STATE OF WISCONSIN

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

DISTRICT III

Case No. 2019AP2091-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARSHUN DANTE JACKSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN ST. CROIX COUNTY CIRCUT COURT, THE HONORABLE EDWARD F. VLACK, III, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

SARA LYNN SHAEFFER
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
shaeffersl@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes

ISSUE PRESENTED

As a result of Marshun Dante Jackson's involvement in a check-cashing scheme in St. Croix County, the State charged him with fraud against a financial institution (value exceeds $500 but does not exceed $10,000) as a party to a crime (PTAC) and as a repeater. Jackson moved to dismiss the complaint on double jeopardy grounds. He argued that the St. Croix County charge constituted a second prosecution for the same offense for which he was previously convicted in Dunn County.

Jackson's Dunn County conviction, unlike the charge brought in St. Croix County, was for *conspiracy* to commit fraud against a financial institution, and it was for crimes that were committed in Dunn County. Also, the Dunn County conspiracy conviction concerned a higher value of money obtained through fraud: exceeds $10,000 but does not exceed $100,000; it was therefore a Class G felony. The St. Croix charge was a Class H felony.

The court denied Jackson's motion to dismiss, concluding that the St. Croix County offense was not identical to the Dunn County offense.

Does the St. Croix charge violate Jackson's right to be free from a second prosecution for the same offense after conviction?

The circuit court held, No.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the issue presented involves the application of well-established principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

This case concerns a check-cashing scheme committed by five individuals that occurred in both Minnesota and Wisconsin. On September 14, 2018, St. Croix County charged Jackson through an amended complaint with four counts, but only Count 2 is relevant to this appeal: fraud against financial institution (value exceeds $500 but does not exceed $10,000), as PTAC, repeater. (R. 15:1–2.) The complaint provided that Jackson and four other individuals were "involved in a large and elaborate fraudulent check scheme throughout western Wisconsin and eastern Minnesota." (R. 15:2.) Specific to St. Croix County, Count 2 of the complaint alleged that on or about May 25, 2017, Jackson committed fraud against Security Financial Bank (the Bank), located in River Falls. (R. 15:1–3.) This happened when Jackson, either directly or as PTAC, cashed two checks at the Bank that appeared to have been issued, but were *not* issued, by Construction Install Services in the amount of $2,100.22 and $2,411.66. (R. 15:3–4.)

The complaint also recognized that Jackson had already been convicted of fraud against a financial institution in Dunn County, where he was ultimately sentenced to prison. (R. 15:1–2.) The complaint explained that "River Falls investigator [Jenifer] Knutson *was still investigating the St. Croix County matter* when [Jackson was] sentenced to prison." (*Id.* (emphasis added).) It was not until after Jackson was released from prison for his Dunn County conviction that St. Croix County issued a warrant for his arrest and filed a complaint. (R. 80:7, 10.)

Jackson moved to dismiss the complaint as defective. (R. 11; 30.) He argued that Count 2 of the complaint violates his "constitutional protections against Double Jeopardy." (R. 11:2; 30:5.) He noted that he "was convicted on September 08, 2017, in Dunn County case 2017CF231 of one count of

Conspiracy to Commit Fraud against a Financial Institution, as a Repeater, in violation of Wis. Stats., secs. 939.31, 934.82(1) and 939.62(1)(b), for an offense that occurred on May 25, 2017."[1] (R. 11:3.) He argued that Count 2 of the St. Croix County amended complaint was a second prosecution for the same offense after conviction because "each of the Dunn County charges alleged the Conspiracy of which the current St. Croix County complaint alleges the completed acts that were the object of the Conspiracy." (R. 19:2–3.) According to Jackson, "[t]he fact that the conviction for Conspiracy occurred in Dunn County is irrelevant" because that conviction "insulates [him] against subsequent prosecution in St. Croix County for the crime which was the objective of the conspiracy."[2] (R. 19:3.)

The State argued that double jeopardy did not apply because "[h]ere, the State is alleging the uttering of forged checks *in St. Croix County*. The Defendant was not charged with this offense in Dunn County." (R. 17:1.)

The court held a hearing. (R. 80.) The court noted that "the issue is do I have identical charges in law or fact." (R. 80:5.) The court concluded they were "not identical." (R. 80:5.) Rather, the St. Croix County charge was not the same offense

---

[1] Jackson provides in his appellate brief that he pled guilty in Dunn County "without the repeater allegation." (Jackson's Br. 9–10.) This is incorrect. (R. 12:1; 56:2–3; A-App. 11.)

