STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2017AP000913-CR; 2017AP000914-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

AUTUMN MARIE LOVE LOPEZ,

Defendant-Respondent-Petitioner.

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

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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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?

How the lower courts ruled:

After seven separate incidents taking place over a two-week period, the state charged Ms. Lopez with a single felony count of retail theft. The circuit court dismissed the complaint, holding that multiple incidents of retail theft could not aggregate into a single felony count. The court of appeals reversed, holding that the seven incidents could be charged as one continuous offense pursuant to Wis. Stat. § 971.36(3)(a).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are customary in cases heard by this court.

STATUTES AT ISSUE[1]

971.36 Theft; pleading and evidence; subsequent prosecutions.

> (1) In any criminal pleading for theft, it is sufficient to charge that the defendant did steal the property (describing it) of the owner (naming the owner) of the value of (stating the value in money).
>
> (2) Any criminal pleading for theft may contain a count for receiving the same property and the jury may find all or any of the persons charged guilty of either of the crimes.
>
> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

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[1] Due to their length, Ms. Lopez has omitted portions of Wis. Stats. §§ 943.20 and 943.50 that are not germane to the issue before this court.

(4) In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars. On the trial, evidence may be given of any such theft committed on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance if it is proved that any property was stolen during such period. But an acquittal or conviction in any such case does not bar a subsequent prosecution for any acts of theft on which no evidence was received at the trial of the original charge. In case of a conviction on the original charge on a plea of guilty or no contest, the district attorney may, at any time before sentence, file a bill of particulars or other written statement specifying what particular acts of theft are included in the charge and in that event conviction does not bar a subsequent prosecution for any other acts of theft.

943.50 Retail theft; theft of services.

(1m) A person may be penalized as provided in sub. (4) if he or she does any of the following without the merchant's consent and with intent to deprive the merchant permanently of possession or the full purchase price of the merchandise or property:

Intentionally alters indicia of price or value of merchandise held for resale by a merchant or property of a merchant.

Intentionally takes and carries away merchandise held for resale by a merchant or property of a merchant.

Intentionally transfers merchandise held for resale by a merchant or property of a merchant.

Intentionally conceals merchandise held for resale by a merchant or property of a merchant.

Intentionally retains possession of merchandise held for resale by a merchant or property of a merchant.

While anywhere in the merchant's store, intentionally removes a theft detection device from merchandise held for resale by a merchant or property of a merchant.

Uses, or possesses with intent to use, a theft detection shielding device to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft armor sensor.

Uses, or possesses with intent to use, a theft detection device remover to remove a theft detection device from merchandise held for resale by a merchant or property of a merchant.

…

(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.

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

943.20 Theft

(1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):

(a) Intentionally takes and carries away, uses, transfers, conceals, or retains possession of moveable property of another without the other's consent and with intent to deprive the owner permanently of possession of such property.

(b) By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner. A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his or her possession or custody by virtue of his or her office, business or employment, or as trustee or bailee, upon demand of the person entitled to

receive it, or as required by law, is prima facie evidence of an intent to convert to his or her own use within the meaning of this paragraph.

(c) Having a legal interest in moveable property, intentionally and without consent, takes such property out of the possession of a pledgee or other person having a superior right of possession, with intent thereby to deprive the pledgee or other person permanently of the possession of such property.

(d) Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to perform it if it is part of a false and fraudulent scheme.

(e) Intentionally fails to return any personal property which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement after the lease or rental agreement has expired. This paragraph does not apply to a person who returns personal property, except a motor vehicle, which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement, within 10 days after the lease or rental agreement expires.

…

(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.

(e) If the property is taken from the person of another or from a corpse, is guilty of a Class G felony.

STATEMENT OF THE CASE

On February 16, 2017, the state filed a complaint charging Ms. Autumn Marie Love Lopez and Ms. Amy Rodriguez with retail theft of merchandise with a value of more than $500 but less than $5000 as parties to a crime in violation of Wis. Stat. § 943.50(1m)(c) and (4)(bf). This is a Class I felony. (2:1; App. 114).

