STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2017AP913-CR & 2017AP914-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

AUTUMN MARIE LOVE LOPEZ

and

AMY J. RODRIGUEZ,

Defendants-Respondents.

APPEALS FROM AN ORDER OF THE GREEN COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER, PRESIDING

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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ARGUMENT

I. Respondents' argument that Wis. Stat. § 971.36 can apply only to Wis. Stat. § 943.20 ignores the statutory language and context.

A. Statutory interpretation must account for the statute's context and surrounding statutes.

Respondents claim that Wis. Stat. § 971.36 must apply only to the statutory crime of Theft pursuant to Wis. Stat. § 943.20 because section 971.36 is titled "Theft, pleading and evidence; subsequent prosecutions." (Respondents' Br. 4.) They also note that Retail theft has two additional elements that Theft under Wis. Stat. § 943.20 does not have, and that Retail theft has different monetary cut-offs than Theft under Wis. Stat. § 943.20. (Respondents' Br. 4–6.) They then argue that because the legislature did not list every type of possible theft in Wis. Stat. § 971.36, it must not apply to any of them. (Respondents' Br. 7.) None of these things lead to the conclusion that Retail thefts cannot be aggregated pursuant to Wis. Stat. § 971.36. As the statutory scheme shows, there are many different types of thefts, and unlike the surrounding aggregation statutes, Wis. Stat. § 971.36 is not limited to any particular one of them. Respondents' overly-narrow reading of Wis. Stat. § 971.36 ignores important principles of statutory interpretation, and this Court should reject it.

First, Respondents illogically state that the word "theft" in Wis. Stat. § 971.36 must refer only to "Theft" under Wis. Stat. § 943.20. (Respondents' Br. 7.) But Respondents do not attempt to explain why that is so. Wisconsin Stat. § 943.20 is indeed called "Theft." And Wis. Stat. § 943.50 is called "Retail theft," just as Wis. Stat. § 943.46 is titled "Theft of video service," and Wis. Stat. § 943.74 is called "Theft of farm-raised fish." Respondents offer no explanation why the word "Theft" in Wis. Stat. § 943.20 carries weight, but the word "Theft" in

all the other theft statutes does not. More importantly, the Legislature used the same language in Wis. Stat. § 943.50 to describe Retail theft as it did in Wis. Stat. § 943.20 to describe the modes of committing "Theft." (Appellant's Br. 14–18.) It makes no sense to do this if retail theft is not a theft.

The fact that the legislature provided different penalties for Retail theft than for Theft under Wis. Stat. § 943.20, and that retail theft can be committed in ways that Theft under section 943.20 cannot, does not mean the legislature intended the criminal procedure statutes to apply differently to the two crimes. (Respondent's Br. 7–8.) It means that the legislature meant to penalize stealing merchandise or services from a merchant, which the elements of Wis. Stat. § 943.20 did not necessarily cover. That does not mean that retail theft is not a type of theft.

Furthermore, Respondents are wrong that the two crimes have a different penalty structure. (Respondents' Br. 8.) That the monetary thresholds for Wis. Stat. § 943.20 and Wis. Stat. § 943.50 are different is irrelevant; those are the details of the penalties, not the structure. Both crimes have escalating penalties as the value of the property taken increases; that is the "penalty structure" for Retail theft and for Theft under Wis. Stat. § 943.20. The identical escalating penalty structure shows that the Legislature intended the two crimes to be treated the same way. *Cf. State v. Schumacher*, 144 Wis. 2d 388, 411–12, 424 N.W.2d 672 (Ct. App. 1988).

Next, Respondents' contention that "Wis. Stat. § 971.36 does not apply to Wis. Stat. § 943.50 because it says nothing about retail theft" fails under its own weight. (Respondents' Br. 8.) Wisconsin Stat. § 971.36 does not say anything about Theft under Wis. Stat. § 943.20, either. By the Respondents' logic, Wis. Stat. § 971.36 necessarily applies to nothing. Unlike the surrounding aggregation statutes, Wis. Stat. § 971.36 is not limited to any particular statutory section. It simply says in "any criminal pleading for theft." Wis. Stat.

