STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2018AP53-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS BRANTNER,

Defendant-Appellant.

APPEAL FROM JUDGMENTS OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION ENTERED IN THE FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE PETER L. GRIMM, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Was there sufficient evidence for the jury to find that Brantner possessed all of the drugs found in his boot in Fond du Lac County when he was arrested in Kenosha County and driven to Fond du Lac while in custody?

The circuit court determined that a reasonable jury could conclude that Brantner maintained possession of the pills until the booking officer at the Fond du Lac County jail found them in his boot.

This Court should affirm the circuit court.

2. Are Brantner's two convictions and sentences for possession of pills of two different colors and dosages of oxycodone multiplicitous?

The circuit court determined that Brantner could be convicted and sentenced for two counts of possession because the two types of oxycodone pills were different sizes, shapes, colors, dosages, and had different markings, and therefore the two possession counts required proof of different facts.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State asserts that neither oral argument nor publication are warranted. This case involves only the application of well-settled law to the facts, which the briefs should adequately address.

INTRODUCTION

There was sufficient evidence for the jury to find that Brantner had possession of the bag of pills found in his boot in Fond du Lac County even though he was arrested in Kenosha County. Brantner knew he had the pills in his boot at the time of his arrest. He knew that the officers were taking

him to Fond du Lac County pursuant to their arrest warrant for him. The pills were in an area over which Brantner had control and he showed his intent to exert control over the pills by hiding them from the officers until they were discovered by the booking officer at the Fond du Lac County jail. All Brantner had to do to avoid possession in Fond du Lac County was to tell the officers that he had the pills at the time of his arrest. He did not, therefore he maintained possession of the pills until they were discovered and taken from him in Fond du Lac County.

Additionally, Brantner's convictions and sentences for two counts of possession of oxycodone are not multiplicitous because they are different in fact, and Brantner has not met his burden to show that the Legislature did not intend cumulative punishments. The offenses were different in fact because Brantner had possession of two different types of oxycodone pills. Brantner did not have a prescription for either type of pill. This shows that Brantner committed two different volitional acts of possession that had to be separate in time. The burden is therefore on Brantner to show that the Legislature did not intend separate charges and punishments pursuant to the four-part test articulated in the case law, which he has neither discussed nor applied. This Court should affirm the circuit court.

STATEMENT OF THE FACTS

On March 27, 2015, Fond du Lac County Sheriff's Office Detectives Pete Vergos and Nate LaMotte took Brantner into custody on an arrest warrant for first-degree intentional homicide.[1] (R. 1:3.) Brantner had a court appearance in a Kenosha County case that day. (R. 67:16.) The detectives arrested him as he was leaving the Kenosha County

[1] That case, Fond du Lac County case number 2015CF176, is not at issue in this appeal.

Courthouse. (R. 67:16.) Brantner was patted down for weapons, handcuffed, and placed in a squad car. (R. 67:18–19.) The detectives drove Brantner from the Kenosha County Courthouse to the Fond du Lac County jail. (R. 67:19.)

After they arrived, Brantner said he had a cramp, and the detectives allowed him to massage his legs for several minutes. (R. 67:12.) The detectives then walked him into the booking area in the jail. (R. 67:12.) As part of the normal booking process, Brantner was told to remove his shoes. (R. 67:12.) Brantner claimed he had another cramp, and Detective Vergos offered to help him remove his boot. (R. 67:12–13.) Brantner refused, saying he wanted to do it himself. (R. 67:13.) Brantner removed the boot and gave it to the booking officer, who found a Ziploc baggie containing 54 pills of five different types. The pills were four different substances: 35 pink 20mg oxycodone pills with an inscription of "OP" on one side and "20" on the other, two white 5mg oxycodone pills with the inscription "223," two hydrocodone pills, four cyclobenzaprine pills, and 11 Zolpidem pills. (R. 67:9–10; 26:Ex. 3, 5:1–2.) Brantner did not have a prescription for any of the pills. (R. 67:23.)

The State charged Brantner with three counts of possession of narcotic drugs: count one for possession of the 35 pink 20mg oxycodone pills, count three for possession of the two white 5mg oxycodone pills, and count five for possession of the hydrocodone pills. (R. 1:1–2.) It charged Brantner with one misdemeanor count of possession of a controlled substance for the Zolpidem (count seven) and one misdemeanor count of possessing an illegally obtained prescription drug for the cyclobenzaprine (count nine). (R. 1:2–3.) The State also charged Brantner with five counts of felony bail jumping premised on the commission of the possession crimes (counts two, four, six, eight, and ten). (R. 1:1–3.)

