STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP53-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS BRANTNER,

Defendant-Appellant-Petitioner.

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 PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

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ISSUES PRESENTED

1. Was venue proper in Fond du Lac County when Brantner possessed pills in his boot at the Fond du Lac County Jail following his arrest in Kenosha County?

This Court should affirm the circuit court and court of appeals.

2. Are two charges under Wis. Stat. § 961.14(3g) for possessing, without a prescription, pills of two different doses, colors, and sizes of the same controlled substance multiplicitous?

This Court should hold that two charges for possession of different dosages of the same controlled substance are not multiplicitous.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

INTRODUCTION

There was sufficient evidence for the jury to find that Brantner committed possession of controlled substances in Fond du Lac County, because he failed to tell the Fond du Lac County police officers who arrested him in Kenosha County about the multitude of pills in his boot at any point before they were discovered at the Fond du Lac County Jail. Accordingly, this Court need not reach the question of whether the Wisconsin constitution provides a right to venue in the county where the crime was committed—though it does not—because under a rational view of the evidence the jury could find beyond a reasonable doubt that the pills were in Brantner's physical possession and Brantner intended to

maintain control over them in Fond du Lac County, therefore he willfully possessed them there.

Second, Brantner's multiplicity claim fails. He has misunderstood the meaning of "different in fact" under *Blockburger*, and he has omitted any discussion of the pertinent portion of the possession statute. The statute makes it a crime to possess a controlled substance without a valid prescription. That means each time a person possesses a controlled substance in a pill type or quantity he or she does not have a valid prescription to possess, the person violates the statute. Brantner possessed two different types of oxycodone pills of different dose, color, and size, and did not have a prescription for either of them. He violated the statute twice and his convictions are neither multiplicitous nor violate due process.

STATEMENT OF THE CASE

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 as he was leaving the Kenosha County Courthouse for an appearance in a different case. (R. 1:3; 67:16.) They drove Brantner 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. (R. 67:12.) The detectives walked him into the jail booking area. (R. 67:12.) 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. (R. 67:13.) Brantner removed the boot and gave it to the booking officer, who found a Ziploc baggie containing 54 pills. 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. 5:1–2; 26:Ex. 3; 67:9–10.) Brantner did not have a prescription for any of them. (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 two misdemeanors for the other substances. (R. 1:2–3.) The State also charged Brantner with five counts of felony bail jumping. (R. 1:1–3.)

Before trial, Brantner contested that venue was proper in Fond du Lac County. (R. 67:28.) The court disagreed, concluding: "the defendant had constructive possession of the drugs in his boot and he did nothing to undo that." (R. 68:7.)

At trial, Vergos testified about arresting Brantner at the Kenosha County Courthouse. (R. 70:87.) After Vergos handcuffed Brantner, he asked him if he had anything on him Vergos 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 or at any point during the trip to Fond du Lac County. (R. 70:87.) Vergos testified that Brantner removed the boot when instructed to at the booking station, and after handing it to the booking officer, she found the bag of pills and gave it to Vergos. (R. 70:96.)

Vergos said he tried to learn where Brantner obtained the pills and spoke with Brantner's brother, Michael, at Michael's house. (R. 70:101.) Michael was prescribed a number of pain medications and muscle relaxers for an old injury. (R. 70:101.) Vergos said he found prescription bottles for Michael that matched four of the five drugs and doses

found in the Ziploc bag. (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. (R. 70:202–05.) Video and audio recordings of Brantner's intake at the jail were played for the jury. (R. 70:196–97.)

The State admitted into evidence and played audio of jail phone calls made by Brantner. (R. 70:208–13.) In the recording, Brantner admitted that he got pills from Michael. (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." (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, stating that whether Brantner had possession of the pills in Fond du Lac County was a jury question. (R. 70:220–21.)

The jury found Brantner guilty of all ten counts. (R. 71:340–41.)

The court sentenced Brantner to a total 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, and imposed 11 years of probation. (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 claimed that count one and count three were multiplicitous. (R. 59:1.)

The circuit court held a hearing and denied Brantner's motion. (R. 81; 61.) The court found that there was sufficient evidence 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.)

The court additionally found that the two oxycodone convictions were not multiplicitous. (R. 81:14.) The State's trial evidence demonstrated that Brantner possessed two different types of oxycodone pills from different manufacturers, of different doses, 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.)

Brantner appealed and the court of appeals summarily affirmed on the same grounds as the circuit court. (Pet–App. 1–5.) Brantner petitioned this Court for review, which this Court granted on May 14, 2019.

ARGUMENT

I. There was sufficient evidence for the jury to find that Brantner committed the crime in Fond du Lac County and Brantner's constitutional argument is meritless.

A. Standard of review.

Brantner contends that he has a constitutional right to venue in a particular county pursuant to Article I, Section 7 of the Wisconsin Constitution. (Brantner's Br. 5.) The State asserts Article I, Section 7 establishes a right to a jury of the vicinage; venue is controlled by Wis. Stat. § 971.19.

"Interpretation of the state constitution and interpretation of a state statute are questions of law that this court decides de novo . . . ." *State v. Hamdan*, 2003 WI 113, ¶ 19, 264 Wis. 2d 433, 665 N.W.2d 785.

Regardless whether venue is established by the constitution or by statute, though, whether the State proved venue beyond a reasonable doubt is subject to the usual sufficiency of the evidence analysis. *State v. Swinson*, 2003 WI App 45, ¶ 19, 261 Wis. 2d 633, 660 N.W.2d 12; *compare with State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

"[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." *Poellinger*, 153 Wis. 2d at 507.