[2] On September 7, 2018, Jackson moved to dismiss the St. Croix County complaint. (R. 11.) The State then filed an amended complaint on September 14, 2018. (R. 15.) Jackson then filed a reply brief on September 21, 2018, arguing that the amended complaint still must be dismissed on double jeopardy grounds. (R. 19:1.) Finally, on November 26, 2018, Jackson filed another motion to dismiss on double jeopardy grounds, "renew[ing] all arguments." (R. 30.)

as the Dunn County offense. (R. 80:5–6.) Consequently, the court found no double jeopardy violation. (R. 80:5–6.)

Jackson then pled no contest in St. Croix County to fraud against a financial institution (value exceeds $500 but does not exceed $10,000), as PTAC.[3] (R. 80:16.)

Jackson appeals.

STANDARD OF REVIEW

"Whether a defendant's convictions violate the Double Jeopardy Clauses of the Fifth Amendment and Article I, Section 8 of the Wisconsin Constitution, are questions of law appellate courts review de novo." *State v. Schultz*, 2020 WI 24, ¶ 16.

ARGUMENT

The St. Croix charge did not subject Jackson to double jeopardy.

A. For double jeopardy to apply, the charges must be identical in both law and fact.

"The Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution guarantee the right to be free from double jeopardy." *State v. Steinhardt*, 2017 WI 62, ¶ 13, 375 Wis. 2d 712, 896 N.W.2d 700 (footnotes omitted). "This right provides 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.'" *Id.* (citation omitted).

---

[3] Contrary to Jackson's assertion, Jackson did not plead to a "repeater" status in St. Croix County. (*See* Jackson's Br. 12.) The repeater allegation was stricken. (R. 80:7, 14, 16; 41.)

This case involves the second of these protections. (Jackson's Br. 13.) For a defendant to show that a second prosecution subjected him to double jeopardy, "the offenses charged in the two prosecutions must be identical in the law and in fact." *State v. Van Meter,* 72 Wis. 2d 754, 758, 242 N.W.2d 206 (1976). Double-jeopardy principles allow a second prosecution if the offenses in the two prosecutions are factually different, even if they are legally identical. *See id*. at 758–59.

"Offenses are not identical in law if each requires proof of an element that the other does not." *Schultz*, 2020 WI 24, ¶ 22 (citing *Blockburger v. United States*, 284 U.S. 299 (1932)). "Offenses are not identical in fact when 'a conviction for each offense requires proof of an additional fact that conviction for the other offenses does not.'" *Id*. (quoting *State v. Lechner*, 217 Wis. 2d 392, 414, 576 N.W.2d 912 (1998)).

Charges in two separate prosecutions are factually identical if the "facts alleged under either of the indictments would, if proved under the other, warrant a conviction under the latter." *Van Meter*, 72 Wis. 2d at 758 (citation omitted). In other words, "[c]harges are not the same in fact if each requires proof of a fact that the other does not." *State v. Nommensen*, 2007 WI App 224, ¶ 8, 305 Wis. 2d 695, 741 N.W.2d 481; *see also Lechner*, 217 Wis. 2d at 414, (citing *Van Meter*, 72 Wis. 2d at 758 (and other cases for this test)).

"[A] guilty plea relinquishes the right to assert a [double-jeopardy] claim when the claim cannot be resolved on the record." *State v. Kelty*, 2006 WI 101, ¶ 2, 294 Wis. 2d 62, 716 N.W.2d 886. Because Jackson's double-jeopardy claim challenges a charge to which he pled guilty, that claim is waived if this Court cannot resolve it on this record. However, as the supreme court recently stated in *Schultz*, "courts may review the entire record of the first proceeding to determine

the scope of jeopardy."[4] *Schultz*, 2020 WI 24, ¶ 25. "Regardless of whether the first prosecution results in an acquittal or a conviction, it is the record in its entirety that reveals the scope of jeopardy and protects a defendant against a subsequent prosecution for the same crime." *Id.* ¶ 32.

B. The record shows that the St. Croix County charge was not factually or legally identical to the Dunn County conviction.