Both women objected to the complaint, arguing that the state improperly aggregated seven separate instances of misdemeanor theft into one felony theft. (6; 9). The circuit court granted the motions to dismiss the complaints without prejudice, ruling that Wis. Stat. § 971.36(3)(a) applied only to the crime of

theft under Wis. Stat. § 943.20 and not to retail theft. (21:20-21; App. 112-113).

The state appealed. (11). The court of appeals reversed the circuit court, holding that the state has the authority pursuant to Wis. Stat. § 971.36(3)(a) to charge multiple acts of retail theft as one continuous felony offense. (*State v. Lopez*, 2017AP000913-CR; App. 101-110).

Ms. Lopez filed a petition for review which this court granted on April 9, 2019.

STATEMENT OF FACTS

Walmart employee Autumn Marie Love Lopez worked at the store's self-checkout registers. In February 2017, the Walmart Asset Protection Manager contacted the police to report thefts that took place in January 2017. Walmart informed police that the company wanted to press charges and receive restitution. (2:3, 5; App. 116).

Walmart surveillance video of each separate transaction showed an unidentified woman arrive at the self-checkout register. Ms. Lopez assisted the woman. Ms. Lopez scanned food items and pretended to scan other items. The unidentified woman paid for the food with her food stamps. The other items, which included tampons, diapers, baby wipes, diaper cream, baby toys, underwear, toilet paper, clothing and household items, were not paid for. This took place on seven separate occasions on seven different days over

a two-week period. (2:5-6, 11; App. 116-117, 122). The amount of stolen merchandise during the two week period totaled $1,452.12. The following is a list of the value of the unpaid items on each day:

- January 10 – $218.99;
- January 12 – $313.95;
- January 13 – $221.46;
- January 16 – $257.49;
- January 19 – $132.62;
- January 20 – $181.28;
- January 25 – $126.33.

(2:6; App. 117).

Officer Chris Hammel of the Monroe Police Department confronted Ms. Lopez at Walmart while she worked. The officer questioned Ms. Lopez in the Walmart manager's office with several other Walmart employees and the Asset Protection Manager present. Admitting that she failed to scan the items, Ms. Lopez said that what she did was wrong. Ms. Lopez explained that she helped the other woman because she was afraid of her. When pressed, Ms. Lopez explained that she worried the woman would take action that might compromise her

husband's citizenship application. Ms. Lopez would not identify the woman to police. (2:5-6, 15; App. 116-117, 126).

Officer Hammel arrested and searched Ms. Lopez. The twenty six year old Ms. Lopez, who had no prior convictions, had no weapons or contraband. The officer handcuffed Ms. Lopez and transported her to the police station in a squad car. (2:6; App. 117).

At the station, Ms. Lopez declined to make a further statement. She was issued a misdemeanor citation for retail theft and released. (2:6; App. 117).

A few days later, the Walmart Asset Protection Manager saw the unidentified woman in the store. The Asset Protection Manager obtained the woman's name, Amy Rodriguez, from customer service and called police. Police arrested Ms. Rodriguez at her home. She waived her Miranda rights and told police her boyfriend and Ms. Lopez's husband were cousins. Ms. Rodriguez explained that her carpal tunnel prevented her from holding items and she required assistance at the self-checkout register. Ms. Lopez was the only Walmart worker willing to help her. Ms. Rodriguez denied that she failed to pay for any items. (2:8-10; App. 119-121).

The state charged Ms. Lopez and Ms. Rodriguez with retail theft, party to a crime. In the complaint, the state aggregated the seven incidents of misdemeanor retail theft into one felony charge. (2: App. 114). Ms. Lopez's attorney argued

that the complaint failed to state probable cause, contending that the incidents could only be charged as multiple misdemeanors. (16:3-4). The circuit court ordered briefing. (16:4).

In her briefs, Ms. Lopez moved to dismiss the complaint arguing that the aggregation permitted in Wis. Stat. § 971.36(3)(a) was specific to the crime of theft in Wis. Stat. § 943.20 and did not apply to retail theft. (9:1). Ms. Lopez also argued that because the offenses took place over a two-week period, the state did not have the prosecutorial discretion to charge these multiple offenses as a single felony. (6:2; 9:4-6).