B. This Court reviews a jury's finding of venue under the sufficiency of the evidence test.

Sufficiency of the evidence has long been the test for determining whether the State proved venue in a criminal case. *See State v. Corey J.G.*, 215 Wis. 2d 395, 407–08, 572 N.W.2d 845 (1998).

Determining the right secured by Article I, § 7 is purely an academic exercise in this case, then, because regardless of whether venue is established by the constitution or by statute, the record unequivocally shows that there was sufficient evidence for the jury, which was instructed that it had to find venue to find Brantner guilty, (R. 71:278–79, 81–82, 84–85, 87–92), to find that he committed his crime in Fond du Lac County.

Brantner's real claim is simply that if sufficiency of the evidence were not the test for a jury's venue finding, an argument could be made that Kenosha County was a more appropriate venue. (Brantner's Br. 12–22). But he has entirely failed to address the cases establishing sufficiency of the evidence as the test for appellate review of a jury's venue finding.

In other words, Brantner appears to argue *sub silencio* that this Court should jettison the sufficiency of the evidence test for venue challenges following trial, and follow his proposed public policy test instead. (*See* Brantner's Br. 12–14, 21–22.) But he fails to even attempt to explain why the sufficiency of the evidence test should not apply, fails to acknowledge the many cases stating that this is the proper

test for whether the State proved venue, and does not make any argument that they should be overturned. *See*, *e.g.*, *Swinson*, 261 Wis. 2d 633, ¶ 19; *Corey J.G.*, 215 Wis. 2d at 407–08; *State v. Cavallari*, 214 Wis. 2d 42, 54–55, 571 N.W.2d 176 (Ct. App. 1997); *State v. Dombrowski*, 44 Wis. 2d 486, 501–04, 171 N.W.2d 349 (1969); *Smazal v. State*, 31 Wis. 2d 360, 363–64, 142 N.W.2d 808 (1966).

Under the sufficiency of the evidence test, there is no question that Brantner was properly tried and convicted in Fond du Lac County regardless of whether the constitution or the statute establishes venue.

1. There was sufficient evidence for the jury to find that Brantner committed the crime of possession of controlled substances in Fond du Lac County.

It is well settled in Wisconsin that though "venue is not an element of a crime, it nonetheless must be proved beyond a reasonable doubt" at trial. *State v. Schultz*, 2010 WI App 124, ¶ 12, 329 Wis. 2d 424, 791 N.W.2d 190. It is equally well settled that the same highly deferential test applies to allegations that the State insufficiently proved venue as to challenges to the sufficiency of the evidence on the substantive elements of the crime. *Corey J.G.*, 215 Wis. 2d at 407–08.

Under that standard, 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." *Corey J.G.*, 215 Wis. 2d at 407–08; *State v. Lippold*, 2008 WI App 130, ¶¶ 11–15, 313 Wis. 2d 699, 757 N.W.2d 825.

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). 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.

A reasonable juror could find that venue in Fond du Lac County was proper in this case.

The State charged Brantner with five counts of possession of controlled or prescription substances pursuant to Wis. Stat. § 961.41(3g). 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).

First, because a rational view of the evidence permits a finding that Brantner committed the entire crime of possession in Fond du Lac County, venue can be quickly established under Wis. Stat. § 971.19(1), providing for trial in the county where the offense was committed—which would also foreclose Brantner's constitutional claim even if he were correct about the construction of Article I, § 7.

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 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 of the Fond du Lac County Jail. Vergos offered to help him remove his boot, and Brantner refused, saying he wanted to do it himself. He 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 he gave his boot to the booking officer 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. He did not tell the officers that he had them, which shows that he intended to keep control 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.

Alternatively, § 971.19(2) also applies because, as Brantner has conceded on several occasions, possession is a continuous offense. (Pet. 15; R. 81:6). *State v. Elverman*, 2015 WI App 91, ¶¶ 37–38, 366 Wis. 2d 169, 873 N.W.2d 528. Even if Brantner's possession began in Kenosha

County, he committed a continuous act of possession by intentionally failing to tell the officers about the pills in his boot, meaning he only relinquished possession of them when he handed his boot to the booking agent at the jail.

The jury had sufficient evidence to find that Brantner possessed the pills in Fond du Lac County.

2. Brantner has made no argument that the evidence was insufficient to find venue beyond a reasonable doubt.

Brantner does not acknowledge that he had control over where the officers learned about the pills and therefore had the option not to possess them in Fond du Lac County. (*See* Brantner's Br. 16–22.) 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 "[h]e could not do anything [with the pills] except leave them right where they were." (Brantner's Br. 19). But as the jury instructions show, Brantner did not have to be able to reach the bag with his hand to possess the pills. He could easily have told the officers at the time of his arrest "I have pills in my boot," relinquished control over them, and therefore dispossessed himself of them in Kenosha County. He did not.

Brantner also contends that he committed the crime only in Kenosha County because that "is the only location where there were opportunities for the substances to be abused." (*See* Brantner's Br. 19). Wisconsin Stat. § 961.41(3g) criminalizes possessing the pills without a prescription. Whether Brantner had an opportunity to abuse them in Fond du Lac is irrelevant. Brantner also makes several unclear arguments about the word "possess" in the jury instructions having a different meaning than the word

"possess" in Wis. Stat. § 961.41(3g), but supports them with no legal authority. (Brantner's Br. 17–19.)

