STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

AUTUMN MARIE LOVE LOPEZ

and

AMY J. RODRIGUEZ,

Defendants-Respondents.

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

BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT

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ISSUES PRESENTED

The defendants committed seven separate thefts from Walmart over a two-week period. Each individual theft was for merchandise valued between $126 and $314. The total amount stolen over the course of the thefts was $1452.12. Did the complaint describing those seven thefts over two weeks sufficiently show probable cause that Love Lopez and Rodriguez committed a single felony Retail theft[1] of merchandise over $500 but less than $5000 under either of two legal theories: (1) because the State has authority to aggregate multiple thefts including Retail thefts into a single charge pursuant to Wis. Stat. § 971.36; or (2), because the State has the authority to determine the unit of prosecution when individual acts that could be charged separately are part of a single continuing scheme?

The circuit court dismissed the complaint. It determined that even though the seven thefts could be considered a continuing event, Wis. Stat. § 971.36 did not apply, and thus, the seven separate thefts could not be charged as one crime. The circuit court did not consider prosecutorial authority to determine the unit of prosecution as a separate basis for the complaint's sufficiency.

This Court should reverse the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes the briefs will adequately address the issues and does not request oral argument. Publication

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[1] In the interest of clarity, when discussing specifically the statutorily-defined crimes of "Theft" pursuant to Wis. Stat. § 943.20 and "Retail theft" pursuant to Wis. Stat. § 943.50 the State has followed the capitalization scheme in the statutes.

may be warranted pursuant to Wis. Stat. § (Rule) 809.23(1)(a)2. and (1)(a)5., as there are no Wisconsin cases that directly address the issue, and it is likely to recur.

INTRODUCTION

Autumn Love Lopez and Amy Rodriguez were caught on a surveillance camera scamming Walmart out of merchandise by manipulating Rodriguez's transactions at the self-checkout register. This happened seven times in two weeks. Each transaction resulted in a theft of merchandise valued between $126 and $314 dollars. At the end of the two-week period, they had stolen merchandise with a total value of $1452.12.

The State charged Love Lopez and Rodriguez both with a single felony count of Retail theft of merchandise valued at more than $500. They objected, claiming that Wis. Stat. § 971.36, which allows multiple thefts to be charged as a single offense, did not apply to "Retail theft." They also claimed that the complaint was duplicitous because the seven transactions over two weeks were not committed at "substantially the same time." The circuit court determined that the two-week period was not too long for the thefts to be considered a continuing transaction, but dismissed the complaint because it believed that Wis. Stat. § 971.36 applied only to charges for "Theft" under Wis. Stat. § 943.20.

This Court should reverse the circuit court. Section 971.36 applies to "any criminal pleading for theft." "Retail theft" is a kind of theft. The statute does not limit itself to "any criminal pleading for Theft under Wis. Stat. § 943.20." Moreover, the other aggregation statutes surrounding Wis. Stat. § 971.36 do contain language limiting them to pleadings for specific statutory crimes. If the Legislature meant for Wis. Stat. § 971.36 to apply only to Wis. Stat. § 943.20, it would have included that limitation in the statute.

And even without Wis. Stat. § 971.36, the State had the authority to charge Love Lopez and Rodriguez with a single felony instead of seven misdemeanors. The State has discretion to determine the unit of prosecution when a series of criminal acts are committed by the same parties at substantially the same time as part of a single continuing offense. All of those elements are met here. The circuit court improperly dismissed the complaint in this case.

STATUTES AT ISSUE

The statutes at issue, as relevant here,[2] are as follows:

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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[2] Due to their length, the State has omitted portions of Wis. Stat. §§ 943.20 and 943.50 that are not germane to the issues on appeal.

(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.

943.20 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. 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 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. 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.

. . . .

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.

STATEMENT OF THE CASE

In February 2017, Officer Chris Hammel of the Monroe Police Department responded to Walmart to investigate a report of theft by an employee and an accomplice. (R. 2:1–3, A-App. 101–03.)[3] When he arrived, the Walmart Asset Protection Manager told him that she had been investigating several thefts of merchandise committed during a two-week period in January by Love Lopez and an unidentified woman. (R. 2:5, A-App. 105.)