The circuit court dismissed the complaint without prejudice. (21:21; App. 113). Agreeing with Ms. Lopez's statutory argument, the circuit court noted that in over two decades on the bench, it had never seen multiple incidents of retail theft aggregated to one felony count. The court concluded that "I cannot see where that intent of the statute was to apply to retail theft. I think it was meant to regular theft, but not retail theft." (21:20-21; App. 112-113).

The state appealed and the court of appeals reversed the circuit court. (*State v. Lopez*, 2017AP000913-CR; App. 101-110). The court of appeals held that "if the legislature had intended to restrict the application of § 971.36(3)(a) to one or more of the numerous theft offenses identified in Wis. Stat. ch. 943, that intent could have been made plain by saying so." (App. 107). The court of appeals

concluded that to limit the application of Wis. Stat. § 971.36(3)(a) "would be undertaking judicial legislation…" (App. 108). Rejecting the defendants' arguments that the elements and penalties in theft and retail theft were different, that no case since Wis. Stat. § 971.36(3)(a) was enacted in 1955 has ever held that it applied to retail theft and that aggregation raised duplicity and jury unanimity problems, the court of appeals concluded that "§ 971.36(3)(a) is not limited in its application to § 943.20 and that it applies as well to retail theft under WIS. STAT. § 943.50." (App. 108). The court of appeals did not reach the issue of whether the state's general prosecutorial charging discretion allowed aggregation.

ARGUMENT

I. 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

A. Introduction and Standard of Review.

The state charged Ms. Lopez with one count of felony retail theft, as party to a crime, in violation of Wis. Stats. §§ 943.50 and 939.05. The complaint alleged that on seven separate occasions during seven separate transactions, Ms. Lopez and Ms. Rodriguez stole items from Walmart. Each separate transaction involved merchandise valued between $126 and $314.

(2:6, App. 117). Rather than properly charge the defendants with seven misdemeanors, the state combined the transactions into one count, aggregating the total loss to the retailer, thereby improperly increasing the penalty from seven misdemeanors to one felony. (2, App. 114).

The circuit court correctly dismissed the charges, ruling that the state lacked authority to charge these acts as one single felony because Wis. Stat. § 971.36 did not apply to acts of retail theft. The court of appeals reversed, holding that Wis. Stat. § 971.36 referred generally to theft, and that nothing in the language of the text suggested the legislature intended to limit its application only to a specific type of theft. (App. 108).

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.

B. Wisconsin Statute § 971.36 is clear on its face and applies only to the five modes of theft under Wis. Stat. § 943.20.

Statutory interpretation begins with the plain language of the statute, which is given "its common, ordinary, and accepted meaning." ***State v. 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.***

"One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." ***Fond Du Lac County v. Town of Rosendale***, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). *See also* Sutherland Statutes and Statutory Construction (7th ed. 2007), § 46.6, "it is also the case that every word excluded from the statute must be presumed to have been excluded for a purpose."

Wisconsin Statute § 971.36 states:

> 1. In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent or design in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; OR(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

Wis. Stat. § 971.36 (2017-2018).

Wisconsin Statute § 971.36 is explicit and clear—it applies to 'theft.' Theft is found in Wis. Stat. § 943.20. A plain and clear reading of this statute is simple, 'theft' referred to in Wis. Stat. § 971.36 applies to theft as set out in Wis. Stat. § 943.20.

Missing from the text of Wis. Stat. § 971.36 is anything regarding retail theft. Missing also from the text is anything regarding the application of this section to other crimes against property under Chapter 943. Had the legislature intended Wis. Stat. § 971.36 to include more than Wis. Stat. § 943.20, it would have explicitly said so. The exclusion by the legislature of any additional language regarding the application of Wis. Stat. § 971.36 requires this court to read the statute's plain and ordinary meaning to mean that Wis. Stat. § 971.36 only applies to the five modes of commission of a 'theft' delineated in Wis. Stat. § 943.20.

