her paycheck and categorizing them as reimbursements" (2:4, R-Ap. 104). She also engaged in a "fraudulent check writing scheme" (*id.*). The amounts stolen for purposes of the Complaint were calculated by Allan Mader, a forensic accountant who examined CBC's books and analyzed Jacobsen's accounting practices (*id.*). Mader's forensic analysis, with exhibits, is part of the court record (15:3-32).

Count 1 charged Jacobsen with transferring to herself more than $10,000 from CBC between January 1 and December 31, 2009 (2:1, R-Ap. 101). Mader's examination of CBC's records revealed that Jacobsen's excess reimbursements in 2009 totaled $33,302.75 (2:4, R-Ap. 104).

Count 2 charged Jacobsen with transferring to herself more than $10,000 from CBC between January 1 and December 31, 2010 (2:1, R-Ap. 101). Mader's examination of CBC's records revealed that Jacobsen's excess reimbursements in 2010 totaled $81,853.84 (2:4, R-Ap. 104).

Count 3 charged Jacobsen with transferring to herself more than $10,000 from CBC between January 1 and April 12, 2011 (2:1-2, R-Ap. 101-02). Mader's examination of CBC's records revealed that Jacobsen's excess reimbursements in 2011 totaled $32,000 (2:4, R-Ap. 104).

Count 4 charged Jacobsen with converting to her own use more than $10,000 in "negotiable instruments" from CBC between January 1 and April 12, 2011 (2:2, R-Ap. 102). Mader's examination of CBC's records revealed that, through her fraudulent check writing scheme, Jacobsen fraudulently obtained $17,695.96 from CBC through seventeen false checks written between March 15 and April 30, 2011 (2:5, R-Ap. 105). Investigating Detective Renkas found additional fraudulent checks paid to Jacobsen totaling more than $300,000 (2:5, R-Ap. 105).

Count 5 charged Jacobsen with transferring to herself between $5,000 and $10,000 from CBC between January 1 and December 31, 2008 (2:2, R-Ap. 102). Mader's examination of CBC's records revealed that Jacobsen's excess reimbursements in 2008 totaled $5,725.46 (2:4, R-Ap. 104).

Count 6 charged Jacobsen with theft by fraudulent writing, alleging that Jacobsen, "being an employee of a corporation, with intent to defraud, did falsify any record belonging to that corporation," "on or about Tuesday, March 15, 2011" (2:2, R-Ap. 102). Mader's examination of CBC's records revealed seventeen separate false check transactions, beginning on March 15 (2:5, R-Ap. 105).

Counts 7 and 8 charged Jacobsen with transferring to herself unspecified amounts of CBC's money on or about January 1, 2006 (2:3, R-Ap. 103). A misdemeanor theft charge does not require the State to prove theft of a minimum dollar amount. *See* Wis. Stat. § 943.20(3)(a).

Through examination of Jacobsen's bank records, investigating Detective Renkas discovered that in 2009 through 2011, Jacobsen deposited in her bank account $500,000 more than she had earned legitimately in that time period (2:5, R-Ap. 105).

Jacobsen pleaded no contest to Counts 1, 2, and 5 on November 8, 2011 (36:15). The other counts were dismissed and read in for sentencing (36:2).

Asked at the plea hearing how she accomplished these thefts, Jacobsen told the court: "I read the Criminal Complaint and I do not dispute the items that are listed" (36:8). Defense counsel Michael Petersen conceded "a sufficient factual basis contained within the Criminal Complaint. And Ms. Jacobsen does not dispute that at this point" (36:9). Jacobsen admitted that while "employed at the Community Blood Center, I had written company checks to myself and also had changed payroll dollar amounts to myself in order to support a gambling addiction that I do have" (*id.*). She agreed that the amount she took from CBC was in "the ballpark of $470,000" (36:10). At sentencing, the State informed the court that the final estimate of the money taken was $485,630 (37:5). Jacobsen agreed with this estimate (37:7).

After sentencing, Jacobsen filed a postconviction motion to withdraw her no contest pleas (23). In pertinent part, she argued that Petersen provided ineffective assistance of counsel because he failed to advise Jacobsen of multiplicity and/or duplicity problems in the Complaint, and failed to move to dismiss the Complaint on the grounds of multiplicity, duplicity, vagueness, and indefiniteness (23:8).

The circuit court denied Jacobsen's postconviction motion (39:29). This appeal follows.

ARGUMENT

JACOBSEN HAS NOT PROVED A MANIFEST INJUSTICE ENTITLING HER TO PLEA WITHDRAWAL.