Finally, he claims that a finding that venue was proper in this case will "open the door to" governmental abuse and manufacturing venue. (Brantner's Br. 21–23.) Brantner fails to recognize that the parade of horribles he claims will occur if venue is proper in this case are all entirely preventable: a defendant can relinquish possession by simply alerting the officers that he or she has contraband at the time of the encounter with law enforcement. The officers had no way of knowing Brantner had the pills in his boot. They did not learn of the pills and then intentionally drive him to Fond du Lac County. 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 at the Kenosha County Courthouse. (R. 70:135.) Brantner had every opportunity to avoid any possibility of charges in Fond du Lac County, but instead he chose to continue to exercise control over the pills until they were taken from him at the jail.

Seemingly the only thing Brantner does not discuss is the sufficiency of the evidence test. (Brantner's Br. 12–23.)

Given that there was sufficient evidence for a rational jury to find that Brantner possessed the pills in Fond du Lac County, Brantner could not prevail even if his constitutional argument were sound. This Court should uphold the jury's verdict.

C. Brantner's constitutional argument is meritless.

1. General rules of constitutional interpretation.

In interpreting constitutional provisions, this Court's task is "to give effect to the intent of the framers and of the people who adopted it; and it is a rule of construction applicable to all constitutions that they are to be construed so as to promote the objects for which they were framed and adopted." *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328 (citation omitted). The court uses three sources to determine a provision's meaning:

> "[T]he plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption."

Id. (quoting *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996) (additional citations omitted)).

2. Brantner's argument is fundamentally flawed.

Brantner's constitutional claim is difficult to follow. He does not identify or discuss any of the proper sources of constitutional interpretation. (Brantner's Br. 12–14.) He notes that criminal venue in the federal system is controlled by Article III, § 2 of the federal Constitution, but Wisconsin has no corresponding constitutional provision. He states almost as an afterthought that "[v]enue in Wisconsin criminal cases is also governed by statute." (Brantner's Br. 14.) He then discusses policy arguments about the place of trial and claims Wis. Stat. § 961.41(3g), the statute criminalizing possession of controlled substances, must be

construed "in light of the policies underlying the constitutional right to venue in criminal proceedings," because that is what the Supreme Court of the United States does when a federal statute "does not indicate where Congress considered the place of committing the crime to be." (Brantner's Br. 15.)

That is not how this Court interprets the Wisconsin Constitution, nor how it determines whether the State proved venue. *Thompson*, 199 Wis. 2d at 680; *Lippold*, 313 Wis. 2d 699, ¶ 10. And at any rate, the Supreme Court construes federal criminal statutes in the manner Brantner describes only if the location of the offense could be determined to be in multiple locations and Congress has not explicitly stated in the criminal statute where venue lies. *See, e.g., Travis v. United States*, 364 U.S. 631, 634–37 (1961); *see also United States v. Flaxman*, 304 F. Supp 1301, 1303 (S.D.N.Y 1969) ("Congress has the power to define elements of a crime carefully and give the executive power to prosecute it in any one of the districts in which the crucial elements of the crime are performed.") (citing *Travis*, 364 U.S. 631).

This makes sense for federal crimes: Congress has the power to enact criminal laws only as enumerated by the Constitution or that are "necessary and [p]roper" to carrying out its other legislative powers granted by the Constitution. *See United States v. Comstock*, 560 U.S. 126, 133–35 (2010). Because Congress's legislative authority is limited to national affairs that have some kind of interstate or extrastate effect, federal crimes are nearly always going to consist of acts completed over several states or several districts. In order to ensure proper Article III, § 2 venue, Congress needs to state statutorily where it believes the locus delicti of the crime to be, and if it does not, the federal courts must construe the statute in light of the Article III,

§ 2 right to trial in the state where the crime was committed and the Sixth Amendment right to a jury chosen from that state and district.

Not so with state crimes. With the exception of ongoing offenses, state crimes are nearly always going to have a clear location where the criminal act was committed. Accordingly, unlike in the federal system, the Wisconsin criminal statutes do not themselves designate the place of the crime. And the Wisconsin Legislature has provided where it "consider[s] the place of committing the crime to be" when venue could be proper in multiple counties. (Brantner's Br. 15); *see* Wis. Stat. § 971.19. Brantner has made no argument that Wis. Stat. § 971.19 is unconstitutional, and could not prevail on such an argument even if this Court determined that Article I, § 7 provides a right to venue. Wis. Stat. § 971.19(1) ("Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided."). In fact, Brantner has omitted any discussion of Wis. Stat. § 971.19 at all. (Brantner's Br. 12–22.)

Furthermore, when proper venue as described by the federal criminal statute could be found in the location where trial was had, whether the government proved venue is a question of fact for the jury, just as it is in Wisconsin. *See United States v. Charlton*, 372 F.2d 663, 664–65 (6th Cir. 1967) (citing *United States v. Johnson*, 323 U.S. 273 (1944)); *Lippold*, 313 Wis. 2d 699, ¶ 10.

In short, Brantner's analysis is simply off-point. This Court is not free to ignore the criminal venue statute enacted by the Legislature, which would meet any constitutional mandate that crimes be tried in the county where the offense was committed, if one existed. But, as the State will show, it does not. The constitution provides a right to a jury of the vicinage, not to venue.

