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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. The plain language of the statute is clear, Wis. Stat. § 971.36 applies to Wis. Stat. § 943.20.

To reiterate, theft means theft. Wis. Stat. § 971.36 says "any *theft* proceeding," and Wis. Stat. § 943.20 delineates fives modes of *theft*. The statute could not be any clearer. This court held in ***Kalal*** that "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel.* ***Kalal v. Circuit Court for Dane County,*** 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110, quoting ***Seider v. O'Connell,*** 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659; *see also* ***State v. Setagord,*** 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997); ***State v. Williams,***198 Wis. 2d 516, 525, 544 N.W.2d 406 (1996); ***State v. Martin,*** 162 Wis. 2d 883, 893–94, 470 N.W.2d 900 (1991). "Statutory language is given its common, ordinary, and accepted meaning." *Id.*, quoting ***Bruno v. Milwaukee County,*** 2003 WI 28, ¶¶8, 20, 260 Wis. 2d 633, 660 N.W.2d 656; *see also* Wis. Stat. § 990.01(1).

It is true that "statutory language is interpreted in the context in which it is used; not 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***, 2004 WI 58, ¶46. What the state

attempts to do, however, is manipulate the statute in order to give the plain meaning of theft an absurdly broad application. The state argues that absent from Wis. Stat. § 971.36 is any restrictive definition for the word "theft." (State's brief at 12). But, the state's argument fails to address that Wis. Stat. § 971.36 does not *include* any language regarding its application to other, newer statutes that are theft-like.

Additionally, the legislature did not need to include Wis. Stat. § 943.20 in the text of Wis. Stat. § 971.36, because it was perfectly clear that theft means theft. The state focuses on the word *any* in "in any criminal pleading for theft," and completely misses the fact that any criminal pleading for theft plainly refers to the five modes of theft delineated in Wis. Stat. § 943.20. To read the statute more broadly would be absurd.

The state indicates that 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 as theft. (State's brief at 13). This statement ignores the requirement of this court to read the plain meaning of the text and to "presume that a legislature says in a statute what it means and means in the statute what is says there." ***Conneticut Nat'l Bank v. Germain,*** 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992*).; see also* ***Hartford Underwriters Ins. v. Union Planters Bank,*** 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000).

Theft means theft. Asking this court to read in extra words such as "retail" or "of farm raised fish" is inconsistent with this court's precedent.

II. The state's argument regarding statutory context and legislative history are misplaced.

The court need not go further than the plain meaning of the statute. However, if the court determines that the statute is ambiguous, then extrinsic evidence demonstrates what the legislature meant, and the state's arguments do not support its position.

A. The state's legislative history argument fails.

The state argues that the legislature hasn't excluded anything from the statute after passage of other Wis. Stat. Ch. 943 crimes. However, the legislature has not included any of the crimes, either. In fact, while the legislature added additional, new crimes to Ch. 943, Wis. Stat. § 971.36 has stayed the same. There was no addition to include any other newly created statutes that are 'theft-like.' Thus, the only reasonable interpretation of the unchanging nature of Wis. Stat. § 971.36 is that it is meant, and has always meant, to cover only Wis. Stat. § 943.20, as theft refers to theft. The state's recitation of the evolution of Wis. Stat. § 971.36 simply provides additional support that, if the legislature meant to expand the meaning of theft in Wis. Stat. § 971.36 to

cover any and all theft-like proceedings in Wis. Stat. Ch. 943, it would have explicitly done so.

B. The state's argument regarding other aggregation statutes also fails.

Wisconsin Statute § 971.365 covers certain controlled substances. While it is true that those substances are defined by a statutory number instead of name, this makes sense—the legislature did not feel the need to include Wis. Stat. § 943.20 in Wis. Stat. § 971.36 because theft means theft, and no further explanation was required—the application was simple and clear.

Furthermore, the state's reliance on other aggregating statutes such as Wis. Stats. §§ 971.366 and 971.367 directly contradicts its position that Wis. Stat. § 971.36 "applies to all types of theft." (State's brief at 25). Use of another person's identifying information is a 'theft-like' offense. Basically, it criminalizes the use of another's information to obtain anything of value. *See* Wis. Stat. § 943.201(2). But what purpose, then, would Wis. Stat. § 971.366 serve if Wis. Stat. § 971.36 applies to "all types of theft"? The same can be said for Wis. Stat. § 971.367, which discusses aggregation of cases of false statements to financial institutions. Wisconsin Statute § 946.79, in short, criminalizes the falsification of one's identity during a financial transaction with a financial institution. *See* Wis. Stat. § 946.79. This is also theft-like, in that it involves acts that deprive a person or entity of

some good or service without consent. If Wis. Stat. § 971.36 is to apply broadly to all theft-like offenses, then the §§ 971.366 and 971.367 are meaningless. The state does not and cannot provide an explanation for the problematic interpretation and application of Wis. Stat. § 971.36 when read in conjunction with Wis. Stat. § 971.366 and Wis. Stat. § 971.367.

