STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP1209-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TODD N. TRIEBOLD,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN PIERCE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH D. BOLES, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court err when it held that the State of Wisconsin had personal and subject matter jurisdiction to prosecute Todd N. Triebold for his failure to comply with the sex offender registry reporting requirements of Wis. Stat. § 301.45 while he was living in Minnesota?

The trial court held that the State of Wisconsin had jurisdiction to prosecute Triebold under Wis. Stat. § 301.45 for his failure to report his change of address in Minnesota to Wisconsin authorities because it had jurisdiction under Wis. Stat. § 939.03.

This Court should affirm because Wisconsin had jurisdiction over the offense and over Triebold.

2. Did the trial court err when it held that the prosecution of Triebold for his failure to comply with the reporting requirements of Wis. Stat. § 301.45 was not barred by Wis. Stat. § 939.71 even though Minnesota had earlier prosecuted him for violating the reporting requirements of its own sex offender registry law?

The trial court held that the Wisconsin prosecution of Triebold for violating Wis. Stat. § 301.45 was not barred by Wis. Stat. § 939.71 because it was not the same offense as his violation of the reporting requirements in the Minnesota statute.

This Court should affirm because Triebold's violation of the Minnesota mandatory reporting statute was not the same offense as his violation of Wis. Stat. § 301.45.

3. Has Triebold forfeited his claim that the reporting requirements of Wis. Stat. § 301.45 are preempted by federal law once the sex offender moves out of Wisconsin?

Triebold did not argue federal preemption in the trial court. He argued only that Wisconsin lacked territorial

jurisdiction to prosecute him and that his prosecution was barred by the double jeopardy clause and Wis. Stat. § 939.71.

This Court should decline to review the preemption argument because Triebold forfeited it by not raising it in the trial court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The parties' briefs should adequately address the legal issues presented as they are based on undisputed, straightforward facts.

Publication may be of benefit with regard to the issues because they may recur, especially in border counties such as Pierce County.

STATEMENT OF THE CASE

Triebold was charged in a criminal complaint and information in Pierce County Circuit Court with knowingly failing to comply with the requirement of Wisconsin's sex offender registration and reporting law that he report any change of address at least ten days prior to the move. Wis. Stat. § 301.45(2)(a), (6)(a)1; (R. 1:2–4; 7).

In a trial to the court held on September 20, 2017, the State proved beyond a reasonable doubt that Triebold was subject to Wisconsin's lifetime sex offender registration and reporting law because he was convicted in Wisconsin of second-degree sexual assault of a child in 1994. (R. 73:24–25, 65); *see* Wis. Stat. § 301.45(1d)(b), (1g)(a). The State proved that Triebold notified the Wisconsin Department of Corrections (DOC) in a confirmation letter received on August 20, 2013, that he was living at 750 Point Douglas Road in St. Paul, Minnesota. (R. 73:27–28, 39, 47.) Triebold later moved to 259 English Street in St. Paul, Minnesota, but never notified the DOC of his change of address. (R. 73:29–30, 52–

53. 54–56.) This violated the statute's requirement that Triebold notify the DOC of his change of address at least ten days before the move. (R. 73:25–27, 51.) Triebold does not dispute that he was fully aware of the notification requirement or that he knowingly failed to comply with it. Triebold waived his right to testify and put on no defense. (R. 73:60–64.)

The trial court found Triebold guilty as charged beyond a reasonable doubt. (R. 74:12–15.)

Triebold had filed a pretrial motion to dismiss for lack of jurisdiction. He argued that Wisconsin could not prosecute him for failing to notify the DOC of his change of address in St. Paul because Minnesota had already prosecuted him for failing to report that address change to Minnesota authorities under its own sex offender registry and reporting law. (R. 75:13–14.) Triebold argued, in essence, that once he moved to Minnesota, Wisconsin authorities lost any authority to compel him to comply with Wisconsin's sex offender registry and reporting law. (R. 23:6; 29; 30; 71:35–36, 42–43.)

Triebold renewed his jurisdictional challenge at the outset of the court trial. He also argued that the Wisconsin prosecution was barred by the Double Jeopardy Clause of the United States Constitution and by Wis. Stat. § 939.71, Wisconsin's statutory double jeopardy provision, because the Wisconsin offense was the same offense as his earlier Minnesota conviction for failing to report the same change of address to Minnesota authorities. (R. 73:3–8). The trial court reserved ruling until the close of trial. (R. 73:16.)

The trial court denied the motion to dismiss either for lack of jurisdiction or for violating the double jeopardy clause and Wis. Stat. § 939.71 at a hearing held on September 27, 2017. (R. 74:6–11.) With regard to jurisdiction, the court held that Wisconsin had jurisdiction over Triebold's violation of Wis. Stat. § 301.45 due to his commission and 1994 conviction

of a sex offense in Wisconsin, requiring lifetime registration here. (R. 74:6–9.) The court reasoned that the lifetime registration requirement would be rendered meaningless if a sex offender could defeat it simply by moving out of state. (R. 74:8–9.)