At the preliminary hearing, Brantner alleged that there was insufficient evidence to support a finding that he committed a felony in Fond du Lac County because he did not have actual physical control over the pills when he was transported to Fond du Lac from Kenosha. (R. 67:28.) The court disagreed and bound Brantner over for trial. (R. 67:30.) Brantner filed a motion to dismiss the charges based on a defective bindover, and the court held a hearing. (R. 10; 68.) The court denied Brantner's motion. It concluded:

> It's just such a simple case to me that it may be unusual and novel, but the defendant had constructive possession of the drugs in his boot and he did nothing to undo that, either by taking off his boots or throwing the drugs away in some fashion, or turning them over to the officers, or saying something. So his silence can't be acquiescence to, I can't be charged with a crime.

(R. 68:7–8.)

The case proceeded to trial. Detective Vergos testified about arresting Brantner at the Kenosha County Courthouse. (R. 70:87.) He said that after he put Brantner in handcuffs, he asked him if he had anything on him that he should know about before he patted Brantner down. (R. 70:87.) Brantner did not tell him about the pills in his boot during the patdown in Kenosha or at any point in the squad car trip to Fond du Lac. (R. 70:87.) Vergos testified that Brantner removed the boot when instructed to at the booking station, and after he handed it to the booking officer, she pulled out the Ziploc bag of pills and gave it to Vergos. (R. 70:96.)

Vergos said that he attempted to learn where Brantner obtained the pills and spoke with Brantner's brother, Michael, at Michael's house. (R. 70:101.) Vergos testified that Michael suffered from a number of ailments from an injury, and consequently Michael is prescribed a number of pain medications and muscle relaxers. (R. 70:101.) Vergos said he had an opportunity to look around Michael's house and found

prescription bottles for Michael that matched four of the five drugs and dosages found in the Ziploc bag, though the shape and color of some of the pills were different. (R. 70:104.) Specifically, Vergos found a prescription for 5mg oxycodone pills that matched the two 5mg white oxycodone pills found in the bag, a prescription for 10mg cyclobenzaprine, a prescription for 12.5mg Zolpidem, and a prescription for hydrocodone. (R. 70:105–19, 121–23.) He was unable to locate any prescription for 20mg oxycodone pills. (R. 70:122.)

LaMotte testified consistently with Vergos about the events leading to the discovery of the pills. (R. 70:202–05.) Video and audio recordings of Brantner's intake at the jail were played for the jury. (R. 70:196–97.) Audio of jail phone calls Brantner made where he admitted that he got the pills from his brother was also played for the jury. (R. 70:208–13.)

After the State rested, Brantner moved to dismiss count one as multiplicitous with count three on the ground that both counts charge possession of oxycodone, and "that the dosage weights really make no difference. I mean, the statute prohibits the possession of the controlled substance." (R. 70:214.) The court disagreed, noting that "there are distinct facts here that permit the State to charge the matter separately given that the pills are different in color, size, markings, and they have different milligrams thereto, so I believe the State can properly charge those counts separately." (R. 70:217.)

Brantner also moved for a directed verdict on all counts, claiming that the State had not presented sufficient evidence for the jury to find that Brantner exercised control and intended to exercise control over the pills in Fond du Lac County. (R. 70:218–20.) The court denied the motion, concluding that whether Brantner had possession of the pills in Fond du Lac County was a jury question and there was evidence in the record that could allow them to find that he did. (R. 70:220–21.)

Brantner did not present any evidence. The jury found him guilty of all ten counts. (R. 71:340–41.)

At sentencing, the court stated that,

> . . . I think logically and in fairness, the best way for the Court to sentence the case is to recognize that each type of drug should have its own sentence. And because he had two oxys, in my mind, that could have easily been charged as one oxy count, and the State is well within their prerogative to charge it out because they were different milligrams. But for sentencing purposes I think it's more logical and fair to consider one -- Count 1 for prison. Count 5 is the hydrocodone, that's a separate drug, different type that should be sentenced separately. And Count 7 and 9 are also separate pills, and I believe they should receive separate sentences. I'm not a big fan on concurrent sentencing . . . I believe each pill type should have its own separate sentence.
>
> . . . .
>
> So if you're taking notes, Count 1, 5, 7, 9, and 2 will be prison cases, and then the other counts . . . I'm going to spring behind the prison and ES a consecutive probation for 11 years.

(R. 72:56–57.) It sentenced Brantner to a global sentence of six years of initial confinement and seven years of extended supervision for counts one, two, five, seven, and nine. For counts three, four, six, eight, and ten, the court imposed and stayed sentences on all of those counts, and imposed 11 years of probation consecutive to the prison sentences. (R. 72:59.)