C. The state's argument that other aggregation statutes are irrelevant fails.

As the state cites, "[s]tatutes 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. The state argues that because the Wis. Stats. §§ 943.24 and 943.41 are not in the same chapter as Wis. Stat. § 971.36 or do not reference each other that the argument is irrelevant. (State's brief at 18). However, what the state seemingly fails to address is the use of similar terms and functions.

The state fails to address the similarities in language between the statutes. Wisconsin Statute § 943.24 states "whoever within a 90-day period issues more than one check or other order amounting in the *aggregate* to more than $2,500." Wisconsin Statute § 943.41 states "if the value of 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 state offers no explanation for the

similarities between these two statutes and language in Wis. Stat. § 971.36 regarding prosecution of multiple thefts as a single crime. The state provides no explanation for why these statutes, that contain similar references and language, do not serve the same purpose, although found in different places.

The state doesn't want the other aggregation statutes to be meaningful, because it shows that there is a fundamental flaw in their application of Wis. Stat. § 971.36 to anything other than Wis. Stat. § 943.20.

III. The state's interpretation and application of Wis. Stat. § 971.36 is overbroad leads to absurd results.

A. The state's argument that retail theft and theft "match exactly" and are both covered under § 971.36 is incorrect.

The state argues that retail theft is a kind of theft encompassed by the words "any criminal pleading for theft" because the word "theft" is used 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. § 943.29(1)(a)." (State's brief at 12-13). While the statutory layout is the same for both crimes, i.e. it lays out the definitions, the substantive crime, and the penalties, retail theft

contains elements that theft does not.[1] Specifically, theft does not require that the state prove that property was held for resale by the merchant and that the defendant knew that the property was merchandise held for resale by the merchant. For the state to suggest that the crimes are exactly the same is disingenuous. And, in fact, the state concedes that there are additional modes of retail theft not contemplated in the Wis. Stat. § 943.20. (State's brief at 28).

B. The state's absurd results argument fails.

The state argues that Wis. Stat. § 971.36 must apply broadly, otherwise offenders could steal $499 worth of merchandise from the same store everyday but only be charged with misdemeanors. (State's brief at 26). This is exactly right. The state seems to be concerned with an inability to manipulate the law in order to charge someone with a felony when they have only committed misdemeanors under the statute. This is not a legitimate concern, as these crimes typically do not involve savvy criminals, bringing a calculator to total up merchandise in order to avoid going over the $500 threshold, coming back without being detected or caught, day after day, to the same retailer, as part of some big scheme.

If the state feels it could charge a defendant under Wis. Stat. § 943.20 for theft in this situation, it certainly would have the option to do so. However,

[1] Notably, this same statutory layout is common, and can be found even in statutes pertaining to homicide.

there would be clear proof issues, as theft is a different crime than retail theft, requiring different elements to be proven before findings of guilt can be entered. That problem, however, is not a result for this court to be concerned with, and, rather, is a simple application of the law. It may not be one that the state likes, but the state cannot have it both ways.

C. The state fails to provide support for some assertions.

It should be noted that while the state asserted that Lopez's reliance on the jury instructions is 'inapposite,' it does not provide any support or argument to support the premise, and therefore is a concession by the state. The state completely ignores the jury instructions, as it directly contradicts its position. (State's brief at 27-28).

The rule of lenity does apply. The state asserts that Lopez has made no argument regarding the ambiguity of the statute and therefore cannot assert this position. (State's brief at 31). This is incorrect. Lopez has consistently argued that this court need not find the statute ambiguous, and therefore, the rule of lenity need not apply. However, Lopez, as is consistent with many arguments this court has heard, argues without conceding, that if this court determines that the statute is ambiguous, then extrinsic evidence still supports Lopez's position. In that case, the rule of lenity would apply.

The state also asserts that the rule does not apply as there is no grievous ambiguity. (State's brief at 31). This position completely discounts the difference in what would be a misdemeanor conviction versus a felony conviction. To suggest that the collateral consequences of a felony conviction, issues with housing, inability to own a firearm, or vote, are not grievous, as compared to misdemeanor consequences ignores the real world.

IV. The state does not have the inherent authority to charge individual retail thefts as one theft.

The state cannot use its inherent authority to charge these seven retail thefts as a single felony. Lopez agrees that the state has discretion to determine the unit of prosecution. ***State v. Jacobsen,*** 2014 WI App 13, ¶18, 352 Wis. 2d 409, 842 N.W.2d 365. (State's brief at 32). However, ***Jacobsen*** does not give the state unfettered discretion. Pursuant to ***State v. Lomagro***, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983), the state can only charge multiple acts as one criminal offense if the incidents occur at substantially the same time and are part of a continuing transaction. *Id.* Neither of those criteria are met in this case.