With regard to double jeopardy and Wis. Stat. § 939.71, the court held that the Minnesota and Wisconsin prosecutions were not for the same offense. By virtue of his change of residence to Minnesota, Triebold was required to report to both Minnesota and Wisconsin authorities and could be held liable in both states for failing to do so. (R. 74:10–11.)

The trial court withheld sentence and imposed a two-year term of probation with the condition that Triebold comply with the sex offender registry reporting requirements. (R. 75:23–24.)

Triebold appeals, arguing that the trial court lacked personal and subject matter jurisdiction because the violation occurred in Minnesota, and that the Wisconsin prosecution violated Wis. Stat. § 939.71 because it was the same offense as the earlier Minnesota prosecution for Triebold's failure to report the same change of residence to Minnesota authorities. Triebold also argues for the first time that the reporting requirements of Wis. Stat. § 301.45 are preempted by federal law once the registered offender moves to another state.

SUMMARY OF ARGUMENT

1. Wisconsin had jurisdiction to prosecute Triebold for failing to report his address change in Minnesota. Triebold was convicted of second-degree sexual assault of a child in Wisconsin in 1994. By virtue of that conviction, Triebold was required to comply with Wisconsin's mandatory reporting requirements for convicted sex offenders for the rest of his life. Wis. Stat. §§ 301.45, 973.048(2m). After completing his sentence, Triebold moved to Minnesota. Triebold argues that

Wisconsin lost jurisdiction to compel him to continue reporting his whereabouts once he moved across the border. He is wrong.

When he changed addresses in St. Paul, Minnesota, Triebold knowingly and intentionally chose not to notify either Wisconsin or Minnesota authorities of the move. Minnesota prosecuted and convicted him for violating its mandatory reporting statute. Triebold argues that the Minnesota prosecution bars this Wisconsin prosecution because they are based on the same facts. Again, he is wrong.

Minnesota and Wisconsin had concurrent jurisdiction over Triebold's failure to report his change of address to both states' authorities. Wisconsin had jurisdiction by virtue of Wis. Stat. § 939.03(1)(a) because the threshold "constituent element[ ]" of the offense occurred in Wisconsin; Triebold's 1994 conviction for second-degree sexual assault of a child that triggered the lifetime reporting requirements of Wis. Stat. § 301.45, regardless of where Triebold might eventually take up residence.

Wisconsin also had jurisdiction by virtue of Wis. Stat. § 939.03(1)(c) because Triebold committed an act in Minnesota, changing his address and knowingly deciding not to report his change of address to anyone, with the intent to cause "a consequence" in Wisconsin as "set forth in a section defining a crime"—here, Wis. Stat. § 301.45. Triebold's intended consequence was to prevent Wisconsin authorities from being able to track his whereabouts by moving to a new address without reporting it to anyone.

Wisconsin and Minnesota had concurrent jurisdiction to prosecute Triebold for his knowing failure to report his change of address to each state's authorities. The "dual sovereignty" doctrine allows states with concurrent jurisdiction to prosecute an offender separately even when the dual prosecutions are based on the same conduct. It follows

that, by virtue of its concurrent jurisdiction with Minnesota, Wisconsin's prosecution of Triebold for violating Wis. Stat. § 301.45 was not barred by Minnesota's earlier prosecution of him under its similar mandatory reporting statute.

2. Triebold's prosecution for violating Wis. Stat. § 301.45 was not barred by Wis. Stat. § 939.71, Wisconsin's statutory embodiment of the double jeopardy clause's proscription against multiple punishments for the same offense after conviction or acquittal. The Minnesota and Wisconsin offenses are not the same in law or in fact. The elements of each state's mandatory reporting statute are different, and the facts required to prove those elements are different. One can violate Minnesota's law without violating Wisconsin's law even under the same set of facts, and vice versa.

Moreover, because Wis. Stat. § 939.71 embodies double jeopardy law, the dual sovereignty doctrine applies and allows for prosecution in both states even under the same set of facts.

3. Triebold forfeited his argument, raised for the first time in this Court, that federal law preempts prosecution for violating the mandatory reporting provisions of Wis. Stat. § 301.45 once the convicted sex offender moves out of Wisconsin.

STANDARD OF REVIEW

1. The issue whether Wisconsin courts have jurisdiction over a crime based on undisputed facts is a question of law for the circuit court subject to independent review by this Court. *State v. Anderson*, 2005 WI 54, ¶ 22 n.5, 280 Wis. 2d 104, 695 N.W.2d 731 (citing *State v. Brown*, 2003 WI App 34, ¶¶ 25–27, 260 Wis. 2d 125, 659 N.W.2d 110).

2. The issue whether the Minnesota and Wisconsin offenses are the same offense under Wis. Stat. § 939.71 involves the circuit court's interpretation of that statute,

subject to independent review by this Court. *E.g., State v. Petty*, 201 Wis. 2d 337, 354–55, 548 N.W.2d 817 (1996).

ARGUMENT

I. The Pierce County Circuit Court had jurisdiction over Triebold's violation of Wis. Stat. § 301.45 under Wis. Stat. § 939.03(1)(a) and (c).

