STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP913-CR & 2017AP914-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

AUTUMN MARIE LOVE LOPEZ

and

AMY J. RODRIGUEZ,

Defendants-Respondents-Petitioners.

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

BRIEF OF THE PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

Page

Page

Page

Additional Authorities

ISSUES PRESENTED

I. Does the aggregation-of-thefts statute, Wis. Stat. § 971.36, apply—as it states—to "any criminal pleading for theft," or only to criminal pleadings alleging violations of Wis. Stat. § 943.20?

The circuit court held the latter, and dismissed the complaint.

On the State's appeal, the court of appeals reversed, holding the former.

This Court should affirm the court of appeals.

II. Alternatively, could the State determine the unit of prosecution and charge the seven thefts in this case as a single felony theft under its general charging authority because: (1) the offenses were committed by the same perpetrators, (2) at substantially the same time, (3) as part of a single deceptive scheme, and (4) none of the dangers of a duplicitous charge were present?

The circuit court and court of appeals did not reach this question.

This Court should hold that the State had the authority to charge these thefts as a single crime.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case before this Court, publication and oral argument are appropriate.

INTRODUCTION

Autumn Lopez worked at Walmart. Her acquaintance, Amy Rodriguez, frequented the store. On seven occasions between January 10 and January 25, 2017, Lopez helped

Rodriguez steal merchandise by manipulating her purchases at the self-checkout registers. The value of the merchandise stolen each day totaled between $126 and $314.

Based on the aggregate amount stolen in this case—$1452.12, the State charged Lopez and Rodriguez each with one count of felony retail theft of merchandise valuing more than $500. The sole issue in this case is whether the State could so charge Lopez and Rodriguez.

It could, for two reasons. First, the plain language and context of Wis. Stat. § 971.36 authorizes the aggregation of multiple thefts of any type into a single charge. Alternatively, the State has inherent authority to join criminal acts that can be characterized as a continuing offense into a single unit of prosecution. And here, that exercise of authority was appropriate given that the offenses involved the same perpetrators, occurred at the same time, were part of a single deceptive scheme, and did not risk duplicitous charges.

STATEMENT OF THE CASE

In February 2017, Officer Chris Hammel of the Monroe Police Department responded to Walmart to investigate a report of theft. (R. 2:1–3.)[1] When he arrived, the Walmart Asset Protection Manager told him that she had been investigating several thefts of merchandise

[1] There are two different appellate records in this case. To avoid confusion, the State will refer to the record for 2017AP913 unless otherwise indicated. Citations to documents found in the record for 2017AP914 will be indicated by the designation (R2).

committed during a two-week period in January by Autumn Lopez, who was employed at the store, and an unidentified woman. (R. 2:5.)

Lopez frequently manned the self-checkout registers. (*See* R. 2:5–6.) Surveillance videos showed seven occasions where a woman, later identified as Amy Rodriguez, approached a self-checkout register with a cart full of merchandise and was assisted by Lopez. (R. 2:5.) Lopez then checked Rodriguez out, but would scan only food items. (R. 2:5.) Lopez would pretend to scan the rest of Rodriguez's items, but would cover the bar code or void the transaction before Rodriguez paid. (R. 2:5.) On seven days in January 2017, the women stole merchandise worth the following amounts:

1. January 10, 2017, $218.99;
2. January 12, 2017, $313.95;
3. January 13, 2017, $221.46;
4. January 16, 2017, $257.49;
5. January 19, 2017, $132.62;
6. January 20, 2017: $181.28;
7. January 25, 2017: $126.33.

(R. 2:6.) The total value stolen was $1452.12.[2]

[2] The exhibits attached to the criminal complaint allege that the total value of the merchandise taken was $1489.15, but that is not the total reached by adding the seven respective amounts, which is $1452.12. (R. 2:11–12.) The discrepancy does not affect the outcome of this case; therefore, the State will assume that the total amount stolen was $1452.12.

When confronted, Lopez admitted the thefts to both the asset protection manager and Officer Hammel but would not tell them who the unidentified woman on the video was. (R. 2:5–6.) Lopez explained that the woman on the video was the same person each time, and Lopez said she felt she had to help the woman steal because the woman "had something on" Lopez and her family. (R. 2:5–6.) Hammel arrested Lopez. (R. 2:6.)

Police arrested Rodriguez a few days later after the asset protection manager saw her in the Walmart and was able to learn her name. (R. 2:8–9.) After waiving her constitutional rights, Rodriguez told police that her boyfriend and Lopez's husband are cousins. (R. 2:9.) Rodriguez said she frequently used the self-checkout registers and needs assistance checking out due to carpal tunnel syndrome. (R. 2:9.) She claimed Lopez was the only employee willing to help her, and she denied taking anything without paying. (R. 2:9.)

The State charged Lopez and Rodriguez with Retail theft of merchandise with a value of more than $500 but less than $5000 as a party to a crime pursuant to Wis. Stat. §§ 943.50.(1m)(c) and (4)(bf), a Class I felony. (R. 2:1.) Both defendants objected to the complaint. They claimed that the single felony charge was unsubstantiated by the complaint's description of the seven separate instances of theft of merchandise less than $500, but they did so on different grounds. (*See* R. 6:1.)

Lopez alleged that Wis. Stat. § 971.36(3)(a), the statute permitting aggregation of charges for thefts, was applicable only to charges of theft pursuant to Wis. Stat. § 943.20. (R. 6:1.) She argued that the State could charge her with either a single Class A Misdemeanor for theft by

employee of less than $2500 as a single continuing scheme under Wis. Stat. § 943.20(3)(a), or with seven Class A Misdemeanors for seven separate charges of Retail Theft less than $500 pursuant to Wis. Stat. § 943.50(4)(a). (R. 6:2.)

Rodriguez, for her part, argued that the single felony charge was duplicitous and violated her rights to due process and protection from double jeopardy. (R2. 7:1.)

The circuit court granted each of the defendants' motions to dismiss the complaints without prejudice based on the arguments Lopez advanced. (R. 21:22.) It determined that the two-week period over which the thefts occurred was not too long for the State to charge the thefts as a continuing offense. (R. 21:20.) But, it concluded, because Wis. Stat. § 971.36 referenced "thefts" and not "retail thefts," the Legislature intended section 971.36 to apply to only the crime of theft pursuant to Wis. Stat. § 943.20. (R. 21:20.) It did not address whether the State had discretionary authority to charge a felony. (R. 21:20.)