§ 971.36(1). A pleading charging a defendant with retail theft is a criminal pleading for theft. To hold otherwise is to ignore the commonsense meaning of "any criminal pleading for theft" and would also ignore the fact that there is no limitation to Wis. Stat. § 943.20 in Wis. Stat. § 971.36.

That there are no cases discussing whether Wis. Stat. § 971.36 applies to any type of theft is not a persuasive reason to adopt the Respondents' unsupportable reading of the statute. There are only two reported cases that have ever discussed Wis. Stat. § 971.36 at all. *See State v. Elverman*, 2015 WI App 91, 366 Wis. 2d 169, 873 N.W.2d 528; *State v. Jacobsen*, 2014 WI App 13, 352 Wis. 2d 409, 842 N.W.2d 365. And neither of those cases discuss the scope of Wis. Stat. § 971.36. In *Jacobsen*, this Court cited Wis. Stat. § 971.36 only as additional support for the holding that the State had properly aggregated the charges against the defendant. *Jacobsen*, 352 Wis. 2d 409, ¶ 20. In *Elverman*, the issue was determining whether the Legislature intended a crime to be a continuing offense. *Elverman*, 366 Wis. 2d 169, ¶¶ 29–32. An equally likely explanation for the lack of cases about whether retail theft is a theft is that "[t]he proposition is so apparent on its face that it is difficult to find legal citation to support it." *State v. Groppi*, 41 Wis. 2d 312, 323, 164 N.W.2d 266 (1969).

Finally, Respondents' reading of *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, is wrong. (*See* Respondents' Br. 11–12.) No part of *Kalal* states that the "surrounding statutes only need be consulted if the language is ambiguous." (Respondent's Br. 11.) *Kalal* says the opposite:

> [c]ontext is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; *in relation to the language of surrounding or closely-related statutes*;

> and reasonably, to avoid absurd or unreasonable results.

Kalal, 271 Wis. 2d 633, ¶ 46 (emphasis added). This Court is obligated to consider the language of the surrounding statutes when interpreting Wis. Stat. § 971.36. And all of the surrounding statutes contain language limiting them to specific statutory sections. But no such language appears in Wis. Stat. § 971.36.

Respondents ignore controlling case law showing that Wis. Stat. § 971.36 and Wis. Stat. §§ 971.365, 971.366, and 971.367 are closely related. (*See* Respondents' Br. 11.) "Statutes are closely related when they are in the same chapter, reference one another, or use similar terms." *See State v. Reyes Fuerte*, 2017 WI 104, ¶ 27 (citations omitted). Wisconsin Stat. § 971.36 is closely related to Wis. Stat. §§ 971.365, 971.366, and 971.367 because not only do they all appear in the same chapter, but they appear in succession. All four statutes use similar terms to explain when the State can charge multiple acts as a single crime. However, the other aggregation statutes are all limited to specific statutory sections. Wisconsin Stat. § 971.36 does not contain similar language and is therefore not limited to any particular statute. It simply says in "any criminal pleading for theft." Wis. Stat. § 971.36(1). As explained, there are multiple types of theft described in the statutes. Because Wis. Stat. § 971.36 is not limited to any particular one of them, it should apply to all of them.

Respondents are also wrong that "analysis of legislative history is only appropriate if the statute is ambiguous." (Respondents' Br. 12.) *Kalal* states that legislative history can be "consulted to confirm or verify a plain-meaning interpretation." *Kalal*, 271 Wis. 2d 633, ¶ 51. And here, the history of the statute confirms the plain meaning advocated by the State. Contrary to Respondents' assertion, the State did "account for the fact that Wis. Stat. § 971.36 has remained

in its current form since 1955" even though types of theft were created after that, because the history of the statute shows that the Legislature intentionally has not limited Wis. Stat. § 971.36 to a particular crime. (*See* Respondents' Br. 11.)