1. The charges are not identical in law.

It is well-established that "[a] substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States v. Felix*, 503 U.S. 378, 389 (1992). Indeed, the Supreme Court "repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense." *Iannelli v. United States*, 420 U.S. 770, 778 (1975). In *Felix*, the Supreme Court upheld the defendant's conspiracy conviction against a double jeopardy challenge, even though two of the nine overt acts supporting the conspiracy charge "were based on the conduct for which he had been previously prosecuted." 503 U.S. at 388.

Here, similarly, Jackson's conspiracy conviction in Dunn County does not foreclose his fraud conviction in St. Croix County. These two offenses are different in law.

In Dunn County, Jackson was convicted of conspiracy to commit fraud against a financial institution (value exceeds $10,000 but does not exceed $100,000), repeater, in violation of Wis. Stat. § 939.31 (conspiracy to commit), Wis. Stat. § 943.82(1) (fraud against financial institution, value exceeds

---

[4] The State therefore agrees with Jackson that this Court may consider the entire record in determining the scope of double jeopardy protection. (Jackson's Br. 18–21.)

$10,000 but does not exceed $100,000), and Wis. Stat. § 939.62(1)(b) (repeater). (R. 12:1.) It was a class G felony. (*Id*.) The crime occurred in Menomonie, Wisconsin at Dairy State Bank. (R. 12:1–2.)

In St. Croix County, Jackson was charged with fraud against a financial institution (value exceeds $500 but does not exceed $10,000) as PTAC, in violation of Wis. Stat. § 943.82(1) (fraud against a financial institution, value exceeds $500 but does not exceed $10,000), Wis. Stat. § 939.05 (as PTAC), and Wis. Stat. § 939.62(1)(b) (repeater). (R. 15:1.) It was a class H felony. (*Id*.) The crime occurred in River Falls, Wisconsin at Security Financial Bank. (R. 15:1–3.)

So, Jackson was charged with different class felonies for different crimes that occurred in different counties. The crime of conspiracy under Wis. Stat. § 939.31 has "three elements: (1) an intent by the defendant that the crime be committed; (2) an agreement between the defendant and at least one other person to commit the crime; and (3) an act performed by one of the conspirators in furtherance of the conspiracy." *State v. Routon*, 2007 WI App 178, ¶ 18, 304 Wis. 2d 480, 736 N.W.2d 530. The elements of Jackson's substantive offense are that he, as a party to the crime, "obtain[ed] money . . . owned by or under the custody or control of a financial institution," and did so "by use of any fraudulent device, scheme, artifice, or monetary instrument." Wis. Stat. § 943.82(1).

These two offenses are not identical in law. The substantive offense under section 943.82(1) does not require an agreement. *See id.* And the crime of conspiracy does not require any member of the conspiracy to obtain money or otherwise complete the agreed-upon crime. Rather, the crime of conspiracy "is complete when there is an agreement and an initial overt act in furtherance of the agreement." *State v. Moffett*, 2000 WI App 67, ¶ 13, 233 Wis. 2d 628, 608 N.W.2d

733, *aff'd and adopted*, 2000 WI 130, ¶ 16, 239 Wis. 2d 629, 619 N.W.2d 918.

Jackson's one-sentence argument that the St. Croix County charge is identical in law is the following: "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)." (Jackson's Br. 17.) The State construes Jackson's argument to be that because Jackson was convicted in Dunn County for conspiring to cash fake checks *in Dunn County* that were all individually less than $10,000, St. Croix County cannot charge Jackson for his fraudulent conduct in cashing the two fake checks *in St. Croix County* because the Dunn County conspiracy conviction "incorporated" the St. Croix County fraud.

Jackson is wrong.

Jackson was not convicted in Dunn County for any fraudulent conduct (or conspiracy) that he committed in St. Croix County. (*See* R. 56:2–3; 12:1.) Similarly, Jackson was not charged in St. Croix County for any fraudulent conduct he committed in Dunn County. (R. 15.) Rather, he was charged in St. Croix County with fraud against a financial institution where he, either directly or as a PTAC, cashed fake checks at a financial institution located *in St. Croix County* – Security Financial Bank in River Falls. (*Id.*) Jackson was not convicted of this offense in Dunn County. He was convicted of *conspiring* to cash fake checks at Dairy State Bank in Menomonie, Dunn County. (R. 12:1.)

