No. 2015AP1782-CR

In The Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

SAMBATH PAL,
DEFENDANT-APPELLANT-PETITIONER.

On Appeal from the Rock County Circuit Court,
The Honorable Richard T. Werner, Presiding,
Case No. 2014CF766

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUES PRESENTED

1. Under Wis. Stat. § 346.67,[1] "[t]he operator of any vehicle involved in an accident" that causes "injury to or death of any person" must "immediately stop such vehicle," provide certain information "to the person struck," and "render to any person injured . . . reasonable assistance." Wis. Stat. § 346.67(1)(a)–(c).

If an operator hits multiple victims and then flees in violation of Section 346.67, may a prosecutor charge the operator with "as many offenses as individuals affected," *State v. Rabe*, 96 Wis. 2d 48, 68, 291 N.W.2d 809 (1980), without violating the multiplicity doctrine, which prohibits "multiple charges for the same offense," *State v. Ziegler*, 2012 WI 73, ¶ 59, 342 Wis. 2d 256, 816 N.W.2d 238?

The circuit court and court of appeals answered, "Yes."

2. Did the circuit court properly exercise its sentencing discretion by imposing a sentence well under the statutory maximum?

The circuit court and court of appeals answered, "Yes."

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[1] Except where specified otherwise, all references to the Wisconsin Statutes in this brief are to the 2013–14 version, which was in effect on the date of the accident in this case, April 20, 2014.

INTRODUCTION

For more than 25 years, Wisconsin courts have permitted prosecutors to file multiple charges for hit-and-run accidents involving multiple victims. *See State v. Hartnek*, 146 Wis. 2d 188, 430 N.W.2d 361 (Ct. App. 1988). And since at least 1978, this Court has employed the "general rule when different victims are involved, there is a corresponding number of distinct crimes." *Austin v. State*, 86 Wis. 2d 213, 223, 271 N.W.2d 668 (1978), *overruled on other grounds by State v. Poelliger*, 153 Wis. 2d 493, 504 & n.5, 507, 451 N.W.2d 752 (1990); *Rabe*, 96 Wis. 2d at 68. Here, Sambath Pal seeks to upend this precedent without demonstrating any "compelling reason" for doing so. *State v. Douangmala*, 2002 WI 62, ¶ 42, 253 Wis. 2d 173, 646 N.W.2d 1.

While driving on a Rock County highway in 2014, Pal crossed the centerline and struck two oncoming motorcyclists. Instead of stopping to help these two young men who lay dead or dying, Pal drove off to drink beer and discuss sports with his girlfriend's stepfather. The Rock County District Attorney charged Pal with two counts of hit-and-run, in violation of Wis. Stat. § 346.67, one for each victim. Pal pleaded no contest to both counts. The court of appeals affirmed, correctly applying the court of appeals' longstanding precedent of *Hartnek*.

Pal seeks to limit multi-victim hit-and-run incidents to one charge, but he is wrong on the law. Under this Court's "well-established two-pronged methodology," Pal's

multiplicity claim fails because Counts One and Two of the criminal complaint are not "identical [ ] in fact," *Ziegler,* 342 Wis. 2d 256, ¶ 60, and there is no indication that the Legislature intended for drivers who flee multi-victim accidents to only be charged for a single count, *id.* ¶ 62.

The court of appeals' judgment should be affirmed.

STATEMENT

1. In Wisconsin, drivers who flee the scene of an accident causing "injury to or death of a person" face criminal liability. Wis. Stat. § 346.67(1). The Wisconsin Statutes provide that the "operator of any vehicle involved in an accident resulting in injury to or death of any person . . . shall immediately stop such vehicle at the scene." *Id.*

In addition to this general requirement to "immediately stop," operators must "remain at the scene of the accident until the operator has fulfilled the following [three] requirements." *Id.* First, the operator must "give his or her name, address and the registration number of the vehicle he or she is driving to the person struck," or the "person" attending a vehicle "collided with." Wis. Stat. § 346.67(1)(a). Second, the operator of a vehicle causing an accident must, "upon request and if available, exhibit his or her operator's license to the person struck," or the "person" attending a vehicle "collided with." Wis. Stat. § 346.67(1)(b). Third, "the operator shall render to any person injured in such accident reasonable assistance, including the carrying, or the making

of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person." Wis. Stat. § 346.67(1)(c).

Drivers violating this statute face a series of graduated criminal penalties for each charge. *See* Wis. Stat. § 346.74(5). If the charge involves no "death or injury to a person," then the operator faces penalties of "not less than $300 nor more than $1,000 or imprison[ment] not more than 6 months or both." Wis. Stat. § 346.74(5)(a). If the charge involves "injury to a person and the person suffered great bodily harm," then the driver is "guilty of a Class E felony." Wis. Stat. § 346.74(5)(c).[2] And if the charge involves "death to a person," then the driver is "guilty of a Class D felony." Wis. Stat. § 346.74(5)(d).

2. On Easter, April 20, 2014, two friends—MV and DJ—took their motorcycles out for a ride along Highway 14 near Janesville, Wisconsin. R.1:2–3. At the time, MV was 24 and DJ was 18. R.6:4–5. As they approached a curve in the road, Pal, driving his father's SUV, crossed the centerline and struck MV and DJ. R.1:3. Pal did not stop, and instead chose to drive away from the scene. R.1:3. Responding police officers discovered the two bodies lying on the highway. R.1:2.

[2] Courts "[m]ay" impose a lower penalty of "not more than $10,000 or imprisonment for not more than nine months or both" if the "injury" did not involve "great bodily harm." Wis. Stat. § 346.74(5)(b).

MV was dead. R.1:2. DJ later died at a hospital in Janesville. R.1:2.