Love Lopez frequently manned the self-checkout registers. (*See* R. 2:5–6, A-App. 105–06.) Surveillance videos showed seven occasions where a woman, later identified as Rodriguez, approached a self-checkout register with a cart full of merchandise and was assisted by Love Lopez. (R. 2:5, A-App. 105.) Love Lopez then checked Rodriguez out, but would scan only food items. (R. 2:5, A-App. 105.) Love 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, A-App. 105.) 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;

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[3] Though these cases have been consolidated, there are two different records on appeal. The record for Love Lopez's case is 2017AP913-CR, and the record for Rodriguez's case is 2017AP914-CR. To avoid confusion, the State will refer to the record for 2017AP913-CR unless otherwise indicated. Citations to documents found in the record for 2017AP914-CR will be indicated by the designation (R2).

5. January 19, 2017, $132.62;

6. January 20, 2017: $181.28;

7. January 25, 2017: $126.33.

(R. 2:6, A-App. 106.) The merchandise taken included clothes, housewares, bedding, baby items, detergent, movies, home décor, and other items. (R. 2:5, A-App. 105.) The total value stolen was $1452.12.[4]

When confronted, Love 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, A-App. 105–06.) Love Lopez explained that the woman on the video was the same person each time, and Love Lopez said she felt she had to help her steal because the woman had something on Love Lopez and her family. (R. 2:5–6, A-App. 105–06.) Hammel arrested Love Lopez. (R. 2:6, A-App. 106.) A few days later, the asset protection manager saw the woman from the surveillance videos at the customer service desk. (R. 2:8, A-App. 108.) The customer service employees said that the woman's name was Amy Rodriguez. (R. 2:8, A-App. 108.) The asset protection manager called the police. (R. 2:8, A-App. 108.) Police found Rodriguez at her home and arrested her. (R. 2:9, A-App. 109.) After waiving her constitutional rights, Rodriguez told police that her boyfriend and Love Lopez's husband are cousins. (R. 2:9, A-App. 109.) Rodriguez said she frequently used the self-checkout registers and needs assistance checking out due to carpal tunnel syndrome. (R. 2:9, A-App.

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[4] 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.

109.) She claimed Love Lopez was the only employee willing to help her, and she denied taking anything without paying. (R. 2:9, A-App. 109.)

The State charged Love 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, A-App. 101.) 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, A-App. 111.)

Love Lopez acknowledged that multiple thefts can be charged as one continuing act pursuant to Wis. Stat. § 971.36(3)(a) if "[t]he 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." (R. 6:1, A-App. 111 (quoting Wis. Stat. § 971.36(3)(a)).) She claimed, however, that Wis. Stat. § 971.36(3)(a) was applicable only to charges of Theft pursuant to Wis. Stat. § 943.20. (R. 6:1, A-App. 111.) She maintained that section 973.36 does not apply to Retail Theft. (R. 6:1, A-App. 111.) Instead, 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, A-App. 112.) What the State could not do, she claimed, was aggregate the seven separate instances and charge her with a single Class I Felony count of Retail Theft pursuant to Wis. Stat. § 943.50(4)(bf). (R. 6:2, A-App. 112.)

Rodriguez argued that the complaint "aggregates these offenses without clear legal authority." (R2. 7:1.) She claimed that therefore the charge was duplicitous and

violated her rights to due process and protection from double jeopardy.[5] (R2. 7:1.)