3. The Wisconsin constitution provides a right to a jury of the vicinage; it does not establish venue.

a. The plain language of Article I, § 7, provides the right to a jury picked from the county where the offense was committed.

Article I, § 7 of the Wisconsin Constitution provides that the accused has a 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 plain language of this provision shows that it secures a defendant a right to "an impartial jury of the county" in which the offense was committed. Wis. Const. art. I, § 7. It says nothing about the place of trial.

Accordingly, this Court, based on the language of the provision and the Supreme Court of the United States' construction of the nearly identical language in the Sixth Amendment and history of its drafting, has already determined that "Const. Art. 1, sec. 7 does not restrict venue. Rather, it restricts the locale from which the jury can be picked." *State v. Mendoza*, 80 Wis. 2d 122, 138 n.3, 258 N.W.2d 260 (1977). In other words, it secures a criminal defendant the common law right to be tried by a "jury of the vicinage." *Id.*; *see also Williams v. Florida*, 399 U.S. 78, 93–98.

"Jury of the vicinage" means a jury of the neighborhood, which was a closely guarded right at the time of the ratification of both the federal and Wisconsin constitutions. *Mendoza* 80 Wis. 2d at 138 n.3. Indeed, "the right to a jury of the county or district where the crime was

committed is . . . a component of the right to a fair trial." *Id.* at 142. However, the right to a jury of the vicinage secures the "geographic area from which jurors in criminal proceedings must be drawn" and nothing more. *The Sixth Amendment and the Right to a Trial by a Jury of the Vicinage*, 31 Wash. & Lee L. Rev. 399, 399 (1974).

Criminal venue was a matter of common law, which Wisconsin has codified and established by statute since Wisconsin became a state. Wis. Stat. § 971.19; Ch. 147 R. S. 1849. And while many early decisions of this Court assumed that the two rights were indistinguishable, this Court in *Mendoza* noted that the two were not the same. *Mendoza*, 80 Wis. 2d at 143–44. It held "it unwise . . . to construe one right as contingent upon another. Both rights seek to insure the ultimate right to a fair trial." *Id.* at 143. The plain language of Article I, § 7 secures a right to a jury of the vicinage, and both the history of the drafting of the provision and the first statute passed by the Legislature after ratification confirm that interpretation.

b. The constitutional debates and the practices in existence at the time of the writing of the Wisconsin constitution show that the provision secures a right to a jury of the vicinage, not venue.

As this Court recognized in *Mendoza*, the language of Article I, § 7 mirrors the language of the Sixth Amendment to the Federal Constitution. *Mendoza*, 80 Wis. 2d at 138 n.3. But that does not help Brantner, as he appears to believe (*see* Brantner's Br. 13), because the Sixth Amendment, too, was meant to secure a right to a jury of the vicinage.

A history of the drafting of the Sixth Amendment, which was ratified 57 years before Wisconsin's constitution,

shows that the Sixth Amendment also was meant to protect the right to a jury of the vicinage, not venue. *See Williams*, 399 U.S. 78.

The federal constitutional right to venue is conferred by a different Constitutional provision: U.S. Const. article III, § 2. It states, "[t]he trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." *Id.*

The Sixth Amendment was drafted specifically to allay fears among those who ratified the Constitution that Article III, § 2, "failed to preserve the common-law right to be tried by a 'jury of the vicinage'" by giving Congress unfettered authority to determine the place of trial when the offense was not wholly committed in any state. *Williams*, 399 U.S. at 93.

The Supreme Court of the United States gave a comprehensive examination to the history behind the drafting and ratification of the Sixth Amendment in *Williams*. 399 U.S. at 93–98. It noted that "[w]hile Article III provided for venue, it did not impose the explicit juror-residence requirement associated with the concept of 'vicinage.'" *Id.* at 93 n.35. Concerns over whether Article III, § 2 adequately preserved the right to a jury of the vicinage "furnished part of the impetus for introducing amendment to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments." *Id.* at 93–94.

James Madison introduced a version of the Amendment that explicitly stated "[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the

vicinage . . . ," but it was rejected by the Senate. *Id.* at 94–95. The specific term 'vicinage' in what "ultimately became the Sixth Amendment . . . [was] replaced by wording that reflected a compromise between broad and narrow definitions of that term, and that left Congress the power to determine the actual size of the vicinage by its creation of judicial districts." *Id.* 95–96.

In short, the entire purpose of the language in the Sixth Amendment that Wisconsin's provision replicates was to secure the right to a jury of the vicinage in criminal trials. None of the framers nor the people at the time of ratification believed it addressed venue. *Williams*, 399 U.S. at 92–98; *See also United States v. Dawson*, 56 U.S. 467 (1853).

This, then, was the understanding of the Sixth Amendment at the time the Wisconsin constitution was drafted and ratified in 1848. *See also Ex parte Quirin*, 317 U.S. 1, 39 (1942) (specifically mentioning trial by a jury of the vicinage as the right protected by the Sixth Amendment, which was enacted to "guarantee[ ] the continuance of certain incidents of trial by jury which Article III, s 2 had left unmentioned."). The records of the two Wisconsin constitutional conventions show that this was also the meaning of Article I, § 7, as the drafters understood it.