Brantner filed a postconviction motion seeking to vacate his judgment of conviction and dismiss all of the charges on the grounds that there was insufficient evidence for the jury to find that venue was proper in Fond du Lac County. (R. 59:1.) He also sought resentencing, claiming that count one and count three were multiplicitous and therefore his separate, concurrent sentences for them constituted double jeopardy. (R. 59:1.)

The circuit court held a hearing and denied Brantner's motion. (R. 81; 61.) The court noted that the State's trial evidence demonstrated that Brantner possessed two different types of oxycodone pills from different manufacturers, of different dosages, and of different shapes and colors. (R. 81:14.) The court recognized that the State has wide discretion in charging decisions, and after reviewing the statutes it found no evidence that the Legislature did not intend multiple punishments. (R. 81:14.) Regarding venue, the court found that Brantner possessed the pills in Fond du Lac County because Brantner put the pills in his boot, knew they were there, and "did nothing to stop or terminate his possession of those pills in his boot." (R. 81:16.) Brantner appeals.

ARGUMENT

I. There was sufficient evidence for the jury to conclude that Brantner possessed controlled substances in Fond du Lac County.

A. Standard of review

"[W]hether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law, subject to our de novo review." *State v. Smith,* 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. However, review of a sufficiency of the evidence challenge is very narrow, and the reviewing court must give great deference to the trier of fact. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203. "[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

B. Relevant law

Proper venue for a criminal trial is controlled by Wis. Stat. § 971.19. The statute provides several methods of determining the proper venue for a criminal trial. Though venue must be proven beyond a reasonable doubt, it is not an element of the crime, and "may be established by proof of facts and circumstances from which it may be reasonably inferred." *State v. Lippold*, 2008 WI App 130, ¶ 10, 313 Wis. 2d 699, 757 N.W.2d 825. As relevant here, the State could prove venue beyond a reasonable doubt by showing that Brantner committed at least one element of the crimes in Fond du Lac County. Wis. Stat. § 971.19(1), (2); *Lippold*, 313 Wis. 2d 699, ¶ 13.

This Court "will not reverse a conviction based upon the State's failure to establish venue unless the evidence, viewed most favorably to the State and the conviction, is so insufficient that there is no basis upon which a trier of fact could determine venue beyond a reasonable doubt." *In Interest of Corey J.G.*, 215 Wis. 2d 395, 407–08, 572 N.W.2d 845 (1998).

It is the trier of fact that decides which evidence is worthy of belief, which evidence is not, and how to resolve any conflicts in the evidence. *State v. Wilson,* 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). This Court "must examine the record to find facts that support upholding the jury's decision to convict." *Hayes*, 273 Wis. 2d 1, ¶ 57. Therefore, when more than one inference can reasonably be drawn from the evidence, the inference that supports the trier of fact's verdict must be the one followed on review. *State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989); *see also Smith,* 342 Wis. 2d 710, ¶ 31 (reaffirming the holding in *Poellinger,* 153 Wis. 2d at 506, that "the trier of fact is free to choose among conflicting inferences of the evidence and may, within the bounds of reason, reject that inference which is

consistent with innocence of the accused" (emphasis omitted).).

C. A reasonable jury could conclude that Brantner possessed the pills in Fond du Lac County.

The State charged Brantner with five counts of possession of controlled or prescription substances. As explained above, though venue is not an element of any crime, the State also had to prove beyond a reasonable doubt that venue was proper in Fond du Lac County. *Lippold*, 313 Wis. 2d 699, ¶ 10. Brantner claims that the State introduced insufficient evidence for the jury to conclude that he ever had "possession" of the drugs in Fond du Lac County. Brantner claims he lost possession of the drugs when he was taken into custody in Kenosha County, primarily because he could not reach his boot while in handcuffs and had no choice over going to Fond du Lac County. (Brantner's Br. 18–23.)

The jury instructions define "possessed." They state that "possessed" means any of the following:

1. The "defendant knowingly had actual physical control of a substance;"
2. The substance "is in an area over which the person has control and the person intends to exercise control over the substance."
3. The "person exercises control over a substance."

Wis. JI–Criminal 6030 (2016).

The evidence was sufficient to allow a reasonable trier of fact to conclude that Brantner possessed the drugs in Fond du Lac County because he had actual physical control of them there. It could also conclude that the pills were in an area over which Brantner had control and he intended to exercise that control until the booking officer found the Ziploc bag in his

boot at the Fond du Lac County jail because he never told the officers about them.

