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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 19 AP 2091-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARSHUN DANTE JACKSON,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF & APPENDIX

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On appeal from the Circuit Court
of St. Croix County, Hon. Edward F. Vlack,
Circuit Judge, presiding.

TABLE OF CONTENTS

Page

ISSUE FOR REVIEW 6

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 7

STATEMENT OF THE CASE 7-13

ARGUMENT 13-24

I. DOUBLE JEOPARDY BARS A SUCCESSIVE "PARTY TO A CRIME" CONVICTION BASED ON THE SAME MULTI-COUNTY CHECK CASHING SCHEME ALLEGED IN A PRIOR CONSPIRACY CONVICTION. 13-24

1. Legal standards. 13-16

2. The charged offenses are identical in law. 17

3. The charged offenses are identical in fact. 17-24

a) Legal standards for determining factual scope of double jeopardy protection. 18-21

b) The factual scope of the Dunn County prosecution includes the checks cashed in St. Croix County. 21-24

CONCLUSION 24

CERTIFICATIONS 26-28

APPENDIX 29

CASES CITED

Blockburger v. United States, 14
284 U.S. 299 (1932)

Commonwealth v. Valle, 23
136 S.Ct. 1863 (2016)

Green v. United States, 15
355 U.S. 184 (1957)

Harris v. Oklahoma, 15
433 U.S. 682 (1977)

Morris v. Reynolds, 13
264 F.3d 38 (2nd Cir. 2001)

State v. Davidson, 14
2003 WI 89, 263 Wis.2d 145, 666 N.W.2d 1

State v. Fawcett, 18
145 Wis.2d 244, 426 N.W.2d 91 (Ct. App. 1988)

State v. Jackson, 16
2004 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 688

State v. Kelty, 14
2006 WI 101, 294 Wis.2d 62, 716 N.W.2d 886

State v. Kloss, 16
2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563,
petition for review granted (June 11, 2019)

State v. Koller, 13
2001 WI App 253, 248 Wis.2d 259, 635 N.W.2d 838

State v. Lippold, 23
2008 WI App 130, 313 Wis.2d 699, 757 N.W.2d 825

State v. Moffett, 15
2000 WI 130, 239 Wis. 2d 629, 619 N.W.2d 918

State v. Schultz, 13, 19, 21
2019 WI App 3, 385 Wis.2d 494, 922 N.W.2d 866,
petition for review granted (April 9, 2019)

State v. Scott, 24
230 Wis. 2d 643, 602 N.W.2d 296 (Ct. App. 1999)

State v. Steinhardt, 13, 14
2017 WI 62, 375 Wis.2d 712, 896 N.W.2d 700

State v. Stevens, 14
123 Wis.2d 303, 367 N.W.2d 788 (1985)

State v. Ziegler, 14
2012 WI 73, 342 Wis.2d 256, 816 N.W.2d 238

United States v. Castro, 23, 24
776 F.2d 1118 (3rd Cir. 1985)

United States v. Crowder, 21
346 F.2d 1 (6th Cir. 1964)

United States v. Dixon, 16
509 U.S. 688 (1993)

United States v. Hatchett, 15
245 F.3d 625 (7th Cir. 2001)

United States v. Olmeda, 19-22
461 F.3d 271 (2nd Cir. 2006)

United States v. Roman, 22, 24
728 F.2d 846 (7th Cir. 1984)

United States v. Wilson, 15
420 U.S. 332, 343 (1975)

Waller v. Florida, 23
397 U.S. 387(1970)

STATUTES CITED

Wis. Stat. § 939.31 7, 9, 10, 11, 12, 16, 17
Wis. Stat. § 939.62(1)(b) 7
Wis. Stat. § 939.66(1) 14
Wis. Stat. § 939.71 15
Wis. Stat. § 939.72 16
Wis. Stat. § 939.72(2) 24
Wis. Stat. § 943.29(1)(a) 7, 10
Wis. Stat. § 943.29(3)(c) 7
Wis. Stat. § 943.82 9
Wis. Stat. § 943.82(1) 7, 9, 10, 12, 17, 18
Wis. Stat. § 943.91(4) 7
Wis. Stat. § 971.19(2) 23

OTHER AUTHORITY

WI JI-CRIMINAL 570 16

STATE OF WISCONSIN

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

DISTRICT III

Appeal No. 19 AP 2091-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARSHUN DANTE JACKSON,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF & APPENDIX

ISSUE FOR REVIEW

1. Does double jeopardy bar a successive "party to a crime" conviction based on the same multi-county check cashing scheme alleged in a prior conspiracy conviction?

