STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2017AP000913-CR
2017AP000914-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,
v.

AUTUMN MARIE LOVE LOPEZ

and

AMY J. RODRIGUEZ,
Defendants-Respondents.

Appeal from an Order of the Green County Circuit Court,
the Honorable James R. Beer, Presiding

BRIEF OF DEFENDANT-RESPONDENT AUTUMN MARIE LOVE LOPEZ

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ISSUE PRESENTED

Does Wis. Stat. § 971.36 or prosecutorial charging discretion allow for seven separate acts of retail theft of merchandise valued at $126-$314 each and committed over a two-week period, to be charged as a single count of felony retail theft of merchandise totaling $1,452.12?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication may be warranted pursuant to Wis. Stat. § 809.23(1)(a)2 because a decision from this court may clarify whether Wis. Stat. § 971.36 applies to crimes other than Wis. Stat. § 943.20 theft.

STATEMENT OF THE CASE AND FACTS

The state's discussion of the facts and procedural history are accurate. Facts will be discussed and elaborated on as needed in the argument section.

ARGUMENT

The state cannot charge seven retail thefts totaling $126-$314 each and committed over a two-week period, as one single felony because Wis. Stat. § 971.36 does not apply to retail theft and because the state lacks inherent authority to charge the acts together. Further, grouping the acts raises duplicity concerns.

A. Introduction and standard of review.

The defendants in this case were each charged with one count of felony retail theft, as party to a crime, in violation of Wis. Stats. §§ 943.50, 939.05. The complaint alleges they stole items from Walmart on seven separate occasions between January 10, 2017, and January 25, 2017. (2:5).[1] Each allegation involved merchandise valued between $126 and $314. (2:6). Rather than charge these acts as misdemeanors, the state aggregated the transactions into one count for purposes of calculating the retailer's loss thereby increasing the penalty from misdemeanor to felony under Wis. Stat. § 943.50.

The circuit court correctly held the state had no authority to charge these acts as one single felony because Wis. Stat. § 971.36 does not apply to acts of retail theft. Further, the state lacked inherent authority to charge the acts, which were not committed at substantially the same time and which were not part of a continued transaction, as one crime and doing so raises duplicity concerns.

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[1] Cases 2017AP000913-CR and 2017AP000914-CR were consolidated. Citations are to the Love Lopez record, 2017AP000913-CR, unless otherwise indicated.

Whether Wis. Stat. § 971.36 applies to retail theft is a question of statutory interpretation. Statutory interpretation presents a question of law for this court to review de novo. ***State v. Hemp***, 2014 WI 129, ¶ 12, 359 Wis. 2d 320, 856 N.W.2d 811. The question of whether the charge is duplicitous or raises duplicity concerns is also a question of law for this court to review de novo. ***State v. Fawcett***, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988).

B. The state could not aggregate the seven acts into one single felony because Wis. Stat. § 971.36 aggregation does not apply to retail theft.

The circuit court in this case ruled that Wis. Stat. § 971.36 only allows for aggregation of acts of "theft" and not acts of "retail theft." (21:20-21). The circuit court was correct – Wis. Stat. § 971.36 does not allow for the aggregation of multiple acts of retail theft.

Statutory interpretation begins with the plain language of the statute, which is given "its common, ordinary, and accepted meaning." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If the language of a statute is clear and unambiguous, the statute is applied according to its plain meaning and further interpretation is unnecessary. ***Id***. at ¶ 46. If the statutory language is deemed ambiguous, courts may look to the language of surrounding or closely-related statutes and may examine extrinsic sources such as legislative history. ***Id***.

Wisconsin Statute § 971.36(3) states that in any case of theft and involving more than one theft, all thefts may be prosecuted as a single crime if the property belonged to the same owner and the thefts were committed pursuant to a single deceptive scheme. But the statute is specific to theft as defined in Wis. Stat. § 943.20 and does not allow the state to

aggregate claims of retail theft to reach the felony threshold. The language of Wis. Stat. § 971.36 is unambiguous – it discusses "theft," which has a distinct definition in Wisconsin Statutes, and does not mention retail theft. Retail theft is a separate crime from theft, with a distinct name, distinct statute section, distinct elements, and distinct monetary cutoff and penalty structure.