While MV and DJ lay dead or dying, Pal drove to his girlfriend's house to drink beer with her stepfather and discuss sports. R.36:50. He did not tell anyone about the accident. R.36:50.

The next morning, Pal returned to his father's home in Illinois. R.36:50. Pal's father asked him about damage to the SUV, and Pal said that he had hit something. R.36:50. Pal's girlfriend then called and confronted Pal about the accident and reports that the car involved matched Pal's SUV; Pal denied knowing anything about the car accident. R.36:50.

Pal did know something, however. Pal used his phone to search "many pages, of many subjects about how to avoid being caught for a hit and run, how to repair a vehicle, how to hide a vehicle, what are the penalties [for a hit and run]." R.36:51. Pal later asked his girlfriend to help him delete this internet history. R.36:51–52.

A few days after the accident and Pal's subsequent return home to Illinois, Pal's relatives in Janesville called his father and mentioned the accident and that police were looking for a vehicle that matched the SUV that Pal drove. R.36:50–51. Pal's father then contacted police and allowed them to seize the vehicle. R.36:51.

3. On October 5, 2015, the Rock County District Attorney filed a criminal complaint against Pal. R.1:1. The

complaint contained two counts of hit-and-run resulting in death under Wis. Stat. § 346.67.

Count One charged Pal with "being the operator of a vehicle involved in an accident resulting in death to [DJ]." R.1:1. Count One further charged Pal with failing "to remain at the scene of said accident until he" provided his "name, address and the registration number" "to the person struck," failing to "exhibit his operator's license to the person struck," and failing to "render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment." R.1:1.

Count Two charged Pal with "being the operator of a vehicle involved in an accident resulting in death to [MV]." R.1:1–2. Count Two further charged Pal with failing "to remain at the scene of said accident until he" provided his "name, address and the registration number" "to the person struck," failing to "exhibit his operator's license to the person struck," and failing to "render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment." R.1:1–2.

After Pal pleaded no contest to both charges, R.12:1, at a sentencing hearing, the circuit court considered the facts of the case, Pal's flight, his failure to report the accident, and his

overall conduct following the accident. R.36:50. The court explained that it was giving the "greatest amount of weight to [ ] the seriousness of the offense." R.36:57. The court stated: "I can't say enough about the seriousness of these offenses, and I say offenses because two lives were lost." R.36:53. "The result, of course, is the death of those two young men that had a lot to offer, that brought a lot of joy to their family and friends, and needless to say, the extreme, never-ending pain that their family and friends are going to experience and even the pain and angst of your [Pal's] father and [ ] family." R.36:56. But the seriousness of the offense was "exacerbated by [Pal] fleeing without any apparent concern for them and [his] actions that [he] took several days afterwards and after learning of what happened." R.35:57. Pal's conduct showed that he was not "taking any acceptance or any responsibility" following the accident and that he attempted to "avoid being caught." R.36:51. These actions following the accident were "not the actions of a remorseful individual, of one that's taking any responsibility whatsoever for this situation." R.36:52.

Taking into account all of these facts, the court imposed a sentence of 20 years initial confinement and 20 years extended supervision: (1) for Count One, ten years initial confinement and ten years extended supervision, and (2) for Count Two, ten years initial confinement and ten years extended supervision. The court ordered the sentences to run consecutively. R.16:1; R.18.

In a post-conviction motion, Pal argued that the sentence was unnecessarily harsh and that the two charges were multiplicitous. R.24:1–5. The circuit court rejected both arguments. R.29.

4. On appeal, Pal argued that the circuit court imposed an unnecessarily harsh sentence, and that his two convictions arising out of a single accident violated the Double Jeopardy Clauses of the Wisconsin and United States Constitutions. *See* App. 100-A. The court of appeals affirmed, holding that the circuit court did not abuse its discretion in sentencing Pal. App. 100-B. The court of appeals explained that the circuit court appropriately "considered at length Pal's actions in the days after he left the accident scene and the fact that he never turned himself in, even when questioned about the accident by his girlfriend and his father." App. 100-C. Also, considering the fact that "Pal performed internet searches from his phone after the accident, seeking information on how to escape a hit and run and what penalties he faced," which, combined with other evidence, "showed a lack of remorse and responsibility," the court of appeals held that the sentence was "not unduly harsh and that the [circuit] court considered proper factors in imposing it." App. 100-C.

Next considering whether "it was multiplicitous, in violation of [Pal's] constitutional protection against double jeopardy, for the State to charge him with two counts of hit and run for a single act of flight from the accident scene," the court of appeals applied its prior decision in *Hartnek*, 146 Wis.

2d 188. App. 100-C. In that case, the court of appeals had concluded that "a single event of failing to stop and render aid may give rise to multiple charges when there are multiple victims." App. 100-C to 100-D (citing *Hartnek*, 146 Wis. 2d 188). Explaining that it "lack[s] the power to" "reverse *Hartnek*," the court of appeals rejected "Pal's multiplicity argument on that basis." App. 100-D.

Pal petitioned for review from this Court, which this Court granted. This Court ordered that this case be argued on the same day as *State v. Steinhardt,* No. 2015AP993, which also raises double-jeopardy issues.

SUMMARY OF ARGUMENT

I. Under this Court's "well-established two-pronged methodology," courts must first consider whether two charges are "identical in law and fact." *Ziegler*, 342 Wis. 2d 256, ¶ 60. If they are *not* identical, then the defendant bears the burden of "demonstrating that the offenses are nevertheless multiplicitous on grounds that the legislature did not intend to authorize cumulative punishments." *Id.* ¶ 62. On the other hand, if the charges *are* identical, then the State bears the burden of establishing a contrary legislative intent. *Id.* ¶ 61. Accordingly, the touchstone of this Court's multiplicity doctrine is "legislative intent." *State v. Davison*, 2003 WI 89, ¶ 35, 263 Wis. 2d 145, 666 N.W.2d 1 (citation omitted).