A. Legal Principles.

1. Ineffective assistance of counsel.

A motion to withdraw a plea is committed to the trial court's discretion. This court will reverse the court below only if it exercised its discretion erroneously. *State v. Booth*, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). After sentencing, a plea may be withdrawn only where necessary to correct a manifest injustice. *Booth*, 142 Wis. 2d at 235. A defendant has the burden of proving a manifest injustice by clear and convincing evidence. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

Under the manifest injustice standard, a defendant moving to withdraw his plea on ineffective assistance of counsel grounds must show that counsel's performance was deficient and prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984). The burden is on the defendant to prove both elements. *State v. Liukonen*, 2004 WI App 157, ¶18, 276 Wis. 2d 64, 686 N.W.2d 689. If the defendant fails on one prong, the court need not address the other. *See Strickland*, 466 U.S. at 697.

An attorney does not perform deficiently by foregoing a meritless argument. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

Where counsel's performance is raised as a manifest injustice supporting plea withdrawal, "the

defendant … must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Bentley*, 201 Wis. 2d at 312 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

On appeal, an ineffective assistance of counsel claim presents a mixed question of law and fact. *State v. Mayo*, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115 (citations omitted). The circuit court's findings of fact will be upheld unless they are clearly erroneous; whether counsel's performance was deficient and prejudicial to the defense presents a question of law reviewable de novo. *Id.*

2. Wis. Stat. § 971.36, duplicity, and multiplicity.

Wis. Stat. § 971.36.

Under Wisconsin law, there are special charging rules applicable to theft cases:

> **(3)** In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.
>
> **(4)** In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars. On the trial, evidence may be given of any such theft committed

> on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance if it is proved that any property was stolen during such period…. In case of a conviction on the original charge on a plea of guilty or no contest, the district attorney may, at any time before sentence, file a bill of particulars or other written statement specifying what particular acts of theft are included in the charge ….

Wis. Stat. § 971.36.

Duplicity.

> A complaint is duplicitous if
>
> > it joins two or more distinct and separate offenses in a single count. A duplicitous charge is defective because the jury may find the defendant guilty without the state proving each element of the offense beyond a reasonable doubt. However, "where an offense is composed of continuous acts it may be charged as one offense without rendering the charge duplicitous." The nature of the charge is a matter of election on the part of the state.

State v. Copening, 103 Wis. 2d 564, 572, 309 N.W.2d 850 (Ct. App. 1981) (citations omitted). "[T]he State's discretion to charge a defendant's actions as one continuing offense is generally limited to those situations in which the separately chargeable offenses are committed by the same person at substantially the same time and relating to one continued transaction." *State v. Miller*, 2002 WI App 197, ¶23, 257 Wis. 2d 124, 650 N.W.2d 850.

The State charged Roy Copening with one count of attempted theft by fraud on the basis of approximately six fraudulent transactions involving three checking accounts in a one-week period. *Copening*, 103 Wis. 2d. at 568-69. The single count was not duplicitous because Copening demonstrated a "single criminal design to commit theft." *Id.* at 573.

> [W]hen a defendant is operating an ongoing fraudulent scheme, it may be necessary to allege

> several individual transactions which, considered together, reflect the fraudulent operation. We can conceive of no other manner in which a check kiting operation, such as involved here, can be alleged. Although each check passed represents a distinct taking, it is within the state's discretion to charge the entire scheme as a single offense. The single criminal design to commit theft is inferable from the complaint.

Id. at 572-73 (footnote omitted); *id.* at 573 n.3 (collecting cases).

The discretion to join multiple acts in a single charge is "limited by the purposes of the prohibition against duplicity." *State v. Lomagro*, 113 Wis. 2d 582, 588, 335 N.W.2d 583 (1983).

> Those dangers include the possibility that the defendant may not be properly notified of the charges against him, that he may be subjected to double jeopardy, that he may be prejudiced by evidentiary rulings during the trial, and that he may be convicted by a less than unanimous verdict. If any of these dangers are present, the acts of the defendant should be separated into different counts even though they may represent a single, continuing scheme.

Id.

Multiplicity.

"'Multiplicity arises where the defendant is charged in more than one count for a single offense.'" *State v. Davison*, 2003 WI 89, ¶34, 263 Wis. 2d 145, 666 N.W.2d 1 (citation omitted). "Multiplicity challenges … usually arise in two different situations: 1) when a single course of conduct is charged in multiple counts of the same statutory offense (the 'continuous offense' cases), and 2) when a single criminal act encompasses the elements of more than one distinct statutory crime." *State v. Derango*, 2000 WI 89, ¶27, 236 Wis. 2d 721, 613 N.W.2d 833.