The state ignores the plain language of the statute which is entitled "Theft, pleading and evidence; subsequent prosecutions" and which specifically states it applies to "any criminal pleading for theft." Theft is defined by and discussed in Wis. Stat. § 943.20. The defendants in this case were charged not with theft, but with retail theft under Wis. Stat. 943.50, which is entitled "Retail theft, theft of services."

Not only do theft and retail theft arise under different statutes, they also have different elements. The elements of theft under Wis. Stat. § 943.20 are:

(1) The defendant intentionally took and carried away movable property of another.

(2) The owner of the property did not consent to taking and carrying away the property.

(3) The defendant knew that the owner did not consent.

(4) The defendant intended to deprive the owner permanently of the possession of the property.

Wisconsin Criminal Jury Inst. 1441.

There are two additional elements the state must prove for a conviction of retail theft – (1) the property was merchandise held for resale by a merchant, and (2) the

defendant knew that the property was merchandise held for resale by a merchant. Wisconsin Criminal Jury Inst. 1498.

Further, theft and retail theft have different penalty structures with different monetary cutoffs. For theft, the monetary cutoffs read as follows:

> (3) PENALTIES. Whoever violates sub. (1);
>
> (a) If the value of the property does not exceed $2,500 is guilty of a Class A misdemeanor.
>
> (bf) If the value of the property exceeds $2,500 but does not exceed $5,000, is guilty of a Class I felony.
>
> (bm) If the value of the property exceeds $5,000 but does not exceed $10,000, is guilty of a Class H felony.
>
> (c) If the value of the property exceeds $10,000, is guilty of a Class G felony.

Wis. Stat. § 943.20.[2]

The monetary cutoffs for retail theft differ and read:

> (4) Whoever violates this section is guilty of:
>
> (a) Except as provided in sub. (4m), a Class A misdemeanor, if the value of the merchandise does not exceed $500.
>
> (bf) A Class I felony, if the value of the merchandise exceeds $500 but does not exceed $5,000.
>
> (bm) A Class H felony, if the value of the merchandise exceeds $5,000 but does not exceed $10,000.

[2] Inapplicable subsections (3)(d) and (e) not listed.

> (c) A class G felony, if the value of the merchandise exceeds $10,000.

Wis. Stat. § 943.50(4).

Given that the crimes have different names, are discussed in separate statutes, have different elements, and have different monetary cutoffs and penalty structures, it is not reasonable to assume that the Legislature meant to include "retail theft" when it stated Wis. Stat. § 971.36 allows for aggregation of any "theft."

If the court disagrees with the defendants and finds the statute ambiguous, the rule of lenity should apply. ***State v. Cole***, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700 ("When there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused.").

Case law also supports the defendants' position that Wis. Stat. § 971.36 only applies to Wis. Stat. § 943.20 thefts and not to retail theft. Every case found by counsel that endorses aggregation of acts into a single crime under Wis. Stat. § 971.36 has been in the context of prosecution for theft under Wis. Stat. § 943.20. *See e.g.* ***State v. Jacobsen***, 2014 WI App 13, 352 Wis. 2d 409, 842 N.W.2d 365; ***State v. Elverman***, 2015 WI App 91, 366 Wis. 2d 169, 873 N.W.2d 528. The circuit court noted that in 21 years on the bench, it had never seen multiple acts of retail theft combined under Wis. Stat. § 971.36 to make one felony. (21:20). Counsel too is unaware of any published case that has stated that Wis. Stat. § 971.36 allows for aggregation of acts of retail theft under Wis. Stat. § 943.50, which is what the defendants here were charged with.

The state asserts that the Legislature created multiple types of theft under different names and statutes to "criminalize acts that would not otherwise neatly fit into the definition of 'theft' under Wis. Stat. § 943.20." (State's Br. at 14-15). It asserts this means various types of crimes including retail theft, "theft of trade secrets" under Wis. Stat. § 943.205, "theft of commercial mobile service" under Wis. Stat. § 943.455, and many more, all fall under the "theft" umbrella and thus Wis. Stat. § 971.36 applies to any and all of these crimes. (State's Br. at 14, n. 6, 17). But the fact these various crimes have different names and are covered by different statutes actually support the opposite conclusion, that Wis. Stat. § 971.36 does not apply to these other crimes.