The State disagreed with both defendants' contentions. The State pointed out that the plain language of Wis. Stat. § 971.36 does not limit it to any specific statutory type of theft. It contrasted this to several nearby aggregation statutes that limited the types of crimes that could be aggregated. (R. 8:1, A-App. 118.) The State also noted that neither Rodriguez's brief nor the cases she cited addressed section 971.36 or theft matters at all. The State argued that the cases Rodriguez cited, in particular *State v. Lomagro*, 113 Wis. 2d 582, 335 N.W.2d 583 (1983), actually established an alternative ground for the State to aggregate these thefts: the State's prosecutorial discretion to charge separately chargeable offenses as a single crime if they were committed by the same person at substantially the same time as part of a single continuing scheme or transaction. (*See* R. 8:2, A-App. 119 (quoting *Lomagro*, 113 Wis. 2d at 589).) The State argued that, consequently, the defendants' motions should be denied based either on the plain language of Wis. Stat. § 971.36 or the State's inherent authority to charge these thefts as one continuing transaction. (R. 8:2, A-App. 119.)

The circuit court granted the defendants' motions to dismiss the complaints but did so without prejudice. (R. 21:21, A-App. 147.) It determined that the two-week period over which the thefts occurred was not too long for the thefts to be charged as a continuing offense. (R. 21:20, A-App. 146.) But the court observed that in its experience the Legislature "put everything in but the kitchen sink, if they wanted it to apply to everything." (R. 21:20, A-App. 146.)

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[5] At the subsequent hearing on the motions, Rodriguez also argued that Wis. Stat. § 971.36 was ambiguous and therefore the rule of lenity should apply. (R. 21:19, A-App. 145.)

Ergo, because the statute did not specifically mention Retail theft, the court found that the reference to "thefts" in Wis. Stat. § 971.36 was intended to apply to only the crime of Theft pursuant to Wis. Stat. § 943.20. (R. 21:20–21, A-App. 146–47.) The State appeals.

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).

Whether the complaint is sufficient here depends on whether Wis. Stat. § 971.36 applies to the crime of Retail theft; this question requires this Court to interpret Wis. Stat. § 971.36. 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.

Alternatively, the State alleges it had discretion to charge this series of acts as a single continuous event even without the statute, which requires this Court to evaluate whether doing so would violate the constitutional prohibition against duplicitous charges. Whether a complaint is duplicitous is a question of law this Court reviews de novo. *See State v. Fawcett*, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988).

ARGUMENT

The State had the authority to charge Love Lopez and Rodriguez with a single count of felony Retail theft for the seven separate transactions either by virtue of Wis. Stat. § 971.36, which allows aggregation of thefts, or by virtue of the State's authority to determine the unit of prosecution for acts committed as part of a continuing scheme.

A. Controlling legal principles

"A complaint establishes probable cause if it sets forth facts sufficient to permit an impartial judicial officer 'to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.'" *State v. Chinavare*, 185 Wis. 2d 528, 533, 518 N.W.2d 772 (Ct. App. 1994) (citation omitted). "When the sufficiency of a criminal complaint is challenged, the alleged facts in the complaint must be sufficient to establish probable cause, not in a hypertechnical sense, but in a minimally adequate way through a common sense evaluation by a neutral magistrate making a judgment that a crime has been committed." *State v. Dekker*, 112 Wis. 2d 304, 310, 332 N.W.2d 816 (Ct. App. 1983).

Here, the complaint had to allege sufficient facts to establish probable cause that: (1) Lopez and Rodriguez intentionally transferred merchandise; (2) the merchandise was held for resale by a merchant; (3) the defendants knew the property was merchandise held for resale by a merchant; (4) they took the property without the merchant's consent; (5) the defendants knew the merchant did not consent; and (6) they intended to deprive the merchant permanently of possession or the full purchase price of the merchandise. *See* Wis JI—Criminal 1498. If those elements are met and the

value of the merchandise stolen was more than $500, the offense is a Class I felony. *Id.* The circuit court in this case determined that the complaint against Love Lopez and Rodriguez did not establish probable cause that the two committed felony Retail theft because no single theft of the seven was for merchandise with a total value exceeding $500.

The ultimate question in this case, then, is whether the seven separate thefts of merchandise valued between $126 and $314 committed over a two-week period can be charged as a single offense of Retail theft of merchandise totaling $1452.12. The State asserts that this series of thefts can be charged as a single offense under either of two theories: (1) the Legislature's express authorization of the aggregation of multiple thefts into a single charge pursuant to Wis. Stat. § 971.36; or (2) the State's authority to join criminal acts that can be characterized as a continuing offense into a single unit of prosecution.