   The Trial Court Answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not requested.

STATEMENT OF THE CASE[1]

On May 31, 2017, Dunn County prosecutors charged Jackson with three counts of conspiracy based on a check cashing scheme involving Jackson, Brian Augustus, Robin Santee, Tyler Santee and Peyton Heistand.[2]

According to the complaint, Jackson and Augustus recruited Heistand and the Santees at a Walmart parking lot in St. Paul Minnesota. Heistand and the Santees were parked at the lot because they were from Iowa and had run out of money. Jackson and Augustus approached their car claiming they were construction workers who had illegal Mexicans working for them. They offered to pay for help cashing checks in order to avoid the IRS. Heistand and the Santees agreed to help, and the next day Jackson and Augustus produced checks written out in their names from various businesses. Each check was approximately $2,000. Jackson and Augustus drove them to multiple banks "in the area" where they cashed the checks. Jackson and Augustus received the money obtained from the cashed checks and in

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1 The Statement of the Case and the Statement of Facts are combined.

2 1) Conspiracy to commit fraud against financial institution ($10,000 to $100,000), contrary to Wis. Stat. §§ 939.31 and 943.82(1), a class G felony (Wis. Stat. § 943.91(4)) 2) Conspiracy to commit theft – Movable property (>$10,000), contrary to Wis. Stat. §§ 939.31 and 943.29(1)(a), a class G felony (Wis. Stat. 943.29(3)(c)); and 3) Conspiracy to commit forgery, contrary to Wis. Stats. §§ 939.31 and 943.38(1), a class H felony. All were charged as repeaters contrary to Wis. Stat. § 939.62(1)(b).

return Heistand and the Santees were paid $175 for each check they cashed. Heistand recalled going to banks in Eau Claire, Menomonie and Turtle Lake but did not remember all the banks or cities they went to. (55:4 (Appendix (A):9)).

All five were arrested in Menomonie on May 25, 2017 after Heistand and Robin Santee cashed checks at the Dairy State Bank in Menomonie. An employee recognized the pair from an alert the bank had received from one of their branches in Turtle Lake. The employee called the police and followed their van until the police arrived. Police recovered 21 uncashed checks hidden in the ceiling of the van and more than $20,000 in cash between Augustus and Jackson. Police also found keys to the Hyatt Regency Hotel in Bloomington, Minnesota. The complaint alleged more cash would likely be located at the hotel "due to them committing these crimes in multiple cities." (55:3-4 (A:8-9)).

After the arrests Menomonie Detective Kelly Pollack investigated the case and prepared a report. (54:4-15 (A:16-27)). While not all the information in her report was cited in the complaint, the Dunn County prosecutors were aware of her investigation as Pollack's name was twice mentioned in the complaint as a source of information.[3]

According to Pollack, the checks cashed in Menomonie were "part of a larger check fraud scheme that had been traveling around various location[s] in Western Wisconsin and Eastern Minnesota." (54:4 (A:16)). Pollack interviewed Robin Santee who admitted they had been "cashing checks at different bank locations from the Twin Cities area, into

3 "Inv. Kelly Pollack conducted a full interview of Robin Santee…." (55:4 (A:9)) "After consulting with Inv. Pollack, it was believed it was probably (sic) they had more money in the hotel rooms due to them committing these crimes in multiple cities." (55:4 (A:16)).

the Eau Claire area and the Menomonie area." (54:7 (A:19)). Santee did not know the names of all the cities they had stopped in or the banks they had been to. *Id.*

Pollack also investigated the uncashed checks recovered from Jackson's van. They were stolen from multiple Wisconsin businesses located in Durand, Eau Claire, Altoona, Osseo, Bloomer, Holcomb, Elmwood, and Menomonie; as well as Minnesota businesses located in Ramsey, Brooklyn Park, and Clear Lake. (54:9-14 (A:21-26)). Many of these checks had already been altered to name Robin Santee, Tyler Santee or Peyton Heistand as payee. (54:7 (A:19)). After contacting several of the business owners Pollack confirmed that at a minimum, checks had been cashed in Durand (54:9 (A:21)); River Falls (54:10 (A:22)); and Menomonie (54:13 (A:25)). She specifically noted two checks from Construction Install Services, Inc, of Durand, Wisconsin that were cashed in River Falls—one by Tyler Santee and the other by Peyton Heistand. (54:10 (A:22)).