The State appealed. The court of appeals reversed, recognizing that "nothing in § 971.36(3)(a) indicates that the legislature intended to limit that provision to a specific type or types of theft," and accordingly "the State may under Wis. Stat. § 971.36(3)(a) charge multiple acts of retail theft as one continuous act of retail theft." *State v. Lopez*, 2019 WI App 2, ¶¶ 12, 14, 385 Wis. 2d 482, 922 N.W.2d 855. Lopez and Rodriguez petitioned this Court for review, which this Court granted on May 10, 2019.

STATUTES AT ISSUE

The statutes at issue provide in relevant part:

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.

(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. . . .

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 movable 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. . . .

(c) Having a legal interest in movable 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 a 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.

. . . .

(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.

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:

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

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

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

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

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

(f) 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.

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

(h) 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.

STANDARD OF REVIEW

The sufficiency of a complaint presents a question of law, reviewed de novo. *State v. Manthey*, 169 Wis. 2d 673, 685, 487 N.W.2d 44 (Ct. App. 1992).

Statutory interpretation presents a question of law that this Court reviews de novo. *State v. Hemp*, 2014 WI 129, ¶ 12, 359 Wis. 2d 320, 856 N.W.2d 811.

Whether a complaint is duplicitous also is a question of law that this Court reviews de novo. *See State v. Fawcett*, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988.)

ARGUMENT

I. The language and context of Wis. Stat. § 971.36(3)(a) unambiguously show that the statute applies to pleadings alleging any type of theft, including retail theft.

Lopez and Rodriguez first argue that the State could not charge them under Wis. Stat. § 971.36(3)(a) for their combined retail thefts. But, as discussed below, the plain language and context of the statute demonstrates that they are wrong.

A. Interpreting a statute requires reading the statute's plain language in context and in relation to the language of surrounding and closely related statutes.

Courts employ statutory interpretation to determine the meaning of a statute "so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Submission to the plain meaning of a statute requires courts to begin with the language of the statute, which is given "its common, ordinary, and accepted meaning." *Id.* ¶ 45.

If the language of a statute is clear and unambiguous, the court applies the statute according to its plain meaning and the inquiry ceases. *Kalal*, 271 Wis. 2d 633, ¶ 46. That does not mean, though, that the words of the statute are read in a vacuum: "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." *Id.* Extrinsic sources, such as legislative history, are not considered unless the language is

declared ambiguous and is therefore in need of further interpretation. *Id.*

B. Plain language, context, and the evolution of the statute demonstrate that the Legislature intended Wis. Stat. § 971.36 to apply to criminal pleadings for any theft.

1. By the plain language of Wis. Stat. § 971.36, theft means "theft," not just "Theft" as defined in section 943.20.

There are many different types of theft.[3] The language of these statutes indicates that the Legislature created them to criminalize acts that would not otherwise neatly fit into the definition of "Theft" under Wis. Stat. § 943.20.

But as the statutes themselves unambiguously show, they are all still "thefts." And multiple "thefts may be prosecuted as a single crime" pursuant to Wis. Stat. § 971.36 if:

a. the property belonged to the same owner and the thefts were all committed pursuant to a single intent and design or in execution of a single deceptive scheme;

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[3] *See* Wis. Stat. § 943.20, "Theft"; Wis. Stat. § 943.205, "Theft of trade secrets"; Wis. Stat. § 943.45, "Theft of telecommunications service"; Wis. Stat. § 943.455, "Theft of commercial mobile service"; Wis. Stat. § 943.46, "Theft of video service"; Wis. Stat. § 943.47, "Theft of satellite cable programming"; Wis. Stat. § 943.50 "Retail theft; theft of services"; Wis. Stat. § 943.61, "Theft of library material"; Wis. Stat. § 943.74, "Theft of farm-raised fish"; Wis. Stat. § 943.81, "Theft from a financial institution."

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(3). And when the State prosecutes more than one theft 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." Wis. Stat. § 971.36(4).

Nothing in Wis. Stat. § 971.36 suggests that by creating different statutory types of theft that the Legislature meant to exempt those acts from the criminal procedure pleading statute applying generally to pleadings for thefts. Wis. Stat. § 971.36.

To the contrary, the language of Wis. Stat. § 971.36 frames the Legislature's understanding of "thefts" broadly. The statute provides that "[i]n *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)." Wis. Stat. § 971.36(1). And "in *any* case of theft involving more than one theft, *all* thefts may be prosecuted as a single crime" if, as relevant here, "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." The statute also indicates that "[i]n *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." Wis. Stat. § 971.36(3)–(4).

"When the legislature does not use words in a restricted manner, the general terms should be interpreted

broadly to give effect to the legislature's intent." *State v. Quintana*, 2008 WI 33, ¶ 32, 308 Wis. 2d 615, 748 N.W.2d 447. Notably absent from Wis. Stat. § 971.36 is any language indicating that the Legislature meant the word "thefts" to apply only to complaints alleging violations of Wis. Stat. § 943.20, or any restrictive definition of the word "theft." It simply says, "in *any* criminal pleading for theft." Wis. Stat. § 971.36(1). The word "theft" in Wis. Stat. § 971.36 should therefore be construed broadly.

If the Legislature meant "in criminal pleadings for Theft under Wis. Stat. § 943.20" only, it could have easily said so. But it did not; it said, "in any criminal pleading for theft." The ordinary dictionary meaning of "any" is "one or some indiscriminately of whatever kind."[4] And the Legislature plainly believes that "Retail theft" is a kind of theft: they use the word "theft" to define the crime, and five of the nine modes of commission of Retail theft match exactly the five modes of commission of Theft of moveable property of another under Wis. Stat. § 943.20(1)(a).[5] A

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[4] *Any*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/any (last visited June 14, 2019).

[5] *Compare* Wis. Stat. § 943.20(1)(a) (a person commits theft if the person "[i]ntentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of such property") *with* Wis. Stat. § 943.50(1m)(b)–(e) (a person commits Retail theft by doing "any of the following without the merchant's consent and with the intent to deprive the merchant permanently of possession or the full purchase price of the merchandise or property:" sub (b), "[i]ntentionally takes and carries away," sub (c), "[i]ntentionally transfers," sub (d) "[i]ntentionally conceals," (e), "[i]ntentionally retains possession" of merchandise or property of the merchant.)

pleading for Retail theft is therefore encompassed by the words, "any criminal pleading for theft." Wis. Stat. § 971.36.