B. The plain language and context of Wis. Stat. § 971.36 allow a series of any type of thefts to be charged as a single offense if the statutory criteria are met; the statute is not limited to violations of Wis. Stat. § 943.20.

1. Legal principles of statutory interpretation

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. The judicial branch yields great deference to the law as enacted by the Legislature. *Id.* Submission to the plain meaning of a statute requires that the process of statutory interpretation begin with the language of the

statute, which is given "its common, ordinary, and accepted meaning." *Id.* ¶ 45.

"[S]tatutory 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.* ¶ 46. Furthermore, the language of a statute is read in a manner that gives reasonable effect to each word in order to avoid surplusage. *Id.* If the language of a statute is clear and unambiguous, the statute is applied according to its plain meaning and the inquiry ceases. *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.* However, legislative history can be "consulted to confirm or verify a plain-meaning interpretation." *Id.* ¶ 51.

Here, the plain language and context of Wis. Stat. § 971.36, the surrounding aggregation statutes, and the various theft statutes show unambiguously that the Legislature intended Wis. Stat. § 971.36 to apply to criminal pleadings for any type of theft, not only to "Theft" under Wis. Stat. § 943.20.

2. The plain language of the theft statutes and Wis. Stat. § 971.36 show that the Legislature did not intend to limit Wis. Stat. § 971.36 to pleadings alleging theft under Wis. Stat. § 943.20.

There are many different types of theft, as the statutory scheme for Wis. Stat. ch. 943 shows.[6] The

[6] *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

language of these statutes shows that the Legislature created them to criminalize acts that would not otherwise neatly fit into the definition of "Theft" under Wis. Stat. § 943.20, not to exempt those acts from all the statutes and case law defining theft. For example, the Legislature described several modes of commission for Retail theft using the exact language used to describe theft pursuant to Wis. Stat. § 943.20(1)(a).[7] But the Retail theft statute provides that a person can also 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). That particular act would not be chargeable as "Theft" under Wis. Stat. § 943.20 because the person did not take and carry away, use, transfer, conceal, or retain possession of moveable property of another, convert money of another, take property out of the possession of a pledgee, obtain title to property of another, or intentionally fail to

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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."

[7] *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).

return personal property of another. *See* Wis. Stat. § 943.20(1).

In other words, the purpose of having separate statutes for different types of thefts is to criminalize the broad array of acts that deprive someone of payment or property that may not fit into the broader Theft statute. It also prevents confusion, debate, and inconsistent application of what constitutes "moveable property" or "personal property" under Wis. Stat. § 943.20. The creation of different types of theft also allows the Legislature to provide different penalties for thefts that it deems more egregious than others.[8] It further allows the Legislature to designate different penalties for types of thefts where the statutory penalties for Theft under Wis. Stat. § 943.20 are unlikely to serve as a deterrent.[9]

But that does not mean that the various acts described in theft statutes other than "Theft" under Wis. Stat. § 943.20 are not also "thefts" as contemplated by Wis. Stat. § 971.36. To the contrary, an analysis of the structure of the theft

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[8] *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).

[9] For example, a person would have to steal more than $2500 worth of Retail merchandise for the offense to be anything other than a Class A misdemeanor if the Legislature did not designate Retail theft as a separate type of theft. The threshold for felony Retail theft used to be $2500, *see* Memorandum from the Wisconsin Legislative Council on 2011 Wis. Act 174 (April 10, 2012), but that amount is unlikely to be reached in most Retail theft cases. Average retailers rarely carry such high-ticket items, and the items they do carry are unlikely to reach that amount even in aggregate. Consequently, the Legislature lowered the monetary threshold for reaching a felony Retail theft to $500. *Id.*

statutes and the language of Wis. Stat. § 971.36 shows otherwise.

First, as explained, the Legislature described possible modes of commission of theft under Wis. Stat. § 943.20 and Retail theft under section 943.50 the same way. It does not make sense to do this if "Retail theft" is not a type of theft.

