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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

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Appeal No. 19 AP 2091-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARSHUN DANTE JACKSON,

Defendant-Appellant.

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**DEFENDANT-APPELLANT'S REPLY BRIEF**

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

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**DEFENDANT-APPELLANT'S REPLY BRIEF**

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**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.**

The St. Croix County conviction is prohibited by double jeopardy for the following reasons: 1) the scope of the Dunn County conspiracy conviction includes the checks cashed in St. Croix County; 2) the St. Croix County PTAC conviction is, as a matter of legislative directive, identical in law to the Dunn County conviction; and 3) the defendant's interests are

paramount in a successive prosecution and therefore any ambiguity must be resolved against the State.

**1. The scope of the Dunn County conspiracy charge includes the checks cashed in St. Croix County.**

The Dunn County conspiracy charge and the St. Croix County PTAC charge are not identical, according to the State, because they encompass different facts—i.e. different times, places and checks. The State also argues each conviction is factually distinct because Dunn County cannot charge a crime that occurs in St. Croix County.

The Dunn County conviction includes the checks cashed in St. Croix County. The statutory elements of conspiracy and its underlying objective—Wis. Stat. § 943.82(1)—are broad. The combined elements contain no limit on the number of checks, the number of banks, or the number of locations affected during the period alleged (May 25, 2017). In addition, reviewing the record as a whole, the Dunn County prosecution covers checks cashed or intended to be cashed in Wisconsin on May 25, 2017, including the checks cashed in St. Croix County.

**a) The “objective” of the conspiracy charge includes all intended or completed violations of Wis. Stat. § 943.82(1) occurring on May 25, 2017.**

Dunn County charged Jackson with 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), (12:1 (A:11-12<sup>1</sup>)). The cumulative amount of fraud (\$10,000 to \$100,000) is broad,

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<sup>1</sup> Appendix references are to Defendant-Appellant’s Appendix in his Brief-in-Chief.

and unlike Count 2 of the complaint, Count 1 does not limit itself to any particular victims. The conspiracy charge by necessity requires a combination of multiple checks from multiple banks to meet \$10,000 threshold, as each check was “approximately \$2,000.”<sup>2</sup> No single bank was allegedly defrauded of \$10,000 or more.<sup>3</sup> (55:4). See also *State v. Lomagro*, 113 Wis.2d 582, 589, 335 N.W.2d 583 (Wis. 1983) (“When separate criminal offenses of the same type occur during one continuous criminal transaction, the prosecutor may join these acts in a single count if they can properly be viewed as one continuous occurrence....”).

- b) The factual scope of criminal activity charged by Dunn County includes all checks cashed or intended to be cashed on May 25, 2017 including those in St. Croix County.**

The probable cause portion of the complaint describes an inter-state conspiracy involving multiple counties in western Wisconsin. Co-conspirators were paid to “enter banks and cash checks.” Crimes were committed in “multiple cities.” Jackson and Augustus would write checks of approximately \$2,000 in the co-conspirators’ names which they cashed in “various banks....” Checks were cashed “at several banks *in the area including* Eau Claire and Menomonie.” (55:4). Jackson and Augustus’ were found with a “large amount of cash” (over \$20,000) on their persons and “it was probably (sic) they had more money in the hotel

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<sup>2</sup> The checks recovered by police, both cashed and uncashed, ranged from \$1744.66 to \$2955.00. (54:9-14).

<sup>3</sup> The complaint did not allege any specific amounts as to any of the checks cashed or stolen, but did allege that “the total number of checks cashed” at the “downtown” and “east” Dairy State Banks was “over \$13,000.” (55:4). In the complaint, at least, neither of these banks were specifically identified as located in Dunn County.

rooms due to them committing *these crimes* in multiple cities.” (emphasis added). (55:4). A search of Jackson’s vehicle uncovered 21 yet-to-be cashed “fraudulent” checks. (55:4).

Dunn County Investigator Kelly Pollack’s report details the cashed and uncashed checks underlying the broader allegations in the complaint, including the two St. Croix County checks cashed on May 25, 2017.<sup>4</sup> (54:9-10). The report is in the record in this case and twice cited in the Dunn County criminal complaint. (55:4).

A court must review the “entire record” of the prior proceeding “in ascertaining whether a defendant’s double jeopardy rights have been violated by a second prosecution.” *State v. Schultz*, 2020 WI 24, ¶32. The purpose of reviewing the record is to determine “the parameters of the offense for which the defendant *was actually in jeopardy* during the first proceeding...” *Id.*, at ¶55. The record “in its entirety,” and not just the pleading, “reveals the details of the offense” and thus the “scope of jeopardy” which “protects a defendant against a subsequent prosecution for the same crime.” *Id.*, at ¶¶55-56.

In *Schultz*, the record included the police report because it was attached to the complaint. *Schultz* is unclear about whether the investigative report must be attached to the complaint before it can be considered for double jeopardy purposes, or whether being attached to the complaint is the means by which it became part of the record and thus available for review.

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<sup>4</sup> The two checks cashed in River Falls on May 25, 2017 were \$2,100.22 and \$2,411.66. (15:3-4; 55:9-10).