Nor is there anything in Wis. Stat. § 943.20 or Wis. Stat. § 943.50 indicating that the Legislature intended for Wis. Stat. § 971.36 to apply to Theft, but not Retail theft. Retail theft under Wis. Stat. § 943.50 and Theft under Wis. Stat. § 943.20 both involve theft of property, and the severity of both offenses increases as the value of the property stolen increases. *Compare* Wis. Stat. § 943.20(1)(a)–(e), (3) *with* Wis. Stat. § 943.50(1m)–(1r), (4). It is illogical to conclude that the Legislature did not intend Retail theft to be considered a theft when it called the crime a theft and defined it exactly the same way it defined the modes of commission of "Theft" in Wis. Stat. § 943.20(1)(a).

To be sure, each statute provides some modes of commission that the other does not. But those differences show only that the Legislature meant to criminalize different methods of stealing. For example, the Retail theft statute provides that a person can commit Retail theft if the person, "[w]hile 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." Wis. Stat. § 943.50(1m)(f). While that particular act would not be chargeable as "Theft" under Wis. Stat. § 943.20, intentionally removing a theft detection device to steal property is still a type of theft. The person is still engaged in an act of stealing property, and the Legislature expressly called the crime a "theft." Wis. Stat. § 943.50.

To that end, the Legislature's creation of separate theft statutes serves multiple purposes. First, it identifies the broad array of acts that deprive someone of payment, property, or services that may not fit into the general definition of "Theft" under Wis. Stat. § 943.20. It also

prevents confusion, debate, and inconsistent application of what constitutes "moveable property" or "personal property" under Wis. Stat. § 943.20(1)(a). In addition, it allows the Legislature to provide different penalties for thefts that it deems more egregious than others.[6] But it does not logically serve to suggest that these types of thefts that do not fit its general "Theft" statute in Wis. Stat. § 943.20 are not "thefts" under Wis. Stat. § 971.36.

Additionally, just as for "Theft" under Wis. Stat. § 943.20, the Legislature provided a progressive penalty structure for "Retail theft" under Wis. Stat. § 943.50. *See, e.g.*, Wis. Stat. § 943.20(3)(a)–(e); Wis. Stat. § 943.50(4)(a)–(c). This structure shows that the Legislature contemplated "Retail theft" as a type of theft that could constitute a continuing crime within the meaning of Wis. Stat. § 971.36. *Cf. State v. Schumacher*, 144 Wis. 2d 388, 411, 493 N.W.2d 23 (1992) ("Use of a progressive penalty structure must, within reason, contemplate a continuing crime.").

Consequently, the plain language and context of Wis. Stat. § 971.36 and Wis. Stat. § 943.50 indicate that a criminal pleading for Retail theft falls in the category of "any criminal pleading for theft." And if more than one Retail theft is alleged, it falls in the category of "any case of theft involving more than one theft," allowing the State to aggregate the value of the property stolen. Wis. Stat. § 971.36(3). The court of appeals properly interpreted the plain language of section 971.36.

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[6] *Compare, e.g.*, Wis. Stat. § 943.46(4)(a) (defining first-time theft of video service with no intent for financial gain as a Class C misdemeanor) *with* Wis. Stat. § 943.46(4)(d) (defining second or subsequent theft of video services for commercial advantage or financial gain as a Class I felony).

2. Statutory context likewise supports the court of appeals' interpretation of Wis. Stat. § 971.36.

"[S]tatutory language is interpreted . . . in relation to the language of surrounding or closely-related statutes." *Kalal*, 271 Wis. 2d 633, ¶ 46. In addition to the plain language of Wis. Stat. § 971.36 and the theft statutes themselves, the closely related aggregation statutes surrounding Wis. Stat. § 971.36 also show that the Legislature did not intend Wis. Stat. § 971.36 to be limited to criminal pleadings under Wis. Stat. § 943.20.

And when read in "relation to the language of surrounding or closely-related" aggregation statutes, *see Kalal*, 271 Wis. 2d 633, ¶ 46, what Wis. Stat. § 971.36 *doesn't* say is perhaps more telling than what it *does* say. That is so because the other aggregation statutes surrounding Wis. Stat. § 971.36 all contain language limiting those statutes to pleadings for specific statutory crimes. *See* Wis. Stat. §§ 971.365, 971.366, and 971.367. Wisconsin Stat. §§ 971.365, 971.366, and 971.367 allow "all violations" only of specific statutory sections to be prosecuted "as a single crime if the violations were pursuant to a single intent and design." *Id.* Such limiting language is absent from Wis. Stat. § 971.36.

For example, Wis. Stat. § 971.366, "Use of another's personal identifying information: charges," provides that "[i]n any case under s. 943.201 or 943.203 involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design." Similarly, Wis. Stat. § 971.367, "False statements to financial institutions: charges," provides, "[i]n any case under s. 946.79 involving more than one violation,

all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design."

Wisconsin Stat. § 971.365, the very next statute in sequence to Wis. Stat. § 971.36, demonstrates that the Legislature would have expressly limited section 971.36 to pleadings for Theft under section 943.20 if that was its intent. As relevant here, Wis. Stat. § 971.365, titled "Crimes involving certain controlled substances," identifies—and, in effect, limits—the precise crimes that may be aggregated:

> **(1)**
>
> **(a)** In any case under s. 961.41(1)(em), 1999 stats., or s.961.41(1)(cm), (d), (e), (f), (g), or (h) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.
>
> **(b)** In any case under s. 961.41(1m)(em), 1999 stats., or s.961.41(1m)(cm), (d), (e), (f), (g), or (h) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.
>
> **(c)** In any case under s. 961.41(3g)(a)2., 1999 stats., or s.961.41(3g)(dm), 1999 stats., or s.961.41 (3g)(am), (c), (d), (e), or (g) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.

Unlike Wis. Stat. § 971.365 and the other surrounding aggregation statutes, Wis. Stat. § 971.36 lacks similar limiting language. Section 971.36 does not say "thefts under section 943.20" or "in any case under s. 943.20" or give any indication that the statute is limited to pleadings alleging violations of Wis. Stat. § 943.20. In fact, Wis. Stat. § 971.36 does not mention Wis. Stat. § 943.20 at all.