Ms. Lopez is not asking this court to limit the reading of Wis. Stat. § 971.36—rather, Ms. Lopez is asking that the court read the plain words of the specific statute that clearly and unambiguously refer only to the five modes of theft and apply it narrowly, as written and required, avoiding absurd results from an overbroad and improper application.

It is the state that is asking this court to read extra words into the statute, requesting an improper expansion of the plain and clear meaning of Wis. Stat. § 971.36 to more than the legislature intended. Endorsing the state's argument to expand

and add to the plain statute would lead to absurd results. For example, if this court finds that Wis. Stat. § 971.36 applies to all misappropriations in Chapter 943, there will be inevitable confusion about how to properly charge aggregated counts of issuance of worthless checks under Wis. Stat. § 943.24, which has its own provisions for aggregation.

Or, for example, if the state's position is expand the application of Wis. Stat. § 971.36 to the whole of Chapter 943, does the state intend on aggregating charges for criminal damage to property under Wis. Stat. § 943.01, as to constitute a felony charge? If so, how?

Reading Wis. Stat. § 971.36 as applying to more than the five modes of theft in Wis. Stat. § 943.20 would lead to a multitude of absurd results. This reading is overbroad and inconsistent with the plain meaning of the statute.

This court need not go further than the plain language of the statute to avoid these results and properly determine that, because the legislature explicitly said 'theft,' it limited the application of Wis. Stat. § 971.36 to 'theft.'

C. Even if this court finds that it needs to look further than the plain language of Wis. Stat. § 971.36, it still does not apply to Wis. Stat. § 943.50.

If this court determines that the words of the statute are not clear, the state's argument and

application of Wis. Stat. § 971.36 to Wis. Stat. § 943.50 is still improper when considering other context in order to determine meaning.

Furthermore, even if the court disagrees with Ms. Lopez's argument and somehow finds that the statute is ambiguous, then this court should apply the rule of lenity. ***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.").

1. The difference in statutory structure between retail theft and theft suggests that Wis. Stat. § 971.36 applies only to Wis. Stat. § 943.20.

Retail theft and theft are two distinct crimes, with separate statutory sections, and with distinct statutory elements the state must prove.

As a starting point, Wis. Stat. § 943.20 delineates five distinct modes of commission of theft: simple theft, theft by contractor, theft by one having undisputed interest in property from one having superior right of possession, theft by fraud, and theft by failure to return leased or rented property. (Wis. Stat. § 943.20(1)(a)-(e)).

As to the first mode of commission of theft under Wis. Stat. § 943.20(1)(a), the state must prove that a person "intentionally takes and carries

away…the movable property of another without consent and with intent to deprive the owner permanently of possession of the property." Wisconsin JI Criminal 1441.

Theft by contractor[2] in Wis. Stat. § 943.20(1)(b) is the second alternative mode of theft under Wis. Stat. § 943.20, and criminalizes the unauthorized use of money for any other purpose than the contractual use. (*See* Wisconsin JI Criminal 1443).

Wisconsin Statute § 943.20(1)(c) sets forth the third mode of commission of theft, theft by one having an undisputed interest in property from one having superior right of possession. To prove this crime, the state must demonstrate an individual, having a legal interest in movable property, intentionally and without consent, took the property out of the possession of a person having a superior right of possession with intent to permanently deprive possession. (*See* Wisconsin JI Criminal 1450).

The fourth mode of commission of theft is Wis. Stat. § 943.20(1)(d)[3], theft by fraud, which is

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[2] Also included as a section of Wis. Stat. § 943.20(1)(b), theft by contractor: defendant is a corporate officer, theft by employee, trustee, or bailee (Embezzlement), with corresponding Wisconsin JI Criminal 1443A and 1444.

[3] Also included within this section is theft by fraud: failure to disclose as a representation and theft by fraud: representations made to an agent, with the corresponding Wisconsin JI Criminal 1453B and 1453C.

committed by a person who obtains title to property of another by intentional deception by false representation. (*See* Wisconsin JI Criminal 1453A).

The fifth and final mode of commission of theft is Wis. Stat. § 943.20(1)(e), theft by failure to return leased or rented property, which is committed by someone who intentionally fails to return personal property which is in their possession by virtue of a written lease within 10 days of its expiration. (*See* Wisconsin JI Criminal 1455).