Second, 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 shows that, just like "Theft" under Wis. Stat. § 943.20, 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, 411–12, 424 N.W.2d 672 (Ct. App. 1988) ("Use of a progressive penalty structure must, within reason, contemplate a continuing crime.").

And the language of Wis. Stat. § 971.36 itself is extremely broad: it says that in *any* criminal pleading for theft it is sufficient to describe the property stolen, name the owner, and state the value of the property taken. Wis. Stat. § 971.36(1). It also states that in any case involving more than one theft "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). The ordinary dictionary meaning of "any" is "one or some indiscriminately of whatever kind." *Any*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/any (last visited October 2, 2017). 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). It is illogical to conclude that the Legislature did not intend Retail theft to be considered a

theft when they both called the crime a theft and defined it the same way they defined the portion of "Theft" in Wis. Stat. § 943.20(1)(a) that would apply to stealing retail merchandise.[10] A criminal pleading for Retail theft is a kind of "criminal pleading for theft." Wis. Stat. § 971.36.

Consequently, 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." The circuit court's decision is contrary to the plain language of section 971.36.

3. The plain language of the other aggregation statutes surrounding Wis. Stat. § 971.36 show that the Legislature did not intend to limit Wis. Stat. § 971.36 to pleadings under Wis. Stat. § 943.20, and interpreting the statute in that manner would lead to an absurd result.

Apart from the plain language and context of the theft statutes, the plain language and context of the aggregation statutes surrounding Wis. Stat. § 971.36 also show that it was not intended to be limited to criminal pleadings under Wis. Stat. § 943.20. And though an argument could be made

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[10] The other methods of committing Theft under section 943.20 would not be applicable in a Retail theft context because they deal with theft by abusing a fiduciary type position, tricking a person out of title to property, or intentionally failing to return personal property. *See* Wis. Stat. § 943.20(1)(b)–(e). None of those situations would arise between a merchant and the public. Similarly, Retail theft includes four modes of commission by tampering with theft detection devices or absconding without paying for services that would not apply outside of retail circumstances. *See* Wis. Stat. §§ 943.50(1m)(f)–(g) and (1r).

that "any" in Wis. Stat. § 971.36 modifies only the phrase "criminal pleading" and not "for theft," adopting this interpretation of the statute would require this Court to violate two fundamental principles of statutory interpretation. It would require this Court to write words into the statute, and it would lead to an absurd result inconsistent with the statute's purpose.

The defendant's interpretation of Wis. Stat. § 971.36 requires this Court to write a limitation into the statute. But perhaps more telling than what Wis. Stat. § 971.36 says is what it does not say, particularly when read "in relation to the language of surrounding or closely-related statutes." *Kalal*, 271 Wis. 2d 633, ¶ 46. The other aggregation statutes surrounding Wis. Stat. § 971.36 all *do* 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.* Similar language is absent from Wis. Stat. § 971.36.

For example, Wis. Stat. § 971.366, "Use of another's personal identifying information: charges," states "[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," states, "[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."

But unlike the surrounding aggregation statutes, similar limiting language is absent from Wis. Stat. § 971.36, which simply says "[i]n any criminal pleading for theft." 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 the statutory crime of Theft pursuant to Wis. Stat. § 943.20. In fact, Wis. Stat. § 971.36 does not mention Wis. Stat. § 943.20 at all. If the Legislature meant to limit Wis. Stat. § 971.36's application to cases under section 943.20, it knew how to do so. It did not.

Of the surrounding aggregation statutes, Wis. Stat. § 971.365 is the most telling that the Legislature would have expressly limited § 971.36 to pleadings for Theft under section 943.20 if that was how the statute was meant to be construed. The Legislature has amended the very next statute in sequence to Wis. Stat. § 971.36 multiple times expressly to add or remove specific statutory sections to it. But it has made no attempt to add similar language to Wis. Stat. § 971.36. As relevant here, Wis. Stat. § 971.365, titled "Crimes involving certain controlled substances," currently states,

> **(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.