"[M]ultiplicity claims are examined under a two-part test." *State v. Eaglefeathers*, 2009 WI App 2, ¶7, 316 Wis. 2d 152, 762 N.W.2d 690. First, the court must determine whether the charged offenses are "identical in law and in fact." *Id.* Where counts are based on the same statute, they are the same in law. *See State v. Eisch*, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980). Where they are based on the same acts by the defendant, they are the same in fact. *See State v. Hirsch*, 140 Wis. 2d 468, 474-75, 410 N.W.2d 638 (Ct. App. 1987). Second, the court must determine "whether the legislature intended to authorize multiple punishments." *Eaglefeathers*, 316 Wis. 2d 152, ¶7.

> If it is determined under the first part of the test that the charged offenses are identical in both law and fact, a presumption arises under the second part of the test that the legislature did not intend to authorize cumulative punishments. Conversely, if the charged offenses are not identical in law and in fact, a presumption arises that the legislature did not intend to preclude cumulative punishments.

Id. (citations omitted).

Only the first part of the multiplicity test implicates double jeopardy concerns. "Once it is determined that the offenses are different in law or fact, double jeopardy concerns disappear." *State v. Grayson*, 172 Wis. 2d 156, 159 n.3, 493 N.W.2d 23 (1992). When applying this part of the analysis "to a continuous offense challenge, we focus on the facts giving rise to the charged offenses and ask if the offenses are either separated in time *or* significantly different in nature." *State v. Warren*, 229 Wis. 2d 172, 180, 599 N.W.2d 431 (Ct. App. 1999).

> To determine if the charged offenses are separated in time, we consider whether there is a "sufficient break" in the defendant's conduct to constitute more than one offense. The test for whether the offenses are significantly different in nature is whether a conviction for each offense requires proof of an additional fact that a conviction for the other offense does not. Offenses are also

> significantly different in nature if each requires a "'new volitional departure in the defendant's course of conduct.'" If we conclude that the offenses are significantly different in nature, we need not address whether [the defendant's acts] are separated in time.

Id. (citations omitted). "The fact that proof of one count may be, in many respects, the same as proof of other counts does not necessarily render the counts multiplicitous." *State v. Multaler*, 2001 WI App 149, ¶34, 246 Wis. 2d 752, 632 N.W.2d 89.

The second part of the multiplicity analysis is "solely a question of statutory interpretation. Criminal charges that are multiplicitous under this factor are impermissible because they contravene the will of the legislature." *Grayson*, 172 Wis. 2d at 159 n.3. The presumption that the legislature intended to permit cumulative punishments for offenses that are not identical in either law or fact "can only be rebutted by clear legislative intent to the contrary." *Derango*, 236 Wis. 2d 721, ¶30. Where the statutory text does not expressly indicate whether the legislature intended to allow the State to base multiple criminal charges on a single act, the court considers four factors to determine legislative intent: "(1) the statutory language; (2) the legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment." *Warren*, 229 Wis. 2d at 185.

B. Analysis.

Jacobsen does not challenge Count 6, the fraudulent writing charge, on duplicity or multiplicity grounds. She challenges all the theft counts on these grounds. Jacobsen's Brief at 13.

Although Jacobsen states in her argument heading that Petersen should have moved to dismiss the complaint on the ground that it was vague or indefinite, she fails to develop an argument on that theory. Jacobsen's Brief at 13. Therefore, the State need not present a responsive argument on this theory and the court need not address it.

See State v. Jones, 2002 WI App 196, ¶38 n.6, 257 Wis. 2d 319, 651 N.W.2d 305; *State v. O'Connell,* 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993). Moreover, because Petersen *did* move to dismiss the complaint arguing that (among other things) it was vague and indefinite (10), he could not have performed deficiently on this ground.

1. The counts against Jacobsen were not duplicitous.

This court wrote in *Copening* that "'where an offense is composed of continuous acts it may be charged as one offense without rendering the charge duplicitous.'" *Copening*, 103 Wis. 2d at 572. The manner of charging the case is a matter of prosecutorial discretion. *See id.* In *Miller*, this court explained that the State's discretion "to charge a defendant's actions as one continuing offense is generally limited to those situations in which the separately chargeable offenses are committed by the same person at substantially the same time and relating to one continued transaction." *Miller*, 257 Wis. 2d 124, ¶23. This doctrine fits Jacobsen's complaint as closely as the glass slipper fit Cinderella's foot. For example, Count 1 was based on Jacobsen's scheme of stealing money from CBC through phony reimbursements while she worked as a CBC accountant specialist during the calendar year 2009 (2:1, 4, R-Ap. 101, 104). Under *Copening* and *Miller*, the State had the discretion to charge Jacobsen as it did.

The *Copening*/*Miller* doctrine is generally applicable to all criminal statutes. But when it comes to theft, the legislature has explicitly provided prosecutors with special charging discretion. Wisconsin Stat. § 971.36(3) specifically permits the State to prosecute multiple thefts as a single theft under three different scenarios, one of which is clearly present in this case. A single theft charge can be based on multiple acts where "[t]he property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme." Wis. Stat.