Triebold argues that Wisconsin lost all jurisdiction over him once he moved to Minnesota. It could no longer require him to report his whereabouts under Wis. Stat. § 301.45. (R. 23:6.) He is wrong. Wisconsin maintained jurisdiction over Triebold for the rest of his life by virtue of his having committed and been convicted of a child sex offense in Wisconsin. As argued by the State in the trial court, Wisconsin had jurisdiction as provided in Wis. Stat. § 939.03(1)(a) and (c). (R. 24.)

A. Wisconsin's sex offender registry and reporting statute.

Any person who is "convicted" of a "sex offense" in Wisconsin after December 25, 1993, must register with the DOC under Wis. Stat. § 301.45 for the remainder of his lifetime. Wis. Stat. § 973.048(2m); *State v. Smith*, 2010 WI 16, ¶ 22, 323 Wis. 2d 377, 780 N.W.2d 90. The person is guilty of a Class H felony if he, pertinent here, fails to notify the DOC of a change in address at least ten days prior to the move. Wis. Stat. § 301.45(1g)(a), (2)(a), (4)(a), (6)(a). The elements of the offense are as follows: (1) The defendant was a person required to provide information under Wis. Stat. § 301.45(1g); (2) The defendant failed to provide the required information under Wis. Stat. § 301.45(2)–(4); (3) The defendant knowingly failed to provide the required information. Wis. JI–Criminal 2198 (2013).

The crime of second-degree sexual assault of a child, of which Triebold was convicted under Wis. Stat. § 948.02(2) in

1994, is a "sex offense" subject to the mandatory registry and reporting statute. Wis. Stat. § 301.45(1d)(b). The Defendant's failure to notify the DOC of an address change is a violation of the statute. Wis. Stat. § 301.45(2)(a), (4)(a).

The purpose of the mandatory sex offender registry and reporting statute is "public protection and safety." *State v. Bollig*, 2000 WI 6, ¶ 20, 232 Wis. 2d 561, 605 N.W.2d 199. "Registration statutes assist law enforcement agencies in investigating and apprehending offenders in order to protect the health, safety, and welfare of the local community and members of the state." *Id.* Wisconsin Stat. § 301.45 "reflects the intent to protect the public and assist law enforcement." *Id.* ¶ 21. Requiring sex offenders to register, "is rationally related to the state's legitimate interest in protecting the public, including children, and assisting law enforcement." *Smith*, 323 Wis. 2d 377, ¶ 13. This statute, along with its companion statutes governing the supervision of other convicted Wisconsin offenders, "establish various safeguards to protect the public from persons convicted of criminal conduct." *State v. Muldrow*, 2018 WI 52, ¶ 44, 381 Wis. 2d 492, 912 N.W.2d 74. They are "non-punitive in nature." *Id.* "This purpose is served when the public and law enforcement officers have accurate information about the whereabouts of known sex offenders so that they can be monitored." *State v. Dinkins*, 2012 WI 24, ¶ 45, 339 Wis. 2d 78, 810 N.W.2d 787.

B. The scope of Wisconsin territorial jurisdiction over crimes.

Wisconsin circuit courts "are courts of general jurisdiction, with 'original subject matter jurisdiction over civil and criminal matters not excepted in the constitution or prohibited by law.'" *State v. Gantt*, 201 Wis. 2d 206, 212, 548 N.W.2d 134 (Ct. App. 1996) (quoting *State v. Olexa*, 136 Wis. 2d 475, 479, 402 N.W.2d 733 (Ct. App. 1987)).

The Pierce County Circuit Court had subject matter jurisdiction in this case because "a circuit court is never without subject matter jurisdiction." *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 12, 370 Wis. 2d 595, 882 N.W.2d 738 (citation omitted). In other words, "no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever." *Id.* ¶ 18 (citation omitted); *see also State v. Scott*, 2017 WI App 40, ¶ 13, 376 Wis. 2d 430, 899 N.W.2d 728 ("Because Scott was charged with a crime known to law, the court had subject matter jurisdiction.").

Moreover, because Triebold had a sufficient relationship to Pierce County by virtue of the filing of the criminal complaint and information, (R. 1:3; 7), and his appearing personally in court to answer the charged violation of Wis. Stat. § 301.45 within the jurisdiction of the Circuit Court for Pierce County, the circuit court properly exercised personal jurisdiction over him. "Personal jurisdiction assures that the defendant has a sufficient relationship to the jurisdiction exercising authority and that the defendant has notice of the charges." *State v. Smith*, 131 Wis. 2d 220, 239, 388 N.W.2d 601 (1986). Notice is satisfied by the criminal complaint that includes the essential elements of the charged offense and the potential penalties. *Id.* "The requirement of a sufficient relationship to the state is satisfied by section 939.03." *Id.*; *see Olexa*, 136 Wis. 2d at 480 n.2 ("*Smith* suggests that personal jurisdiction now depends only on the defendant's physical presence before the court on an accusatory pleading, no matter how such physical presence was obtained."). *See generally State v. Webb*, 160 Wis. 2d 622, 634–35, 467 N.W.2d 108, (1991) *reconsideration denied*, 161 Wis. 2d 600, 468 N.W.2d 694 (1991) (per curiam).