The surrounding aggregation statutes show that if the Legislature meant to limit Wis. Stat. § 971.36's application to cases under section 943.20, it knew how to do so. Further, the Legislature has amended Wis. Stat. § 971.365, the statute immediately following section 971.36, multiple times since its enactment in 1985 only to add or remove specific statutory sections to which it applies.[7] The Legislature has made no attempt to add similar language to Wis. Stat. § 971.36. That is a strong indication that Wis. Stat. § 971.36 is not limited to pleadings for violations of Wis. Stat. § 943.20 only, and instead applies to pleadings for any type of theft.

Because that limiting language is absent, this Court would have to write "under section 943.20" into the statute to adopt Lopez and Rodriguez's interpretation. (Pet. Br. 13–16.) This is something Lopez and Rodriguez recognize that this Court cannot do. (Pet. Br. 14 ("One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." (*quoting Fond Du Lac County v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989))).) *See also, e.g., Employers Mut. Fire Ins. Co v. Haucke*, 267 Wis. 72, 76, 64 N.W.2d 426 (1954) ("To interpret [the statute] as respondent would have us do it would be necessary to add words to the statute to cover such meaning. This we cannot do."). As shown, writing those words in is also something that the Legislature itself has declined to do.

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[7] *See* 1987 Wis. Act 339, § 103; 1989 Wis. Act 121, §§ 117–18; 1993 Wis. Act 98, §§ 150–52; 1993 Wis. Act 118, §§ 17–18; 1995 Wis. Act 448, §§ 504–07; 1999 Wis. Act 48, §§ 14–17; 2001 Wis. Act 109, §§ 1109–12; 2003 Wis. Act 49, §§ 7–8.

As Lopez and Rodriguez note, "every word excluded from the statute must be presumed to have been excluded for a purpose." (Pet. Br. 14 (quoting Sutherland Statutes and Statutory Construction (7th ed. 2007).) The Legislature must be presumed to have excluded the limiting language that Lopez and Rodriguez would like this Court to write into the statute while including it in the surrounding statutes for a reason. Accordingly, this Court should decline Lopez and Rodriguez's invitation to do so.

Lopez and Rodriguez invoke irrelevant statutes—namely, Wis. Stat. §§ 943.24 and 943.41—to argue that the Legislature must have meant to limit Wis. Stat. § 971.36 to pleadings alleging Theft under Wis. Stat. § 943.20. (Petitioner's Br. 24–26.) Those statutes are irrelevant to the analysis because they are not closely related to Wis. Stat. § 971.36. "Statutes are closely related when they are in the same chapter, reference one another, or use similar terms." *State v. Reyes Fuerte,* 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773. "Being within the same statutory scheme may also make two statutes closely related." *Id.* Sections 943.24 and 943.41 do not satisfy any of those parameters in relation to Wis. Stat. § 971.36.

To start, sections 943.24 and 943.41 appear in Chapter 943 creating and defining Crimes Against Property, a different chapter than section 971.36, which appears in Chapter 971 establishing pretrial criminal procedure. None of these statutes reference each other or deal with the same subject. Moreover, the statutes serve different functions. Sections 943.24 and 943.41 define the crimes of issuing worthless checks and financial transaction card crimes. In contrast, section 971.36 does not create a crime; it is a pleading statute. Nor are the three statutes even a part of

the same statutory scheme: Wis. Stat. §§ 943.24 and 943.41 appear in the Criminal Code, whereas Wis. Stat. § 971.36 appears in the Criminal Procedure portion of the code.

Furthermore, the portions of Wis. Stat. §§ 943.24 and 943.41 that Lopez and Rodriguez reference are not aggregation statutes. (Pet. Br. 24–25.) They are the portions assigning penalties for issuing worthless checks or committing fraudulent use of a financial transaction card. And, importantly, neither of these crimes is designated a "theft." To the extent they have any relevance, these statutes support, rather than refute, the State's interpretation of Wis. Stat. § 971.36.

In all, the plain language of Wis. Stat. § 971.36, when properly interpreted in relation to the surrounding statutes in the same chapter, section, and which appear in succession with Wis. Stat. § 971.36, shows that the Legislature intended Wis. Stat. § 971.36 to apply not just to the crime of Theft under section 943.20, but as it says, to "any criminal pleading for theft," which would include Retail theft.

3. The previous versions of Wis. Stat. § 971.36 support the State's interpretation.

Evaluation of the context of a statute under a plain-meaning analysis also includes consideration of "previously enacted and repealed provisions of a statute." *United States v. Franklin*, 2019 WI 64, ¶ 13 (citation omitted). Here, the evolution of the aggregation-of-thefts statute also supports the State's interpretation.

The first version of this statute appears in Wis. Rev. Stat. § 141.10 (1849). It stated that "in any prosecution for the offence of embezzling the money, bank notes, checks, drafts, bills of exchange, or other security for money of any

person" it was sufficient to allege generally the amount embezzled. *Id.* In 1913, the statute was amended to read, "In any prosecution for the offense of embezzling under section 4418 or for larceny as a bailee under section 4415," a general allegation of the amount stolen and a general date range was sufficient. Wis. Rev. Stat. § 189.4667 (1913). By 1939, the statutes had been renumbered and section 4667 was then Wis. Stat. § 355.31. *See* Wis. Stat. § 355.31 (1939–40). The statute then read, "[i]n any prosecution for the offense of embezzling under 343.20 or for larceny as a bailee under section 343.17," a general allegation was sufficient. *Id.*

In the 1943–44 version of the statutes, the "under section 343.20" and "under section 343.17" language was removed. Wis. Stat. § 355.31 (1943–44.) The statute was amended to read,

> [i]n any case of larceny where 2 or more thefts of money or property belonging to the same owner have been committed pursuant to a single intent or design or in execution of a common fraudulent scheme, and in any case of embezzlement or larceny by bailee, all thefts or misappropriations of money or property belonging to the same owner may be prosecuted as a single offense . . . .

Id.

In 1951, the statute was again broadened to apply to pleadings "[i]n any case of larceny or of obtaining money or property by false personation or pretenses or by means of a confidence game, where 2 or more thefts have been committed. . . and in any case of embezzlement or larceny by a bailee." Wis. Stat. § 355.31 (1951–52). The statute said that in any such case, "all thefts and acts of obtaining or misappropriations of money or property belonging to the owner may be prosecuted as a single crime." *Id.*

By 1953, the statute had become a complicated, 303-word, unbroken paragraph titled "Larceny, false pretenses, confidence game and embezzlement; pleading and evidence; subsequent prosecution." It provided in part,

> where 2 or more thefts of, or acts of obtaining, money or property belonging to the same owner have been committed pursuant to a single intent and design or in execution of a common fraudulent scheme, and in any case of embezzlement or larceny by bailee, all thefts and acts of obtaining or misappropriations of money or property belonging to the owner may be prosecuted as a single crime. In the complaint, indictment or information it shall be sufficient to allege generally a larceny, obtaining or embezzlement of money to a certain amount or property to a certain value committed between certain dates, without specifying any particulars thereof.