The first Wisconsin constitutional convention split into committees, one of which was a committee on the bill of rights. *See Journal of the Convention to form a Constitution for the State of Wisconsin* 123 (Madison, Beriah Brown 1847). On October 28, 1846, the committee submitted a draft of the bill of rights to the convention. *Id.* It contained 25 provisions; there was a section securing the right to "trial by jury" and another securing the right to a "judgment of his peers." *Id.* at 123–25. It said nothing about either venue or vicinage. *Id.* The final version of the constitution that was

submitted to the people of Wisconsin, however, contained the following provision in the bill of rights, Article XVI, § 9[1]:

> In all criminal prosecutions the accused shall have the right to a speedy and public trial *by an impartial jury of the vicinage*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Milo M. Quaife, *The Convention of 1846,* 749 (1919) (emphasis added).

The people rejected that constitution and a new constitutional convention was held. At the beginning of that convention, it was observed that "[a] large majority of the people had by their votes declared against that instrument in consequence of a few provisions which they had regarded as most pernicious." *Journal of the Convention to form a Constitution for the State of Wisconsin* 8 (Madison, Tenney, Smith & Holt, 1848).[2] The convention determined that it would be "inexpedient to draft an entirely new constitution," and appointed a committee on general provisions to perform minor revisions on the uncontroversial portions, which included the bill of rights, while the bulk of the convention's time would be spent revising the five problematic articles. *Id.* at 8–9.

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[1] The journal does not contain an explanation of how the provisions were changed before the final version was passed. *See id* at 298–306.

[2] For simplicity this journal will hereinafter be cited as *1848 Journal*.

The committee on general provisions submitted a new, simplified bill of rights. *1848 Journal* 50–51. Section 9 of the old bill of rights became Section 7, and said,

> [i]n all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial *by an impartial jury of the count[y] or district wherein the offence shall have been committed*, which count[y] or district shall have been previously ascertained by law.

Id. at 50 (emphasis added).

The change from the express "jury of the vicinage" language in the original provision to the "impartial jury of the count[y] or district wherein the offence shall have been committed" language in the new provision garnered no discussion at the convention. *See 1848 Journal* at 106–110, 120–128, 143. The committee on revisions changed "hath a" to "shall enjoy the" in the first line, and the constitution was submitted to the people. *See 1848 Journal* at 452. It was ratified May 25, 1848.

This history is near irrefutable evidence that the drafters of Article I, § 7 understood that provision to secure the right to a jury of the vicinage. The previous version of the provision had expressly stated it secured a right to "a jury of the vicinage." The language of Article I, § 7 was then changed to follow the federal Sixth Amendment's jury of the vicinage provision, and not a single drafter took issue with the change. Nor did the people of Wisconsin. Surely if the linguistic change altered the right secured by the provision, there would have been some discussion or at least remark about it. But there was nothing.

c. The earliest interpretation of the provision by the Legislature shows that it did not interpret Article I, § 7 as securing criminal venue.

Finally, the first statute passed on the matter shows that the Legislature believed it must codify venue, which was until then secured by common law. Nothing suggests that the Legislature at the time of ratification interpreted Article I, § 7 as determining venue.

At English common law venue was jurisdictional and only permitted in the county where the offense was committed, but that left some crimes un-triable if the offense was not wholly committed in one place. *See In re Eldred*, 46 Wis. 530, 545–48, 1 N.W. 175 (1879); *see also Dawson*, 56 U.S. at 469, 473–74. Accordingly, statutes established venue for those situations. *Id.* As explained above, Article III, § 2 of the federal Constitution secured this common law right to restrict venue for federal crimes.

The Wisconsin constitution does not contain an analogous provision. Accordingly, less than a year after the constitution was ratified, the second Legislature passed a chapter codifying the common law venue requirements, stating, "[a]ll criminal causes shall be tried in the county where the offence was committed, except where otherwise provided by law, unless it shall appear to the satisfaction of the court . . . that a fair and impartial trial cannot be had in such county. . . ." Ch. 147 R. S. 1849.

This first statutory enactment on criminal venue was passed nearly contemporaneously with ratification of the constitution. It is highly unlikely that those who drafted and ratified the Wisconsin constitution believed Article I, § 7 determined criminal venue, but then passed an entire statutory chapter codifying the common law provision for

venue in criminal cases in the county where the offense was committed, and providing venue when it may lie in multiple counties, a mere seven months later. *Eldred*, 46 Wis. at 549. Nor does it make any sense for the Legislature to feel the need to pass this statute if it believed common law venue had been incorporated and codified by Article I, § 7.

This Court recognized in 1879, "[Article I, § 7] does not provide as the common law did, for trial in the county in which the offense is committed; but for trial in the county or district wherein the offense is committed, which county or district shall be previously ascertained by law."[3] *Eldred*, 46 Wis. at 547–48. This Court held that "[t]his very peculiar language is obviously designed to avoid the difficulties which had arisen at common law,[4] without *depriving the accused of a trial by a jury of the vicinage*." *Id.* at 548. (emphasis added).

This Court then explained what the provision means: "[t]he legislature takes express power to provide by statute for trial of offenses in the county or district in which the offenses shall have been committed. . . . the legislature

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[3] The State maintains that the plain language of Article I, § 7 does not provide for trial in the county or district in which the offense is committed but provides a right to trial by an impartial jury from that county or district. Most of the time, ensuring a jury of the vicinage would require the trial to be held in a particular county, as this Court observed in *Mendoza*. The rest of this Court's discussion in *Eldred* is in line with the State's construction that the section at issue secures a right to a jury of the vicinage. *In re Eldred*, 46 Wis. 530, 547–53, 1 N.W. 175 (1879).