The State introduced testimony from Detectives Vergos and LaMotte that when they encountered Brantner at the Kenosha County Courthouse, they informed Brantner that he was under arrest. They then placed him in handcuffs and asked him if he had anything on him they "should know about." (R. 70:87.) Brantner did not tell the officers about the pills in his boot. (R. 70:87.) The officers patted Brantner down for safety and did not find the pills. (*See* R. 70:87–88.) He still said nothing. Vergos testified that if Brantner had told him about the pills when the officers arrested him, he "would have turned them over to one of the Kenosha County deputies that were standing there for their own processes" and there "would have been no reason" to charge Brantner in Fond du Lac County. (R. 70:135.) Brantner did not tell the officers about the pills at any point in the squad car, or when they walked into the booking area. Vergos offered to help him remove his boot, and Brantner refused, saying he wanted to do it himself. He still knew the pills were there and took care not to let Vergos near his boot.

This is sufficient evidence for the jury to find that Brantner had actual physical control of the pills up to the point when they were removed from his boot in the Fond du Lac County Jail. It is also sufficient to show that the pills were in an area over which Brantner had control—his boot—and that he intended to exercise control over the substances. Brantner obviously knew that he had the pills and he knew where they were. He did not tell the officers that he had them, which shows that he intended to keep possession of them if he could. He went out of his way *not* to let the officers know he had the pills, and tried to keep Vergos away from his boot. That shows intent to exercise control over the pills.

In short, Brantner had the pills physically on his person, and he could relinquish that control by telling the

officers that he had the pills. Brantner never did this. His failure to tell the officers about the pills at any point, including when he was in the Fond du Lac County Jail, shows that he intended to exercise control over the pills. He therefore possessed the pills up until the point that the booking officer found them in his boot because he had actual physical possession and intended to exercise control over them. The jury had sufficient evidence to find that Brantner possessed the pills in Fond du Lac County.

Brantner does not acknowledge that he had control over where the officers learned about the pills and had the option not to possess them in Fond du Lac County. (*See* Brantner's Br. 19—26.) Instead, he argues that he did not have actual physical control over the pills because he was brought to Fond du Lac County while handcuffed, and therefore the pills were "out of his reach." (Brantner's Br. 19). He also contends that he lacked control because he was arrested "by surprise," and therefore did not have time to hide the pills elsewhere beforehand. (*See* Brantner's Br. 22–23). Brantner also makes several observations about the legislative intent in criminalizing possession of controlled substances. (Brantner's Br. 21–23.) Finally, he claims that a finding that venue was proper in this case will lead to absurd results and "encourage law enforcement to manufacture venue." (Brantner's Br. 23–24.)

These arguments are red herrings. First, as the jury instructions show, Brantner did not have to be able to reach his boot with his hand to possess the pills. They were in his boot, over which he had control because he knew they were physically on his person and could alert the officers that they were there, and he showed that he intended to exercise control over the pills by failing to tell the officers about them. Second, criminal defendants do not have a right to avoid criminal charges by being given the opportunity to hide evidence before their arrest. Third, Brantner's arguments about legislative

intent in criminalizing possession are outside of the scope of the issue on appeal. The question here is only whether there was sufficient evidence for a rational jury to find that Brantner possessed the pills in Fond du Lac County. Though that is a question of law this Court reviews de novo, it depends entirely on the quantum of evidentiary facts in the record. Legislative intent in criminalizing possession is simply not at issue.

And finally, Brantner again fails to recognize that the parade of horribles he claims will occur if venue is found proper in this case are all entirely preventable: all a defendant has to do to relinquish possession is alert the officers that he or she has contraband at the time of the encounter with law enforcement. If Brantner did not want to be charged with possession in Fond du Lac County, he could have alerted the officers to the pills in his boot when they encountered him at the Kenosha County Courthouse. He had every opportunity to tell the officers about the pills then and avoid any possibility of charges in Fond du Lac County, but instead he continued to exercise control over them until they were taken from him at the jail.

In sum, there was ample evidence in the record for the jury to find that Brantner had possession of the pills in Fond du Lac County. This Court should affirm the circuit court.

D. There is no constitutional right to a trial in the county where the defendant committed the crime.

Brantner claims that Article I, § 7 of the Wisconsin Constitution provides a constitutional right to venue in the county where the crime was committed, and therefore requires this Court to dismiss all of the charges against him because they were filed in the wrong county. (*See* Brantner's Br. 15–18, 25–26.) He is wrong.

Article I, § 7 of the Wisconsin Constitution does not provide a constitutional right to have a trial in the county where the offense was committed.[2] The section states that, "the accused shall enjoy the right . . . to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law." Wis. Const. art. I, § 7. The right provided by this section is the right to a jury of the vicinage. *State v. Mendoza*, 80 Wis. 2d 122, 138 n.3, 258 N.W.2d 260 (1977).