Pal cannot seriously argue that Counts One and Two are identical in fact. The counts charge Pal's failure to stop

and provide "reasonable assistance" to two different victims: DJ and MV, respectively. This Court has repeatedly held that when "there are multiple victims," each count requires an "additional proof of fact." *Rabe*, 96 Wis. 2d at 67 (citation omitted); *see also Austin*, 86 Wis. 2d at 223.

Moving to the second prong of the analysis, the Legislature intended multiple charges for a multi-victim hit-and-run accident. The Legislature chose language focusing on each individual victim, Wis. Stat. § 346.67(1)(a)–(c) ("person struck," "such person"), and then imposed cascading penalties depending on whether the accident caused injuries or death to "a person," Wis. Stat. § 346.74(5)(a)–(d). Had the Legislature intended to impose a single penalty for a hit-and-run accident regardless of the number of victims, it could have easily enacted different language to do so. *See Hartnek*, 146 Wis. 2d at 194. Therefore, Pal's two counts are not multiplicitous, and both his convictions can stand.

II. Pal's sentences are "well within" the statutory maximum, and are thus "unlikely to be" unconstitutional. *State v. Cummings*, 2014 WI 88, ¶ 74, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted). Here, the circuit court imposed a global sentence of 40 years when Pal faced sentences of up to 50 years. The circuit court properly and lawfully considered the gravity of the crime and Pal's remorseless response, including his attempts to evade capture.

STANDARD OF REVIEW

Pal challenges the two counts in the criminal complaint as violating the constitutional protection against multiplicity; this raises "a question of law subject to [this Court's] independent review." *Ziegler*, 342 Wis. 2d 256, ¶ 38. When a criminal defendant pleads guilty, he "waives a double jeopardy claim unless the record reveals . . . the state lacked the power to hale the defendant into court and prosecute [him]." *State v. Kelty*, 2006 WI 101, ¶ 26, 294 Wis. 2d 62, 716 N.W.2d 886. In other words, "if a court cannot determine, based on the record, whether there is a double jeopardy violation, a guilty plea will relinquish a defendant's opportunity to have [his] double jeopardy claim resolved on the merits." *Id.*

Pal also challenges his sentence, which will be upheld if the trial court did not abuse its discretion. *Cummings*, 357 Wis. 2d 1, ¶ 75. "If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual." *Id.*

ARGUMENT

I. A Hit-And-Run Accident Resulting In Two Victims May Result In Two Separate Charges

A. The Double Jeopardy Clause, as embodied in the Wisconsin and United States Constitutions, includes three basic protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second

prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Rabe*, 96 Wis. 2d at 64 (quoting *United States v. Wilson*, 420 U.S. 332, 343 (1975)).

This case involves only the last category: protection against "multiple punishments for the same offense." *Ziegler*, 342 Wis. 2d 256, ¶ 59. The term "[m]ultiplicity" is used by this Court to describe "the charging of a single offense in separate counts." *State v. Tappa*, 127 Wis. 2d 155, 161, 378 N.W.2d 883 (1985). To determine whether two charges are multiplicitous, this Court employs "a well-established two-pronged methodology." *Ziegler*, 342 Wis. 2d 256, ¶ 60. This methodology encompasses both "double jeopardy" and "due process" protections found in the United States and Wisconsin Constitutions. *See id.* ¶ 62.

Under the first prong of this multiplicity test, this Court applies the double-jeopardy test derived from *Blockburger v. United States*, 284 U.S. 299 (1932). *See Ziegler*, 342 Wis. 2d 256, ¶ 60. In *Blockberger*, the United States Supreme Court found no double-jeopardy violation where one count requires "proof of a fact which the other does not." 284 U.S. 299, 304 (1932); *see also Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975) ("If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."). Under this prong of the test, this Court must determine whether the two charged offenses are "identical in

law" and "identical in fact." *Ziegler*, 342 Wis. 2d 256, ¶ 60. Two offenses are "identical in law" when, for example, they are "charged under" the same statute. *Id.* ¶ 66. Two offenses may also be "identical in law" when one is a "lesser-included offense[ ]" of the other—that is, when all of the "statutory elements" of one offense are found in another "greater" offense. *State v. Sauceda*, 168 Wis. 2d 486, 493–94 & n.8, 485 N.W.2d 1 (1992) (citation omitted). Two offenses are "not identical in fact if the acts allegedly committed are sufficiently different in fact to demonstrate that separate crimes have been committed." *Ziegler*, 342 Wis. 2d 256, ¶ 60.

The first prong, the *Blockburger* test, is "seen as simply a rule of construction creating a rebuttable" presumption of multiplicity. *Davison,* 263 Wis. 2d 145, ¶ 24 (citation omitted). The result of this first prong determines which party bears the burden of rebutting the presumption in the second prong. When two offenses *are* "identical in law *and* fact" then, under the second prong, the State bears the burden of demonstrating, by a "clear indication" of "legislative intent," that the Legislature intended "to authorize cumulative punishments." *Ziegler*, 342 Wis. 2d 256, ¶ 61 (emphasis added). If the State succeeds here, then the two charges will stand. *See id.* But if the two counts are *not* identical in either law or fact under the first prong then, under the second prong, "the defendant has the burden of demonstrating that the offenses are nevertheless multiplicitous on grounds that the legislature did not intend

to authorize cumulative punishments." *Id.* ¶ 62. If the defendant succeeds here then one of the charges must fall. *Id.*

While the first prong is derived from double-jeopardy principles, the second prong employs a "due process" analysis, whereby courts decide whether the Legislature did—or did not—intend to provide for multiple punishments. *Id.* To identify a "legitimate due process claim," *id.* ¶ 62, this Court "discern[s] legislative intent under the second prong of [the] methodology, [using] the following four factors: (1) all applicable statutory language; (2) the legislative history and context of the statutes; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct," *id.* ¶ 63.