On September 8, 2017, Jackson entered a guilty plea to the first count of the complaint, Conspiracy to Commit Fraud Against Financial Institution ($10,000 to $100,000), contrary to Wis. Stat. §§ 939.31[4] and 943.82(1)[5] (without the

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4 Wis. Stat. § 939.31 Conspiracy:

Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

5 Wis. Stat. § 943.82 Fraud against a financial institution:

repeater allegation). Counts two and three were dismissed on the prosecutor's motion. (56:2). Jackson was sentenced to 40 months, with 14 months of initial confinement and 26 months of extended supervision. (12:1 (A:11-12)).

On March 6, 2018 St. Croix County filed a three count[6] complaint against Jackson based on the checks cashed in River Falls. One of the counts was Fraud Against Financial Institution ($500-$10,000), contrary to Wis. Stat. § 943.82(1). Each count was alleged to have occurred on May 25, 2017—the same day checks were cashed in Menomonie. *Id.* The factual basis for the complaint is a verbatim recitation of Menomonie Investigator Pollack's 2017 report. (54:4-15 (A:16-27)). The case was dismissed on August 6, 2018. (73:5).

On August 10, 2018 St. Croix County filed a second complaint, this time alleging four counts of conspiracy.[7] One

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(1) Whoever obtains money, funds, credits, assets, securities, or other property owned by or under the custody or control of a financial institution by means of false pretenses, representations, or promises, or by use of any fraudulent device, scheme, artifice, or monetary instrument may be penalized as provided in s. 943.91.

6 St. Croix County Case No. 18 CF 168: 1) Fraud against financial institution ($500-$10,000), contrary to Wis. Stat. § 943.82(1), a class H felony; 2) Forgery, directly or as party to a crime, contrary to Wis. Stats. § 943.38(1), a class H felony; and 3) Theft – Movable property ($2,500 -$5,000), contrary to Wis. Stat. § 943.29(1)(a)&(3)(bf), a class I felony. Each count was charged with a repeater enhancement. (54:1-2 (A:13-14)).

7 St. Croix County Case No. 18 CF 499: 1) Conspiracy to Commit Identity Theft - Financial Gain - as a Party to the Crime, repeater, contrary to Wis. Stats. §§ 939.31 & 943.201(2)(a); 2) Conspiracy to Commit Fraud Against Financial Institution ($500-$10,000) – As a Party to a Crime, repeater, contrary to Wis. Stats. §§ 939.31 & 943.82(1); 3) Conspiracy to

of the counts was Conspiracy to Commit Fraud Against Financial Institution ($500-$10,000) – As a Party to a Crime, Repeater, contrary to Wis. Stats. §§ 939.31 & 943.82(1). The factual portion of the complaint was a condensed version of the previous complaint, but still consisted almost entirely of information from either Inv. Pollack or the Dunn County complaint. (57:2-4 (A:30-32)). The complaint confirmed that the checks cashed in River Falls were the same checks from "Construction Install Services" that Pollack noted in her report. (54:9-10 (A:21-22); 57:4 (A:32)). On August 29, 2018, the case was dismissed for lack of jurisdiction. (73:6).

The State filed a third complaint on August 31, 2018.[8] This complaint was identical to the preceding complaint but without the repeater allegations. (3:1-4 (A:35-38); 57:2-4 (A:30-32)). An amended complaint was filed on September 14, 2018 changing each count from conspiracy to party to a crime. (15:1-4 (A:39-42)).

The St. Croix County prosecution was not based on any material evidence beyond what the Dunn County investigation had uncovered. (79:44). In fact, Menomonie Investigator Kelly Pollack testified at the preliminary hearing in St. Croix County. (79:9). She repeated the information contained in her report including how the defendants met; how the check cashing scheme was perpetrated; the geographical area the scheme covered, and how the defendants were caught and arrested. (79:13, 15-17). She noted the checks were cashed in River Falls and Menomonie on the same day about 2½ hours apart. (79:42;

Commit Forgery – As a Party to a Crime, repeater, contrary to Wis. Stats. §§ 939.31 & 943.38(1); and 4) Conspiracy to Commit Theft – Movable Property ($2,500 - $5,000) – As a Party to a Crime, repeater. (57:1-2 (A:29-30)).