C. The Pierce County Circuit Court had territorial jurisdiction in this case.

A Wisconsin court has territorial jurisdiction only over those crimes committed within the territorial jurisdiction of Wisconsin. *Anderson*, 280 Wis. 2d 104, ¶ 32. Although territorial jurisdiction was once considered to be a matter of subject matter jurisdiction, this Court has since held that it is "more akin to personal jurisdiction." *Brown*, 260 Wis. 2d 125, ¶ 26 n.11.

The statute that defines the territorial jurisdiction of Wisconsin courts is Wis. Stat. § 939.03. *Anderson*, 280 Wis. 2d 104, ¶¶ 28, 32. Pertinent to this case, Wis. Stat. § 939.03 provides two alternative methods of securing territorial jurisdiction:

> (1) A person is subject to prosecution and punishment under the law of this state if any of the following applies:
>
> (a) The person commits a crime, any of the constituent elements of which takes place in this state.
>
> . . . .
>
> (c) While out of this state, the person does an act with intent that it cause in this state a consequence set forth in a section defining a crime.

Wis. Stat. § 939.03.

"[T]he 'constituent elements' . . . are those elements of the criminal offense that the State is required to prove beyond a reasonable doubt in the prosecution of the offense." *Anderson*, 280 Wis. 2d 104 ¶ 33. "A constituent element of a criminal offense may be either an actus reus element or a mens rea element." *Id.* ¶ 51.

Here, the Pierce County Circuit Court had territorial jurisdiction under either option. It had jurisdiction under section 939.03(1)(a) because Triebold's 1994 sex offense was a

constituent element of a charge under Wis. Stat. § 301.45, and he committed that 1994 offense in Wisconsin. Alternatively, the court had jurisdiction under section 939.03(1)(c) because Triebold violated section 301.45 while outside Wisconsin with the intent that his violation would have a consequence in this state—namely, preventing Wisconsin authorities from being able to track him.

1. The Pierce County Circuit Court had territorial jurisdiction under Wis. Stat. § 939.03(1)(a) because the threshold constituent element of the offense occurred in Wisconsin.

As discussed above, the threshold element that the State must prove beyond a reasonable doubt under Wis. Stat. § 301.45 is that Triebold was a person "required to provide information under section 301.45." Wis. JI–Criminal 2198 (2013). Such a person is one who meets the criteria for reporting under Wis. Stat. § 301.45(1g). *Id*. A person such as Triebold who was "convicted" of a "sex offense" in Wisconsin after December 25, 1993, is a person who meets those criteria. This threshold constituent element, both the sexual offense itself and the conviction for it in 1994, occurred in Wisconsin and made Triebold subject to the mandatory reporting statute for the rest of his life. The Pierce County Circuit Court, therefore, had territorial jurisdiction to try Triebold for his alleged violation of Wis. Stat. § 301.45.

D. Alternatively, the Pierce County Circuit Court had territorial jurisdiction under Wis. Stat. § 939.03(1)(c) because Triebold's refusal to comply with the registration requirement was an act outside this state that had a criminal consequence in Wisconsin.

While in Minnesota, Triebold's knowing refusal to comply with Wisconsin's change-of-address reporting

requirement was "an act with intent that it cause in this state a consequence set forth in a section defining a crime"—here, Wis. Stat. § 301.45. Wis. Stat. § 939.03(1)(c). "This provision applies straightforwardly to the registration requirement, because a nonresident's failing to comply has a criminal consequence in Wisconsin—namely a failure to register with the state's Department of Corrections." *Mueller v. Raemisch*, 740 F.3d 1128, 1132 (7th Cir. 2014).

Triebold disputes neither his knowledge of Wisconsin's mandatory reporting requirement, his intent not to comply with it while living in Minnesota, nor his failure to report his change of address.

Triebold argues that his failure to report his change of address was an act of omission, not commission, and it occurred entirely in Minnesota, depriving Wisconsin courts of jurisdiction. He is wrong. Wisconsin jurisdiction under the mandatory reporting statute attached when he was convicted in Wisconsin of a child sex offense in 1994. The statutory reporting obligation followed Triebold to Minnesota after his release from prison the same as does a parent's obligation to continue to pay child support adjudicated in Wisconsin even after both the parent and child have moved to other states. *Gantt*, 201 Wis. 2d at 210–12. This is so because it is "the general criminal-law rule that a crime involving a failure to act is committed at the place where the act is required to be performed." *Id.* at 211. The court rejected Gantt's argument that Wisconsin lost jurisdiction because he could be prosecuted for non-support in Texas where his child lived:

> We have no doubt that an action for nonsupport could be maintained against Gantt in Texas, where [his child] was living. But in our opinion, that does not rule out concurrent jurisdiction in Wisconsin based on Gantt's willful failure to comply with a valid Wisconsin judgment requiring him to pay child support to the clerk of the Dane County Circuit Court.

Id.