See Wis. Stat. § 355.31 (1953–54).

In 1955, the Legislature sought to clarify, modernize, and reorganize the statutes. *See* 1955 Wis. Act 660. In doing so, the Legislature repealed Wis. Stat. § 355.31 and replaced it with the modern version stating simply that "in any criminal pleading for theft it is sufficient to charge that the defendant did steal the property (describing it) of the owner (naming him) and the value of (stating the value in money)." *See* 1955 Wis. Act 696, § 315. Apart from renumbering and an amendment in 1993 to use gender-neutral language,[8] what is now Wis. Stat. § 971.36 has remained untouched by the Legislature since it was simplified in 1955.

[8] *See* 1993 Wis. Act 486, § 731.

The Legislature then enacted nine other statutes since 1955 describing crimes as "thefts" and did not amend section 971.36 to exclude them from it. *See* n.6.

The evolution of section 971.36 shows that the Legislature did not intend to limit it to pleadings for the statutory crime of Theft under Wis. Stat. § 943.20. To the contrary, the Legislature had included language in prior versions of Wis. Stat. § 971.36 that limited it to specific statutory sections, but removed it to cover a broader array of acts. Then, in a push to simplify the statutes in 1955, the longer version of the statute was replaced simply with the generic reference to "thefts." And despite creating numerous types of thefts since then, the Legislature has not attempted to limit Wis. Stat. § 971.36's application to exclude pleadings for any of them.

The Legislature is presumed to know the law when it writes statutes. *City of Kenosha v. Labor and Industry Review Commission*, 2000 WI App 131, ¶ 17, 237 Wis. 2d 304, 614 N.W.2d 508. Here, the Legislature expressly removed the very language the defendants are asking this Court to write back into the statute and has itself declined to write it back in, while creating multiple crimes designated as "thefts," but did not limit Wis. Stat. § 971.36 to any particular type of theft. That is a powerful statement that "thefts" in Wis. Stat. § 971.36 should not be construed as "Thefts under section 943.20 only."

C. Lopez and Rodriguez's arguments fail.

Lopez and Rodriguez, in arguing to the contrary, take the following approach: (1) they misread *Kalal*; (2) they apply a faulty analysis to the statute and attribute arguments to the State that it did not make; (3) they advance an interpretation that creates absurd results; and

(4) they focus on irrelevant differences between the retail theft and theft statutes. Finally, they argue that the rule of lenity should apply. None of their arguments persuade.

1. Lopez and Rodriguez misread *Kalal*.

Lopez and Rodriguez's reading of *Kalal* is wrong. (*See* Pet. Br. 13–14.) They claim that "courts may look to the language of surrounding or closely-related statutes" only "[i]f the statutory language is deemed ambiguous." (Pet. Br. 14.) But *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). Indeed, this Court recently reaffirmed that "[e]valuation of the context of a statute *is part of a plain-meaning analysis* and includes a review of the language of 'surrounding or closely-related statutes, . . ." *Franklin*, 2019 WI 64, ¶ 13 (citing *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, because that context is part of a plain-meaning analysis. *Franklin*, 2019 WI 64, ¶ 13. And as explained, all of the surrounding statutes contain language limiting them to specific statutory sections. But no such language appears in Wis. Stat. § 971.36. Such a limitation therefore does not exist.

2. Lopez and Rodriguez's interpretation of the statute relies on faulty premises.

Lopez and Rodriguez then insist, with no support, that the word "theft" in Wis. Stat. § 971.36 must refer only to "Theft" under Wis. Stat. § 943.20. (Pet. Br. 15.) But they 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." Lopez and Rodriguez do not explain why the word "theft" in Wis. Stat. § 943.20 is significant, but the word "theft" in all the other theft statutes is not. (Pet. Br. 15.)

Next, Lopez and Rodriguez contend that Wis. Stat. § 971.36 does not apply to Wis. Stat. § 943.50 because "[m]issing from the text of Wis. Stat. § 971.36 is anything regarding retail theft." (Pet. Br. 15.) That argument fails under its own weight. Wisconsin Stat. § 971.36 does not say anything about Theft under Wis. Stat. § 943.20, either. By Lopez and Rodriguez's logic, Wis. Stat. § 971.36 necessarily applies to nothing. But 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.

Lopez and Rodriguez accuse the State of asking this Court to "expand the application of Wis. Stat. § 971.36 to the whole of Chapter 943," and notes that it would then apply to

charges for criminal damage to property under Wis. Stat. § 943.01. (Pet. Br. 16.) But it is not, and has never been, the State's position that Wis. Stat. § 971.36 applies to the entirety of Chapter 943. Rather, the only reasonable interpretation of Wis. Stat. § 971.36's generic references to "any criminal pleading for theft," without any kind of language limiting it to a particular statutory type of theft, is that it applies to all types of theft. As the Legislature clearly did not designate criminal damage to property as a "theft" of such property, Wis. Stat. § 971.36 does not apply to criminal pleadings for criminal damage to property, nor to any other non-theft crime in Chapter 943.

3. Lopez and Rodriguez's interpretation of the statute leads to absurd results.

Lopez and Rodriguez further claim that "[r]eading 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," but fail to explain how. (Pet. Br. 16.) Yet, as discussed below, it is Lopez and Rodriguez's interpretation of Wis. Stat. § 971.36, not the State's, that leads to absurd results.

The progressive penalty for Retail theft shows that the Legislature did not intend pleadings for Retail theft to require a separate charge for each separate event in a single case, because doing so would completely gut that penalty structure. *Cf. Schumacher*, 144 Wis. 2d at 411. If Lopez and Rodriguez are correct that Wis. Stat. § 971.36 does not apply to Retail theft under Wis. Stat. § 943.50, an offender could be charged with felony Retail theft only if the merchandise

stolen during any single incident meets the monetary threshold.[9]

By that logic, if an offender steals $358 worth of merchandise from the same store in the same manner every day for a week, the State could charge him only with seven Class A misdemeanors if it charged him with Retail theft.[10] This would be so even though he stole $2506 worth of merchandise—well over the $500 felony threshold—from the same merchant as part of a single design and plan because the amounts could not be aggregated. Illogically, though, if the State decided to charge him with Theft under Wis. Stat. § 943.20, *then* the amounts could be aggregated and the State could charge him with a single felony count of Theft of more than $2500.