8 St. Croix County Case No. 18 CF 551.

55:3 (A:8)). As there was no direct evidence showing Jackson or Augustus were in River Falls when the checks were cashed, the prosecutor relied on "the entire fraudulent scheme" as evidence of Jackson's participation. (79:12, 58-59). The State specifically asked the Court to take judicial notice of the Dunn County conviction. (79:49).

Jackson moved to dismiss the complaint on double jeopardy grounds. (see 19:1-4; 30:1-5; 35:1-2). The circuit court denied the motion:

> With regard to the double-jeopardy, I'm not going to go into a lot of detail, but the issue is do I have identical charges in law or fact. And they are not identical. In fact, we've got different dates. I know one was the same date, but we also have different counties. The statute says Dunn County can't bring this there. Federal law may be different, but this is State law. So, I checked the Wisconsin Constitution to see if there was some other provision that may have app -- I couldn't find anything. So, with regard to double-jeopardy, I'm finding that there's not a double jeopardy issue in this case. And if you look at the Schultz decision, I thought I gave a very good summary about – in Paragraph 15, to be free from double-jeopardy you provide three protections; protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense. And in my opinion the charging in this county is not the same offense as in Dunn County. Therefore, with regard to double jeopardy, those motions are denied.

(80:5-6 (A:5-6)).

Jackson then entered a plea to Count 2 of the information, Commit Fraud Against Financial Institution ($500-$10,000) – As a Party to a Crime, repeater, contrary to Wis. Stats. §§ 939.31 & 943.82(1). The remaining counts

were dismissed. (80:14, 21-22). He did not waive his right to challenge the conviction on double jeopardy grounds. (80). The court withheld sentence and placed Jackson on probation for two years. (80:27; 41:1-2 (A:1-2)).

ARGUMENT

I. DOUBLE JEOPARDY BARS A SUCCESSIVE "PARTY TO A CRIME" CONVICTION BASED ON THE SAME MULTI-COUNTY CHECK CASHING SCHEME ALLEGED IN A PRIOR CONSPIRACY CONVICTION.

1. Legal standards

A defendant is guaranteed the right to be free from double jeopardy by the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution. *State v. Steinhardt* , 2017 WI 62, ¶13, 375 Wis.2d 712, 896 N.W.2d 700. Whether this right has been violated presents a question of law reviewed de novo. *Id.*, at ¶12; *State v. Schultz*, 2019 WI App 3, ¶14, 385 Wis.2d 494, 922 N.W.2d 866, *petition for review granted* (April 9, 2019).

The right to be free from double jeopardy provides three protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *Steinhardt* , at ¶13; *Schultz*, at ¶15. In this case, Jackson argues that the State violated his right to be free from a second prosecution for the same offense after conviction. See *Morris v. Reynolds*, 264 F.3d 38, 49 (2nd Cir. 2001) (Double jeopardy clearly prohibits a second prosecution for the same offense following a guilty plea.) Whether a conviction violates double jeopardy is a question

of law reviewed de novo. *State v. Koller*, 2001 WI App 253, ¶32, 248 Wis.2d 259, 635 N.W.2d 838.

A guilty plea does not forfeit a double jeopardy challenge if there was no "express waiver" *and* "it can be resolved on the record as it existed at the time the defendant pled." (emphasis original). *State v. Kelty*, 2006 WI 101, ¶¶19, 38, 294 Wis.2d 62, 716 N.W.2d 886.

Separate prosecutions are for the "same offense" if the convictions are identical both in law and in fact. *Steinhardt* , at ¶14. If the offenses are identical in law and fact, a presumption arises that the legislature did not intend to authorize cumulative punishments. *State v. Ziegler*, 2012 WI 73, ¶61, 342 Wis.2d 256, 816 N.W.2d 238.