In the same vein, this Court has held that Wisconsin courts had concurrent jurisdiction with Minnesota to prosecute a fisherman who was apprehended in Wisconsin after being observed "snagging" fish on the Minnesota side of the Mississippi River in violation of both Wisconsin and Minnesota law. Wisconsin and Minnesota have concurrent jurisdiction over the width of the Mississippi River that forms the territorial boundary between the two states. *State v. Nelson*, 92 Wis. 2d 855, 858–59, 285 N.W.2d 924 (Ct. App. 1979). "Where the two states have similar laws, however, concurrent jurisdiction allows a conviction in either state for violation of such laws." *Id.* at 859; *see also Anderson*, 280 Wis. 2d 104, ¶¶ 45–51 (To establish Wisconsin territorial jurisdiction to prosecute for first-degree intentional homicide in a case where the victim's body was found in North Carolina, the State needed only prove "that the defendant committed an act in this state that manifests an intent to kill.").

Triebold's failure to report his change of address to Wisconsin authorities took place in Wisconsin because it is where the act of reporting was "required to be performed." *Gantt*, 201 Wis. 2d at 211. The Pierce County Circuit Court, therefore, had territorial jurisdiction over Triebold and his violation of Wis. Stat. § 301.45 under either or both Wis. Stat. § 939.03(1)(a) and (c). As the trial court succinctly put it: "It is clearly the intent of the sex offender registration requirements set forth in Section 301.45, Wis. Stats. that persons subject to the requirements of the act could not avoid the reporting requirements simply by moving out of state." (R. 26:2.)

E. The trial court retained jurisdiction even though Minnesota prosecuted Triebold under its own sex offender registry law for failing to report his change of address.

Triebold argues that Wisconsin could no longer prosecute him because Minnesota had earlier prosecuted him

for failing to report his change of address to Minnesota authorities. That argument has been laid to rest by the United States Supreme Court. Under the "dual sovereignty" doctrine, states with concurrent jurisdiction such as Minnesota and Wisconsin may separately prosecute an offender for violating their respective criminal laws addressing the same unlawful conduct. *Heath v. Alabama*, 474 U.S. 82, 88–89 (1985). The Supreme Court "has plainly and repeatedly stated that two identical offenses are not the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Id.* at 92 (emphasis omitted). "Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code. To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.'" *Id.* at 93 (citations omitted). "A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws. . . . In recognition of this fact, the Court consistently has endorsed the principle that a single act constitutes an 'offence' against each sovereign whose laws are violated by that act." *Id.*; *see Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) ("We have long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign. Under this 'dual sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute."); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870 (2016) ("But two prosecutions, this Court has long held, are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws."); *see also Petty*, 201 Wis. 2d at 358, 360 n.11.

Although the dual sovereignty doctrine grew out of double jeopardy jurisprudence, it is closely connected to Triebold's jurisdictional challenge. The State has shown above that Wisconsin had both subject matter and territorial jurisdiction over Triebold's failure to report his change of address to the DOC as required by Wis. Stat. § 301.45, and it had personal jurisdiction over Triebold once he appeared in court to answer the charge. Triebold also does not argue that his Wisconsin prosecution violates the double jeopardy clause. Therefore, because Wisconsin had personal and subject matter jurisdiction, and because there was no double jeopardy violation, Wisconsin could prosecute Triebold for violating Wis. Stat. § 301.45 even after Minnesota had earlier prosecuted him for violating its own sex offender reporting statute for failing to report the same change of address to Minnesota authorities.

II. The Wisconsin prosecution was not barred by Wis. Stat. § 939.71 because Triebold's violation of Wis. Stat. § 301.45 was not the same offense as his violation of Minnesota's mandatory reporting statute.

A. Wisconsin's statutory bar against multiple prosecutions for the same offense.

Apparently recognizing that he has no viable double jeopardy challenge to his Wisconsin prosecution in light of the dual sovereignty doctrine, Triebold relies exclusively on Wis. Stat. § 939.71 in arguing that his prosecution is barred under that statute, even if not under the double jeopardy clause, because his violation of Wis. Stat. § 301.45 relied on the same facts as the offense for which he had been earlier prosecuted and convicted in Minnesota. Wisconsin Stat. § 939.71 provides:

> **Limitation on the number of convictions.** If an act forms the basis for a crime punishable under more than one statutory provision of this state or

> under a statutory provision of this state and the laws of another jurisdiction, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require.

Wis. Stat. § 939.71.

Notably, this Court has held that Wis. Stat. § 939.71 "adheres to the dual sovereignty doctrine" discussed above. *State v. Swinson*, 2003 WI App 45, ¶ 55, 261 Wis. 2d 633, 660 N.W.2d 12. "Under this statute, a subsequent prosecution is not prohibited if each provision requires proof of a fact for conviction which the other does not require, *even if the same conduct was involved in the two prosecutions*." *Id.* ¶ 49 (emphasis added).

Although Triebold does not here present a constitutional double jeopardy challenge, Wis. Stat. § 939.71 is "substantially" the statutory embodiment of the constitutional test established in *Blockburger v. United States*, 284 U.S. 299 (1932), for determining whether two offenses are "the same." *State v. Vassos*, 218 Wis. 2d 330, 335, 579 N.W.2d 35 (1998). The test is whether "each provision requires proof of a fact which the other does not." *Id.* (quoting *Blockburger*, 284 U.S. at 304). In other words, the test looks at whether the two statutes "contain the same statutory elements." *Id.*

Under *Blockburger*, the court must determine whether two offenses are identical both in law and in fact. *State v. Derango*, 2000 WI 89, ¶ 29, 236 Wis. 2d 721, 613 N.W.2d 833. If the charges are not identical in law and in fact, there is a presumption that the legislature intended to permit multiple charges and cumulative punishment for both offenses absent clear evidence of a contrary intent sufficient to overcome that presumption. *Derango*, 236 Wis. 2d 721, ¶ 30; *Swinson*, 261 Wis. 2d 633, ¶ 28. If the underlying facts are the same,

the court must compare the elements of the two statutes to determine whether the offenses are the same in law. *E.g.*, *Vassos*, 218 Wis. 2d 330, 335–37; *State v. Johnson*, 178 Wis. 2d 42, 49, 503 N.W.2d 575 (Ct. App. 1993).