B. In 1988, the Wisconsin Court of Appeals applied this two-prong multiplicity test to the same statute at issue in this case: Section 346.67. *Hartnek*, 146 Wis. 2d 188, 191–92. In *Hartnek*, the defendant "struck two vehicles" in a single accident, injuring two women, and left the scene "without providing information or assistance to anyone." *Id.* at 191. The defendant properly "concede[d] that the first part of the [multiplicity] test [was] met because each charge require[d] proof of different injured persons." *Id.* at 192. Under the second prong, the court of appeals held that the text and context of the statute supported multiple charges for multiple victims: "[a]s currently drafted, a multiple victim accident could invoke several of the differing penalties of sec. 346.74(5)." *Id.* at 194–95. The court did not believe that the

"nature of the proscribed conduct," or "appropriateness of multiple punishments" precluded multiple charges. *Id.* at 195–96. The court held that the "obvious intent of the legislature" was to ensure the "receipt of medical attention with the least possible delay," and that permitting multiple punishments for each victim would further this interest. *Id.* at 196 (citation omitted).

Pal argues that *Hartnek* should be overruled, but, as explained below, his argument fails under the two-prong multiplicity analysis. At the very minimum, Pal offers no "compelling reason" to overrule a decision of the court of appeals, which has been the law in this State for over 25 years. *Douangmala*, 253 Wis. 2d 173, ¶ 42 ("The principle of stare decisis is applicable to the decisions of the court of appeals.").

C. *Hartnek* was correctly decided, meaning that Pal's two charges under Section 346.67 are not multiplicitous under the well-established two-prong approach.

1. Under the first prong of the multiplicity test, the two charges that Pal faced were not identical in fact. While the two charges here "are identical in law because both were contrary to the same statute," *State v. Anderson*, 219 Wis. 2d 739, 747, 580 N.W.2d 329 (1998), they are not identical in fact because "the acts [ ] committed are sufficiently different in fact to demonstrate that separate crimes have been committed," *Ziegler*, 342 Wis. 2d 186, ¶ 60.

This Court's decision in *Rabe* is particularly instructive. 96 Wis. 2d 48. In that case, the defendant, while intoxicated, caused an accident resulting in the deaths of four "persons." *Id.* at 53. Prosecutors charged the defendant with four identical counts of homicide under Wis. Stat. § 940.09. *Id.* at 52. The defendant raised a multiplicity challenge. *Id.* at 53. Under the first prong of the multiplicity analysis, this Court held that the "offenses charged in the present case [were] identical in law." *Id.* at 63. Therefore, this Court next considered "whether each count require[d] proof of an additional fact which the other count or counts [did] not." *Id.* (citation omitted). This Court held that the four counts were not identical in fact: "[e]ach count require[d] proof of additional facts that the other counts d[id] not namely, the death of the *particular* victim named in each count and the causal relationship between the defendant's negligent operation of his vehicle while intoxicated and that *particular* death." *Id.* at 66 (emphases added). According to this Court, "evidence sufficient for conviction under the first charge would not have convicted under the second [charge]." *Id.* at 67 (citation omitted). This holding was consistent with the "general rule [that] when different victims are involved, there is a corresponding number of distinct crimes." *Id.* at 67 (quoting *Austin v. State*, 86 Wis. 2d 213, 223, 271 N.W.2d 668 (1978)). "This general rule is equally applicable where the multiple deaths are caused by negligent operation or operation of a vehicle while intoxicated." *Id.* at 68.

Applying these principles here, it is clear that the two charges against Pal are different in fact. Count One charges that Pal "operated a vehicle involved in an accident resulting in the death of [DJ]." R.1:1. Count One also charges that Pal failed to "provide name, address and the registration number" "to the person struck," failed to "exhibit his operator's license to the person struck," and failed to "render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person" to a hospital. R.1:1. In each case, Count One's use of the phrases "the person struck," "such person," and "any person," refer to DJ. On the other hand, Count Two charges that Pal "operated a vehicle involved in an accident resulting in the death of [MV]." R.1:1. Count Two also charges that Pal failed to "provide name, address and the registration number" "to the person struck," failed to "exhibit his operator's license to the person struck," and failed to "render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person" to a hospital. R.1:1. In each case, Count Two's use of the phrases "the person struck," "such person," and "any person," refer to MV.

Pal does not specifically argue that Count One and Count Two are "identical in fact" by comparing the language in the two charges. Nor would such an argument be plausible because Count One requires proof relating to DJ, while Count Two requires proof relating to MV. Although Pal raises

several arguments about the statutory text that purport to go to the first prong of the multiplicity analysis, Opening Br. 13, those arguments have nothing to do with the identical-in-fact inquiry; rather, they go to the separate question of legislative intent, properly addressed at prong two, *see infra* pp. 21–22.