Whether two offenses are identical in law depends largely on the *Blockburger*[9] test, which compares the statutory elements of each crime. Under *Blockburger*, two offenses are identical in law if they share the same elements or one is a lesser included of the other. *State v. Stevens*, 123 Wis.2d 303, 321-22, 367 N.W.2d 788 (1985); see also Wis. Stat. § 939.66(1) ("actor may be convicted of either the crime charged or an included crime, but not both."). In other words, two offenses are identical in law if one offense does not require proof of any fact beyond those necessary to prove the other offense. *Ziegler*, at ¶60.

The *Blockburger* test is not absolute but rather a "rule of construction creating a rebuttable presumption of sameness." The strength of the presumption depends to some extent "upon whether the charge comes in a 'second prosecution' or in a single, first prosecution." *State v. Davidson*, 2003 WI 89, ¶¶24-25, 263 Wis.2d 145, 666 N.W.2d

9 *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

1. Courts are "less tolerant of prosecuting the same offense in a second prosecution." *Id.*, at ¶25. Charges brought in a single prosecution may not violate multiplicity, for example, but could violate double jeopardy in a successive prosecution after conviction or acquittal. See e.g. *State v. Moffett*, 2000 WI 130, ¶12, 239 Wis. 2d 629, 619 N.W.2d 918 (State not barred from *charging* both conspiracy to deliver cocaine and being a party to delivery of cocaine, but defendant cannot be convicted of both). In addition, a defendant's interests are paramount in a successive prosecution. *Green v. United States*, 355 U.S. 184, 187 (1957). Repeated prosecutions expose an individual to "embarrassment, expense and ordeal," *Id.*; violate principles of finality; and increase the risk of a mistaken conviction. *United States v. Wilson*, 420 U.S. 332, 343 (1975).

In other words, offenses with differing elements may be the "same" for double jeopardy purposes if proof of one offense necessarily entails proving the other. *United States v. Hatchett*, 245 F.3d 625, 633 (7th Cir. 2001); *Harris v. Oklahoma*, 433 U.S. 682 (1977) (underlying felony in felony murder prosecution a "species" of lesser included). See also Wis. Stat. § 939.71.[10]

In *Harris*, for example, the defendant and his accomplice shot and killed a store clerk in the course of a robbery. The defendant was first tried and convicted of felony murder, with the State citing armed robbery as the underlying felony. The defendant was subsequently tried

10 Wis. Stat. § 939.71: "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."

and convicted for the robbery itself. A unanimous U.S. Supreme Court vacated the second conviction: "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one." *Id.* at 682.

Likewise, in *United States v. Dixon*, 509 U.S. 688 (1993), the defendant was convicted of criminal contempt after he violated a pre-trial release order prohibiting "any criminal offense." Later, he was charged separately for possession of cocaine with intent to deliver, the same offense which violated the pretrial order. The second prosecution violated double jeopardy. The pretrial order effectively "incorporated the entire governing criminal code" and therefore the crime of violating a condition of release "cannot be abstracted from the 'element' of the violated condition." *Id.*, at 698. As the criminal contempt could not be proven without proving the underlying criminal violation, the underlying criminal violation was "a species of lesser-included offense." *Id.*, at 698-699.

In the same manner, a conspiracy conviction incorporates the elements of any underlying criminal offense that is the object of the conspiracy. See *State v. Jackson*, 2004 WI App 190, ¶8, 276 Wis. 2d 697, 688 N.W.2d 688 (the "elements [of Conspiracy] incorporate each criminal offense that is the criminal object of the conspiracy"); WI JI-CRIMINAL 570; see also *State v. Kloss*, 2019 WI App 13, ¶27, 386 Wis.2d 314, 925 N.W.2d 563, *petition for review granted* (June 11, 2019) (Solicitation of First Degree Reckless Endangerment is a lesser included of Solicitation of First Degree Reckless Injury because the solicited crimes have a lesser included relationship). See also Wis. Stat. § 939.72, which specifically applies in this case: "[a] person

shall not be convicted under both: …. (2) Section 939.31 for conspiracy and s. 939.05 as a party to a crime which is the objective of the conspiracy."

2. The charged offenses are identical in law.

On September 8, 2017 Jackson was convicted of Conspiracy to Commit Fraud Against a Financial Institution (value exceeds $10,000 but does not exceed $100,000), contrary to Wis. Stats. §§ 939.31 & 943.82(1), in Dunn County Case No. 17 CF 231. (12:1 (A:11-12)). Two other conspiracy counts were dismissed as the result of a plea bargain: Conspiracy to Commit Theft – Movable Property (greater than $10,000), contrary to Wis. Stats. §§ 939.31 & 943.20(1)(a)&(3)(c); and Conspiracy to Commit Forgery, contrary to Wis. Stats. §§ 939.31 & 943.38(1). (56:2).