Jackson parenthetically quotes from this Court's decision in *State v. Jackson*, which held that the elements of the crime of conspiracy "incorporate each criminal offense that is the criminal object of the conspiracy. This means that when a conspiracy has as its object the commission of multiple crimes, separate charges and convictions for each intended

crime are permissible." *State v. Jackson*, 2004 WI App 190, ¶ 8, 276 Wis. 2d 697, 688 N.W.2d 688. This Court in *Jackson* thus held that the defendant there could be "charged with two counts of conspiracy." *Id.* ¶ 9. That holding does not apply here because Jackson was not convicted of two counts of conspiracy. He was convicted of one count of conspiracy and one count of fraud as a party to the crime. This Court's decision in *Jackson* is inapposite.

The trial court was correct. The St. Croix County offense was not legally the same offense as the Dunn County offense. (R. 80:5–6.) Because Jackson cannot show that the offenses are identical in law, there is no double jeopardy violation. This Court should affirm his judgment of conviction.

2. The charges are not identical in fact.

Should this Court disagree and conclude that the charges are identical in law, they are not identical in fact.

Jackson argues that based on the entire record, "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." (Jackson's Br. 22 (emphasis added).) And, that "the factual scope of the Dunn County prosecution includes the checks cashed in St. Croix County." (Jackson's Br. 21.) Jackson is wrong.

First, Jackson's "reasonable person" test is the test that was applied in *United State v. Olmeda*, 461 F.3d 271, 282 (2nd Cir. 2006). But in *Schultz*, which the Wisconsin Supreme Court decided after Jackson filed his appellate brief, the court expressly declined to adopt this "reasonable person" test. *Schultz*, 2020 WI 24, ¶¶ 47, 49. It noted that *Olmeda* cited no cases from the United States Supreme Court that incorporated this test, "and we have discovered none." *Id.* ¶ 48. It further recognized that "[t]he double jeopardy clauses

of the Fifth Amendment and Article 1, Section 8 do not include the word 'reasonable' and it is a seminal canon of textual interpretation that we do not insert words into statutes or constitutional text." *Id.* ¶ 49. So the "reasonable person" standard does not apply.

Second, Jackson was prosecuted in St. Croix County for a crime he committed *in* St. Croix County. He was not prosecuted for a crime that he committed in a different county. This case is analogous to *Van Meter*, 72 Wis. 2d at 755–59. In that case, the supreme court decided there was no double jeopardy violation when, after a jury trial, the trial court convicted Van Meter of knowingly fleeing a police officer in Wood County, after he was previously convicted of knowingly fleeing a police officer in Portage County, with both charges arising from the same high speed chase across county lines, in violation of the same statute. *Id.*

Van Meter argued the Double Jeopardy Clause barred the second prosecution. *Id.* at 757. Acknowledging the "identity of legal elements" based on both prosecutions charging violations of the same statute, the supreme court concluded that the requisite "identity in fact[ ] cannot be shown" because "eluding Wood county officers in Wood county" is not the same offense as "eluding Portage county officers in Portage county." *Id.* at 757–58. The court held a double jeopardy violation exists when "facts alleged under either of the indictments would, if proved under the other, warrant a conviction under the latter." *Id.* at 758 (quoting *State v. George*, 69 Wis. 2d 92, 98, 230 N.W.2d 253 (1975)). Applying that test, the supreme court determined that Van Meter had "not been put twice in jeopardy for the same offense because proof of facts for conviction for the Wood county offense would not have sustained conviction for the Portage county offense." *Van Meter*, 72 Wis. 2d at 759.

Similarly, in this case, the facts alleged on the plain language of the complaints are different. (R. 15; 55.)

Conspiring to commit fraud in Menomonie, Dunn County at Diary State Bank is factually not the same offense as committing fraud in River Falls, St. Croix County at Security Financial Bank. (*Id.*) The facts alleged under either complaint would not, "if proved under the other, warrant a conviction under the latter." *See Van Meter,* 72 Wis. 2d at 758. There is no double jeopardy violation.