The Minnesota and Wisconsin sex offender registry and reporting statutes are not the same in law. Each has different elements that can be proven by different facts. (R. 37.)

Triebold violated Minn. Stat. § 243.166, which requires a Minnesota resident who was convicted of a sex offense in another state to report any change of address to the Minnesota Bureau of Criminal Apprehension. Minn. Stat. § 243.166 subd. 3(a), subd. 5(a); (R. 30:1, 7–8). It appears that Triebold specifically violated Minn. Stat. § 243.166 subd. 1b(a)(4)(b), subd. 3(b), and subd. 5(a). (R. 33:1–8.) Notably, the Minnesota statute requires only five days advance notice of a change of address, whereas the Wisconsin statute requires ten days advance notice of the change. The Minnesota statute also requires the notice even when the person's "new primary address" is "in another state." Minn. Stat. § 243.166 subd. 3(b). "[T]he person shall also give written notice of the new address to the designated registration agency in the new state" if "that state has a registration requirement." *Id*. Unlike its Wisconsin counterpart, the Minnesota statute specifically provides that the registration requirements in Minnesota "are suspended after the person begins living in the new state and the bureau has confirmed the address in the other state through the annual verification process on at least one occasion." *Id*. Conversely, the Wisconsin statute has no such suspension provision.

The elements of the Minnesota offense are: (1) The defendant is a person required to register as a "predatory offender" in that (pertinent here) he has been convicted of a sex offense in another state; (2) The defendant knowingly violated the requirement to register his change of address at least five days before he started living at a "new primary

address," Minn. Stat. § 343.166 subd. 3(b); (3) The time period during which the defendant was required to register had not elapsed; (4) The defendant's failure to act took place in a specific Minnesota county (here Ramsey County). (R. 31:1.)

Triebold also violated Wis. Stat. § 301.45(2)(a)5., (4m), and (6)(a)1. The elements of the Wisconsin offense are: (1) The defendant was a person required to provide information under Wis. Stat. 301.45(1g) in that (pertinent here) he was convicted of a "sex offense" in Wisconsin after December 25, 1993, Wis. JI–Criminal 2198 cmt. 3 n.1 (2013); (2) The defendant failed to provide information regarding a change of address as required by Wis. Stat. § 301.45(4), Wis. JI–Criminal 2198 cmt. 2 (2013); (3) The defendant knowingly failed to provide the required information. Wis. JI–Criminal 2198 (2013).

Triebold did not notify either Minnesota or Wisconsin authorities about his change of address from one residence to another in St. Paul. Triebold's failure to report the change violated Wis. Stat. § 301.45 because he had been convicted of a "sex offense" in Wisconsin in 1994 and he was required to register for the rest of his life no matter where he resided. Triebold's failure to report the change also violated the Minnesota law because he was a Minnesota resident and a "predatory offender" by virtue of his out-of-state conviction for a sex crime.

The Minnesota and Wisconsin statutes are thus different in law because each requires proof of a fact that the other does not require. In other words, each statute has at least one element that the other does not have. Obviously, a Minnesota resident could violate the Minnesota reporting statute without having been convicted of a sex offense *in Wisconsin*. One could violate the Wisconsin reporting statute without ever having been a Minnesota resident. A Wisconsin sex offender residing in Minnesota could violate the Minnesota statute by not reporting the change of address there, but fully comply with the Wisconsin statute by

reporting the change to Wisconsin authorities, and vice versa. A Wisconsin sex offender living in Wisconsin, obviously, does not have to report a change of address in Wisconsin to the Minnesota Bureau of Criminal Apprehension. A "predatory offender" living in Minnesota, who committed a sex crime in Minnesota or in any state other than Wisconsin, does not have to report his change of address in St. Paul to the Wisconsin Department of Corrections. A Wisconsin sex offender living in Minnesota would violate the Wisconsin law but comply with the Minnesota law if he waited until five days before the change of address to report it to both agencies. There are, therefore, many scenarios whereby Triebold, or someone in the same position, could comply with the Minnesota reporting statute but not the Wisconsin statute, and vice versa. The elements are substantially different, and the facts needed to prove those elements can often be materially different.

For similar reasons, Triebold's two reporting offenses are different in fact. Two offenses are different in fact if "each count requires proof of an additional fact that the other count does not." *State v. Anderson*, 219 Wis. 2d 739, 750, 580 N.W.2d 329 (1998). Each of Triebold's convictions for failure to report required proof of a different fact. He committed a Minnesota offense by failing to report his address change to the Minnesota Bureau of Criminal Apprehension. And he committed a Wisconsin offense by failing to report his address change to the Wisconsin Department of Corrections.