§ 971.36(3)(a). Again, the statute fits the present circumstances perfectly. In all seven counts, the stolen money belonged to CBC. In Counts 1, 3, 5, 7 and 8, Jacobsen committed multiple thefts pursuant to her single deceptive false reimbursement scheme (2:1-3, R-Ap. 103). In Count 4, she committed multiple thefts pursuant to her single deceptive check-writing scheme (2:2, R-Ap. 102). This statute is dispositive.

Mysteriously, Jacobsen dismisses Wis. Stat. § 971.36(3) on the ground that it is "a pleading statute and not a penal statute." Jacobsen's Brief at 17-18. The State does not understand this argument. The substantive elements of theft are defined by Wis. Stat. § 943.20. Section 971.36(3) explains that, in cases like Jacobsen's, a continuing course of many single thefts can be charged as a consolidated offense provided its conditions are met. Jacobsen's objection to her prosecution, and the basis of her ineffective assistance of counsel claim, is that the State did not charge her properly. She admits that she committed theft (36:10). *See* Jacobsen's Brief at 6 n.1. At the postconviction hearing, she conceded that she "ripped off half a million dollars," but argued that "the way I was charged was incorrect" (38:83). If her complaint is improper charging, § 971.36, which permits the State's charging choices in this case, should answer her complaint and end the argument.

Jacobsen pleaded no contest (36:15). Had she gone to trial, § 971.36(4) would have guided the State's proof. Of course, Jacobsen did not go to trial. Instead, she admitted that the Criminal Complaint provided a factual basis for her no contest pleas (36:9). This raises a presumption that the State would have been able to make a prima facie case on each count at trial. During the postconviction proceedings, the State filed a chart tabulating Jacobsen's misappropriations by date and amount for the year 2010 (31; 39:3-8). The annual total was over $330,000 (31:unnumbered sixth page). There were multiple instances in which Jacobsen misappropriated more than $10,000 on a single day (31:1).

This chart, plus Mader's original forensic examination of CBC's books, suggests that, had Jacobsen gone to trial, the State could have easily met any argument she could have made about whether the provable facts satisfied the elements of the crimes charged.

Lomagro recites the dangers of duplicitous charging, none of which are present here. *See Lomagro*, 113 Wis. 2d at 588. Jacobsen was "'properly notified'" of the charges against her; she has not alleged otherwise. As will be shown below, the Complaint as written did not expose Jacobsen to double jeopardy because the counts were different in fact. *See infra* at 14-15. Jacobsen did not go to trial, and has developed no argument about how the Complaint could have generated prejudicial evidentiary rulings against her if she had. Finally, Jacobsen makes no argument that a jury could have convicted her with less than a unanimous verdict.

Jacobsen cites *State v. Spraggin*, 71 Wis. 2d 604, 239 N.W.2d 297 (1976), to support her position. Spraggin was charged with two counts of receiving stolen property. Two pieces of property (a television and a gun) were stolen by a single burglar in two separate burglaries from two separate homes on two dates separated by sixty days. *Id.* at 609. Spraggin obtained the property in two separate bargains with the burglar. *Id.* at 613. At trial, the State successfully moved to consolidate the two counts into one. *Id.* The supreme court found that the consolidation was improper. *Id.* at 613-16. The court emphasized the factors showing that the transactions were separate in every respect and not part of a continuing criminal enterprise. *Id.* at 613. Therefore, although the court did not cite § 971.36(3), it is clear that the two counts were not properly merged into a "single crime" under the statute. The court rejected the State's effort to justify the consolidation of the two acts under a conspiracy theory. *See Spraggin*, 71 Wis. 2d at 614-15. The State makes no conspiracy argument here. *Spraggin* is inapposite and offers no guidance in the present case.

As a parting shot, Jacobsen states that "not all of the amounts were correct." Jacobsen's Brief at 20. It's not clear what "amounts" Jacobsen refers to. Assuming that she is referring to the dollar amounts of stolen funds alleged in the Criminal Complaint, this criticism gets her nowhere. Jacobsen agreed that the Complaint provided a factual basis for her no contest pleas (36:9). Having done so, Jacobsen cannot now contest the factual accuracy of the Complaint. By pleading no contest, she conceded the Complaint's factual accuracy. *See State v. Merryfield*, 229 Wis. 2d 52, 60, 598 N.W.2d 251 (1999). Jacobsen expressly forfeited the right to put the State to its proof. *See id.* at 61.

2. The counts against Jacobsen were not multiplicitous.

a. The counts are not the same in fact.

The State concedes that Counts 1 through 5, 7 and 8 are the "same in law," *i.e.*, Wis. Stat. § 943.20(1)(b) (5:1-2, R-Ap. 106-07).