But Jackson argues that the Dunn County conspiracy charge is not limited to checks cashed in Dunn County because (1) the "conspiracy took place throughout Western Wisconsin," and (2) the State "bound itself" by "act[ing] through the agency of the Dunn County District Attorney."[5] (Jackson's Br. 23, 24.) Jackson is wrong. As the trial court correctly noted, "[t]he allegations of the Dunn County case were allegations of crimes allegedly committed in Dunn County. The allegations in these proceedings are allegations of crimes allegedly committed in St. Croix County." (R. 80:4.) And, "[t]here was no reference at all in Dunn County to any other alleged counts." *(Id.*) This is correct. The Dunn County complaint did not specifically mention the fraudulent crime in River Falls that served as the basis for the St. Croix County conviction. (R. 55; A-App. 7–10.) As Jackson admitted to the trial court: "the Dunn County Information did not specifically list these checks." (R. 35:2.) Therefore, as the trial court concluded, Jackson's crimes in St. Croix "had to be brought in St. Croix County, cannot be brought in Dunn County unless there was a consolidation." (R. 80:4.) Like in *Van Meter*, Jackson was not "put twice in jeopardy for the same offense because proof of facts for conviction for the [St. Croix] county

[5] While Jackson argues that under Wis. Stat. § 939.72(2) he cannot be convicted of both conspiracy *and* PTAC "which is the objective of the conspiracy" (Jackson's Br. 16), his reliance on that statute is misplaced. Jackson was not convicted of both conspiracy and PTAC in either Dunn County or St. Croix County. (R. 12; 15.)

offense would not have sustained conviction for the [Dunn] county offense." *See Van Meter*, 72 Wis. 2d at 759.

Jackson next argues that *United State v. Crowder*, 346 F.2d 1 (6th Cir. 1964), also applies. (Jackson's Br. 22.) But *Crowder*, a nonbinding federal case, is inapposite. In *Crowder*, the defendant was prosecuted for conspiracy to transport stolen and forged money orders in interstate commerce. The indictment specifically listed only 12 money orders that the defendant was alleged to have possessed, even though 235 money orders had been recovered and offered into evidence. *Crowder*, 346 F.2d at 2–3. The defendant argued that because the indictment did not list all 235 money orders, it failed to protect him "against subsequent jeopardy for the same offense." *Id.* at 3. The Sixth Circuit disagreed, concluding that the record, which included evidence of all 235 money orders, protected against a subsequent prosecution related to *all* money orders, not just the 12 in the indictment. *Id.*

But in this case, nowhere in the Dunn County complaint does it discuss either a check-cashing *conspiracy* in St. Croix County, or that actual *fraud* occurred in St. Croix County. (R. 55:2–4.) Again, the Dunn County complaint did not mention the specific St. Croix crime at all (R. 55), and, as Jackson conceded to the trial court, nor did the complaint include the specific checks at issue in St. Croix County. (R. 35:2; 55:2–4.)

Jackson cites to Wis. Stat. § 939.72(2) twice. (Jackson's Br. 16, 24.) This statute does not help Jackson. It states that a person shall not be convicted for both conspiracy under section 939.31 and "as a party to a crime which is the objective of the conspiracy." Wis. Stat. § 939.72(2). However, when addressing subsection (3)'s analogous provision regarding attempted and completed crimes, the supreme court explained that "[t]he bar in 939.72(3) follows from the proposition that it is improper to convict for crimes based on the same conduct unless each requires proof of a fact not

required by the other." *Austin v. State*, 86 Wis. 2d 213, 222–23, 271 N.W.2d 668 (1978), *abrogated on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). So, Wis. Stat. § 939.72(2) does not apply here because Jackson's conspiracy conviction in Dunn County and fraud conviction in St. Croix County are different in fact. Further, if Jackson were correct, the State would be unable to prosecute and punish individuals like Jackson who commit crimes in more than one county, permitting those individuals to inflict more harm on more victims, without fear of additional punishment. Simply because Dunn County chose to prosecute Jackson for crimes that he committed in Dunn County does not "bind" St. Croix County for crimes he committed in St. Croix County.

For all the above reasons, Jackson's claims are not identical in law and fact. As a result, there is no double jeopardy violation.

3. There is no legislative intent to prohibit multiple convictions.

Finally, Jackson makes no attempt in his appellate brief to rebut the presumption that the legislature did not intend to prohibit multiple convictions here. *See, e.g.*, *State v. Lock*, 2013 WI App 80, ¶ 38, 348 Wis. 2d 334, 833 N.W.2d 189. Because he has not developed this argument, this Court should hold that there is no legislative intent prohibiting these multiple convictions. *See id.*

CONCLUSION

This Court should affirm Jackson's judgment of conviction.

Dated this 10th day of April 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SARA LYNN SHAEFFER
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
shaeffersl@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 3,650 words.

Dated this 10th day of April 2020.

_____
SARA LYNN SHAEFFER
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 10th day of April 2020.

_____
SARA LYNN SHAEFFER
Assistant Attorney General