First, if the Legislature intended for § 971.36 to apply to all these types of crimes including retail theft, why did it only mention "theft" in Wis. Stat. § 971.36? Further, the crimes mentioned by the state have different elements and different penalty structures from one another and from those of Wis. Stat. § 943.20 suggesting the Legislature intended for them all to be treated differently.

The state says that the fact that some modes of commission of retail theft under Wis. Stat. § 943.50 match modes of commission of theft under Wis. Stat. § 943.20 mean that the Legislature intended for retail theft to be considered a type of "theft." (State's Br. p. 17-18). This argument is problematic for multiple reasons. First, the state ignores the fact that retail theft has additional elements the state must prove beyond those necessary for theft. Additionally, the different penalty structures contradict the state's argument. If retail theft is just a subset of theft, the defendant should get the benefit of the more lenient penalty structure of Wis. Stat. § 943.20 which only allows for felony charges for amounts over $2,500. The fact that the Legislature chose a different

penalty structure for retail theft indicates it is a distinct crime and is not simply a subset of "theft" under Wis. Stat. § 943.20.

It makes little sense to assume that the Legislature intended for Wis. Stat. § 971.36 which refers to "theft," with a penalty structure that requires a misdemeanor charge for amounts below $2,500, to also allow for counts of retail theft with a penalty structure that allows felony charges for merchandise valued at $500 or more to be combined under Wis. Stat. § 971.36. If the Legislature meant to authorize the altering of the penalty structure of Wis. Stat. § 943.50 or any other statute, through aggregation, it would have said so in Wis. Stat. § 971.36.

The state hypothesizes that the Legislature wrote Wis. Stat. § 971.36 to "prevent habitual offenders from escaping harsher penalties by stealing a series of small amounts instead of stealing all of the property or services at once" and must want to do the same for retail theft. (State's Br. at 22). The problem is that the Legislature has not said this and the state is only assuming it is the case. The state says that the penalty structure of Wis. Stat. § 943.50 shows that the Legislature intended for counts of retail theft to be combined for a higher charge. But as discussed above, the differing penalty structures of Wis. Stats. §§ 943.20 and 943.50 actually indicate that the Legislature would like the two types of crimes to be treated and punished differently, leading to the conclusion that Wis. Stat. § 971.36 does not apply to Wis. Stat. § 943.50 because it says nothing about retail theft.

The facts of this case illustrate how a defendant is treated differently if subject to a charge of theft under Wis. Stat. § 943.20 versus a charge of retail theft under

Wis. Stat. § 943.50. The defendants here stole from Walmart on seven separate occasions. On each occasion they stole between $126 and $314 worth of merchandise with the total amount of merchandise for all occasions being $1,452.12. If the state had aggregated the counts into one charge of theft under Wis. Stat. § 943.20, the state would only have been able to charge the defendants with a Class A misdemeanor because the penalty structure for Wis. Stat. § 943.20(3)(a) states that if the value of the property does not exceed $2,500, the defendant is guilty of a Class A misdemeanor. Here the state chose to charge the defendants with retail theft, not theft, and the penalty structure for retail theft states that if the value of the merchandise does not exceed $500, the individual can only be found guilty of an A misdemeanor. If the state were allowed to aggregate claims of retail theft pursuant to Wis. Stat. § 971.36, the state would be able to charge the defendants with a felony because the value of all merchandise together exceeds $500. *See* § 943.50(4)(bf).

The misdemeanor/felony distinction is important. A felony conviction can make it difficult for a person to secure housing or employment. Further, felony convictions prevent an individual from possessing a firearm or voting and can have significant immigration consequences.

The problem with the state's argument is that it allows for manipulation of the penalty structures by the state. Wisconsin Statute § 971.36 applies to theft as covered by Wis. Stat. § 943.20. The Legislature may very well have elected to allow for aggregation of claims of theft because under the penalty structure of § 943.20 it takes merchandise of significant value to be stolen to reach the felony threshold. The same is not true for retail theft which allows for felony charges if the merchandise in question is worth more than $500. The state wants this court to adopt an interpretation of

Wis. Stat. § 971.36 that makes it yet easier for an individual to be charged with a felony. Presumably the Legislature would have been clear in discussing retail theft in Wis. Stat. 971.36 if it wanted it to be even easier for defendants to be charged with felonies.