If the latter, Pollack's report *is* part of the record on appeal. Pollack's report was attached to St. Croix County's first complaint. (54:4-15). It was also referenced and repeated in substance by Pollack's and Jennifer Knutson's preliminary hearing testimony. (79:9-33, 35). See also *State v. Kelty*, 2006 WI 101, ¶¶19, 38, 294 Wis.2d 62, 716 N.W.2d 886 (plea does not forfeit double jeopardy challenge if it "can be resolved *on the record as it existed at the time the defendant pled.*" (emphasis added)).

If the former, it must still be considered because it was clearly known to Dunn County prosecutors at the time the complaint was filed. The complaint cites information directly from the report. (see e.g. 55:4 and 54:6). Pollack's report shows the "parameters of the offense" for which Jackson "was actually in jeopardy" because her report is the only document of record which shows the full scope of the investigation, the full scope of the evidence available for trial, and most importantly, the full scope of the evidence known to Jackson and the Dunn County prosecutors at the time Jackson entered his plea. *Schultz*, at ¶55. The scope of double jeopardy cannot depend solely on the happenstance of whether a prosecutor decides to attach the investigator's report to the complaint rather than summarize parts of it as he did here. (55:4). Complaints are often bare-bones. See e.g. *State v. Williams*, 47 Wis. 2d 242, 252, 177 N.W.2d 611 (1970) (alleged facts need only give rise to reasonable inferences sufficient to establish probable cause). As in *Schultz*, the report is necessary to make a fair determination of Jackson's double jeopardy rights. *Schultz*, at ¶55.

According to Pollack's report, 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)). Robin Santee, a co-conspirator, admitted they had been "cashing checks at different bank locations from the Twin Cities area,

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

Pollack details the recovered checks as well as the uncashed checks found in Jackson’s vehicle. (54:9-14 (A: 21-26)) Checks were stolen from multiple Wisconsin businesses located in Durand (Pepin County), Eau Claire (Eau Claire County), Altoona (Eau Claire County), Osseo (Trempealeau County), Bloomer (Chippewa County), Holcomb (Chippewa County), Elmwood (Pierce County), 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 the other co-conspirators—Robin Santee, Tyler Santee or Peyton Heistand—as payees. (54:7 (A:19)). After contacting several of the business owners Pollack confirmed that at a minimum, checks had been cashed in Durand (Pepin County) (54:9 (A:21)); River Falls (St. Croix County) (54:10 (A:22)); and Menomonie (54:13 (A:25)). Pollack specifically noted that two checks stolen from Durand were cashed in River Falls about 2½ hours before checks were cashed in Menomonie (Dunn County). (79:42; 55:3; 54:10 (A:8, 22)).

Alternatively, even if Pollack’s report is not considered, the allegations in the complaint are sufficient to show the multi-county scope of the Dunn County prosecution. The complaint’s broad allegations referencing “various banks” defrauded in “multiple cities” from the Twin Cities to Eau Claire incorporate related criminal activity beyond Dunn County. The specific reference to 21 “fraudulent” uncashed checks found in Jackson’s vehicle further corroborates the broad coverage intended by the conspiracy charge to include not just completed criminal activity but intended future criminal activity.

Alternatively, the time frame alone is sufficient to protect Jackson from successive prosecution. *Schultz*, citing *State v. George*, 69 Wis.2d 92, 98, 230 N.W.2d 253 (1975), affirmed the principle that “if one prosecution charges a continuing crime, ‘a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period.’” *Schultz*, at ¶42. See also *U.S. v. Roman*, 728 F.2d 846, 854 (7th Cir. 1984) (defendant protected from future charges by time frame of active conspiracy and participants involved). In this case, the crimes in both Dunn and St. Croix County were concededly part of the same on-going criminal scheme and committed on the same day. In fact, St. Croix County relied on the “the entire fraudulent scheme” as evidence of Jackson’s participation as there was no direct evidence showing Jackson was in River Falls when the checks were cashed. (79:12, 58-59).

- c) The St. Croix County prosecutor is bound by the Dunn County prosecutor’s charging decision and plea bargain.**

County venue is proper if at least one of the elements necessary to the offense occurs in that county. *State v. Lippold*, 2008 WI App 130, ¶16, 313 Wis.2d 699, 757 N.W.2d 825; see also *State v. Elverman*, 2015 WI App 91, 367 Wis. 2d 126, 876 N.W.2d 511 (venue is appropriate in any county in which at least one of the alleged acts occurred when the charge is based on a continuous offense); Wis. Stat. § 971.19(2) (“where two or more acts are requisite to the commission of any offense, the trial may be in any county in which any of such acts occurred.”).