[4] The difficulties to which this Court was referring were situations where the offense consisted of multiple elements occurring in different places, or where it was impossible to determine where the offense took place. *Eldred*, 46 Wis. 545–48.

clearly takes power to provide for the trial of a crime partly committed in several counties, in one or any of these counties." *Eldred*, 46 Wis. 548. "So apparently it takes power to provide for a district, composed of two or more counties, for the trial of crime, when it may be doubtful in which of the counties of the district the crime is committed." *Id.* at 548–49. This Court also noted that if Article I, § 7 determined venue, the venue provisions passed by the Legislature, which "were framed by very intelligent gentlemen, some of them being distinguished members of the bar, in the same year in which the constitution was adopted . . . would apparently have been invalid." *Id.* at 549.

The right to a trial in the county where the offense was committed was a different common law right, which the Legislature codified in 1849 and which has been provided by statute ever since. *See* Ch. 147, R. S. 1849; Wis. Stat. ch. 356 (1925 through 1954); Wis. Stat. ch. 956 (1955 through 1968); Wis. Stat. § 971.19 (1971 to present). All of the sources of constitutional interpretation show that Article I, § 7 secures the right to a jury of the vicinage, not to venue. *See Thompson*, 199 Wis. 2d at 680.

Brantner could not now prevail on a jury of the vicinage claim, for two reasons. First, as explained above in part B, the evidence was sufficient for the jury to find that he committed his crime in Fond du Lac County, therefore he was necessarily tried by a jury of the vicinage. But second, jury of the vicinage claims must be made before trial. *State v. Wyss*, 124 Wis. 2d 681, 719, 370 N.W.2d 745 (1985). Brantner never made a jury of the vicinage claim at any point in this proceeding.

In sum, not only has Brantner failed to support his interpretation of Article I, § 7, but he failed to give any persuasive reason why the sufficiency of the evidence test should not apply and failed to show that the evidence was

insufficient for the jury to find venue. Consequently, he has also failed to explain why a distinction between a constitutional right to trial in the county where the offense was committed and a statutory right to trial in the county where the offense was committed would make any difference in this case. This Court should affirm the jury's venue finding.

II. Brantner's two charges are not multiplicitous because he possessed pills of two different doses, colors, and sizes of the same controlled substance without a prescription and therefore violated the statute twice.

A. Legal standard and multiplicity.

1. 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.

2. Multiple convictions for violating the same statute are constitutionally permissible if the Legislature intended cumulative punishments.

Under the United States and Wisconsin constitutions, "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 a defendant is convicted of two offenses that are the same in law and fact and Legislature did not intend cumulative punishments, the punishments are unconstitutionally multiplicitous in violation of the Double Jeopardy Clause. *Davison*, 263 Wis. 2d 145, ¶¶ 31–32.

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 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)).

However, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Davison*, 263 Wis. 2d 154, ¶ 28.

Accordingly, the second prong of the test 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 legislative intent. *Id.* ¶¶ 61–62.

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 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.* Then "it is the defendant's burden to show a clear legislative intent that cumulative punishments are not authorized." *Davison*, 263 Wis. 2d 145, ¶ 45.

Regardless of whether a potential due process violation or a potential double jeopardy violation is at issue, "the intent of the legislature is ultimately determinative of the appropriate unit of prosecution." *State v. Trawitzki*, 2001 WI 77, ¶ 49, 244 Wis. 2d 523, 628 N.W.2d 801 (A.W. Bradley, J., dissenting).

B. Brantner's convictions are different in fact.

Brantner's two convictions for possession of oxycodone[5] are necessarily the same in law because they are two

[5] Brantner claims that his bail jumping charges are also multiplicitous. (Brantner's Br. 22.) 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.

convictions for violations of the same statute. *Davison*, 263 Wis. 2d 145, ¶ 41. However, his two convictions each required proof of a different fact showing Brantner recommitted himself to the criminal conduct, therefore they are not convictions for "the same offense." *Id.* at ¶ 33.

1. Brantner's possession of 20mg pink oxycodone pills and 5mg white oxycodone pills are sufficiently different in fact to show that he committed separate possession crimes.

"[W]hen different crimes are committed, each may be prosecuted separately although all form part of one transaction or sequence of events." *Harrell v. State*, 88 Wis. 2d 546, 555, 277 N.W.2d 462 (Ct. App. 1979) (citation omitted). "Crimes are different when the evidence necessary to establish one differs from the other." *Id.* (citation omitted). Brantner's two charges for possession of oxycodone each required proof of a different evidentiary fact, namely, the type of oxycodone pills that Brantner possessed without a valid prescription.

However, 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, 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. *See, e.g.*, *State v. Hauk*, 2002 WI App 226, ¶ 16, 257 Wis. 2d 579, 652 N.W.2d 393.

Brantner admitted he got the pills from Michael, and Michael did not have a current prescription for 20mg pink oxycodone pills, but he did have a current prescription for the 5mg white oxycodone pills. Brantner had to complete the act of taking possession of each type of pill separately, therefore those acts were separate in time: Brantner either 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. *See Multaler*, 252 Wis. 2d 54, ¶ 58 (holding 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 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.'" *Multaler*, 252 Wis. 2d 54, ¶ 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. Even if Brantner took all of the pills from Michael at the same time, he still had to take them from different prescription bottles, which constitutes two volitional acts of taking the pills.