The state wants to have its cake and eat it too. It states that retail theft is a subset of theft and thus Wis. Stat. § 971.36 aggregation applies. But then why not simply charge it as theft and combine the counts under Wis. Stat. § 971.36? The reason the state does not want to do that is because doing so would mean that the defendants would only be charged with a single misdemeanor as the merchandise was worth less than $2,500. The state may not like that it cannot aggregate separate acts to reach the $500 threshold in Wis. Stat. § 943.50, but without an indication to the contrary, that was the Legislature's intent. The state cannot simply assume the Legislature wanted it to be easier to charge individuals with felonies and use that as basis to assume language that is not in Wis. Stat. § 971.36 is actually there and that the statute applies to acts other than "theft."

Case law also contradicts the state's position that Wis. Stat. § 971.36 applies to retail theft, "theft of trade secrets," and other crimes. If the state is correct that all these other crimes are all subsets of theft and Wis. Stat. § 971.36 allows for multiple counts of any of them to be combined into one offense, then why are there no Wisconsin cases stating that Wis. Stat. § 971.36 applies to any of those offenses? Wisconsin Statute 971.36 has been in the Wisconsin statutes in its current form since 1955, it seems strange that there would be no cases stating it applies to crimes other than "theft" in the last 60+ years if it in fact so applies.

The state also says that the fact that other aggregation statutes contain limiting language and Wis. Stat. § 971.36 does not means that Wis. Stat. § 971.36 was not meant to be limited to just theft under Wis. Stat. § 943.20. The defendants disagree. First, under the rules of statutory interpretation, surrounding statutes only need be consulted if the language of the statute is ambiguous. ***Kalal***, 271 Wis. 2d 633, ¶ 46. As discussed above, the language of Wis. Stat. § 971.36 unambiguously refers to "theft," not retail theft. But even if these other statutes are examined, limiting language in them does not prove that the absence of limiting language in Wis. Stat. § 971.36 means it applies to any and all crimes that include the word "theft." This is true because contrary to the state's assertions, these are not "closely-related" statutes to Wis. Stat. § 971.36. Wisconsin Statute § 971.36 is about theft while the statutes the state refers to are about totally different subject matters including crimes involving controlled substances (971.365), use of another's personal identifying information (971.366) and false statements to a financial institution (971.365). Additionally, the state does not account for the fact that Wis. Stat. § 971.36 has remained in its current form since 1955, meaning it was in existence before other crimes like retail theft (943.50 enacted in 1969) and theft of satellite cable programming (943.47 enacted in 1987) were even created. If Wis. Stat. § 971.36 existed before crimes like retail theft were created, how can we assume the statute meant to include those not-yet-created crimes?

The state asserts that because limiting language is absent from Wis. Stat. § 971.36, the court would have to write words into the statute to adopt the defendant's interpretation. (State's Br. p. 21-22). To the contrary, the state ignores the plain language of Wis. Stat. § 971.36 which states that it applies only to "theft." "Theft" has a statutory definition. It is defined and covered by Wis. Stat. § 943.20. Retail theft is a

separate crime with different elements and different penalties. As the circuit court in this case correctly pointed out, if the Legislature wanted Wis. Stat. § 971.36 to cover other types of crimes, it would have said so. (21:20). It is the state that is asking this court to read something nonexistent into the statute, not the defendants.

Finally, the state claims that the legislative history of Wis. Stat. § 971.36 proves that it applies to various types of crimes, not just theft under Wis. Stat. § 943.20. (State's Br. at 24). But analysis of legislative history is only appropriate if the statute is ambiguous and this statute is not. ***Kalal***, 271 Wis. 2d 633, ¶ 51. Further, as the state admits, the legislative history does not directly speak to the issue of whether Wis. Stat. § 971.36 applies to crimes other than theft under Wis. Stat. § 943.20. (State's Br. at 24). At no point in the state's lengthy discussion of the previous versions of Wis. Stat. § 971.36 does it mention any discussions by the Legislature about having the statute apply to retail theft or other crimes. The state's discussion of the history of terms that were used in previous versions of the statute is also unpersuasive because the state does not evaluate how that legislative history of Wis. Stat. § 971.36 interacts with the emergence of other crimes like "theft of video service" or "theft of telecommunications service" or Wis. Stat. § 943.50 retail theft. The state argues that over time the Legislature broadened the language of Wis. Stat. § 971.36 to make it applicable to a wider array of acts. But at the very same time, the Legislature was adding different crimes of specific types of theft to the statutes. The fact that the Legislature felt the need to deal with different types of crimes outside the broad heading of "theft" and felt compelled to create differing penalty structures for these crimes, indicates that it did not mean for all such crimes to fall under the universal term

"theft" and did not intend for separate acts of these other crimes to all be aggregated pursuant to Wis. Stat. § 971.36.