Wisconsin Stat. § 971.365 was created in 1985. *See* 1985 Wis. Act 328, § 22m. It has been amended eight times since then to change the statutory sections to which it applies.[11] This and the other aggregation statutes show that when the Legislature wants to limit these pleading statutes to a particular statutory section, it does so. That the Legislature has made no attempt to add or remove similar limiting language to § 971.36 is a strong indication that the statute is not limited to pleadings for violations of Wis. Stat. § 943.20 only, but rather applies to pleadings for of 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 the defendant's interpretation. This is something the Court cannot do. *See 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."); *Cf. In re Michael H.*, 2014 WI 127, ¶ 6, 359 Wis. 2d 272, 856 N.W.2d 603 (refusing to "write into the [involuntary commitment] statute" a requirement that a suicidal person articulate a plan of treatment before being committed for treatment). And as explained, it is also something the Legislature itself has declined to do even while repeatedly adding such language to the very next statutory section.

It is true that there is a specific statute called simply "Theft," and that it has different monetary gradation than "Retail theft." *Compare* Wis. Stat. §§ 943.20(1)(a)–(e) and

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[11] *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.

(3)(a)–(e) *with* Wis. Stat. §§ 943.50(1m)–(1r) and (4)–(4m). Those distinctions, however, do not support an interpretation limiting Wis. Stat. § 971.36 to charges of Theft under Wis. Stat. § 943.20. Interpreting the statute in this manner would lead to the type of absurd result seen here.

The plain language of Wis. Stat. § 971.36 shows that one of the statute's purposes is to prevent habitual offenders from escaping harsher penalties by stealing a series of small amounts instead of stealing all of the property or services at once. And allowing aggregation of multiple thefts into a single count also can be beneficial to the defendant because it allows prosecutors "to avoid unnecessarily cumulating offense categories and thereby cumulating punishments." *United States v. Tanner*, 471 F.2d 128, 138–39 (7th Cir. 1972). There is no logical reason that the Legislature would intend these results for people who commit multiple "Thefts" but not those who commit multiple "Retail thefts."

And 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 every case, because doing so would completely gut that penalty structure. If the defendants are correct that Wis. Stat. § 971.36 applies only to charges of Theft under Wis. Stat. § 943.20 and not Retail theft under Wis. Stat. § 943.50, an offender can be charged with felony Retail theft only if the merchandise stolen during any single incident meets the monetary threshold. By that logic, if an offender sneaks $358 worth of merchandise out of the back door of the same store every day for a week, the State could charge him only with seven Class A misdemeanors if it charged him with Retail theft. This would be so despite the fact that he stole $2506 worth of merchandise—well over the $500 felony threshold—

from the same merchant as part of a single intent and design because the amounts could not be aggregated.[12] But, illogically, if the State decided to charge him with Theft under Wis. Stat. § 943.20 instead, *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 an entire 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 the defendants' interpretation, the State could elect to charge the person with (1) 365 Class A misdemeanor Retail thefts under Wis. Stat. § 943.50, (2) 72 Class I felony Thefts under Wis. Stat. § 943.20(3)(bf), (3) 36 Class H felony Thefts under Wis. Stat. § 943.20(3)(bm), (4) 18 Class G felony Thefts under Wis. Stat. § 943.20(3)(c), or (5) one Class G felony Theft under Wis. Stat. § 943.20(3)(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 simply makes no sense, and it would render the progressive penalty structure for Retail theft—and in particular section 943.50(4)(c)—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

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[12] Though as the State will explain in Part C, 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.

according to the same design and plan 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 valued at more than $10,000. Barring a jewelry heist or similar act, a single episode of Retail theft is almost never going to exceed $10,000. 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, the defendants' interpretation of the statute is contrary to the common sense meaning of the statute and leads to an absurd result. This Court should therefore reject it.