In other words, Brantner made the choice to commit two different unlawful acts of possession of oxycodone. The

fact that the evidence of those two acts was discovered simultaneously does not mean that the acts were not separate crimes. *See Multaler*, 252 Wis. 2d 54, ¶ 58; *see also 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). His convictions were different in fact.

2. Brantner has misunderstood the difference between proof of different elements and proof of different facts.

Brantner's different in fact analysis must fail because he has conflated proof of different elements and proof of different facts. He claims that "the question [under *Blockburger*] is not whether the State purportedly proved different facts under each count, but whether the [S]tate was required to prove an additional fact under each count." (Brantner's Br. 25 (emphasis omitted).) According to Brantner, requiring "proof of an additional fact" means proof of an additional element the other charge did not require. (*See* Brantner's Br. 26 ("Here, each count required proof of an additional fact that the other did not, but only because the State added an extra element [the type of pill] to the offense.").) He is wrong.

The question for the different–in–fact analysis under *Blockburger* is precisely whether the State proved different facts to meet the elements for each conviction. *State v. Bergeron*, 162 Wis. 2d 521, 534, 470 N.W.2d 322 (Ct. App. 1991) ("The five charges are not identical in fact because each count requires proof of a significant evidentiary fact not required or pertinent to proof of the other counts."). Whether each charge required proof of *an additional element* is the question for whether the offenses are different in law, not for

whether they are different in fact. *Ziegler*, 342 Wis. 2d 256, ¶ 60; *see also State v. Eisch*, 96 Wis. 2d 25, 30, 291 N.W.2d 800 (1980).

Brantner's claim that the complaint "created an entirely new offense" by bringing two charges based on the two different doses of the pills, thus requiring the State to prove the that Brantner possessed a different type of oxycodone pills for each charge, is unsupported by the law and common sense. (Brantner's Br. 25–28.) The State does not create a new offense by specifying in the complaint the different facts on which two charges under the same statute are based. That is the whole point of the "different in fact" analysis; if the State charges a person with two violations of the same statute but must prove a different fact to sustain each charge, that shows the defendant has committed two violations of the statute instead of one. *See Multaler*, 252 Wis. 2d 54, ¶¶ 53, 58. This is especially true when two charges under the same statute are based on the defendant's committing two separate criminal acts during a course of conduct. *See Eisch*, 96 Wis. 2d 27–30. It does not mean the State has added an element to the offense. *Id.* If Brantner were correct, the State could never bring multiple charges against someone under the same statute without creating a new offense, because requiring the State to prove the different fact would always add an element to the offense.

For example, assume a person is charged with two counts of child abuse under Wis. Stat. § 948.03(2) for breaking a child's arm and breaking the same child's leg. For both charges, the State would be required to prove that the person (1) intentionally, (2) caused great bodily harm, (3) to a person who was under age 18. Wis. JI–Criminal 2108 (2009). One charge would require the State to prove that the person intentionally caused great bodily harm by breaking the child's arm, and the other would require the State to

prove that the person intentionally caused great bodily harm by breaking the child's leg; but that would not mean the State created two new offenses of "physical abuse of a child by breaking a child's arm" and "physical abuse of a child by breaking a child's leg." Requiring proof of different facts does not add an element to the offense.

Brantner seems to suggest that *Trawitzki*, *Anderson*, and *State v. Pal*, 2017 WI 44, 374 Wis. 2d 759, 893 N.W.2d 848, support his formulation of the different in fact test, but fails to explain how. (Brantner's Br. 24–26.) These cases support the State's position, not Brantner's.

In *Trawitzki*, the defendant was convicted of ten charges of theft under Wis. Stat. § 943.20 for stealing ten firearms from a house. *Trawitzki*, 244 Wis. 2d 523, ¶ 5. This Court held that the convictions were different in fact because the State had to prove the identity of a different firearm for each charge. *Id.* ¶ 28.

In *Anderson*, the defendant pled to two counts of bail jumping under Wis. Stat. § 946.49. *Anderson*, 219 Wis. 2d 739 at 744. This Court held that the convictions were different in fact because the defendant committing two different acts that both violated the bond: consuming alcohol and contacting a prohibited person. *Id.* at 749–50.

In *Pal*, the defendant was charged with two counts of hit and run causing death under Wis. Stat. § 346.67(1) for two deaths caused by one accident. *Pal*, 374 Wis. 2d 759, ¶ 2. This Court held the convictions were different in fact because each charge required proof that the defendant "failed to complete his statutory responsibilities with regard to each victim." *Id.* ¶ 22.

Brantner does not discuss *Ziegler*. (Brantner's Br. 24–26.) There, the defendant was convicted of five counts of second-degree sexual assault of a child in violation of Wis.

Stat. § 948.02(2) for a sexual episode with a minor. *Ziegler*, 342 Wis. 2d 256, ¶ 65. This Court held that the convictions were different in fact because each charge required proof of a different sexual act. *Id.* ¶ 73. Brantner makes no mention of *Multaler*, either, where the defendant was convicted of 28 counts possession of child pornography under Wis. Stat. § 948.12, and this Court held the convictions were different in fact because each charge required proof that the defendant possessed a different image file. *Multaler*, 252 Wis. 2d 54, ¶¶ 56–60.

If Brantner's analysis were correct, this Court should have found the convictions were the same in fact, and that the State impermissibly created multiple new offenses, in every single one of these cases. In each, the State charged the defendant with multiple violations of the same statute, so the charges all necessarily had the same elements. And in each case, this Court held that the convictions were different in fact because the State had to prove a different evidentiary fact to meet those elements for each conviction.