The legal and factual differences between these statutes are not mere technicalities. Those differences are real and are reflected in several significantly different interests protected by each. Once a person has been convicted of a sex offense in Wisconsin, the State of Wisconsin has a compelling interest in keeping track of that person for the rest of his life, not only for the protection of its own citizens should he ever return to this State temporarily or permanently, but also to notify any other state where the convicted sex offender

chooses to take up temporary or permanent residence. The State of Minnesota has an equally compelling interest in keeping track of anyone convicted of a sex offense in another state who chooses to take up temporary or permanent residence in Minnesota.

Wisconsin has a compelling interest in keeping track of its sex offenders even after they move out of state because it gives the victim of his sex crime peace of mind in knowing where he is living and it may "induce precautionary measures if the victim discovers that the offender, although no longer a Wisconsin resident, lives just across the Wisconsin border, in Michigan, Illinois, Iowa, or Minnesota." *Mueller*, 740 F.3d at 1132 (summarizing the State's argument). Triebold's failure to report his change of address in St. Paul to either Minnesota or Wisconsin authorities violated those separate and distinct compelling state interests protected by each state's mandatory reporting law.

It is plain that the Wisconsin Legislature intended in Wis. Stat. § 301.45 to permit separate prosecutions in this state and in the state where the offender currently resides should he fail to report his change of address because it could have easily provided otherwise. For example, the Legislature has abrogated the dual sovereignty doctrine in drug cases. *See Swinson*, 261 Wis. 2d 633, ¶¶ 49, 54–55 (discussing Wis. Stat. § 961.45, which bars a drug prosecution in Wisconsin after a conviction or acquittal "for the same act" under a comparable federal law or law of another state). Wisconsin Stat. § 961.45 represents "the type of legislation instituted by our legislature seeking to preclude continuing prosecution in the drug arena *as is otherwise permitted under the doctrine of dual sovereignty*." *Id.* ¶ 55 (emphasis added). "[I]n deciding not to abrogate the dual sovereignty doctrine in nondrug cases, the legislature could have rationally considered that in the nondrug arena, the interests of the state and federal governments are different." *Id.*; *see also Smith*, 323 Wis. 2d

377, ¶ 23 ("The legislature was well aware of its ability to carve out exceptions to the registration requirement."). Certainly, the Wisconsin legislature could have written a suspension provision into its reporting provision for someone who moves out of state as Minnesota has done if it so desired. Minn. Stat. § 243.166 subd. 3(b).

Whether considered under the dual sovereignty doctrine, or the *Blockburger* test as codified by Wis. Stat. § 939.71, the Minnesota and Wisconsin offenses are not the same offense in law or in fact. Wisconsin law allows for the prosecution of Triebold under Wis. Stat. § 301.45 even after Minnesota prosecuted him under its mandatory reporting statute.

III. Triebold forfeited his argument that liability under Wis. Stat. § 301.45 is preempted by federal law.

Triebold argues for the first time in this Court that liability under Wis. Stat. § 301.45 is preempted by the federal sex offender registry act. (Triebold's Br. 9–12.) Triebold forfeited this argument by not raising it in the trial court.

A. Triebold did not specifically argue that Wis. Stat. § 301.45 was preempted by federal law.

Failure to specifically object in the trial court generally precludes appellate review of a claimed error, even an error of constitutional dimension. *E.g., State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727; *State v. Davis*, 199 Wis. 2d 513, 517–19, 545 N.W.2d 244 (Ct. App. 1996); *State v. Edelburg*, 129 Wis. 2d 394, 400–01, 384 N.W.2d 724 (Ct. App. 1986); *see also State v. Pinno*, 2014 WI 74, ¶¶ 56–66, 356 Wis. 2d 106, 850 N.W.2d 207 (the claimed denial of the structural public trial right at voir dire was forfeited by failure to timely object).

To properly preserve an objection for review, Triebold had to "articulate the specific grounds for the objection unless its basis is obvious from its context. . . . so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Agnello*, 226 Wis. 2d 164, 172–73, 593 N.W.2d 427 (1999) (citations omitted).

Triebold's federal preemption argument was not obvious from the context of the arguments he presented to the trial court. Triebold only argued in the trial court that his prosecution violated the double jeopardy clause and that the Pierce County Circuit Court lacked territorial jurisdiction over him. (R. 29; 34.) He did not separately argue that liability under Wis. Stat. § 301.45 is preempted by federal law even assuming Wisconsin has jurisdiction and that there is no double jeopardy violation.

Triebold mislabels his new federal preemption argument as presenting a claim of a lack of "territorial jurisdiction." (Triebold's Br. 12.) It is not. As discussed above, Wisconsin courts had subject matter and territorial jurisdiction over any alleged violation of Wis. Stat. § 301.45, and they obtained personal jurisdiction over Triebold when he appeared in Pierce County circuit court and answered to the charge.

Triebold's new argument also does not account for the impact of the dual sovereignty doctrine with regard not only to Wisconsin jurisdiction vis a vis that of Minnesota, but also to Wisconsin jurisdiction vis a vis that of the federal courts.