2. Given that Count One and Count Two are unquestionably different in fact, "the presumption is that the legislature intended to permit cumulative punishment." *Ziegler*, 342 Wis. 2d 256, ¶ 62. Pal thus bears the "burden of demonstrating that the offenses are nevertheless multiplicitous on grounds that the legislature did not intend to authorize cumulative punishments." *Id.* To determine whether Pal has carried this burden, this Court must "discern legislative intent" by analyzing "four factors: (1) all applicable statutory language; (2) the legislative history and context of the statutes; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct." *Id.* ¶ 63. Applying these four factors here, it is clear that the Legislature intended to permit multiple punishments in the context of a multiple-victim hit-and-run. At the minimum, Pal has not carried his burden of showing otherwise.

a. *Statutory Language.* In this case, there are two applicable statutory provisions: the liability statute, Wis. Stat. § 346.67, and the penalty statute, Wis. Stat. § 346.74(5). *See Ziegler*, 342 Wis. 2d 256, ¶ 63. The text of these provisions makes clear that the Legislature permitted multiple charges for a single hit-and-run accident with multiple victims.

Under the liability statute, Section 346.67, "[t]he operator of any vehicle involved in an accident resulting in injury to or death of any person . . . shall immediately stop such vehicle at the scene of the accident." Wis. Stat. § 346.67(1). The Legislature chose to criminalize a failure to stop at the scene of "*an* accident" causing death or injury to "any person" or damage to "a vehicle." The statute does not prohibit failing to stop at the scene of an accident resulting "in injur*ies* to or death*s* of one or more *people* or damage to vehicle*s*." The Legislature's choice of singular nouns indicates that the gravamen of the offense is not simply failing to stop, but rather the driver's negligent conduct "in regard to each victim." *Rabe*, 96 Wis. 2d at 72–73.

Continuing its use of singular nouns, the Legislature required the driver to (a) provide a "name, address and the registration number of the vehicle" "to the *person* struck"; (b) show an "operator's license" "to the *person* struck;" and (c) "render to any *person* injured [ ] reasonable assistance" by "making of arrangements for the carrying . . . of such *person* to . . . [the] hospital." Wis. Stat. § 346.67(1)(a)–(c) (emphases added). Again, the Legislature's use of the singular phrases "the *person* struck" and "such *person*," in addition to laying out three specific duties owed to each "*person*," indicates that its focus was on each individual victim of an accident, not on the victims collectively as a group.

The penalty statute, Section 346.74(5), is consistent. There, the Legislature chose a cascading set of penalties

focused solely on the impact to "a person" named as a victim in a criminal charge. Wis. Stat. § 346.74(5)(a)–(d). A hit-and-run driver "[s]hall be fined not less than $300 nor more than $1,000 or imprisoned not more than 6 months or both if" the charge does "not involve death or injury to *a person*." Wis. Stat. § 346.74(5)(a) (emphasis added). If a charge does involve injury, but "*the person* did not suffer great bodily harm," then the court "[m]ay" impose a fine of "not more than $10,000 or imprison[ment] for not more than 9 months or both." Wis. Stat. § 346.74(5)(b) (emphasis added). If a charge "involve[s] injury to *a person* and *the person* suffered great bodily harm," an operator is "guilty of a Class E felony." Wis. Stat. § 346.74(5)(c) (emphases added). Finally, if a charge "involve[s] death to *a person*," the operator is guilty of a "Class D felony." Wis. Stat. § 346.74(5)(d) (emphasis added). Had the Legislature intended to limit the statute to just one charge, regardless of the number of victims, it could have easily imposed punishments based on whether the accident involved injury or death "to one or more individuals," or simply used "persons." As the court in *Hartnek* explained, "[a]s currently drafted, a multiple victim accident could invoke several differing penalties of sec. 346.74(5)" for the defendant. 146 Wis. 2d at 195.

Pal does not explain how these singular nouns support his theory of grouping all victims into a single charge. Instead, he argues that the Legislature's choice of the phrase "*any* person" in Section 346.67 is determinative. Opening Br.

14-15 & n.5. He claims that that "[b]ecause [Section 346.67] uses the language 'any person,' which can include more than one person, each count in the information in this case charges exactly the same offense of leaving the scene of an accident causing the death of any person." Opening Br. 13. Pal even claims that in a hit-and-run where "five persons are killed during the accident," the "any person" language of Wis. Stat. § 346.67 would refer to all five victims collectively. Opening Br. 15. In support of this broad claim, Pal attempts to distinguish the phrase "any person" from "a person," hypothesizing that if the Legislature had used the latter phrase, then multiple charges would be appropriate. *See* Opening Br. 13, 14 n.5.

Pal's reading is not supported by the statute. Even assuming that "any person" could mean "one or more people," Pal does not explain—or even mention—the many other phrases in Sections 346.67 and 346.74 that are indisputably singular. *E.g.* Wis. Stat. § 346.67 ("the person struck," "such person," "a vehicle"); § 346.74(5) ("a person," "the person"). Pal just rephrases the statute in his own words, claiming that it "proscribes only the leaving of the scene of an accident involving one *or more* person[s] under specified circumstances, injury to any person, the death of any person or the damage to a vehicle occupied by any person." Opening Br. 14 (emphasis added, subsequent emphases removed). This reading is wrong in two ways. First, the statute does not say "one or more person[s]"; Pal's need to insert this language

completely undermines his case. And second, Pal's argument that the Legislature proscribed only the *leaving* of an accident, no matter the number of victims, Opening Br. 14, was the argument this Court rejected in *Rabe*. 96 Wis. 2d at 71–72. There, the defendant also argued that the "conduct" prohibited by the relevant statute was "driving the vehicle negligently while intoxicated," and that the focus of the law was not on the victims. *Id.* at 71. This Court rejected this argument, explaining that the "gravamen of the offense [was] more than just negligent operation of a vehicle while intoxicated"; it was the defendant's conduct "in regard to each victim." *Id.* at 72–73. Here too, the gravamen of the statute is more than just leaving the accident; the focus is similarly upon "each victim."[3]