While these five modes of commission of theft have different elements and do not necessarily require the same facts to prove those elements, the legislature wrote Wis. Stat. § 943.20 to include these five specific modes of commission. What the legislature did not include as one of the modes, however, is retail theft. Retail theft is not one of the five modes of commission of a theft, nor can it be. The statutory section for retail theft appears much later in misappropriations, with a completely different statute number (Wis. Stat. § 943.50), title, and elements:

> 1. The defendant intentionally (altered the indicated price or value of)(took and carried away)(transferred)(concealed)(retained possession of) property.
>
> 2. The property was merchandise held for resale by a merchant.
>
> 3. The defendant knew that property was merchandise held for resale by a merchant.

> 4. The merchant did not consent to (altering the indicated price or value of)(taking and carrying away)(transferring)(concealing)(retaining possession of) property.
>
> 5. The defendant knew that the merchant did not consent.
>
> 6. The defendant intended to deprive the merchant permanently of possession of the merchandise.

Wisconsin JI Criminal 1498 (2013).

The legislature included five different ways to commit a theft under Wis. Stat. § 943.20. Retail theft was not included as one of the modes of commission of theft under Wis. Stat. § 943.20. Had the legislature intended to include retail theft as one of the five modes of commission, it would have done so. Instead, the legislature explicitly did not include retail theft as a mode of commission, instead giving retail theft its own distinct subsection, penalty structure, and distinctly different elements than theft. Thus, theft is a distinct crime from retail theft, and retail theft is not the same as theft.

Similarly, had the legislature intended on Wis. Stat. § 971.36 applying to retail theft, it would have explicitly done so. Instead, the legislature chose the term theft, not retail theft, not theft of farm-raised fish, not theft of video service, or any of the other subsections in Chapter 943 not included in Wis. Stat. § 943.20.

Additionally, the language of the Jury Instructions relating to Chapter 943 crimes also demonstrate that Wis. Stat. § 971.36 only applies to theft in Wis. Stat. § 943.20.

The only reference Wis. Stat. § 971.36 within all of the jury instructions can be found in Wis. Stat. § 943.20, signifying yet again that Wis. Stat. § 971.36 is only applicable to that specific section.

If Wis. Stat. § 971.36 was to be read expansively to cover Chapter 943 in its entirety, or to any section other than Wis. Stat. § 943.20, the jury instructions would have been included, given that the jury must decide, as part of its deliberations, on the amount of the items stolen.

The difference in statutory structures, elements, and jury instructions leads to only one logical conclusion, that the application of Wis. Stat. § 971.36, which says 'theft,' is only to the five modes of theft under Wis. Stat. § 943.20, and not to retail theft or to any other, separate and distinct statute for crimes against property in Chapter 943.

2. Different penalty structures between theft and retail theft suggest that Wis. Stat. § 971.36 applies only to Wis. Stat. § 943.20, not Wis. Stat. § 943.50.

The differing penalty structures of Wis. Stats. §§ 943.20 and 943.50 yet again illustrate that the legislature intended the two types of crimes to be

treated and punished differently, thus signifying that Wis. Stat. § 971.36 does not apply to retail theft.

For theft, a person is guilty of a "Class A misdemeanor theft if the value of the property does not exceed $2,500." Wis. Stat. § 943.20(3)(a)(2017-2018). A person is guilty of a "Class I felony theft if the value of the property exceeds $2,500 but does not exceed $5,000." Wis. Stat. § 943.20(3)(bf)(2017-2018).

Contrast this with the penalty for retail theft: "Except as provided in sub. (4m), a Class A misdemeanor, if the value of the merchandise does not exceed $500" or "A Class I felony, if the value of the merchandise exceeds $500 but does not exceed $5,000." Wis. Stat. § 943.50(4)(a)-(bf) (2017-2018).

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 valued at $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 property did not exceed $2,500.

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 a Class A misdemeanor. If the state was 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* Wis. Stat. § 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.