On January 10, 2019, Jackson was convicted in St. Croix County circuit court of Fraud Against a Financial Institution (value exceeds $500 but not $10,000), as party to a crime, contrary to Wis. Stat. 943.82(1). As none of the individual checks cashed in Dunn or St. Croix County were alleged to have exceeded $10,000, the conspiracy conviction in Dunn County incorporated multiple checks of less than $10,000 under Wis. Stat. § 943.82(1). The St. Croix County conviction for violating Wis. Stat. § 943.82(1) is therefore identical in law.

3. The charged offenses are identical in fact.

The question then becomes whether the two charges are identical in fact, which depends on whether the St. Croix County conviction falls within the "scope" of the initial prosecution in Dunn County. There's no dispute that the "objective" of the Dunn County conspiracy conviction required multiple checks as no individual check is alleged to have exceeded $10,000. Thus, any number of checks totaling at least $10,000 and up to $100,000, whether cashed in Dunn County or elsewhere, could have supplied the

"objective" of the Dunn County conspiracy count, which in this case was an intent to commit fraud against a financial institution contrary to Wis. Stat. 943.82(1). The State will inevitably argue the "objective" of the Dunn County conspiracy charge were checks cashed in Dunn County, and therefore the checks cashed in St. Croix County are factually distinguishable. The State, however, would be wrong. The scope of double jeopardy protection against a successive prosecution stems from the record as a whole. Double jeopardy bars the St. Croix County conviction because the Dunn County case alleges a conspiracy to commit fraud based on events that occurred beyond Dunn County, including the checks cashed in St. Croix County.

a) Legal standards for determining factual scope of double jeopardy protection.

The factual scope of double jeopardy protection against a subsequent prosecution was recently addressed in *Schultz*. Schultz was acquitted of repeated sexual assault of a child. The complaint alleged he had sexually assaulted a minor at least three times "in the late summer to early fall of 2012." The minor later became pregnant, although it was assumed at the time of trial a person other than Schultz was responsible. Five days after Schulz was acquitted at trial, however, the minor received the results of the paternity test which showed a greater than 99% probability Schultz was the father. Her medical records indicated the conception date was on or about October 19, 2012. Schultz was subsequently charged with second degree sexual assault. He challenged the prosecution on double jeopardy grounds. Citing *State v. Fawcett*, 145 Wis.2d 244, 255, 426 N.W.2d 91 (Ct. App. 1988), Schultz alleged the subsequent prosecution violated double jeopardy because the new charge occurred

"during the same time frame" as the assaults alleged in the previous prosecution.

The question presented was whether the time frame ending with "early fall of 2012" included the October 19, 2012 conception date. *Id.*, at ¶17. Citing *United States v. Olmeda*, 461 F.3d 271, 282 (2nd Cir. 2006), this Court concluded:

> …the proper test to ascertain the scope of the jeopardy bar when the charging language of an Information is ambiguous is to consider how a reasonable person familiar with the facts and circumstances of a particular case would understand that charging language. *To make this determination, it is proper to consider the entire record, including proceedings that take place after jeopardy attaches and the evidence introduced at trial.*

(emphasis added) *Id.*, at ¶30. Considering the record as whole, the Court held: "that a reasonable person, familiar with the facts and circumstances of the first prosecution against Schultz, would not consider the phrase 'early fall of 2012' to include October 19, 2012." *Id.*, at ¶34. The subsequent prosecution was outside the scope of the first prosecution and therefore did not violate double jeopardy.

While the facts in *Schultz* are not directly analogous to the facts here, many of the cases *Schultz* relies upon are. In *Olmeda*, for example, the defendant was charged with illegally possessing ammunition in the Eastern District of North Carolina "and elsewhere[.]" *Id.*, at 275. At the time, federal agents found ammunition on his person in North Carolina and at his apartment in New York. Olmeda pled guilty. Ten months after he was released from prison, he was charged for violating the same statute in the Southern District of New York. *Id.* Olemda moved to dismiss the New York indictment on double jeopardy grounds.