"[I]t is a basic precept of statutory construction that the legislature is presumed to act with full knowledge of existing laws." *State v. Roling*, 191 Wis. 2d 754, 762, 530 N.W.2d 434 (Ct. App. 1995). Since 1955, the Legislature has created other aggregation statutes, and has amended the next statute in sequence to Wis. Stat. § 971.36 eight times solely to add statutory sections to it. But the Legislature has made no attempt to limit Wis. Stat. § 971.36. Presumably the Legislature knew that it created many types of theft, and that Wis. Stat. § 971.36 contained no language limiting it to Wis. Stat. § 943.20. If the Legislature meant to limit Wis. Stat. § 971.36 to Wis. Stat. § 943.20, it would have done so. It did not, and adopting Respondents' interpretation would require this Court to write that limitation into the statute. This Court should reject that invitation.

B. The rule of lenity does not apply here.

Respondents also claim that if this Court "disagrees with the defendants and finds the statute ambiguous, the rule of lenity should apply." (Respondents' Br. 6.) But there are two fundamental flaws with that contention.

First, as the State showed above and in its brief-in-chief, the statutory scheme and plain language of Wis. Stat. § 971.36 show that Wis. Stat. § 971.36 is not limited to the statutory crime of Theft pursuant to Wis. Stat. § 943.20. Respondents' have made no argument at all that the statute is ambiguous. This Court does not find a statute ambiguous "simply because either the parties or the courts differ as to its meaning." *Seider v. O'Connell*, 2000 WI 76, ¶ 30, 236 Wis. 2d 211, 612 N.W.2d 659. A rejection of the Respondents' overly-

narrow interpretation of the statute does not, therefore, equate to a finding that the statute is ambiguous.

Second, even if this Court were to deem Wis. Stat. § 971.36 ambiguous, that would not require this Court to apply the rule of lenity. The rule of lenity applies only "if a 'grievous ambiguity' remains *after* a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must 'simply guess' at the meaning of the statute." *State v. Guarnero*, 2015 WI 72, ¶ 27, 363 Wis. 2d 857, 867 N.W.2d 400 (emphasis added). Where no grievous ambiguity remains after the Court interprets the statute, applying the rule of lenity is unnecessary. *Id*. Furthermore, "the rule of strict construction (of penal statutes) is not violated by taking the common-sense view of the statute as a whole and giving effect to the object of the legislature, if a reasonable construction of the words permits it." *State v. Rabe*, 96 Wis. 2d 48, 70, 291 N.W.2d 809 (1980) (citation omitted). There is no ambiguity, let alone a grievous one, that would cause a court to simply guess at the meaning of the statute after taking a commonsense view of the statute as a whole and the context in which it appears. The rule of lenity therefore does not apply.

II. The State had discretion to charge these offenses as a single crime even without the statute, because they were committed by the same parties at substantially the same time as part of a single continuing scheme.

The Respondents' make no real argument that seven transactions over two weeks is too long for these acts to have been committed at substantially the same time and instead merely ask a series of rhetorical questions. (Respondents' Br. 13–14.) They then attempt to distinguish some of the cases in which the time between offenses has spanned weeks on the grounds that the charges in those cases were sexual assaults, whereas here the crimes were retail theft. (Respondents' Br.

14–15.) But that distinction makes no difference. The acts, whether they are sexual assaults or retail thefts, need only be committed at *substantially* the same time for the State to charge them as a single crime. Multiple Wisconsin cases have held that crimes other than sexual assault committed weeks or even months apart can be considered to have been committed at substantially the same time. *See, e.g.*, *State v. George*, 69 Wis. 2d 92, 100, 230 N.W.2d 253 (1975) (multiple acts of commercial gambling committed over a period of months were committed at substantially the same time); *Blenski v. State*, 73 Wis. 2d 685, 695, 245 N.W.2d 906 (1976) (acts of soliciting charitable contributions spanning months committed at substantially the same time). Seven thefts over two weeks—essentially a theft every other day—are seven thefts committed at substantially the same time.