4. The legislative history of Wis. Stat. § 971.36 confirms this plain language interpretation.

Wisconsin Stat. § 971.36 unambiguously applies to all types of thefts because there is no language limiting it to Theft under Wis. Stat. § 943.20 and an alternative construction would lead to an absurd result. Consequently, there is no need to consult the legislative history of Wis. Stat. § 971.36. *Kalal*, 271 Wis. 2d 633, ¶ 51. However, legislative history can be "consulted to confirm or verify a plain-meaning interpretation." *Id.* And here, though there is nothing in the legislative history that speaks directly to the issue, the prior versions of Wis. Stat. § 971.36 and how and when it has been changed confirms that it applies to all types of thefts.

The first version of this statute appears in the Wis. Rev. Stat. § 141.10 (1849). It originally 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 also 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 undertook an effort to clarify, modernize, and reorganize the statutes. *See* 1955 Wis. Act 660. 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,[13] what is now Wis. Stat. § 971.36 has remained untouched by the Legislature since it was simplified in 1955.

The evolution of this statute 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

[13] *See* 1993 Wis. Act 486, § 731.

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 wordier version of the statute referencing embezzlement, confidence games, false personation, and larceny was replaced simply with the generic reference to "thefts." 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 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. And the Legislature has left Wis. Stat. § 971.36 the same since 1955, even while adding types of "theft" to the statutes, and while amending the surrounding aggregation statutes to limit them to specific statutory sections as recently as 2003. *See* 2003 Wis. Act 49. In short, 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 including similar language in the surrounding statutes. That is a powerful statement that "thefts" in Wis. Stat. § 971.36 should not be construed as "Thefts under section 943.20 only."

The progressive penalty structure for Retail theft and the absence of language limiting Wis. Stat. § 971.36 to charges under Wis. Stat. § 943.20 indicate that Wis. Stat. § 971.36 was intended to apply, as it says, to pleadings for any type of theft.[14] The legislative history confirms that

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[14] However, as the State will show in Part C, the State did not need Wis. Stat. § 971.36 to apply to properly charge these acts as a single continuing event. The defendants' rule of lenity argument is therefore inapposite here. (*See* R. 21:19, A-App. 145.) The rule

plain language interpretation. The statute's purpose is not served by writing a limitation into Wis. Stat. § 971.36 that the Legislature itself removed and that produces an absurd result. This Court should reverse the circuit court.

C. Even without Wis. Stat. § 971.36, the prosecutor had the authority to charge these seven criminal acts as a single felony because they are separate criminal offenses of the same type that occurred as one continuous criminal transaction.

Even if Wis. Stat. § 971.36 is meant to apply only to Theft under Wis. Stat. § 943.20, the State still had the authority to charge these seven episodes as a single felony Retail theft of merchandise valuing over $500. This is so because 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. Multiple acts can be charged as a single crime when "the separately chargeable offenses are committed by the same person at

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of lenity applies only "if a 'grievous ambiguity' remains after the 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. Apart from the fact that there is no "grievous ambiguity" that remains after the court has considered the statutory language, context, structure, and purpose of Wis. Stat. § 971.36, the State had authority wholly independent from the statute to charge these seven acts as a single felony. Even if this Court finds the statute ambiguous after determining its meaning, the rule of lenity does not apply in this case because the State could properly charge these seven acts as a single felony even if Wis. Stat. § 971.36 did not exist. *See* Part C.

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). Those criteria are all met here.

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

"[W]here an offense is composed of continuous acts it may be charged as one offense without rendering the charge duplicitous." *State v. Copening*, 103 Wis. 2d 564, 572, 309 N.W.2d 850 (Ct. App. 1981) (citation omitted). In that situation, "[t]he nature of the charge is a matter of election on the part of the state." *Id.* (citation omitted). Several criminal acts are properly viewed as one continued offense when they occurred within a relatively short period of time[15] and involved the same parties. *State v. McMahon*, 186 Wis. 2d 68, 82–83, 519 N.W.2d 621 (Ct. App. 1994). When such acts can be so characterized, the only remaining question is whether combining the separate offenses into a single charge violates "the protections afforded the defendant by the rule against duplicity." *Lomagro*, 113 Wis. 2d at 589.

When "a complaint joins several criminal acts which 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:

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[15] The outer boundaries of the time frame for a continuous event have not been clearly established.

> (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.