To determine whether two offenses charged in successive prosecutions are the same in fact:

> …the initial burden is on the defendant to make an objective showing that a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, at the time jeopardy attached in the first case, to cover the offense charged in the subsequent prosecution.

Id., at 290. If the defendant makes such a showing:

> …the burden shifts to the government to demonstrate, by a preponderance of the evidence, that a reasonable person familiar with the totality of the facts and circumstances would not, in fact, construe the initial indictment, at the time jeopardy attached in the first case, to cover the offense charged in the subsequent prosecution;….

Id. The original indictment alleged ammunition possession in the "Eastern District of North Carolina and elsewhere." A reasonable person could construe this to include possession of ammunition in both the North Carolina and New York because, based on the record as a whole: 1) at the time the indictment was issued the North Carolina prosecutors knew of Olmeda's contemporaneous possession of ammunition in his New York apartment; 2) they had no reason to think that he possessed ammunition anywhere other than in North Carolina and New York; and 3) they had no good faith basis for thinking that Olmeda ever possessed the ammunition seized from him in Fayetteville "elsewhere" than in the charging district. *Id.*

The government failed to show by a preponderance of evidence that a narrower construction of the North Carolina indictment was warranted. Although no specific mention of the New York possession was made in the indictment, at the

plea hearing, in the presentence report, or at sentencing, the government failed to show the indictment *did not* include the New York possession. *Id.*, at 287.

Schultz did not expressly adopt *Olmeda's* shifting burden of proof. Nonetheless, it clearly did adopt *Olmeda*'s general test which considers the entire record (and evidence known by the government) in making a determination on scope of double jeopardy protection.

Schultz also cites *United States v. Crowder*, 346 F.2d 1 (6th Cir. 1964) to illustrate the scope of double jeopardy protection based on the record as a whole rather than the indictment alone. In *Crowder*, the defendant was charged with conspiracy to transport stolen and forged money orders in interstate commerce. The indictment, however, specifically listed only twelve money orders that the defendant was alleged to have possessed, even though 235 money orders had been recovered. The defendant raised a due process challenge, arguing that the indictment, by failing to list all 235 money orders, failed to protect him "against subsequent jeopardy for the same offense." The Sixth Circuit rejected this argument, concluding that the record as a whole, which included evidence of all 235 money orders, protected against a subsequent prosecution related to all of the money orders, not just the twelve listed in the indictment. *Schultz*, at ¶¶28-29.

b) The factual scope of the Dunn County prosecution includes the checks cashed in St. Croix County.

The Dunn County complaint alleges that "on Thursday, May 25, 2017, in the City of Menomonie, Dunn County, Wisconsin, [Jackson] *conspired to obtain money* owned by or

under the custody or control of a financial institution by means of false pretenses, representations, or promises where *the value of the money exceeded $10,000 but conspired to not exceed $100,000*,…." (emphasis added) (55:2 (A:7)). The probable cause portion of the complaint alleges a check cashing scheme spanning from the Twin Cities to Eau Claire. Twenty-one checks found in Jackson's van had been stolen from businesses in eight Wisconsin cities and three Minnesota cities. Checks were allegedly cashed, to the extent known, at banks in Turtle Lake, Durand, Menomonie, *and River Falls*. (54:10 (A:22); 55:3-4 (A:8-9); 79:42).

Jackson has met his burden of showing, based on the entire record, that a reasonable person familiar with the facts and circumstances of this case would understand that he conspired to steal, alter, and cash checks not just in Dunn County, but throughout Western Wisconsin. The Dunn County complaint charged a conspiracy and alleged fraudulent activity "in the area," including Turtle Lake, Menomonie and Eau Claire. (55:4 (A:9)). Pollack's investigation, known to both the Dunn and St. Croix County prosecutors, outlined a common scheme to cash checks at banks throughout Western Wisconsin. Just as the prosecutors in *Olmeda*, the Dunn County and St. Croix County prosecutors both knew the checks cashed in River Falls were part of the same scheme executed in Dunn County. *Olmeda*, at 290. The dollar amount charged—more than $10,000 but less than $100,000—required multiple check cashing and more than covered all the checks cashed throughout Wisconsin. (55:2 (A:7)).