This Court should not, therefore, consider the merits of Triebold's preemption claim. But if it does, the claim plainly lacks merit.

B. Congress did not intend to preempt the even stricter reporting requirements of Wis. Stat. § 301.45.

"Courts presume that state law is not preempted unless preemption was the 'clear and manifest purpose of Congress.'" *Milwaukee City Hous. Auth. v. Cobb*, 2015 WI 27, ¶ 13, 361 Wis. 2d 359, 860 N.W.2d 267 (citation omitted). Here, it was not the clear and manifest purpose of Congress to preempt Wisconsin from requiring in Wis. Stat. § 301.45 that its convicted sex offenders continue reporting their whereabouts even after they move out of state.

Congress' enactment of the federal sex offender registry law could reasonably be viewed as setting minimal floor requirements that states must follow, but without prohibiting any state from enacting stricter registry and reporting requirements for its own convicted sex offenders. The penalty provision in the federal statute is, after all, a floor below which no state may go, but it does not prohibit a state from imposing greater penalties for noncompliance with its own registry reporting requirements. 34 U.S.C. § 20913(e).

At minimum, then, the sex offender must initially register in the jurisdiction where he was convicted, and the state of conviction is not *required* by federal law to do anything else once the person moves to another jurisdiction because he is now required to register with the new jurisdiction. 34 U.S.C. § 20913(a). Nothing in that federal provision, however, *prohibits* the state in which the offender was initially convicted from requiring that he continue to report any changes in status to its authorities even though federal law only requires registration in the state of his new residence. The federal statute's requirement that the offender report his change of address to "at least" one of the two jurisdictions affected sets only a floor that would not prevent the jurisdiction where the sex offender was initially convicted

to also keep tabs on him by requiring him to continue to report any changes in status even after he moves to another state.

For example, 34 U.S.C. § 20913(c) provides that a sex offender "shall, not later than 3 business days after" he changes residence, "appear in person in at least 1 jurisdiction involved" to report his change of residence. Taken to its logical extent, Triebold's preemption argument would prohibit Wisconsin from requiring the sex offender to report his change of address at least *ten days before* he moves, and it would prohibit Minnesota from requiring the resident sex offender to report his change of address at least *five days before* he moves; both states, according to Triebold, are preempted by federal law from requiring the offender to register any earlier than *three days after* he moves.

Moreover, the federal sex offender registry law defines what must be proven to establish *federal* criminal liability. 18 U.S.C. § 2250(a). It does not foreclose liability under similar state statutes. Or, at least, Triebold fails to adequately show how or explain why Congress intended to occupy the field and proscribe criminal liability under even stricter state mandatory reporting statutes.

The purpose of the federal statute is not served by restricting the power of individual states to enact even stricter reporting requirements.

> The new federal Act reflects Congress' awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems. See 73 Fed.Reg. 38045 (2008). The Act seeks to make those systems more uniform and effective. It does so by repealing several earlier federal laws that also (but less effectively) sought uniformity; by setting forth comprehensive registration-system standards; by making federal funding contingent on States' bringing their systems into compliance with those standards; by requiring both state and federal sex offenders to register with relevant

> jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act's registration requirements.

Reynolds v. United States, 565 U.S. 432, 435 (2012).

Wisconsin and most other states enacted sex offender registry statutes like Wis. Stat. § 301.45 after being "prompted by congressional legislation, adopted in the 1990s, which conditions certain federal grants-in-aid on a state's enactment of conforming sex offender registration laws." *In re Alva*, 92 P.3d 311, 313 (Cal. 2004). "Federal funding was conditioned on the states enacting such legislation." *Smith*, 323 Wis. 2d 377, ¶ 20. Prohibiting Wisconsin from making it even easier than federal law requires to track the movement of a convicted sex offender runs headlong into the purpose of the federal statute to effectively keep tabs on convicted sex offenders as they move about the country. This is not what Congress intended when it required, *at a minimum*, that the sex offender register initially in Wisconsin where he was convicted and thereafter in "at least" the state where he takes up residence.

The federal law did not expressly or implicitly preempt the authority of states to enact even stricter registration standards. *Bostic v. D.C. Hous. Auth.*, 162 A.3d 170, 173 (D.C. 2017). Congress did not expressly prohibit the states from enacting stricter reporting requirements, compliance with both the federal and state statutes is not impossible, and there is no indication that Congress intended to occupy the field in this area leaving "no room for the States to supplement it." *Id.*; *c.f. State v. John*, 308 P.3d 1208, 1211 (Ariz. Ct. App. 2013) (Arizona lacked jurisdiction to require Indian tribal members living on a reservation to comply with Arizona's sex offender registry statute because it was preempted by the federal registry statute which "unambiguously dictates the circumstances under which the state may impose registration requirements upon tribal

members on tribal land"; circumstances that were not present when Arizona imposed its law on tribal members).

In the end, however, resolution of those thorny questions should await another day when they are properly raised and litigated first in the trial court.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 8th day of November 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7234 words.

Dated this 8th day of November 2019.

_____
DANIEL J. O'BRIEN
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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 8th day of November 2019.

_____
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