A. The criteria in ***Jacobsen*** has not been met.

As to timing, the state's only support for their position relies on inapplicable cases. The state asserts that the two-week span in this case is shorter than the time spans found permissible by the court in

other cases of sexual assault. *See* ***State v. Miller***, 2002 WI App 197, 257 Wis. 2d 124, 650 N.W.2d 850; ***State v. George,*** 69 Wis. 2d 92, 100, 230 N.W.2d 253 (1975); ***State v. Molitor***, 210 Wis. 2d 415, 421-23, 565 N.W.2d 248 (Ct. App. 1997). It makes sense that sexual assaults may be grouped because it is often hard for victims to pinpoint exact days and there is often delayed reporting. The same is not true of retail theft, where there is no delay in reporting or question as to when they occurred. Furthermore, sexual assault statutes are different from retail theft, which sets penalties based on the value of merchandise stolen. The structure of the retail theft statute itself indicates the legislature intended for charges to be based on the values of items taken on specific dates. Finally, in ***Molitor***, the court pointed out the language of Wis. Stat. § 948.025 itself showed that the legislature intended to create a single crime for repeated sexual assaults. 210 Wis. 2d 415, 421. The same is not true of the retail theft statute, which is void of language regarding grouping separate acts.

B. This case implicates duplicity, not multiplicity.

The state argues citation of ***State v. Tappa,*** 127 Wis. 2d 155, 378 N.W.2d 883 (1985) and ***State v. Stevens,*** 123 Wis. 2d 303, 367 N.W.2d 788 (1985), are inapplicable because those cases did not deal with duplicity concerns. (State's brief at 35). However, the state seems to miss the point of Lopez's argument. Lopez does not rely on these cases to assert that her case involves multiplicity.

Tappa demonstrates how this court has determined if a defendant has committed "separate volitional acts." 127 Wis. 2d 155, 170. This inquiry is relevant to the determination of whether or not the retail thefts in this case were committed at substantially the same time and related to one continued transaction, as to satisfy the test in ***Lomagro***. The seven misdemeanor retail thefts committed here are separate acts, given that there was "ample time for the Defendant to reflect on [her] actions and recommit [herself] to the criminal enterprise." *Id.* at 170.

Similarly, Ms. Lopez cites ***Stevens*** to illustrate how the separation of offenses by a significant period of time is relevant to the determination of whether offenses are different in fact. Again, in this case, the discussion in ***Stevens*** provides relevant guidance for this court on how to determine whether the seven, separate, misdemeanor instances of retail theft are not part of a continued transaction.

The state also argues that reliance on ***State v. Spraggin,*** 71 Wis. 2d 604, 239 N.W.2d 297 (1976) does not assist. (State's brief at 35-36). This is simply wrong. While it is true that the charges at issue in ***Spraggin*** involved conspiracy to receiving stolen property, the state's attempt to charge conspiracy of different acts of receiving stolen property as one felony act because of the aggregate felony value of the property was forbidden. *Id*. In fact, the court discusses a similar issue as is presented here in its analysis*:* "[a] conspiracy of successful nickel-and-

dime shoplifters still are criminally responsible for only misdemeanors, not felony theft." *Id*. at 615.

The state misses the relevance of these cases and therefore failed to address the actual substance of the arguments.

C. This case deals with problems surrounding jury unanimity, not double jeopardy.

The state seems to argue a red herring to this court regarding double jeopardy. (State's brief at 36-37). As discussed previously, the state's charging discretion is limited by the purposes of the prohibition against duplicity. (*See* Brief in Chief at 32). Apparently the state thinks that Lopez has asserted a claim of double jeopardy, which she has not. Instead, Lopez argues that there is a problem with guaranteeing jury unanimity.

The state further argues that there are no concerns with guaranteeing jury unanimity in this case. However, while Lopez's case may not yet have specific implications regarding jury unanimity, it might, depending how the case was presented to a jury. Ultimately, this court can and must look to the broader implications of this decision and how it would affect other, similar cases. This court must protect jury trials as the fundamental basis for our justice system, requiring that procedure and process is fair and that juries cannot and do not convict someone improperly.

The state's suggestion that unanimity problems could be cured by a jury instruction is not sufficient. The hypothetical presented by Lopez, which is completely appropriate when assessing problems with how a case will have a broader impact, demonstrates that the potential problems with a jury verdict may not become apparent until after the verdict is read, or when polling the jury, or until juror questionnaires are sent out after trial. A jury instruction is not sufficient to cure issues unknown to the parties before deliberations. Endorsing the state's argument would suggest that this court is content with the inevitable mistrials and retrials that would result from jury unanimity issues.

CONCLUSION

The charges against Lopez are duplicitous and implicate jury unanimity. The state does not have the authority to charge Lopez with felony theft, and therefore this court should reverse the court of appeals.

Dated this 15th day of July, 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 2,991 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 15th day of July, 2019.

Signed:

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