These seven counts are not the "same in fact." Most obviously, Count 4, based on Jacobsen's check-writing scheme, is distinct from the other counts, which are based on her excess reimbursement scheme (*id.*).

Counts 1, 2, 3, 5, 7 and 8 are also not the "same in fact" vis-à-vis one another. Although these charges are all based on Jacobsen's reimbursement scheme, they nevertheless differ factually. First, they were "based on different time periods." *Grayson*, 172 Wis. 2d at 160. Each count includes acts committed by Jacobsen within a single calendar year (5:1-2, R-Ap. 106-07). Second, they are different in nature. *See id.* While the evidence required to prove each of these acts of theft may be similar, it is not the same. Each act involved a different amount of money taken on a different date provable by

different paperwork and accounting records. *See State v. Swinson*, 2003 WI App 45, ¶31, 261 Wis. 2d 633, 660 N.W.2d 12; *see also Multaler*, 246 Wis. 2d 752, ¶34 ("The fact that proof of one count may be, in many respects, the same as proof of other counts does not necessarily render the counts multiplicitous."). Also, each decision by Jacobsen to repeat her reimbursement scheme required a "new volitional departure," rendering each offense "significantly different in nature." *Warren*, 229 Wis. 2d at 180.

b. The legislature did not intend to preclude cumulative punishments.

Because these seven counts are not the "same in fact," the "presumption arises that the legislature did not intend to preclude cumulative punishments." *Eaglefeathers*, 316 Wis. 2d 152, ¶7. To overcome this presumption, Jacobsen must show "clear legislative intent to the contrary." *Derango*, 236 Wis. 2d 721, ¶30. She has failed to meet this burden.

The State relied on Wis. Stat. § 971.36(3) to show that the charges against Jacobsen were not duplicitous. *See supra* at 11-12. The statute also shows that the charges were not multiplicitous. Under § 971.36(3), "all thefts *may* be prosecuted as a single crime" if the case meets certain specified requirements, *e.g.*, "a single deceptive scheme." Wis. Stat. § 971.36(3)(a). The corollary of that rule is that each individual theft *may* be prosecuted individually. The statute gives the State the discretion to charge a continuing string of thefts (connected by a single victim, scheme, or place) as either a single continuous crime *or* a series of crimes. The State's decision to charge Jacobsen as it did was an appropriate exercise of prosecutorial discretion.

The State chose to charge Jacobsen in multiple counts, one for each year she stole from CBC, each count based on all the thefts she committed in the specified year (2:1-3, R-Ap. 101-03). Jacobsen objects. Although she

doesn't say so explicitly on appeal, the implication of Jacobsen's argument is that the State could charge her with *either* a single theft count based on her continuous course of larcenous conduct from 2006 to 2011, *or* with multiple individual theft counts based on each false reimbursement or check she gave herself.[1] Although the State agrees that it could have proceeded in either of these directions, it does not agree that the law precludes the charging decision it chose to follow instead. The stark choice just articulated would lead to irrational results.

At the sentencing hearing, the prosecutor noted that Jacobsen committed 289 individual acts of theft (37:14-15). Therefore, the State could have charged Jacobsen with 289 individual charges of theft, instead of seven aggregated charges (2:1-3, R-Ap. 101-03). Would Jacobsen have preferred 289 charges to seven, with a penalty exposure of hundreds of years in prison? The question answers itself.

Presumably, Jacobsen favors the other alternative, limiting the State to charging her with one consolidated count of theft for her nearly 300 individual acts of theft. Because the value of the property stolen is approximately half a million dollars (37:5, 7), Jacobsen's hypothetical consolidated theft count would come under § 943.20(3)(c), which provides that: "If the value of property exceeds *$10,000*, [the defendant] is guilty of a Class G felony." Thus, after stealing close to $500,000, Jacobsen would be guilty of the same crime, and subject to the same penalties, as a person who stole $10,001. Such a result would be absurd. *See Grayson*, 172 Wis. 2d at 167.

Jacobsen supports her argument with *State v. George*, 69 Wis. 2d 92, 230 N.W.2d 253 (1975). In

[1]At the postconviction hearing, Jacobsen testified that she would have no complaint if she had been charged with one continuing criminal offense from 2006 to 2011 or multiple charges based on each separate felony and misdemeanor theft offense (38:65).

George, Louis George was charged with thirty felony commercial gambling counts (based on Wis. Stat. § 945.03) and Robert Tollefson was charged with ten. The complaints were similar to one another in that each alleged a continuing violation of the commercial gambling statute in a series of separate counts. Each count specified a time period between two weeks and four months in which the violations occurred, and each generally alleged that the defendant accepted bets for a specific genre of sporting event (*e.g.*, "college football"). *George*, 69 Wis. 2d at 94-96. One George count and two Tollefson counts alleged a specific sporting event (*i.e.*, the 1974 Super Bowl), and named specific bettors. *Id.* With few exceptions, all of the counts in each complaint overlapped in time with at least one other count. *Id.* at 95-96.