Crowder likewise applies here, as the government's choice to focus on a portion of the evidence in its charging document does not affect the scope of a defendant's double jeopardy protection. Crowder had double jeopardy protection

against all 235 money orders the government had recovered, not just the 12 named in the indictment. See also *United States v. Roman*, 728 F.2d 846, 853-854 (7th Cir. 1984) (Defendant charged with conspiracy to distribute LSD protected against subsequent prosecution in other states based on evidence possessed by the government but not admitted into the record); *United States v. Castro*, 776 F.2d 1118, 1124 (3rd Cir. 1985) (Defendant may rely on record showing activity related to drug conspiracy charge which occurred in other states to prevent subsequent prosecution even though those activities were not alleged nor formed the basis for the charges in current indictment.)

The State cannot argue Dunn County's conspiracy charge must be limited to checks cashed in Dunn County based on venue requirements. As the conspiracy took place throughout Western Wisconsin, including Dunn County, Dunn County can support its conspiracy charge with predicate offenses regardless of which Wisconsin county the predicate offenses occurred. *State v. Lippold*, 2008 WI App 130, ¶ 16, 313 Wis.2d 699, 757 N.W.2d 825 (a crime is properly venued in a county if at least one of the elements necessary to the offense occurs in that county); see also Wis. Stat. § 971.19(2).

Alternatively, there is no "dual sovereignty" among state actors. Under the dual-sovereignty doctrine, a single act can be prosecuted successively by each separate sovereign whose laws that single act offends. *Commonwealth v. Valle*, 136 S.Ct. 1863, 1867 (2016). Thus, a single act can be prosecuted by the federal government and a state government. This doctrine does not extend to prosecutions by multiple entities within a single state, however, because the prosecutorial powers of each subdivision of a state have the same ultimate source: the state itself. *Id.*, at 1871-72;

Waller v. Florida, 397 U.S. 387, 393-395 (1970).

As Dunn County and St. Croix County are not separate sovereigns, the dual-sovereignty doctrine has no applicability here. The actions of a county prosecutor bind the state. See e.g. *State v. Scott*, 230 Wis. 2d 643, 662, 602 N.W.2d 296 (Ct. App. 1999) (State bound by plea bargain as "[p]rosecutors are agents of the State, and it is the State rather than the individual prosecutor which is bound by the agreement.") The State has already chosen to act through the agency of the Dunn County District Attorney, and by so doing, has bound itself under Wis. Stat. § 939.72(2) to not pursue further conviction under Wis. Stat § 939.05 as a party to a crime "which is the objective of the conspiracy."

The Dunn County complaint alleges a multi-city check cashing scheme ranging from the Twin Cities to Eau Claire. Inv. Pollack's report, which forms the basis of the St. Croix County charges, specifically addresses the Construction Install Services checks cashed in River Falls on the same day, by the same people, and in the same manner as the checks cashed in Menomonie. A reasonable person would view the Dunn County conspiracy conviction as relying on the entire scheme to support the charge. Alternatively, the St. Croix County check cashing was uncovered by and clearly known to Dunn County prosecutors at the time of the conspiracy conviction and therefore, as part of the same check cashing scheme, a successive prosecution is barred. *Roman,* at 853-854*; Castro*, at 1124.

CONCLUSION

The St. Croix County conviction should be reversed and remanded for an order of dismissal, with prejudice.

Respectfully submitted this January 27, 2020.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)&(c)

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

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Dated this January 27, 2020.

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I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on January 27, 2020. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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APPENDIX OF DEFENDANT-APPELLANT

INDEX TO APPENDIX

	Page
St. Croix County Judgment of Conviction January 16, 2019 (Record Item 41:1-2)	1-2
Oral Decision Denying Double Jeopardy Motion January 10, 2019 (Record Item 80:3-6)	3-6
Dunn County Complaint May 31, 2017 (Record Item 55:2-4)	7-10
Dunn County Judgment of Conviction September 11, 2017 (Record Item 12:1-2)	11-12
St. Croix County Complaint (18 CF 168) March 6, 2018 (Record Item 54:1-16)	13-28
St. Croix County Complaint (18 CF 499) August 10, 2018 (Record Item 57:1-6)	29-34
St. Croix County Complaint (18 CF 551) August 31, 2018 (Record Item 3:1-4)	35-38
St. Croix County Amended Complaint (18 CF 551) September 14, 2018 (Record Item 15:1-4)	39-42