Respondents' claim that Wis. Stat. § 971.36 would not be necessary if the State had prosecutorial discretion to charge acts like this as a single continuing offense is incorrect. (Respondents' Br. 15.) Respondents again overlook the major difference between when the State has inherent authority to charge multiple acts as a single offense and when it needs statutory authority to do so: the time frame. Without a statute, the State can charge multiple acts as a single offense only if they were committed at substantially the same time as part of a single continuing scheme. *State v. Lomagro*, 113 Wis. 2d 582, 587–88, 335 N.W.2d 583 (1983). Section 971.36 and its neighboring statutes eliminate that time frame and allow all violations that are committed as part of a single intent or design to be prosecuted together regardless of when they were committed. *See* Wis. Stat. § 971.36(3).

Respondents argue that Wis. Stat. § 971.36 does not eliminate the time frame, claiming that multiple acts are part of "a single deceptive scheme" only if they are committed at substantially the same time. (Respondents' Br. 16.) But nothing about the language of the statute suggests that a

single deceptive scheme must be limited in time, and that construction truly would render Wis. Stat. § 971.36 superfluous. A hypothetical explains why. Assume a person decides to defraud their employer by changing the reported profits and keeping the extra money. This person waits until chaotic times in the business to do so. They do it once in 2017 when the company merges with another company. No opportunities arise to commit this scheme again until five years later. In 2022, the company gets purchased again, and the employee again changes the reported profits. The employee was acting according to the same deceptive scheme as in 2017, and therefore the acts could be charged as a single theft pursuant to Wis. Stat. § 971.36. But the State would not have inherent authority to charge this as a single crime without the statute, because the two offenses were not committed at substantially the same time.

Though Respondents may not like it, it is established law that the State has inherent authority to determine the unit of prosecution if offenses were committed: (1) by the same parties; (2) at substantially the same time; (3) as part of a single continuing scheme. *See Lomagro*, 113 Wis. 2d at 587–88. If Respondents' interpretation of "single deceptive scheme" in Wis. Stat. § 971.36 were correct, section 971.36 would do nothing. The State would be able to charge multiple offenses committed as part of a single deceptive scheme as a single crime under its prosecutorial discretion because they would necessarily have to be committed at substantially the same time. And if the crimes were not committed at substantially the same time they would not be part of a single deceptive scheme, and Wis. Stat. § 971.36 would not apply. That is not a reasonable construction of Wis. Stat. § 971.36.

By the statute's plain language, Wis. Stat. § 971.36 allows the State to charge someone with a single crime if they stole from the same person multiple times by the same method or plan, regardless of how far apart the thefts took

place. *See* Wis. Stat. § 971.36(3) ("[A]ll 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 intent and design or in execution of a single deceptive scheme."). But where, like here, the crimes were committed by the same parties at substantially the same time as part of a single continuing scheme, the State does not need additional statutory authority to determine the unit of prosecution.

Respondents' duplicity argument also fails. Respondents have entirely ignored that a complaint joining multiple acts comprising a continuing offense into one count "may be found duplicitous only if any of these dangers are present and cannot be cured by instructions to the jury." *Lomagro*, 113 Wis. 2d at 589. (*See* Respondents' Br. 17–18.) As the State explained, this is a very straightforward case. There is no danger that the jury will be confused about what dates the transactions happened or are unlikely to reach a unanimous verdict. Respondents make no argument refuting the State's contention that duplicity concerns could be cured by jury instructions. (Respondents' Br. 18.) It is therefore deemed admitted. *State v. Chu,* 2002 WI App 98, ¶ 41, 253 Wis. 2d 666, 643 N.W.2d 878 (citation omitted).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the decision of the circuit court.

Dated this 17th day of January, 2018.

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 2911 words.

_____
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 17th day of January, 2018.

_____
LISA E.F. KUMFER
Assistant Attorney General