The supreme court affirmed the circuit court's dismissal of all but one of the charges against George and all but three of the charges against Tollefson. The charges had been dismissed on duplicity and/or multiplicity and/or vagueness grounds. The surviving charges were those in which the State had specifically alleged that the defendants had received bets for the 1974 Super Bowl. *Id.* at 95-96.

Relevant here, the court explained:

> We conclude that if the twenty-nine dismissed counts [in the George complaint] allege continuous offenses they are faulty because they are multiplicitous. If they allege single offenses they are faulty because they are duplicitous, vague and are not sufficient to afford the defendant a basis to plead or prepare a defense. The same objections apply to the seven counts dismissed in the Tollefson complaint.
>
> ….
>
> We perceive no valid reason under the statute … why an individual cannot be charged with one continuous offense of commercial gambling or one or more individual offenses. The State should be able to elect whether to proceed on a complaint alleging one continuous offense or a single offense

> or series of single offenses. The defendant, at the election of the state, can be charged with one continuous offense but only one, or with one or more specific individual offense but not both, for the reasons set forth above.

Id. at 99-100 (footnote omitted).

At first blush, this language appears to support Jacobsen's position. However, this court should not apply *George* to this case for at least two reasons.[2]

First, the present case is distinguishable from *George* because of Wis. Stat. § 971.36. There is no parallel pleading statute allowing the prosecution of commercial gambling cases as either a single continuous crime or a series of individual crimes.

The cases are distinguishable for a second reason. The theft statute includes a graduated penalty structure, while the commercial gambling statute does not. *See* Wis. Stat. § 943.20(3). Depending on the amount of money stolen, theft defendants are subject to different penalties: if the property stolen exceeds $10,000, the defendant is guilty of a Class G felony, if she steals between $5,000 and $10,000, she is guilty of a Class H felony, and so on down the line. In contrast, a person is guilty of a Class I felony under the gambling statute, when he (among other things) "receives … *a bet*." Wis. Stat. § 945.03(1m)(b). There is no greater or lesser penalty depending on the value of the bet or bets. The theft statute's graduated penalty structure (particularly when considered in light of § 971.36) supports a charging system in which a defendant is charged with a new theft count for every $10,000 stolen in one or more distinct acts of theft (provided the *Copening* or § 971.36 criteria are met).

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[2]If this court concludes that the language quoted above supports Jacobsen's argument and requires reversal in this case, the State believes that *George* should be overruled, or, at least, that the quoted language should be withdrawn. Of course, this court does not have the power to overrule *George*. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1996). The State makes this note to preserve the issue in case of later supreme court review.

The federal courts have applied this reasoning to allow the government to group individual pieces of a continuing offense into multiple counts for the express purpose of meeting the jurisdictional requirement for filing a criminal case in federal court. In these cases, the courts have held that, while an indictment cannot divide a single act into multiple offenses, it can treat a series of related acts occurring within a specified time period as multiple continuing offenses. *See United States v. Carter*, 804 F.2d 508, 511 (9th Cir. 1986); *United States v. Newman*, 701 F. Supp. 184, 187 (D. Nev. 1988).

Carter involved the interstate transportation of 68,000 record albums stolen in a two-year period. The records were stolen from stores in Washington state and shipped from there to Chicago and Boston. The defendants were charged with five counts of knowingly transporting in interstate commerce stolen property with a value of $5000 or more. *Carter*, 804 F.2d at 510. The government aggregated all the shipments to Boston into one count. The Chicago shipments were divided chronologically into four separate counts. By charging the defendants in this way, the government was able to satisfy the $5000 jurisdictional requirement of the illegal transportation statute. *Id.*

The defendants argued that the Chicago counts were multiplicitous. While conceding that "related shipments may be aggregated to meet [18 U.S.C.] § 2314's jurisdictional amount, [they argued] that only one substantive count could have been charged." *Id.* Thus, "the question we face is whether aggregable offenses also may be subdivided into separate charges." *Id.* at 511. The answer was yes.

> The government divided 124 shipments into five counts which each include a series of related transactions and which each meet the jurisdictional amount. While all the shipments are part of one overall scheme, the government is not limited to charging only one count of violating § 2314.

> *The indictment did not divide a single transportation into multiple offenses, but rather treated each series of transportations occurring within a specified time period as a separate offense.* Since the appellants concede the logic of charging the transportations to different cities as different offenses, and since [prior case law] allows subdivision of an overall scheme into its constituent parts, we have no difficulty endorsing the subdivision of the overall scheme in this case on a chronological basis.