2. 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.

The State had discretion to charge these seven Retail thefts as a single felony because they were "committed by the same person at substantially the same time and relating to one continued transaction." *Jacobsen*, 352 Wis. 2d 409, ¶ 18. There is no dispute that these seven offenses involved the same parties: Love Lopez, Rodriguez, and Walmart. Contrary to Lopez's assertions in the circuit court, (*See* R. 9:4, A-App. 124),[16] the case law is clear that the offenses

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[16] Lopez additionally argued below that statutes like section 971.36 would not be necessary if the State had discretion to charge a series of events like this as a single crime. (*See* R. 9:5–6, A-App. 125–26.) But Lopez overlooked a 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

do not have to be committed completely without interruption to be considered one continued transaction. *See, e.g.*, *State v. George*, 69 Wis. 2d 92, 100, 230 N.W.2d 253 (1975) (defendant could be charged with one continuous offense of commercial gambling even though offenses occurred on multiple dates over a period of months). Rather, the offenses must be committed at *substantially* the same time. *Lomagro*, 133 Wis. 2d at 587. 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.*, *George*, 69 Wis. 2d at 100; *Miller*, 257 Wis. 2d 124, ¶¶ 32–34 (holding that a four-year time span covering thirty to forty 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 (Ct. App. 1997) (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). The circuit court here properly found that "the length of time, a two week period for a continuing offense is not excessive. . . . I think it can be charged as a continuing event." (R. 21:19–20, A-App. 145–46.)

971.36 and its neighboring statutes eliminate that time frame and allow all violations that are committed as part of a single intent or design to be prosecuted together regardless of whether they were committed at substantially the same time. *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).

But the circuit court then erred when it dismissed the charges based solely on its belief that Wis. Stat. § 971.36 did not apply to Retail theft. The State did not need statutory authorization to combine acts that comprise a continuing event into a single unit of prosecution. *Lomagro*, 113 Wis. 2d at 589. The seven thefts were committed by the same parties at substantially the same time as part of a single continuing offense. That offense was Love Lopez assisting Rodriguez to pretend to ring up all of her items in order to steal them. All seven of the thefts were perpetrated according to this scheme, the same way each time, and only days apart. Regardless of whether the circuit court believed Wis. Stat. § 971.36 applied, it should have evaluated whether combining the offenses would violate any of the principles against duplicity, and if so, whether a jury instruction could cure the violation. *Lomagro*, 113 Wis. 2d at 589. And under those analyses, it should not have dismissed the complaint.

Charging these seven transactions as a single felony count of Retail theft implicates none of the purposes for the prohibition against duplicity. The complaint alleged very clearly the dates the seven acts occurred, and the amount the State was alleging the two stole on each date. (R. 2:6, A-App. 106.) There is no possibility the complaint insufficiently informed them of the basis for the charge. The dates alleged clearly set limits on what acts were included. (R. 2:6, A-App. 106.) There is no danger that if they were acquitted of this single charge they could be subject to double jeopardy by the State prosecuting them for one of the seven thefts. And the question in this case is very simple: did Love Lopez and Rodriguez steal more than $500 worth of merchandise from Walmart between January 10 and January 25. The facts are straightforward. There is no chance that any prejudice or confusion will arise from evidentiary rulings, or that the defendants run the risk of 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.

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 circuit court erred when it dismissed the complaints solely on the basis that it did not believe Wis. Stat. § 971.36 applied. The State did not need statutory authorization to properly join these offenses into a single charge. This Court should reverse the circuit court.

CONCLUSION

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

Dated this 19th day of October, 2017.

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 9616 words.

_____
LISA E.F. KUMFER
Assistant Attorney General

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of October, 2017.

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LISA E.F. KUMFER
Assistant Attorney General

Appendix
State of Wisconsin v.
Autumn Marie Love Lopez & Amy J. Rodriguez
Case No. 2017AP913-CR & 2017AP914-CR

APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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, 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 19th day of October, 2017.

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LISA E.F. KUMFER
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 19th day of October, 2017.

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LISA E.F. KUMFER
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