Allowing aggregation of the seven misdemeanor charges into one felony is a 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 Wis. Stat. § 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 easier for an individual to be charged with a felony. Presumably the legislature would have been clear about including retail theft in Wis. Stat. § 971.36 if it wanted it to be even easier for defendants to be charged with felonies.

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.

3. Other aggregating statutes within Chapter 943 suggest that Wis. Stat. § 971.36 applies only to Wis. Stat. § 943.20.

An expansive reading of Wis. Stat. § 971.36 does not make sense, as it is inconsistent with other provisions in Wis. Stat. § 943.20 that have their own specific language and jury instructions regarding how the state can aggregate charges.

For example, Wis. Stat. § 943.24, Issuance of worthless checks, and Wis. Stat. § 943.41, Financial transaction card crimes both appear in Subsection III of Chapter 943 along with retail theft and theft. Issuance of worthless checks has its own language regarding how separate charges could be aggregated:

> Whoever issues any single check or other order for payment of more than $2,500 or whoever within a 90-day period issues more than one

> check or other order amounting in the aggregate to more than $2,500, at the time of issuance, the person intends shall not be paid is guilty of a Class I Felony.

Wis. Stat. § 943.24(2).

Similarly, Wis. Stat. § 943.41 has its own statutory language regarding aggregation of more than one charge for financial card transaction crimes in the penalty section:

> Any person violating any provision of sub. (5) or (6) (a), (b), or (d), if the value of the money, goods, services, or property illegally obtained does not exceed $2,500 is guilty of a Class A misdemeanor; if the value of the money, goods, services, or property exceeds $2,500 but does not exceed $5,000, in a single transaction or in separate transactions within a period not exceeding 6 months, the person is guilty of a Class I felony; if the value of the money, goods, services, or property exceeds $5,000 but does not exceed $10,000, in a single transaction or in separate transactions within a period not exceeding 6 months, the person is guilty of a Class H felony; or if the value of money, goods, services, or property exceeds $10,000, in a single transaction or in separate transactions within a period not exceeding 6 months, the person is guilty of a Class G felony.

Wis. Stat. § 943.41.

An expansive reading and application of Wis. Stat. § 971.36 to these sections would have an absurd result—the penalties from the individual

subsections would be at odds with Wis. Stat. § 971.36, leading to confusion in the law as to the applicable penalty.

It is hard to believe that the legislature would have intended on causing this type of confusion, again demonstrating the legislature's intent in Wis. Stat. § 971.36 was that it only applied to 'theft' as defined in Wis. Stat. § 943.20, not expansively to any crime defined in Chapter 943 or its other subsections.

Additionally, there are provisions surrounding Wis. Stat. § 971.36 that demonstrate the legislature's intention. Wis. Stat. § 971.366 discusses how multiple instances of misdemeanor identity theft, as defined in Wis. Stat. § 943.201, can be aggregated into a single felony charge. Thus again begging the question, if the legislature meant to include *all* titled theft crimes in Wis. Stat. § 971.36, why create another, exclusive mechanism for aggregating a different type of theft in Chapter 943?

The state's expansive reading of Wis. Stat. § 971.36, to include all of Wis. Stat. § 943.20, or to include all of Subsection III of Chapter 943, or even to include any provision within the subsection that has 'theft' in the title, would lead to absurd, confusing, and inconsistent results. This overly broad reading of the statute defies logic.

4. The Annotations to Wis. Stat. § 971.36 demonstrate that it is only applicable to theft in Wis. Stat. § 943.20.

No Wisconsin case, other than the court of appeals decision here, discusses the application of theft in Wis. Stat. § 971.36 to anything other than to theft as discussed in Wis. Stat. § 943.20. The two cases that appear in the Annotations of Wis. Stat. § 971.36, ***State v. Jacobsen,*** 2014 WI App 13, 352 Wis. 2d 409, 842 N.W.2d 365, and ***State v. Elverman,*** 2015 WI App 91, 367 Wis. 2d 126, 876 N.W.2d 511, are distinguishable from this case.