Carter, 804 F.3d at 511 (emphasis added and footnote omitted).

Our supreme court applied a similar analysis in *Grayson*. There, the defendant was charged under the felony nonsupport statute, which makes it a Class I felony to "intentionally fail[] for 120 or more consecutive days to provide … child support." Wis. Stat. § 948.22(2). Grayson pleaded no contest to four counts. *Grayson*, 172 Wis. 2d at 158.

> Each of the four counts was for failure to pay court ordered child support for more than 120 days during a separate calendar year (1986, 1987, 1988 and 1989). During that four-year period, the defendant's failure to pay support was continuous. In other words, he paid no support at all for four years.

Id. Grayson unsuccessfully moved to withdraw his pleas on multiplicity grounds. The supreme court affirmed the lower court, concluding that a "common sense reading" of the statute "establishes a legislative intent to permit multiple counts of felony nonsupport when the defendant fails to pay child support for one continuous period." *Id.* at 167.

The court below followed *Grayson*.

> As in *Grayson*, here multiple charges are proper. The statutory language in this case defined the crime according to the amount that was stolen. That is citing 943.20(3). The legislature set forth a graduated penalty scheme up to $10,000. Therefore, thefts under $10,000 were intended to be treated as a

> single offense according to the relevant dollar amount. The thefts over $10,000 were intended to be treated as multiple offenses as exemplified by the lack of gradation in the penalty structure for thefts exceeding that amount. See the *Grayson* decision … explaining the significance of a graduated penalty scheme or lack thereof.

(39:19-20).

The State has shown in the preceding pages that Jacobsen has failed to demonstrate a clear legislative intent precluding the multiple punishments meted out to her under § 943.20. *See Derango*, 236 Wis. 2d 721, ¶30. The State's analysis can be summarized within the terms of the four-factor test used to determine legislative intent in multiplicity cases.

First, the statutory language does not support Jacobsen's contention that the legislature intended to prevent the cumulative punishments imposed on Jacobsen. *See Warren*, 229 Wis. 2d at 185. Pursuant to § 971.36, the State is explicitly given permission to charge a string of related thefts as either individual counts or one continuous crime. That statute does not preclude the charging choice made here, which takes the middle ground of charging several continuing offenses based on Jacobsen's string of related thefts from her employer. Meanwhile, the theft statute itself, § 943.20, imposes graduated penalties based on the amount of property stolen. The highest dollar value specified is $10,000. *See* Wis. Stat. § 943.20(3)(c). Reading these statutes together, it would be irrational to conclude that the legislature intended to limit the State to the stark choice of either charging the defendant with an enormous number of individual theft counts (detrimental to the defendant in terms of potential sentencing exposure and exceedingly labor- and resource-intensive for the State, the defense, and the court) or a single continuous crime (advantageous to the defendant but detrimental to the State in its role as defender of the defendant's victims and the citizens of Wisconsin). *See Grayson*, 172 Wis. 2d at 163-64.

Regarding the second factor, the State has located no helpful information in the legislative history of the statutes involved.

Third, the nature of the prescribed conduct indicates that multiple continuing offense charges are allowed under § 943.20. The courts regularly analyze this factor as a replay of the "different in fact" analysis of the first part of the multiplicity test. *See Grayson*, 172 Wis. 2d at 165; *Warren*, 229 Wis. 2d at 187; *see supra* at 9-10. In *Grayson*, the case involving four charges of felony nonpayment of child support where the defendant had failed to pay support on a continuous basis for four years, the court concluded that the facts underlying each count "are separate in time because, each 120-day period of failure to provide support occurred in a separate and distinct calendar year. They are different in nature because a new *mens rea* was formed for each 120-day period of nonpayment." *Grayson*, 172 Wis. 2d at 165. The State has already shown that this same analysis applies to the present case. *See supra* at 14-15.

Fourth, in the present case, it would be grossly inappropriate to preclude multiple punishments. Once again, the *Grayson* court's analysis thoroughly explains this point:

> Multiple punishments based on each 120-day period of nonsupport are not only appropriate, but essential, if the statute is to provide deterrence and proportionality in its operation.
>
> *State v. Hamilton*, 146 Wis. 2d 426, 432 N.W.2d 108 (Ct. App. 1988), illustrates the need for deterrence. In *Hamilton*, the court of appeals determined that a defendant who possesses at one time and place a number or items with altered or removed serial numbers (contrary to sec. 943.37(3), Stats.) may be prosecuted for a separate charge based on each altered article of personal property. *Id.* at 429. It reasoned that deterrence would not exist unless possession of each item constituted a separate offense. *Id.* at 441. More specifically, the court stated the following at p. 441:

> If only a single charge and punishment is available … no matter how many items are possessed, thieves and receivers are encouraged, not deterred. The more they possess, the greater their potential profit, with no concomitant increase in risk. We think such a result contrary to public policy in and of itself and is certainly contrary to the intent of the legislature.
>
> The same is true here. If a parent failing to provide child support for 120 days or more is liable to prosecution for only one offense no matter how long the period of nonsupport continues, the continuation of the failure to provide support is encouraged, not deterred. Multiple charges are not only appropriate, they are essential if the nonsupport statute is to deter long-term failures to provide support.
>
> Multiple charges are also needed to assure proportionality between the harm caused by and the punishment received for nonsupport. In this case, at the end of 120 days, the defendant had failed to provide approximately $1,700 in support. At the end of seven years, he had failed to provide approximately $36,400 in support. The longer the period of nonpayment, the greater harm that is inflicted. A child is left with increasing amounts of the monies needed for his or her support unpaid. Our holding that sec. 948.22(2) permits multiple counts, even if that person fails to pay over one continuous period, provides for punishment proportional to this increased harm. Otherwise, a person who fails to provide support for one year and a person who fails to provide support for 18 years would be subject to the same penalty.

Grayson, 172 Wis. 2d at 166-67.

This analysis is on all fours with the present case. Short of charging Jacobsen with a separate count for each distinct theft, the State's decision to charge her with multiple continuing offenses was "not only appropriate, but essential, if the statute is to provide deterrence and proportionality in its operation." *Id.* at 166. As in *Grayson*, if the State were precluded from charging

Jacobsen in this manner, there would be no down-side to continuing a larcenous scheme year after year, because the thief could be sure of being charged with a single count. *Id.* at 166; *see also Warren*, 229 Wis. 2d at 187. The obvious comeback to this observation is that the State could still charge the thief with individual counts for each separate theft. True, but forcing the State onto that path severely undermines the charging flexibility explicitly provided by § 971.36. Neither the defendant nor the State is well-served by a rule that requires the State to charge someone like Jacobsen with 289 individual counts of theft in order to insure that she and her like are deterred and sanctioned proportionately.

"Multiple charges are also needed to assure proportionality between the harm caused by [Jacobsen's larcenous schemes] and the punishment received" by Jacobsen. *Grayson*, 172 Wis. 2d at 167. Again, absent forcing the State to charge Jacobsen with each of her enumerated crimes (which, again, undermines the very purpose of § 971.36), the State must have the discretion to charge her with multiple continuing offenses in order to assure proportionality between her punishment and the damage she caused. Charging Jacobsen with a single theft count for her continuing offense of thefts committed over a period of five years, which totaled approximately half a million dollars, and comprising nearly 300 separate acts of larceny, would cap her potential punishment at a ten-year bifurcated sentence and a $25,000 fine. *See* Wis. Stat. § 939.50(3)(g); § 943.20(3)(c). Our criminal justice system cannot countenance subjecting Jacobsen to the same punishment due a person who steals $10,001. *See Grayson*, 172 Wis. 2d at 167.

Jacobsen has not and cannot overcome the presumption that the legislature did not intend to preclude cumulative punishments in the present circumstances. *See Derango*, 236 Wis. 2d 721, ¶30. The burden of proof is on her and she has failed to meet it.

3. Ineffective assistance of counsel.

Counsel cannot be ineffective for failing to make a meritless argument. *See Toliver*, 187 Wis. 2d at 360. Since Jacobsen's postconviction and appellate arguments that the Complaint against her was duplicitous and/or multiplicitous are meritless, Petersen did not perform deficiently by not making them.

Even if these arguments had merit, Jacobsen was not prejudiced by Petersen's failure to make them. In a plea withdrawal case based on ineffective assistance of counsel, the defendant "must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Bentley*, 201 Wis. 2d at 312 (citation omitted).

Jacobsen does not make the requisite factual allegations in the prejudice section of her appellate brief. Jacobsen's Brief at 20. Nor did she make them in her postconviction motion or at the postconviction hearing (23; 38).

In conclusion, Peterson did not provide ineffective assistance of counsel because his performance was not deficient, and Jacobsen has failed to allege that any conceivable deficiency prejudiced her defense. Accordingly, the circuit court's ruling denying her postconviction motion should be affirmed.

4. The circuit court's order denying Jacobsen's plea withdrawal should be affirmed.

Having failed to prove that she received ineffective assistance of counsel, Jacobsen has failed to prove a manifest injustice warranting withdrawal of her no contest pleas. *See Bentley*, 201 Wis. 2d at 311-12. The circuit

court's order denying Jacobsen's postconviction motion should be affirmed.

CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 12th day of September, 2013.

Respectfully submitted,

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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 7,383 words.

Dated this 12th day of September, 2013.

_____
Maura FJ Whelan
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 12th day of September, 2013.

_____
Maura FJ Whelan
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