In other words, there is a constitutional right to be tried by a jury selected from the county where the crime was committed. The Wisconsin Supreme Court has expressly rejected the argument that this section provides a constitutional right to venue. *Id*. ("Const. Art. 1, sec. 7 does not restrict venue."). The location of trial is purely statutory, and is controlled by Wis. Stat. § 971.19 ("Criminal actions shall be tried in the county where the crime was committed, except as where otherwise provided."). Consequently, Brantner's constitutional argument is misplaced, and as explained below he has forfeited any argument regarding the place of trial apart from his sufficiency of the evidence claim.

1. Brantner has not made and could not succeed on a jury of the vicinage claim.

Brantner has not raised a jury of the vicinage claim. (*See* R. 59; Brantner's Br. 1.) It is therefore forfeited. *See State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. Even if he had raised this claim, however, he could not succeed. As explained, Brantner committed the crime in Fond

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[2] Even if it did, though, Brantner could not prevail. As shown above, Brantner committed all elements of the crime in Fond du Lac County, therefore his trial took place in the county where the offense was committed.

du Lac County. He therefore was necessarily tried by a jury of the vicinage. But a jury of the vicinage claim would have failed for another reason. In order to prevail after trial based on a jury of the vicinage claim, the defendant must show that the deprivation of a jury of the vicinage resulted in a "presumption against the justice of the verdict." *State v. Wyss*, 124 Wis. 2d 681, 720, 370 N.W.2d 745 (1985) (citation omitted), *disapproved of on other grounds by Poellinger*, 153 Wis. 2d at 505.

Brantner cannot show that a jury in Fond du Lac County should be presumed to have rendered its verdict unfairly. Indeed, Brantner concedes that he committed all elements of the charged offenses in Kenosha County. (Brantner's Br. 22.) There is no reason to believe that a Kenosha County jury would have evaluated his conduct differently than a Fond du Lac County jury. Without some showing of prejudice, a jury of the vicinage challenge would fail even had Brantner raised one.

2. Brantner forfeited any argument that the charges should have been dismissed before trial began due to improper venue.

Brantner seems to argue that all of his convictions should be vacated and the charges dismissed because the trial never should have commenced in Fond du Lac County to begin with. (*See* Brantner's Br. 13–14, 20–24.) This argument is forfeited because he did not petition this Court for leave to appeal the circuit court's bindover decision before trial.

It is well-settled that "a conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing." *State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). To challenge a probable cause determination, the defendant must "seek relief before trial in a motion to dismiss" and if he is still unsuccessful, "[h]e may challenge his

bindover by way of a permissive interlocutory appeal from the non-final order binding him over for trial." *Id.* at 636.

Brantner raised the argument that the State had insufficient evidence that he committed any crimes in Fond du Lac County at his preliminary hearing. (R. 67:27–29.) The circuit court rejected it, found probable cause that Brantner had committed a crime in Fond du Lac County, and bound him over for trial. (R. 67:29–30.) Brantner filed a motion to dismiss the charges based on insufficient evidence to establish venue in Fond du Lac County. (R. 10:1.) The circuit court held a hearing on his motion and denied it, noting that Brantner could have kicked off his boots or otherwise alerted the officers that he had the drugs at any point before reaching Fond du Lac County. (R. 68.)

A month later and two days before trial, Brantner asked the court to remove the trial date from the calendar so he could appeal the bindover decision. Brantner recognized that "such an appeal can only be done on an interlocutory basis of that particular issue, and that also has to be done from a written order." (R. 69:2.) The court entered a written order denying the motion to dismiss but refused to reset the trial. (R. 69:4–7.)

Brantner then faxed an "Emergency Motion for Immediate Stay of Circuit Court Proceedings and Petition for Leave to Appeal Non-Final Orders" in this Court. (R. 18.) This Court denied the stay but determined that his petition for leave to appeal was not "properly before this court" because it was submitted by fax in violation of Wis. Stat. §§ 801.16(2) and (Rule) 809.80(3)(a). (R. 23:2.) It informed Brantner that "[i]n the event Brantner properly files a petition for leave to appeal the circuit court's nonfinal order, we will consider and dispose of the petition at that time." (R. 23:2.)

Brantner never properly filed a petition for leave to appeal the circuit court's bindover decision despite having

recognized that this issue could not be raised on direct appeal, and despite this Court informing him that it would not consider his faxed petition. Consequently, he has forfeited his opportunity for this Court to review that decision. *See State v. Noll*, 160 Wis. 2d 642, 645, 467 N.W.2d 116 (1991). This Court should affirm the circuit court.

II. Brantner's two convictions for possession of oxycodone for possessing pills of different dosages are not multiplicitous.