C. The state does not have inherent authority to charge seven retail thefts as one single felony and doing so raises duplicity concerns.

The state asserts that even if Wis. Stat. § 971.36 does not apply to retail theft, the state had inherent authority to charge the seven acts as a single felony. The state is mistaken because the acts were not committed at substantially the same time and were not part of a continuous transaction and grouping the acts raises duplicity concerns.

i. The state does not have discretion to charge these seven acts together as a single felony because the acts were not committed at substantially the same time and were not part of a continuous transaction.

In ***State v. Lomagro***, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983), the Wisconsin Supreme Court held the state could charge multiple acts together as one criminal offense if the acts were: (1) committed by the same person, (2) were committed at substantially the same time, and (3) related to one continued transaction.

The state did not have authority to charge the seven acts committed here as a single felony because although the acts were committed by the same people, they were not committed at substantially the same time and were not part of a continued transaction.

The seven acts in this case were committed over the course of two weeks. How does a period of two weeks

constitute "substantially the same time?" How can seven separate transactions, days apart, constitute one continued transaction? "Under Wisconsin law, offenses…are different in fact if [they] are either separated in time or are significantly different in nature." ***State v. Stevens***, 123 Wis. 2d 303, 322, 367 N.W.2d 788 (1985). These offenses are separated in time. There were days during the time period in question when Ms. Lopez did not work and Ms. Rodriguez did not visit Walmart. Can they be construed as being in the midst of a transaction if they were not even at the place in question? If so, how?

In ***State v. Tappa***, the Wisconsin Supreme Court concluded it was appropriate to punish the defendant separately for concealing and transferring property because "there was ample time for the Defendant to reflect on his actions and recommit himself to the criminal enterprise." 127 Wis. 2d 155, 170, 378 N.W.2d 883 (1985). Under the state's position, the defendants, having completed their transactions and having gone home to their families, somehow lacked the time to reflect on what they had done and whether they should continue to commit further retail thefts. This makes little sense.

The state asserts that the two-week span in this case is shorter than the time spans courts have found permissible in other cases. But the cases cited by the state differ from this case. For instance, ***State v. Miller***, 2002 WI App 197, 257 Wis. 2d 124, 650 N.W.2d 850, and ***State v. Molitor***, 210 Wis. 2d 415, 565 N.W.2d 248 (Ct. App. 1997), two cases cited by the state, have to do with sexual assaults and sexual exploitation that occurred over multiple months or years being joined in single counts. It makes sense that sexual assaults may be grouped because it is often hard for victims to pinpoint exact days when assaults occurred and there is often delayed reporting. The same is not true in this case where

there is no question as to when the retail thefts occurred and there was no delay in their reporting. Sexual assault statutes are also markedly different from the retail theft statute which sets penalties based on the value of the merchandise stolen. The structure of the retail theft statute itself indicates the Legislature intended for charges to be based on the values of items taken on specific dates. In ***Molitor***, the court also pointed out that the language of Wis. Stat. § 948.025 (repeated sexual assault of a child) itself shows that the Legislature intended to create a single crime for repeated sexual assaults. 210 Wis. 2d 415, 421. The same is not true of the language of the retail theft statute which says nothing about grouping separate acts of retail theft.

The existence of Wis. Stat. § 971.36 and other aggregation statutes is also proof that the state lacks general discretionary authority to charge a series of acts as one offense. If the state had such authority, why would Wis. Stat. § 971.36 exist at all? Why would Wis. Stat. § 971.366, which authorizes violations under Wis. Stats. § 943.201 or § 943.203 to be charged as a single crime if pursuant to a single intent and design, exist? Why would Wis. Stats. §§ 971.365 and 971.367 exist? The answer is simple. The Legislature has seen fit to extend the state's discretionary charging powers in violations of Wis. Stat. § 943.20 and select other crimes to allow for a series of transactions specifically because the state's original discretionary charging powers did not allow such aggregation. The Legislature presumably had its reasons for believing the state's original discretionary charging powers in those types of cases was too limited and thus acted to increase the state's power for those cases. The Legislature has not similarly seen fit to extend the state's charging powers for acts of retail theft in violation of Wis. Stat. § 943.50.