Under that interpretation an offender could steal $499 worth of merchandise from the same store every day for a year (which would amount to $182,135 worth of merchandise), and the State could not charge the person with even a single count of felony Retail theft. Instead, under Lopez and Rodriguez's interpretation, the State could charge the person with: 365 Class A misdemeanor Retail thefts under Wis. Stat. § 943.50; 72 Class I felony Thefts under Wis. Stat. § 943.20(bf); 36 Class H felony Thefts under

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[9] Assuming that the State could not meet the criteria to aggregate the crimes under its inherent charging authority, as will be discussed in section II, *infra*.

[10] Though again, as will be explained in section II, in that scenario the State would have discretion to charge the thefts as a continuing event even without Wis. Stat. § 971.36 because they were committed at substantially the same time.

Wis. Stat. § 943.20(bm); 18 Class G felony Thefts under Wis. Stat. § 943.20(c); or one Class G felony Theft under Wis. Stat. § 943.20(c) for a single theft of property exceeding $10,000. But the State could not charge the person with *any* counts of felony Retail theft.

This result makes no sense, and it would render the progressive penalty structure for Retail theft and theft of services largely toothless. *Cf. State v. Grayson*, 172 Wis. 2d 156, 166–67, 493 N.W.2d 23 (1992) (holding that multiple charges for a continuing offense of failing to pay child support were necessary to assure proportionality between the harm caused and the punishment received). If Wis. Stat. § 971.36 does not apply to Retail theft, offenders who steal from the same store in the same manner on multiple occasions can be charged with a Class G felony for Retail theft only if the merchandise they steal on any single occasion is worth more than $10,000. But if they steal $10,000 worth of merchandise by stealing lesser amounts in a series of thefts, the State cannot charge the person with anything other than a litany of misdemeanor retail thefts. Indeed, a person who steals $2499 worth of retail merchandise from a single retailer could not be charged with *any* felony—either under Wis. Stat. § 943.50 or Wis. Stat. § 943.20—as long as he or she stole no more than $499 worth of merchandise at a time. That result cannot be right, given that the Legislature has designated theft of retail merchandise valuing $500 or more as a felony.

4. Lopez and Rodriguez's reliance on the jury instructions, the details of the two theft crimes, and non-theft statutes is inapposite.

Finally, Lopez and Rodriguez attempt to evade the logical, plain-meaning interpretation of Wis. Stat. § 971.36 by focusing on the differences between the crimes of Retail

theft and Theft. (Pet. Br. 17–24.) This attempt fails for multiple reasons.

First, Lopez and Rodriguez are wrong that the two crimes have a different statutory and penalty structures. (Pet. Br. 17–24.) Apart from the fact that the Wisconsin Jury Instructions on which they base their argument are an extrinsic source that should not be consulted unless the statutes are ambiguous, *Kalal*, 271 Wis. 2d 633, ¶ 46—and Lopez and Rodriguez have made no argument that any statute at issue here is ambiguous—Lopez and Rodriguez have shown only that the details of the two crimes are different, not the statutory structure.

As explained, Retail theft under Wis. Stat. § 943.50 and Theft under Wis. Stat. § 943.20 actually have an identical statutory structure. (*See supra* section I.B.) Both begin with a general statement that a person may be penalized as provided in the penalty subsection for committing any of the acts listed. Wis. Stat. § 943.20(1); Wis. Stat. § 943.50(1m). Both statutes then list the various modes of commission. Wis. Stat. § 943.20(1)(a)–(e); Wis. Stat. § 943.50(1m)–(1r). Five of the nine modes of committing Retail theft or theft of services match exactly the modes of committing Theft of moveable property under Wis. Stat. § 943.20(1)(a). *Compare* Wis. Stat. § 943.20(1)(a) *with* Wis. Stat. § 943.50(1r)(a)–(e). And both statutes then provide escalating penalties as the value of the property stolen increases. Wis. Stat. § 943.20(3); Wis. Stat. § 943.50(4)–(5). The two crimes have the same statutory structure.

Second, that the monetary thresholds for the penalties under sections 943.20 and 943.50 are different is also irrelevant; again, those are the details of the penalties, not the structure. (Pet. Br. 21–24.) Both crimes have escalating penalties as the value of the property taken increases; that

is the "penalty structure" for both Retail theft under Wis. Stat. § 943.50 and for Theft under Wis. Stat. § 943.20. The identical escalating penalty structure in the two statutes shows that the Legislature intended the two crimes to be treated as continuing offenses. *Cf. Schumacher*, 144 Wis. 2d at 411–12.

Next, Lopez and Rodriguez's argument that aggregating the crimes allows the State to "manipulate" the penalty for Retail theft is also unavailing. (Pet. Br. 22–23.) By Lopez and Rodriguez's logic, allowing any aggregation of the value of property stolen allows the State to "manipulate" the penalty for stealing. But it is Lopez and Rodriguez's position, not the State's, that arguably fosters "manipulation" of the penalty scheme. As shown above, if Lopez and Rodriguez are correct that Retail thefts cannot be aggregated in any circumstance, savvy thieves could steal hundreds of thousands of dollars from a retailer without ever facing a felony conviction by stealing no more than $499 of merchandise in any given episode.

Again, the Legislature provided that stealing more than $500 worth of merchandise from a single retailer is a felony. Lopez and Rodriguez stole $1452 worth of merchandise from one retailer over a 15-day period using a single deceptive scheme. They committed felony retail theft, and Wis. Stat. § 971.36 permits aggregation of the value of the property they stole to ensure that they receive the correct penalty.

The lack of case law addressing whether Wis. Stat. § 971.36 applies to any type of criminal pleading for theft does not carry the persuasive force Lopez and Rodriguez attempt to give it. (Petitioner's Br. 27–28.) As Lopez, Rodriguez, and the court of appeals noted, "the absence of any pertinent case law means no more than that this may be

an issue of first impression." *Lopez*, 385 Wis. 2d 482, ¶ 13; (Pet. Br. 28).