A. Standard of review

This Court determines de novo whether convictions are multiplicitous. *State v. Davison*, 2003 WI 89, ¶ 15, 263 Wis. 2d 145, 666 N.W.2d 1.

B. Relevant law

"Under the Wisconsin Constitution, multiple punishments may not be imposed for charges that are identical in law and fact unless the legislature intended to impose such punishments." *State v. Patterson*, 2010 WI 130, ¶ 15, 329 Wis. 2d 599, 790 N.W.2d 909 (citing *Davison*, 263 Wis. 2d 145, ¶¶ 30–32). If the Legislature did not so intend, the punishments are unconstitutionally multiplicitous. A court uses a two-prong test to determine whether convictions are multiplicitous. *State v. Ziegler*, 2012 WI 73, ¶ 60, 342 Wis. 2d 256, 816 N.W.2d 238. The first prong considers whether two offenses are identical in law and fact pursuant to *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *State v. Multaler*, 2002 WI 35, ¶ 52, 252 Wis. 2d 54, 643 N.W.2d 437.

"As a general proposition, different elements of law distinguish one offense from another when different statutes are charged. Different facts distinguish one count from another when the counts are charged under the same statute." *Davison*, 263 Wis. 2d 145, ¶ 41. "Two offenses, which

are legally identical, are not identical in fact if the acts allegedly committed are sufficiently different in fact to demonstrate that separate crimes have been committed." *Ziegler*, 342 Wis. 2d 256, ¶ 60.

Offenses are considered sufficiently different in fact if they "are separated in time or are of a significantly different nature." *Multaler*, 252 Wis. 2d 54, ¶ 56 (citation omitted). To determine whether charged acts were separate in time, "the court asks whether there was sufficient time for reflection between the acts such that the defendant re-committed himself to the criminal conduct." *Id.* "Similarly, whether the charged acts are significantly different in nature is not limited to a straightforward determination of whether the acts are of different types. . . . Acts may be 'different in nature' even when they are the same types of acts as long as each required 'a new volitional departure in the defendant's course of conduct.'" *Id.* ¶ 57 (quoting *State v. Anderson,* 219 Wis. 2d 739, 750, 580 N.W.2d 329 (1998)).

The second prong considers legislative intent. *Ziegler*, 342 Wis. 2d 256, ¶¶ 61–63. The outcome of the first prong determines which of two presumptions a court will apply when analyzing the second prong. *Id.* ¶¶ 61–62. A court considers the second prong regardless of the outcome of the first prong. *Patterson*, 329 Wis. 2d 599, ¶ 16.

If two offenses are identical in both fact and law, then a court presumes that the Legislature did not authorize cumulative punishments, unless the State shows "a clear indication of contrary legislative intent." *Ziegler*, 342 Wis. 2d 256, ¶ 61. If the State cannot meet that burden, multiple punishments for the same offense violate the prohibition on double jeopardy. *Id.* ¶ 62.

By contrast, if two offenses are different in fact or law, then a court presumes that the Legislature authorized cumulative punishments. *Ziegler*, 342 Wis. 2d 256, ¶ 62. At

that point, "we are no longer concerned with a double jeopardy violation but instead a potential due process violation." *Id.* Under those circumstances, "it is the defendant's burden to show a clear legislative intent that cumulative punishments are not authorized." *Davison*, 263 Wis. 2d 145, ¶ 45.

C. Brantner's possession of 20mg pink oxycodone pills and 5mg white oxycodone pills are sufficiently different in fact to show that he committed separate crimes, and therefore there is no double jeopardy concern.

There is no dispute that count one and count three for Brantner's possessing oxycodone are identical in law under the *Blockburger* test, as they are two charges under the same statute and therefore they necessarily have the same elements. *See State v. Trawitzki*, 2001 WI 77, ¶ 28, 244 Wis. 2d 523, 628 N.W.2d 801. Brantner's charges are not multiplicitous, though, because they are different in fact and Brantner has not met his burden to show that the Legislature intended to prohibit cumulative punishments for multiple violations of the statute.

Brantner's two charges for possession of oxycodone each required proof of an additional fact that the other charge did not, namely, the type of pill that Brantner possessed. *Cf. Trawitzki*, 244 Wis. 2d 523, ¶ 28 (ten charges of taking and carrying away a firearm for stealing ten firearms during a single theft each required proof of the identity of the individual firearm and were therefore different in fact). Brantner admitted he got the pills from Michael, and Michael did not have a current prescription for 20mg oxycodone pills. That is strong evidence that Brantner had to complete the act of taking possession of each type of pill separately and that those acts were separate in time; Brantner had to have taken possession of the 20mg oxycodone pills at some point when Michael had a prescription for 20mg oxycodone pills or

obtained them from somewhere else. Brantner therefore had "sufficient time for reflection between the acts" of taking the two different types of pills "such that [Brantner] re-committed himself to the criminal conduct" of possessing oxycodone when he took pills from two different sources. *Multaler*, 252 Wis. 2d 54, ¶ 56.