In ***Jacobsen,*** the court of appeals discussed prosecutorial discretion in charging multiple acts of theft as a single crime as defined in Wis. Stat. § 971.36(3)(a)-(c). In that case, the court noted that defense counsel challenged as multiplicitious and duplicitous only the thefts charged under Wis. Stat. § 943.20, not under any of the other Chapter 943 subsections. As such, its application to this particular issue is not relevant, as Ms. Lopez does not ask this court to overturn any ruling in that case, but, rather, follow the same logic as the court of appeals did in ***Jacobsen*** and rule the application of Wis. Stat. § 971.36 only pertains to one of the five modes of commission of theft in Wis. Stat. § 943.20.

The only other case that appears in the annotations to Wis. Stat. § 971.36 is ***Elverman,*** a case that again supports Ms. Lopez's position, as it

references Wis. Stat. § 971.366(3)(a) and its application to crimes charged as one in Wis. Stat. § 943.20(1)(a), not any other section in Chapter 943.

While the lack of substantial case law regarding the application of Wis. Stat. § 971.36 could suggest this is an issue of first impression, it does not suggest that this court should expand the plain meaning of the statute to encompass additional, unintended crimes, for the state to aggregate to a felony offense. Because there is no other case that has addressed this issue, it again suggests the statute is clear and should be read based on the clear meaning of the words themselves, not the words the state wants it to mean.

II. The state does not have inherent authority to charge seven retail thefts as one single felony and doing so is error on duplicity grounds.

A. Introduction and Standard of Review.

The state should be prohibited from charging this case as one, felonious action, as the acts were not committed at substantially the same time and were not part of a continuous transaction.

Grouping the acts raises duplicity concerns. "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." ***State v. Copening***, 103 Wis. 2d 564, 572, 309 N.W. 2d 850 (Ct. App. 1981). Lumping together

multiple instances of misdemeanor retail theft and packaging it as a felony retail theft is defective, as it is duplicitous and presents issues of jury unanimity. The state's attempt to convict an individual of a felony instead of misdemeanors creates serious proof issues in future cases. These issues are exactly what this court guarded in previous rulings regarding duplicitous charges.

The question of whether the charge is duplicitious 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 does not have discretion to charge these seven acts as one because the acts were not committed at substantially the same time and were not part of a continuous transaction.

This court has previously held that the state can 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. ***State v. Lomagro***, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983).

Here, the state did not have the authority to charge these seven acts as one 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.

These seven, different, retail thefts happened over the course of two weeks. These retail thefts included seven distinct and separate transactions, consistent with this court's reasoning in ***State v. Spraggin***, 77 Wis. 2d 89, 252 N.W.2d 94 (1977). There, this court determined, in the context of receiving stolen property, that receipt of:

> " 'different articles of stolen property at different times and on separate and unconnected occasions, constitute separate offenses and cannot be prosecuted as one crime, in one count, though all of the property is afterwards found in the possession of the defendant at the same time and place.'"

Id. at 613 (quoting ***Hamilton v. State***, 129 Fla. 219, 176 So. 89, 92 (1937)).

Furthermore, "[u]nder 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).

In ***State v. Tappa***, this court concluded it was appropriate to punish the defendant separately for concealing and transferring property for multiple distinct instances of conduct 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).

Here, the offenses constitute separate, unconnected occasions over the course of a two-week period. In between offenses, there were likely days that Ms. Lopez did not work. There were also likely days when Ms. Lopez was working where Ms. Rodriguez did not visit Walmart. The defendant's here completed each separate transaction, each with a separate receipt from that transaction, and went home, with time to reflect on their actions, and make a separate, conscious decision whether or not to do this again.

The state here seems to inappropriately conflate simple shoplifting with a felonious act. However, this court's previously ruling in ***Spraggin*** forecloses the state's attempt, given the courts indication that

> "when the reception of stolen items occurs on separate occasions, the ends of justice and the form of the defined crime are met by multiple misdemeanor counts, not by the forbidden joinder of separate crimes into one count for an aggregate felony value."

77 Wis. 2d at 614.

These charges are different acts, not one continuous transaction. As such, the state does not have discretion to charge them as one single felony.

C. These charges are improperly duplicitous.

Even if this court determines that the state has discretion to charge these as one single act, the

charges still run contrary to the purposes of the prohibition against duplicity and are therefore improper.