Finally, Pal argues that the "rule of leniency" favors his reading, to the extent the statute is ambiguous. Opening Br. 15. As a threshold matter, the rule of lenity has no application because Pal, not the State, bears the burden of persuasion

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[3] Pal also points to the OWI penalty enhancer, which provides that "[i]f there was a minor passenger under 16 years of age in the motor vehicle" at the time of the OWI, then certain minimum penalties are imposed. Wis. Stat. § 346.65(2)(f)1. Pal claims that "[i]f there are two passengers under the age of 16 [in the vehicle at the time of the OWI], two counts of operating while intoxicated cannot be charged." Opening Br. 14. Pal is correct, but this argument is unhelpful here because subsection 346.65(2)(f)1 is a *penalty enhancer*, not a chargeable crime. In Pal's OWI hypothetical, the crime charged would be under Wis. Stat. § 346.63(1) ("Operating under influence of intoxicant or other drug"); this section does *not* contain a separate element referencing a particular victim, as the hit-and-run statute does in this case.

under the second prong of the multiplicity analysis, given that the charges here are different in fact. *See Ziegler,* 342 Wis. 2d 256, ¶ 62; *see supra* p. 18. In any event, lenity would not support Pal because Wis. Stat. § 346.67 is not ambiguous in any relevant respect. *See Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't Nat. Res.*, 2004 WI 40, ¶ 7, 270 Wis. 2d 318, 677 N.W.2d 612. As this Court explained in *Rabe*, a statute need not explicitly spell out a unit of prosecution to *permit* multiple prosecutions for different victims, since the "general rule" is that "when different victims are involved, there is a corresponding number of distinct crimes." *Rabe*, 96 Wis. 2d at 70 (citation omitted).

b. *Legislative History And Context Of The Statutes.* The second factor is "the legislative history and the context of the statutes." *Ziegler,* 342 Wis. 2d 256, ¶ 63.

Since 1911, the Legislature has criminalized hit-and-run accidents. *See* Laws of Wis., ch. 600, § 1 (1911).[4] In that year, the Legislature passed a law providing that "[a]ny person operating an automobile . . . who shall injure any person therewith and fail to stop and give assistance, [and] his name and address . . . to the person so injured . . . shall be deemed guilty of a misdemeanor." *Id.* Two years later, the

[4] The year 1911 is particularly relevant since it was the first year that the Legislature appropriated funds for public highways and also the year that the Department of Transportation's predecessor was created. *See* Wis. Dep't of Trans., *History of WisDOT*, http://wisconsindot.gov/Pages/about-wisdot/who-we-are/dept-overview/history.aspx (last visited Dec. 23, 2016).

Legislature increased the penalty to a felony. Laws of Wis., ch. 576, § 1 (1913). Over the next two decades, the Legislature recodified the criminal traffic laws and clarified the hit-and-run statute, adopting language similar to the current law. *See* Laws of Wis., ch. 427, § 2 (1935) ("The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle" and "give his name, address, and the registration number of the vehicle," "exhibit his driver's license," and "shall render to any person injured in such accident reasonable assistance.").

In 1957, the Wisconsin Legislature again recodified "its traffic laws so as to bring them into greater conformity with the Uniform Vehicle Code," as a response to the rapidly growing public-safety concern presented by widespread automobile ownership. Albert B. Houghton, *Introduction: Wisconsin's Traffic Problem*, 1958 WIS. L. REV. 171, 171–72 (1958) (calling traffic safety "the greatest social problem facing the nation"); Laws of Wis., ch. 260 (1957). In 1957, for example, there were 917 traffic fatalities in Wisconsin, Houghton, *supra*, at 172, compared with 538 in 2015, *see* Wis. Dep't of Trans., *Weekly Fatality Report* (Dec. 11, 2016) (giving preliminary data for 2015).[5]

In this 1957 revision, the Legislature clarified the duties of an operator of a "vehicle involved in an accident

[5] *Available at* http://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/fatality.aspx (last visited Dec. 23, 2016).

resulting in injury to or death of any person or in damage to a vehicle," Wis. Stat. § 346.67(1) (1957–58), and then added, for the first time, graduated penalties based on the harm to the victim, *see* Wis. Stat. § 346.74(5) (1957–58). Similar to the current statute, the Legislature imposed harsher penalties "if the accident involved death or injury to *a person*." *Id.* (emphasis added).

This legislative history indicates that the Legislature has, since 1911, sought to impose criminal penalties for hit-and-run accidents, and, since 1957, has imposed higher penalties when the accident has resulted in "death or injury *to a person*." Wis. Stat. § 346.74(5) (1957–58) (emphasis added); Wis. Stat. § 346.74(5)(c) (2013–14) (same quoted language, emphasis added). Nothing in the legislative history indicates that the Legislature intended to limit the number of charges that may be filed resulting from a multi-victim hit-and-run accident.

Pal concedes that he has not carried his burden under this factor, stating that "there is no relevant guidance either way based on the legislative history or the context of the statute." Opening Br. 15.

c. *Nature Of The Proscribed Conduct.* For the third factor, courts look to "the nature of the proscribed conduct" to determine whether the Legislature intended to limit the charges that could be filed under Section 346.67. *Ziegler,* 342 Wis. 2d 256, ¶ 63.

The Legislature proscribed five general categories of conduct in Section 346.67: (1) failing to "immediately stop [ ] at the scene of [an] accident" "resulting in injury to or death of any person"; (2) failing to provide a "name, address and the registration number" "to the person struck" following such an accident; (3) failing to "exhibit his or her operator's license to the person struck"; (4) failing to "render to any person injured in such accident reasonable assistance"; and (5) failing to stop "without obstructing traffic more than is necessary." Wis. Stat. § 346.67(1)–(2).