That the two types of oxycodone had to have come from two different prescriptions also shows that Brantner's two acts of possession were "significantly different in nature" because "each required 'a new volitional departure in the defendant's course of conduct.'" *Id.* ¶ 57 (citation omitted). Brantner had to make a conscious choice to take the pink 20mg pills from one source, and he had to make another conscious choice to take the white 5mg pills from Michael's current prescription bottle. In other words, Brantner made the choice to commit two different acts of possession of oxycodone. The fact that those two acts were discovered simultaneously does not mean that the acts were not separate crimes. *See Trawitzki*, 244 Wis. 2d 523, ¶ 29 (collecting cases where the court concluded that multiple charges of violation of the same statute were not multiplicitous because they required proof of identity of a particular item to support each charge); *see also Multaler*, 252 Wis. 2d 54, ¶ 58 (concluding that defendant having 28 separate download files containing child pornography showed that defendant "made a new decision to obtain each one" and consequently the 28 charges for possession of child pornography were not identical in fact.)

Brantner focuses solely on the fact that the pills were all discovered at the same time to argue that the acts underlying the possession of oxycodone charges were not separated in time, and claims that they were "plainly identical in nature" without discussing the underlying conduct that Brantner had to commit to obtain the pills. (Brantner's Br. 28–29.) But as *Multaler* shows, a defendant does not commit a single act of possession simply because the

contraband is all *discovered* in the same place at the same time. *Multaler*, 252 Wis. 2d 54, ¶ 58. The question is whether the defendant "made a new decision to obtain each one," and here, Brantner had to have made a new decision to obtain each of the different types of oxycodone pills. The charges were not identical in fact, and therefore there is no double jeopardy concern. *Ziegler*, 342 Wis. 2d 256, ¶ 62.

D. Brantner has not met his burden to rebut the presumption that the Legislature intended to permit cumulative punishments.

The only remaining question, then, is whether cumulative punishments amount to a due process violation because they are contrary to legislative intent. *Id.* Because the charges were not identical in fact, this Court must presume that the Legislature intended to permit cumulative punishments, and the burden is on Brantner to show otherwise. *Id.* He has not done so, and consequently this Court should affirm the circuit court.

This Court uses a four-factor test to determine legislative intent in a multiplicity analysis: "(1) statutory language; (2) legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct." *Multaler*, 252 Wis. 2d 54, ¶ 59 (citing *Anderson*, 219 Wis. 2d at 751).

Brantner does not identify this test nor discuss any of the factors. (Brantner's Br. 29–30.) He instead relies on a hypothetical to claim that a person possessing several different types of pills of the same drug could be punished more severely than a person possessing a single pill of a large dosage, and states that "[i]t is unlikely that the legislature intended to allow for such a disparity" without any explanation why. (Brantner's Br. 29.) He then claims that because the Legislature made a statement of intent that those

who manufacture, distribute, or traffic controlled substances should "be sentenced to substantial terms of imprisonment to shield the public from their predatory acts," Wis. Stat. § 961.001, the Legislature cannot have intended multiple punishments for multiple acts of possession. (Brantner's Br. 30.) But the Legislature's making a broad statement of purpose about considering trafficking controlled substances more severe than using them says nothing about whether it intended cumulative punishments for multiple possessions. And that is not how this Court evaluates legislative intent for cumulative punishments in a multiplicity analysis. *See Multaler*, 252 Wis. 2d 54, ¶¶ 59–68. Brantner does not even discuss the language of the section under which he was charged. (Brantner's Br. 29–30.) Consequently, he has fallen far short of showing "a clear legislative intent that cumulative punishments are not authorized." *Davison*, 263 Wis. 2d 145, ¶ 45.

And indeed, nothing about the statutory language of Wis. Stat. § 961.41(3g) suggests that the Legislature did not intend cumulative punishments for possession of multiple pills of the same drug that necessarily had to have come from different prescriptions. Wisconsin Stat. § 961.41(3g) states, "No person may possess or attempt to possess a controlled substance or a controlled substance analog unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription or order of, a practitioner who is acting in the course of his or her professional practice . . . ." Wis. Stat. § 961.41(3g). The section expressly states that a person may not possess the substance unless the person "*obtains the substance . . . pursuant to a valid prescription*." *Id.* That language indicates that a person commits the crime of possession of a controlled substance each time the person obtains a dosage or type of pill that they do not have a valid

prescription to possess.[3] If Brantner had a valid prescription for the 5mg oxycodone pills, the State still could have charged him with possession of a controlled substance under Wis. Stat. § 961.41(3g) for possessing the 20mg pills, because he did not have a valid prescription for the 20mg pills. Under Brantner's interpretation of the statute, a person who had a valid prescription for any amount of a controlled substance would be immune from prosecution for possession of that substance even if the person had thousands of pills that could not have come from that valid prescription. (*See* Brantner's Br. 28–30.) That is not a reasonable interpretation of Wis. Stat. § 961.41(3g).