The state argues that Wis. Stat. § 971.36 exists in spite of the fact that the state already has inherent authority to group acts into one offense because Wis. Stat. § 971.36(3) eliminates the condition that the crimes be committed at substantially the same time. (State's Br. at 30, n. 16). But this makes little sense. Wisconsin Statute § 971.36 states that multiple thefts can be prosecuted as a single crime if they are part of "as single deceptive scheme." Multiple acts can only be part of a continued scheme if they happen over substantially the same time period otherwise the connection between the acts would be broken. Further, if the state already has authority to group acts into a single charge and Wis. Stat. § 971.36 only exists to open up the time frame for which it can group charges, why does the statute say nothing about opening the time frame? If the statute only has that one purpose, presumably the Legislature would have seen fit to mention it.

Case law also indicates that authority to group charges arises from Wis. Stat. § 971.36, not from a prosecutor's inherent authority. For instance, in ***Jacobsen***, 352 Wis. 2d 409, ¶¶ 24, 43, the court held charges of theft under Wis. Stat. § 943.20 could be grouped pursuant to Wis. Stat. § 971.36 but because § 971.36 does not apply to other types of crimes, groupings of acts of receiving stolen property and commercial gambling, were not acceptable.

ii. Combining the seven acts raises duplicity concerns.

Duplicity exists when two or more separate offenses are joined in a single count. ***Jacobsen***, 352 Wis. 2d 409, ¶ 17. "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." ***Id***. (internal

quotations omitted). Where an offense is composed of continuous acts it may be charged as just one offense without the charge being duplicitous unless combining the separate offenses into a single charge violates "the protections afforded the defendant by the rule against duplicity." ***Lomagro***, 113 Wis. 2d at 587. The purposes for the prohibition against duplicity include:

> (1) To assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity.

Lomagro, 113 Wis. 2d at 587.

Grouping the acts into a single count here violates the purposes of the prohibition on duplicity. Specifically, the grouping of the seven acts creates double jeopardy and jury unanimity concerns.

Because the defendants stole from Walmart on seven different days but were charged with only one felony, it is possible jurors could find the defendants committed some but not all of the acts thereby creating jury unanimity and double jeopardy problems. With the threshold for felony retail theft charge being $500 worth of stolen merchandise, the jury would have to agree on what days the defendants actually stole from Walmart. In ***Boldt v. State***, 72 Wis. 7, 38 N.W. 177 (1888), the Wisconsin Supreme Court held that multiple criminal acts could not be grouped into one charge because of similar unanimity problems. There, the defendant was charged with one count of unlawfully selling liquor for sales

without a license made to different people on different days. 38 N.W. at 178. The court held grouping the acts could create a problem where the jury may agree that the defendant was guilty but not agree on which specific acts were committed on specific dates. ***Id***. at 179.

Similarly, in ***State v. George***, 69 Wis. 2d 92, 99, 230 N.W.2d 253 (1975), the Wisconsin Supreme Court held that a felony commercial gambling charge was duplicitous because there was a possibility that some jurors could believe the defendant was guilty of one offense and others could believe guilty of another. Because a jury would need to agree on which of the seven acts the defendants committed, this case raises jury unanimity problems similar to those in ***Boldt*** and ***George***. The charging also raises possible double jeopardy problems because it creates the possibility that jurors might not agree on which dates the defendants committed retail theft. As a result, if eventually convicted, the defendants would have trouble raising any double jeopardy defenses to bar subsequent prosecutions. As a result of these problems, the circuit court's ruling that the seven acts cannot be grouped into one felony retail theft offense should be affirmed.

CONCLUSION

The state attempted to combine seven separate acts of retail theft into a single felony but it lacks authority to do so. As such, the complaint in this case was defective and the cases were appropriately dismissed. It is therefore requested that this court affirm the decision of the circuit court.

Dated this 20th day of December, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,007 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 20th day of December, 2017.

Signed:

_____

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