The Legislature did not intend to proscribe just one broad category, but five separate types of conduct. Anyone violating one or more requirements could be penalized, and an operator could fulfill a duty to one "person struck," but perhaps not to another "person struck." "Had the legislature intended that only one penalty could be imposed per accident, it could have more clearly done so," but "[a]s currently drafted, a multiple victim accident could invoke several differing penalties of sec. 346.74(5)." *Hartnek,* 146 Wis. 2d at 194–95. As *Hartnek* explains, a driver could violate part of Section 346.67 while complying with other parts. *Id.* at 194. And a single accident could cause injury to more than one "person" or damage to more than one "vehicle," resulting in multiple charges. *See id.*

Pal responds by arguing that the purpose of the statute is to punish "flight from the scene," and "a given defendant can only leave the accident scene once." Opening Br. 16.

Clearly, the Legislature intended to punish more than mere "flight from the scene"—it also punished the failure to "render . . . reasonable assistance," "exhibit" a driver's license, or provide a "name, address and [ ] registration number." Wis. Stat. § 346.67(1); *accord Rabe*, 96 Wis. 2d at 72–73 ("[T]he gravamen of the offense is more than just negligent operation of a vehicle while intoxicated," rather, it is "the defendant's [ ] negligence in regard to each victim."). Whether there was more than one crime depends on the actions of the driver, and a driver may violate the statute in multiple ways. Here, Pal was "involved in an accident resulting in [ ] death" to DJ and "involved in an accident resulting in [ ] death" to MV. Wis. Stat. § 346.67(1). He did not "immediately stop," *id.*, and therefore was appropriately charged with two crimes.

Pal also argues that *State v. Grayson*, 172 Wis. 2d 156, 493 N.W.2d 23 (1992), requires this Court to focus on the timing of the accident in order to determine if two offenses were committed here. Opening Br. 16. In *Grayson*, the Court did not focus purely on timing, but rather on whether "the facts underlying the charges are *either* separated in time *or* are of a significantly different nature in fact." 172 Wis. 2d at 165 (emphases added) (quoting *State v. Eisch*, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980)). In *Eisch*, this Court held that when the "time elapsed between the acts charged is not significant enough" to delineate two offenses, "the different nature of the acts" can still by itself delineate the two offenses. 96 Wis. 2d at 33. Here, the nature of the charges alone

delineates the two offenses because there are two different victims: Pal struck two separate individuals, and thus is appropriately charged separately for each.

d. *Appropriateness Of Multiple Punishments.* For the final factor to determine "legislative intent," this Court considers "the appropriateness of multiple punishments for the conduct." *Ziegler,* 342 Wis. 2d 256, ¶ 63.

The Legislature chose cascading penalties for hit-and-run accidents depending on the harm to "a person" or "the person." Wis. Stat. § 346.74(5). Had the Legislature intended a single penalty for both accidents with single victims and accidents with multiple victims, the Legislature could have easily done so by adopting different language. As such, based on the language of the statute alone, multiple penalties for multiple victims is appropriate.

Moreover, given the aims of Section 346.67, a higher penalty for a multi-victim accident is certainly appropriate. Pal's actions killed two victims. Each victim may have benefitted separately had Pal "immediately stop[ped]" and rendered "reasonable assistance, including the carrying, or the making arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment." Wis. Stat. § 346.67. The Legislature specifically crafted the duty of drivers to render "reasonable assistance" to "*such* person," not to "one or more persons injured." *Id.* (emphasis added). Had the Legislature wanted to impose a single penalty for all the possible failures of a single hit-and-

run driver, the Legislature could have easily drafted a statute that stated that "only one penalty could be imposed per accident." *Hartnek*, 146 Wis. 2d at 194.

Pal responds by stating that "[g]iven the substantial maximum penalty already available when at least one person dies in a hit and run accident, there is no compelling need to charge multiple counts for the single act in leaving the scene of an accident." Opening Br. 16. Yet the Legislature chose to impose a higher penalty when a violation of Section 346.67 results in "death to *a person*," Wis. Stat. § 346.74(5)(d) (emphasis added), not "death to *one or more people*." There is no indication that the Legislature intended to provide the exact same maximum penalty for a hit-and-run accident involving one victim and a hit-and-run accident involving multiple victims. And as this Court noted in *Rabe*, "it should be remembered that the fact multiple counts may be charged for multiple deaths does not mean that in all such cases multiple charges will be filed or that, upon conviction, separate and consecutive sentences will be imposed." 96 Wis. 2d at 76. Charging decisions are "subject to prosecutorial charging discretion," and sentences are subject to "judicial discretion in sentencing." *Id.* at 76–77.

D. Pal also argues that several other States do not permit multiple punishments for a single act of hit-and-run under their state statutes. Opening Br. 17–19. But these cases do not justify overruling *Hartnek*, especially given that

the case is entitled to stare decisis effect. *See Douangmala*, 253 Wis. 2d 173, ¶ 42.