In short, the language of the Retail theft statute shows that the Legislature meant to penalize stealing $500 worth of merchandise or services from a merchant or intentionally possessing and using tools to prevent retail theft detection to steal merchandise as a felony, which the elements of Wis. Stat. § 943.20 did not necessarily allow. *Compare* Wis. Stat. § 943.20(1)(a)–(e) *with* Wis. Stat. § 943.50(1m)(f)–(h), (1r). And the lower monetary thresholds for the escalating penalties for Retail theft charges, *compare* Wis. Stat. § 943.20(3) *with* Wis. Stat. § 943.50(4), (4m), shows only the Legislature's recognition that Retail theft is a serious crime that typically involves thefts of lower-valued merchandise. Neither difference means that Retail theft is not a type of theft or that the Legislature exempted it from section 971.36 dealing with pleadings for theft.

This Court "look[s] to the common sense meaning of the statute to avoid unreasonable and absurd results." *State v. Kittilstad*, 222 Wis. 2d 204, 210, 585 N.W.2d 925 (Ct. App. 1998) *citing State v. Keith*, 216 Wis. 2d 61, 70, 573 N.W.2d 888 (Ct. App. 1997). But as shown, Lopez and Rodriguez's interpretation of Wis. Stat. § 971.36 is contrary to the common-sense meaning of the statute and leads to an absurd result. This Court should therefore reject it.

5. The rule of lenity does not apply here.

Lopez and Rodriguez also claim that if this Court "disagrees with [the defendants] argument and somehow finds the statute is ambiguous, then this court should apple the rule of lenity." (Pet. Br. 17.) There are two fundamental flaws with that contention.

First, Lopez and Rodriguez have made no argument that the statute is ambiguous. (Pet. Br. 12–36.) 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 Lopez and Rodriguez's overly narrow interpretation of the statute does not equate to a finding that the statute is ambiguous.

Second, even if this Court were to deem Wis. Stat. § 971.36 ambiguous, the rule of lenity would not necessarily apply. The rule 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, the rule of lenity does not apply. *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 does not apply here.

In sum, the principles of statutory construction, including the plain language, context, and evolution of section 971.36 support the State's and the court of appeals' understanding of the statute. This Court should affirm for that reason. It could also affirm for a second reason: the

State nevertheless had inherent authority to charge as it did, as discussed below.

II. Even absent section 971.36, the State has inherent authority to determine the unit of prosecution and charge these seven retail thefts as a single crime.

A. Legal principles on the State's discretion to determine the unit of prosecution.

The State has discretion to determine the unit of prosecution—in other words, "to charge a defendant with one continuing offense based on multiple criminal acts"—when certain criteria are met. *State v. Jacobsen*, 2014 WI App 13, ¶ 18, 352 Wis. 2d 409, 842 N.W.2d 365. Those criteria include circumstances where "the separately chargeable offenses are committed by the same person at substantially the same time and relating to one continued transaction." *Id.* (quoting *State v. Miller*, 2002 WI App 197, ¶ 23, 257 Wis. 2d 124, 650 N.W.2d 850).

"This court has consistently held that acts which alone constitute separately chargeable offenses, 'when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense' without violating the rule against duplicity." *State v. Lomagro*, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983) (citation omitted). "If the defendant's actions in committing the separate offenses may properly be viewed as one continuing offense, it is within the state's discretion to elect whether to charge 'one continuous offense or a single offense or series of single offenses.'" *Id.* (citation omitted).

When "a complaint joins several criminal acts that can properly be characterized in one count and is challenged by the defendant on grounds of duplicity, the trial court must

examine the allegations in light of the purposes of the prohibition against duplicity." *Lomagro*, 113 Wis. 2d at 589. There are five purposes for the prohibition against duplicity. *Id.* at 586–87. They are:

> (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. A complaint joining multiple acts that can be characterized as 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." *Id.* at 589.

B. The State had discretion to charge these seven thefts as a single felony because they were committed by the same people at substantially the same time as part of a continuing transaction, and there are no duplicity concerns.

All the criteria described in *Jacobsen*, 352 Wis. 2d 409, ¶ 23, are present here.

To start, there is no dispute that these seven offenses were committed by the same persons and against the same victim: Lopez, Rodriguez, and Walmart.

Contrary to Lopez and Rodriguez's assertion, these incidents occurred at substantially the same time. (Pet. Br. 29–30.) Seven incidents occurring over two weeks—essentially a theft every other day—is a much shorter time span than this Court has found permissible in other cases. *See, e.g.*, *State v. George*, 69 Wis. 2d 92, 100, 230 N.W.2d 253 (1975); *Miller*, 257 Wis. 2d 124, ¶¶ 32–34 (holding that a four-year time span covering 30 to 40 sexual assaults was

permissible); *Blenski v. State*, 73 Wis. 2d 685, 688–89, 692, 245 N.W.2d 906 (1976) (a single charge for soliciting charitable contributions without registration spanning the Christmas seasons of 1972 and 1973 was not duplicitous); *cf. State v. Molitor*, 210 Wis. 2d 415, 421–23, 565 N.W.2d 248 (Wisconsin Stat. § 948.025 allowing several sexual assaults that occurred over a six-week period to be charged as a continuous crime did not violate constitutional prohibition against duplicitous charges.).

Finally, the seven thefts were part of a single continuing offense. "[A] continuing offense is one which consists of a course of conduct enduring over an extended period of time." *Miller*, 257 Wis. 2d 124, ¶ 13. Here, Lopez and Rodriguez engaged in a course of conduct: they pretended to ring up all of Rodriguez's items by manipulating her transactions at the self-checkout register. And that course of conduct endured over an extended period of time: 15 days. All seven of the thefts were perpetrated according to this scheme, the same way each time, and only days apart. It does not matter that "there were likely days that Ms. Lopez did not work" or that "[t]here were also likely days when Ms. Lopez was working where Ms. Rodriguez did not visit Walmart." (Pet. Br. 31.) Over the extended period of days including those when Lopez was working and Rodriguez did visit Walmart, they stole merchandise according to the same course of conduct; they therefore committed a continuing offense.

Lopez and Rodriguez make no real argument that these retail thefts were not a continuous event and instead rely on the fact that they were committed on seven separate days. (Pet. Br. 30–31.) That, though, is an argument that the crimes were not committed at substantially the same time, albeit a misplaced one.

Lopez and Rodriguez's citations to *State v. Stevens*, 123 Wis. 2d 303, 322, 367 N.W.2d 788 (1985), and *State v. Tappa*, 127 Wis. 2d 155, 170, 378 N.W.2d 883 (1985), are also misplaced. (Pet. Br. 31.) Neither case dealt with duplicity challenges.