Dunn County alleged a conspiracy “to obtain money owned by or under the custody and control of a financial institution by means of false pretenses, representations, or promises” contrary to Wis. Stats. §§ 943.82(1), 943.91(4), 939.31, 939.62(1)(b). At the time Jackson and his co-

conspirators were cashing checks in Dunn County with 21 uncashed checks in their vehicle, they intended “that a crime be committed”; had “combine[d] with another for the purpose of committing that crime”; and “one or more of the parties to the conspiracy” were acting to “effect its object,....” See Wis. Stat. § 939.31.<sup>5</sup> Thus, at least one of the elements of Wis. Stat. § 939.31 occurred in Dunn County (as is true with each of the counties where checks were cashed) and therefore venue to issue a charge for this entire scheme was properly set in Dunn County.

Once charges were issued, moreover, the prosecutor in Dunn County, as the state’s agent, bound every other prosecutor in Wisconsin. *State v. Scott*, 230 Wis. 2d 643, 662, 602 N.W.2d 296 (Ct. App. 1999). Thus, the scope of double jeopardy from the Dunn County prosecution applies to all successive prosecutions brought by the State of Wisconsin relying on the same scheme or facts, regardless of which county a successive charge originates.

**2. The St. Croix County PTAC conviction is, as a matter of legislative directive, identical in law to the Dunn County conviction.**

The State argues the charges are not identical in law because the Dunn County conspiracy charge and the PTAC charge in St. Croix county are different. Dunn County charged a conspiracy to commit Wis. Stat. § 943.82(1) (\$10,000-\$100,00) under Wis. Stat. 939.31. St. Croix County charged a direct violation of Wis. Stat. § 943.82(1) as PTAC in a different amount (\$500-\$10,000). (See Wis. Stat.

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<sup>5</sup> Wis. Stat. § 939.31 Conspiracy. “...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,....”

939.05). The State also argues that neither Wis. Stat. § 939.72(2) nor *State v. Jackson*, 2004 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 688 apply because successive charges were not brought in the same county.

Wis. Stat. § 939.72(2)<sup>6</sup> prohibits a PTAC conviction for the same crime “which is the objective of [a] conspiracy” conviction. That is precisely what happened here. The objective of the Dunn County conspiracy conviction was to defraud banks of an amount between \$10,000 and \$100,000 in approximately \$2,000 increments by cashing fraudulent checks in multiple locations throughout Western Wisconsin—including banks in both Dunn and St. Croix Counties. The state’s argument that Wis. Stat. § 939.72(2) doesn’t apply because the conspiracy and PTAC convictions occurred in different counties (State’s Brief, p. 11, n. 5) is easily dismissed once the objective of the Dunn County conspiracy conviction is shown to include checks cashed in both Dunn and St. Croix County. *Jackson* also applies as the conspiracy’s objective (a cumulative violation of Wis. Stats. § 943.82(1)) is incorporated into the conspiracy charge and therefore proving the conspiracy also proves the underlying offense. *Jackson*, at ¶8; *State v. Kloss*, 2019 WI App 13, ¶27, 386 Wis.2d 314, 925 N.W.2d 563; *United States v. Hatchett*, 245 F.3d 625, 633 (7th Cir. 2001) (offenses with differing elements may be the “same” for double jeopardy purposes if proof of one offense necessarily entails proving the other); accord, *Harris v. Oklahoma*, 433 U.S. 682 (1977).

As the State, not the county, is the charging sovereign, St. Croix County is bound by Dunn County’s charging

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<sup>6</sup> Wis. Stat. § 939.72. No conviction of both inchoate and completed crime. 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;....

decision (see pp. 12-13, *supra*). It makes no difference which Wisconsin county brings successive charges.

The State also cites *United States v. Felix*, 503 U.S. 378 (1992) and *State v. Van Meter*, 72 Wis.2d 754, 242 N.W.2d 206 (1976) for the proposition that conspiracy and PTAC are different crimes. *Felix* does not address the attributes of the Wisconsin conspiracy statute; the holding in *Jackson*; or Wis. Stat. § 939.72. *Van Meter* does not apply to a conspiracy charge which encompasses an ongoing criminal scheme based on criminal activity in multiple Wisconsin counties. See *Lomagro*, at 589.

**3. The defendant's interests are paramount in a successive prosecution.**

Finally, the defendant's interests are paramount in a successive prosecution. *Green v. United States*, 355 U.S. 184, 187 (1957). If there is ambiguity in the scope of the initial prosecution or the expectation of finality, it should be resolved against the State. By pleading to a higher-level conspiracy charge (\$10,000-\$100,000) involving Wis. Stats. § 943.82(1) & 943.91(4), Jackson had every reason to believe his liability was contained, at least in Wisconsin. In fact, he had completed the confinement portion of his Dunn County sentence by the time he was sentenced in St. Croix County. (12:1-2; 41:1-2 (A:1-2, 11-12)). If the State has its way, Jackson will remain vulnerable to literally dozens of successive prosecutions in multiple Wisconsin counties. The State made the choice of charging the scheme under a higher-level felony using cumulative totals from multiple banks and accepted a plea bargain to that charge. The State, which includes St. Croix County prosecutors, are bound by that choice.

## CONCLUSION

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

Respectfully submitted this May 18, 2020.

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809.19(8)(b)&(c)**

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Dated this May 18, 2020.

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## CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on May 18, 2020. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this May 18, 2020.

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