None of the out-of-state cases that Pal cites employed Wisconsin's two-prong multiplicity analysis. Instead, those cases interpreted the meaning of the particular state laws at issue, which have different text from Wisconsin's statute. *See California v. Newton*, 66 Cal. Rptr. 3d 422, 424 (Cal. Ct. App. 2007) ("question of statutory interpretation"); *Illinois v. Sleboda*, 519 N.E.2d 512, 522 (Ill. App. Ct. 1988) ("persons"); *Tooke v. Virginia*, 627 S.E.2d 533, 536 (Va. Ct. App. 2006) (interpreting only the statutory text and not undertaking a constitutional analysis). In addition, the cases from Washington and West Virginia, in particular, relied upon the rule of lenity because the statutes at issue there did not indicate the "allowable unit of prosecution . . . with clarity." *West Virginia v. Stone*, 728 S.E.2d 155, 161 (W. Va. 2012) (citation omitted); *Washington v. Ustimenko*, 151 P.3d 256, 260 (Wash. Ct. App. 2007). As noted above, *supra* pp. 22–23, the rule of lenity is inapplicable here because Pal bears the burden of persuasion under *Ziegler*'s second prong. *Ziegler*, 342 Wis. 2d 256, ¶ 62. And Wisconsin, unlike the other jurisdictions that Pal cites, does not permit the application of the rule of lenity simply because the Legislature chose not to specifically identify the allowable unit of prosecution in the text of the statute. Rather, as this Court recognized in *Rabe*, this Court applies the "general rule [that] when different

victims are involved, there is a corresponding number of distinct crimes," *id.* at 67, (citation omitted).

II. The Circuit Court Properly Imposed A Sentence Below The Statutory Maximum

A sentence is unconstitutional only if it is "so excessive and unusual and so disproportionate to the offense committed so as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). "[T]here is a presumption that the trial court acted reasonably [in imposing the particular sentence] and the [defendant] is required to show some unreasonable or unjustifiable basis of the record for the sentence complained of." *Id.* at 184. Sentences "well within" the statutory maximum are "unlikely to be" unconstitutional. *Cummings*, 357 Wis. 2d 1, ¶ 74. "If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual." *Id.* ¶ 75 (citation omitted).

A hit-and-run accident resulting in death is "a Class D felony." Wis. Stat. § 346.74(5)(d). The maximum incarceration penalty for a Class D felony is "imprisonment not to exceed 25 years," Wis. Stat. § 939.50(3)(d), bifurcated as 15 years of initial "confinement in prison" and ten years of "extended supervision," Wis. Stat. § 973.01(2)(b)4, .01(2)(d)3. Therefore, based on two Class D felony convictions, Pal faced a maximum of 50 years of imprisonment, consisting of 30

years of initial confinement and 20 years of extended supervision. R.1:1–2; R.7:1–2.

Pal's sentence of 40 years imprisonment (consisting of 20 years initial confinement and 20 years of extended supervision), R.18, R.36:58, is well within the statutory maximum. Pal's period of initial confinement is two-thirds of the statutory maximum and his total sentence is slightly more than three-quarters of the statutory maximum. In *Ocanas*, this Court held that a 20-year sentence, which was "two-thirds of the statutory maximum," was "not excessive." 70 Wis. 2d at 183, 185.

The circuit court here, furthermore, "applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." *Cummings*, 357 Wis. 2d 1, ¶ 75 (citation omitted). The circuit court considered Pal's flight, his failure to report the accident, and his overall conduct following the accident. R.36:50. The court explained that it was giving the "greatest amount of weight to [ ] the seriousness of the offense." R.36:57. The court considered "the death of those two young men that had a lot to offer, that brought a lot of joy to their family and friends, and, needless to say, the extreme, never-ending pain that their family and friends are going to experience and even the pain and angst of [Pal's] father and [ ] family." R.36:56. Moreover, the seriousness of the offense was "exacerbated by [Pal] fleeing without any apparent concern for them and [his] actions that [he] took several days

afterwards and after learning of what happened." R.35:57. Pal's conduct showed that he was not "taking any acceptance or any responsibility" following the accident, and that he attempted to "avoid being caught." R.36:51. "[T]hese are not the actions of a remorseful individual, of one that's taking any responsibility whatsoever for this situation." R.36:52.

Apart from generally claiming that his sentence ought to be lower for his "split-second decision" and "horrible lapse in judgment," Pal only identifies one purported error in the circuit court's decision: he claims that the circuit court erred in considering "the deaths an aggravating factor justifying a harsh penalty." Opening Br. 24.

The circuit court, however, considered the deaths as part of the overall gravity of the offense, not as an aggravating factor. R.36:56–57. And "[w]hen making a sentencing determination, a court must consider the protection of the public, *the gravity of the offense*, and the rehabilitative needs of the defendant, as well as any appropriate mitigating or aggravating factors." *State v. Salas Gayton*, 2016 WI 58, ¶ 22, 370 Wis. 2d 264, 882 N.W.2d 459 (emphasis added). "A defendant will prevail on a challenge to his or her sentence if he or she proves by clear and convincing evidence that the circuit court actually relied on an improper factor at sentencing." *Id.* ¶ 24.

Pal points to no case or rule of law that prohibits the trial court from considering the impact upon the victims in sentencing Pal as part of "the gravity of the offense;" indeed,

harm to victims is a core component of an offense's gravity. In *State v. Stenzel*, the court of appeals held that a sentence for drunk driving resulting in the death of two young children was not excessive partly because, "considering the age of the victims and the gravity of the offenses, public sentiment supports the sentences imposed." 2004 WI App 181, ¶¶ 2, 22, 276 Wis. 2d 224, 688 N.W.2d 20. And "because there were two victims, making the sentences consecutive does not shock the public conscience." *Id.* ¶ 22. Similarly, in *State v. Gallion*, this Court held that a sentencing court may consider "the impact of the crime on the victim or victim's family." 2004 WI 42, ¶ 65, 270 Wis. 2d 535, 678 N.W.2d 197. This Court explained that a sentencing court may even consider the "good character of the victim" in considering the gravity of the offense. *Id.* ¶¶ 67–68. The circuit court here considered the impact of the crime upon the victims and their families as part of the overall gravity of the offense. This was entirely appropriate.

CONCLUSION

The decision of the court of appeals should be affirmed.

Dated this 29th day of December, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 8,445 words.

Dated this 29th day of December, 2016.

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

I hereby certify that:

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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 29th day of December, 2016.

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