In *Stevens*, the defendant alleged that he was convicted of both a greater offense and a lesser included offense of the same crime. *Stevens*, 123 Wis. 2d at 321–323. That is a multiplicity concern, not a duplicity one. *Tappa* also dealt with a multiplicity challenge. There the State charged the defendant with two counts of violating Wis. Stat. § 943.20(1)(a) for concealing and for transferring the same property. *Tappa*, 127 Wis. 2d at 160–61.

Multiplicity is charging a single offense in more than one count, if the Legislature did not intend multiple punishments. *State v. Ziegler*, 2012 WI 73, ¶¶ 59–63, 342 Wis. 2d 256, 816 N.W.2d 238. It is only when considering whether the offenses are identical in fact under the *multiplicity* test that this Court asks whether the offenses are "separated in time or are significantly different in nature." (Pet. Br. 30); *Ziegler*, 342 Wis. 2d 256, ¶ 60; *Stevens*, 123 Wis. 2d at 322; *Tappa*, 127 Wis. 2d at 161–63. But this test is irrelevant for a duplicity challenge. When duplicity is at issue, the State has charged multiple acts as a single continuous offense—the acts are always different in fact if duplicity is at issue. *See Lomagro*, 113 Wis. 2d at 589. Simply put, Lopez and Rodriguez rely on the wrong principle and the wrong test for their claim that their conduct cannot be a continuous transaction because it involved separate acts on different days. Therefore, their argument must fail.

Further, *State v. Spraggin*, 71 Wis. 2d 604, 239 N.W.2d 297 (1976), on which Lopez and Rodriguez principally rely, does not assist them. (Pet. Br. 31.) The question there was whether two counts of receiving stolen

property for buying a stolen TV on one occasion and two stolen guns on another could properly be charged as a single felony under a conspiracy theory of liability. *Spraggin*, 71 Wis. 2d at 614–15. This Court held that it could not, but there was never any allegation that the defendant received the two items of stolen property as part of an ongoing transaction or continuous offense. *Id.* This result makes sense: a person who simply buys something from a thief when an opportunity arises is not part of a continuing transaction or ongoing deceptive scheme.

But *Spraggin* has no bearing on this case. Unlike in *Spraggin*, Lopez and Rodriguez were not charged with receiving stolen property, they were not charged with conspiracy, and the evidence showed that they were indeed engaged in a continuing offense of stealing merchandise together according to their deceptive scheme. *Spraggin* is inapposite here.

Rather, the question is whether combining the offenses would violate any of the principles against duplicity listed in *Lomagro*, and a jury instruction could not cure the violation. *Lomagro*, 113 Wis. 2d at 589. And under the correct analysis, the complaint is not duplicitous.

The complaint alleged very clearly the dates on which the seven acts occurred, and the amount the State was alleging the two stole on each date. (R. 2:6.) There is no possibility the complaint insufficiently informed Lopez and Rodriguez of the basis for the charge. *Lomagro*, 113 Wis. 2d at 587.

There is no danger that Lopez and Rodriguez could be subject to double jeopardy. There are "three interests that are protected by the double jeopardy provision: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the

same offense after conviction. And it protects against multiple punishments for the same offense." *Tappa*, 127 Wis. 2d at 162 (citation omitted). The dates alleged in the complaint set clear limits on what acts were included. (R. 2:6.) The State could not hereafter charge Lopez and Rodriguez again for one of these thefts after either conviction or acquittal. Since the State has charged them with only one crime, there is no possibility they will face multiple punishments for a single offense.

And the question in this case is simple: did Lopez and Rodriguez steal more than $500 worth of merchandise from Walmart between January 10 and January 25? There is no question that they did: all seven thefts were caught on surveillance video with such clarity that Walmart was able to detail to the penny the amount of each theft and the specific day it occurred. (R. 2:6.) Thus, there is no suggestion that any prejudice or confusion will arise from evidentiary rulings, that Lopez and Rodriguez risk being inappropriately sentenced, or that there is any risk of uncertainty about a unanimous verdict. And even if any of these risks were present, the simplicity of this case ensures that they could be cured by a jury instruction.

Lopez and Rodriguez claim that this charge implicates "issues with jury unanimity," but they again fail to explain how or why there would be a jury unanimity problem on the facts *of this case*. (Pet. Br. 33–35.) They instead rely on a hypothetical, and multiple rhetorical questions, and none of them are remotely close to these facts—so, their only argument is that in a different case there could be jury unanimity problems. (Pet. Br. 33–34.) But that says nothing about why there would be a jury unanimity problem in this case.

Nor do Lopez and Rodriguez attempt to explain why any unanimity issue could not be cured by a jury instruction

informing the jury that in order to find the defendants guilty, they must unanimously agree that Lopez and Rodriguez stole merchandise valuing more than $500 between January 10 and January 25. (Pet. Br. 33–34.) That alone means Lopez and Rodriguez's jury unanimity argument must fail. *Lomagro*, 113 Wis. 2d at 589.

Finally, Lopez and Rodriguez argue that statutes like Wis. Stat. § 971.36 would not be necessary if the State had discretion to charge a series of events like this as a single crime.[11] (Pet. Br. 35–36.) But they have overlooked the major difference between when the State has inherent prosecutorial discretion to charge multiple acts as a single offense and when it needs statutory authority to do so: the time frame.

In the absence of 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. *Lomagro*, 113 Wis. 2d at 587–88. 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 no matter when the acts were committed. *See* Wis. Stat. § 971.36(3) (allowing multiple thefts to be prosecuted as a single crime if any of the conditions in subsections (a) through (c) are met regardless of the time frame over which the separate thefts took place.)

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[11] Lopez and Rodriguez seem to argue that the State has no discretionary aggregation authority at all. (Pet. Br. 35.) But as *Lomagro* discusses, this Court has recognized the State's authority to charge multiple acts committed by the same person at substantially the same time in a single count for over 100 years. *Lomagro*, 113 Wis. 2d at 587.

The State properly exercised its discretion to determine the unit of prosecution in this case. These seven thefts were committed by the same parties against the same victim at substantially the same time as part of a continuing transaction. The State did not need statutory authorization to properly join these offenses into a single charge.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 28th day of June 2019.

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 10,900 words.

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

I hereby certify that:

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Dated this 28th day of June, 2019.

_____
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