Here, the State charged Brantner with two counts of possession of a controlled substance under section 961.41(3g). The two charges necessarily had the same elements. But they were different in fact because the State had to prove that Brantner committed two different volitional acts of possession by obtaining two different types of oxycodone pills from different sources, showing that each possession required "a new volitional departure" by Brantner. *Multaler*, 252 Wis. 2d 54, ¶ 57 (citation omitted). His offenses were different in fact.

3. It is Brantner's burden to show that the Legislature did not intend cumulative punishments, which he has not met and could not meet.

The only remaining question, then, is whether cumulative punishments amount to a due process violation because they are contrary to legislative intent. 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. *Multaler*, 252 Wis. 2d 54, ¶ 57. 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).

Nothing about the statutory language of Wis. Stat. § 961.41(3g) suggests that the Legislature did not intend cumulative punishments for possession of multiple types of the same drug that necessarily had to be obtained from different sources. Wisconsin Stat. § 961.41(3g) says, "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 the person violates the statute "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 dose or type of the substance that they do not have a valid prescription to possess.[6] 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. Brantner has omitted any mention of this language, and claims only that the unit of prosecution in this case is simply "a controlled substance." (Brantner's Br. 27–30.) But to support this argument, he points only to the section of the statute stating that possession of a controlled substance is a Class I felony, and not the section defining the crime. (Brantner's Br. 28.)

The fact that the Legislature has designated possession of a controlled substance as a Class I felony does not mean a person cannot commit multiple violations of the statute by possessing different types of the same substance; it merely means the person has committed a separate Class I felony anytime he or she obtains the controlled substance without a valid prescription. 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).

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[6] 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).

Brantner next claims that because the statute does not say "a pill," allowing the State to charge multiple counts for each pill of the same substance "fundamentally changes the nature of the offense." (Brantner's Br. 29.) The State does not dispute that contention. But the State did not use "a pill" as the unit of prosecution. It charged Brantner with one count of possession of a controlled substance for each of the types of oxycodone pills he possessed without a valid prescription, which is expressly what Wis. Stat. § 961.41(3g) proscribes.

Brantner says 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," Wis. Stat. § 961.001, and provided an escalating penalty scheme for such offenses, Legislature cannot have intended multiple punishments for multiple acts of possession. (Brantner's Br. 29–30.) 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 acts of possession.

There is little legislative history on Wis. Stat. ch. 961, as it is the uniform code adopted for the "general purpose to make uniform the law with respect to" drug crimes across the nation. Wis. Stat. § 961.003. However, the prefatory note to the Uniform Controlled Substances Act of 1994 recognizes that a "major increase in drug use" has occurred due to increased mobility and affluence of citizens, and "[n]owhere is this mobility manifested with greater impact than in the legitimate pharmaceutical industry."[7] Accordingly, one of the

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[7] Prefaratory Note to the Uniform Controlled Substances Act (1994) at 1, *available at* https://www.uniformlaws.org/

goals of the uniform controlled substances act was the "critical" need to "approach not only the control of illicit and legitimate traffic in these substances at the national and international levels, but also to approach this problem at the state and local level." *Supra* n.7. In other words, one of the express purposes of the act was to address the problem of unauthorized possession of legitimate pharmaceuticals.

When assessing the nature of the conduct, a court confronted with a multiplicity challenge "refer[s] back to its inquiry into identity in fact" and looks to whether the conduct was separated in time or different in nature. *State v. Steinhardt*, 2017 WI 62, ¶ 33, 375 Wis. 2d 712, 896 N.W.2d 700. The final factor, the appropriateness of multiple punishments, also typically looks to whether there were multiple acts. *Steinhardt*, 375 Wis. 2d 712, ¶ 34. Brantner's brother, Michael, suffered a number of ailments after an injury and was legally prescribed these pain medications to deal with them. (R. 70:101.) Michael never gave Brantner permission to take the pills. (R. 1:4.) So, Brantner committed multiple acts of stealing his brother's needed prescription medication. (*See* R. 1:4; 70:104–06, 115–20.) Multiple punishments are appropriate.

Brantner had two different types and doses of oxycodone pills that he stole from his injured brother, including one for which his brother did not currently have a prescription—showing Brantner had to steal them at some other time. Brantner himself did not have a prescription for either type. Therefore, he necessarily committed two acts of possession of oxycodone in violation of the statute under its

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plain language. He has not overcome his burden to show that the Legislature did not permit cumulative punishments. This Court should affirm the circuit court.

C. Resentencing on all counts is not the appropriate remedy.

Brantner claims that if his convictions are multiplicitous all of his sentences must be vacated and he must be resentenced on all counts. (Brantner's Br. 31.) He observes, though, 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 (Ct. App. 1992).)

Brantner has given no reason why this Court should not allow the sentencing court to use its broad discretion to determine whether vacating any convictions frustrates the intent of its sentence and what the appropriate remedy should be. (Brantner's Br. 31.) If this Court vacates any convictions, it should leave the decision whether to resentence Brantner on all counts to the discretion of the circuit court.

CONCLUSION

This Court should affirm Brantner's convictions and sentences.

Dated this 14th day of August, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,908 words.

Dated this 14th day of August, 2019.

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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 14th day of August, 2019.

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LISA E.F. KUMFER
Assistant Attorney General