Brantner had two different types and dosages of oxycodone pills. He did not have a prescription for either of them. Therefore, he necessarily committed two acts of possession of oxycodone in violation of the statute under its plain language. Brantner's claim would fail under the first prong of the analysis even had he attempted to undertake it. This Court should affirm the circuit court.

E. Resentencing on all counts is not the appropriate remedy should this Court conclude that the possession of oxycodone counts are multiplicitous.

Brantner claims that if his two convictions for possession of oxycodone are multiplicitous, he is due resentencing on all counts. (Brantner's Br. 30.) He observes, however, that this is inappropriate when "the invalidation of the multiplicitous sentences does not 'disturb the overall sentence structure or frustrate the intent of the original dispositional scheme.'" (Brantner's Br. 31 (quoting *State v.*

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[3] Assuming that, as here, the person did not receive the pills "directly from . . . a practitioner who is acting in the course of his or her professional practice." Wis. Stat. § 961.41(3g).

Church, 2003 WI 74, ¶ 26, 262 Wis. 2d 678, 665 N.W.2d 141).) He also acknowledges that "[w]hether to resentence a defendant after one of the defendant's convictions is dismissed as multiplicitous is within the sound discretion of the trial court." (Brantner's Br. 31 (quoting *State v. Sinks*, 168 Wis. 2d 245, 255, 483 N.W.2d 286 (1992).)

There is no reason for this Court to order resentencing on all of Brantner's charges if it determines that the oxycodone charges were multiplicitous. Brantner claims that vacating his conviction for the second count of possession of oxycodone and the corresponding bail jumping charge[4] will disturb the overall sentencing structure because some of Brantner's sentences were imposed as consecutive sentences. (Brantner's Br. 31.) That may have been true had the two sentences for his oxycodone convictions not been run concurrently to each other, with all of the other sentences running consecutively. (R. 72:56–57.) But vacating Brantner's conviction for one of the oxycodone counts will leave the other count intact. The sentencing court emphasized that it was structuring Brantner's sentence so that he received separate sentences for each substance he possessed rather than each type of pill. Vacating one of the two concurrent sentences for

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[4] The State does not dispute that if one of the oxycodone charges is vacated, then the corresponding bail jumping charge must be vacated as well. However, the State asserts that this is so because *State v. Hansford*, 219 Wis. 2d 226, 245, 580 N.W.2d 171 (1998) establishes that a bail jumping charge premised solely on the defendant's commission of a crime that the appellate court later determines the defendant did not commit cannot stand, and not because a finding that one charge was multiplicitous would necessarily render one of the bail jumping charges multiplicitous as well. While that may be true in a particular case, Brantner has not undertaken any multiplicity analysis in respect to the bail jumping charges, and Wisconsin has long recognized that bail jumping is a separate and distinct crime from the underlying crime on which it is predicated. *See, e.g.*, *State v. Hauk*, 2002 WI App 226, ¶ 16, 257 Wis. 2d 579, 652 N.W.2d 393.

the oxycodone charges does nothing to change that scheme. Similarly, vacating the corresponding bail jumping charge will simply require recalculation of Brantner's probation term that he has not yet begun to serve, and it is well-settled that "probation is not considered a sentence." *State v. Dowdy*, 2010 WI App 158, ¶ 26, 330 Wis. 2d 444, 792 N.W.2d 230 (citation omitted).

Furthermore, as Brantner observes, it is left to the discretion of the circuit court to determine whether to resentence Brantner on all counts. If this Court vacates one of the oxycodone convictions and the corresponding bail jumping conviction, the sentences for those convictions will automatically be void and cease to operate as a matter of law. Wis. Stat. § 973.13. Brantner has given no explanation why this Court should not allow the sentencing court to use its broad discretion to determine whether vacation of those charges frustrates the intent of its sentence and what the appropriate remedy should be. (Brantner's Br. 31.) If this Court vacates any charges, it should leave the decision whether to resentence Brantner on all counts to the discretion of the circuit court.

CONCLUSION

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

Dated this 29th day of June, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,296 words.

Dated this 29th day of June, 2018.

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LISA E.F. KUMFER
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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 29th day of June, 2018.

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