The state does not have unfettered charging discretion. The state cannot, for example, recharge a defendant with the same crime after an acquittal. Similarly, "a prosecutor's discretion to charge separately chargeable offenses as a single crime is limited by "the purposes of the prohibition against duplicity,"" ***State v. Jacobsen***, 2014 WI App 13, ¶22, 352 Wis. 2d 409, 842 N.W.2d 365, citing ***State v. Lomagro***, 113 Wis. 3d 582, 588, 335 N.W.2d 583 (1983).

These purposes 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.

Id. at 586-87.

"If any of these dangers are present, the acts of the defendant should be separated into different counts even though they may represent a single, continuing scheme." ***Id.*** at 588.

The charges here are duplicitous, as they implicate issues with jury unanimity. "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." ***Copening***, 103 Wis. 2d at 572. Put another way, duplicity concerns exist where there is "the possibility that some but not all members of a jury could believe defendant guilty of one offense and others believe him guilty of another," but, despite disagreement on the essential facts of the case, still find guilt on the one, felonious, duplicitous count. ***State v. George***, 69 Wis. 2d 92, 99, 230 N.W.2d 253 (1975).

Imagine a situation similar to what happened here, the state aggregates seven counts of retail theft over two weeks into one felony count. As evidence of the crimes, the state must prove each of the underlying retail theft counts. In only four of the counts, there is video surveillance. In another count, the only evidence is a co-defendant's statement against the defendant. And, yet, in another, the evidence that exists is only the co-defendant's receipt and a store employee's observations. It is possible that different jury members could determine that the state proved only five of these retail thefts, while another jury member could reasonably find that 4, or 5, or 6 had been proven, given the different evidence used to prove each count. This type of confusion is exactly what is contemplated as concern for duplicitous charges.

How far would the state's charging discretion take it in other retail theft cases? Could it charge an individual with a felony for all retail thefts committed at any big box store? What if the evidence of some incidents was weaker, perhaps lacking video proof, or what if the jury believed witnesses on some counts but not on others? What about retail thefts committed at the same named store, but different locations?

These problems become even more apparent when considering the jury instructions for how to consider aggregated charges, which, as previously mentioned, only appear in the instructions for theft. The absence of any of the same language in the instructions for retail theft fails to provide clear guidance to a jury on how to consider multiple instances of retail theft.

Clearly, the slippery slope of aggregating retail thefts into one felony theft presents major issues and concerns with jury unanimity. These issues cannot be dealt with on a case by case basis, and require this court to determine that these charges constitute multiple misdemeanors, all requiring their own proof, and charging them as one felony is duplicitous and improper, even if the court determines that the seven different instances are a single, continuing scheme.

D. The existence of 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 discretionary authority to aggregate in any situation, 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.

To be clear, a ruling that aggregation of charges under Wis. Stat § 971.36 applies only to charges of theft under Wis. Stat. § 943.20 would not open the floodgates for defendants to avoid punishment for retail theft in the future. To the contrary, requiring the state to properly charge the

defendants in this case, under Wis. Stat. § 943.50, with multiple misdemeanors for multiple, separate instances of retail theft, would still subject Ms. Lopez to seven misdemeanor convictions. Upon conviction for three of the separate offenses, she would not only be subjected to repeater status for any future crimes, but also could face more total custody time than she would for a conviction on one felony retail theft. (The total maximum term of imprisonment for seven Class A Misdemeanor counts of retail theft would equal 63 months, whereas the total maximum penalty for a Class I Felony Retail theft is 41 months).

The state's broad discretion to charge is not unfettered and is, in this case, clearly limited by the statute and applies only to theft, not retail theft. As such, this court should reverse the court of appeals and remand with directions for the state to charge these acts as multiple misdemeanors.

CONCLUSION

For the reasons stated above, the circuit court appropriately dismissed the defective complaint. It is therefore requested that this court reverse the court of appeals and affirm the decision of the circuit court.

Dated this 10th day of June, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,547 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 10th day of June, 2019.

Signed:

KELSEY LOSHAW
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of June, 2019.

Signed:

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APPENDIX

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TO
APPENDIX

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