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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP1756-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROMAN T. WISE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION, SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK A. SANDERS AND STEPHANIE G. ROTHSTEIN, PRESIDING.

PLAINTIFF–RESPONDENT'S BRIEF

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ISSUE PRESENTED

Did Wise allege sufficient facts in his postconviction motion that would establish that trial counsel was ineffective for failing to seek dismissal on multiplicity grounds of any three of Wise's four charges for: (1) fleeing an officer causing the death of QRD; (2) fleeing an officer causing great bodily harm to QLH; (3) fleeing an officer causing damage to the property of CW; and (4) fleeing an officer causing damage to the property of CD, where all four charges arose out of the same vehicle crash, but charged different crimes implicating different victims?

The circuit court denied the claim without a hearing.

This Court should affirm the decision of the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe oral argument is necessary. The State requests publication, however, because no case exists interpreting Wis. Stat. § 346.17(3) and addressing whether it creates substantive, stand-alone crimes.

INTRODUCTION

Wise claims that his convictions are multiplicitous because, he says, he committed only one act of fleeing police in violation of Wis. Stat. § 346.04(3), therefore he cannot be charged with separate crimes under Wis. Stat. § 346.17(3) for the separate harms he caused to four different victims as a result of that act. Ergo, he claims, trial counsel was ineffective for failing to dismiss three of his charges on this ground. But Wise's analysis is flawed. Fleeing the police causing different harms are separate crimes with different elements and with their own individually defined felony classifications under Wis. Stat. § 346.17(3). Moreover, the charges are all different

in fact because they all named separate harms to different victims, so Wise could be appropriately charged and convicted of all four even if they were the same in law. Failure to make a challenge that would have failed is neither deficient nor prejudicial, nor can counsel be found deficient for failing to advance a novel interpretation of the law.

STATEMENT OF THE CASE AND FACTS

On December 17, 2017, police saw a Lexus that had been stolen earlier that day and attempted to pull it over. (R. 1:3.) The driver fled and led police on a brief high-speed chase through Milwaukee. (R. 1:3.) The Lexus crashed into two other vehicles in an intersection, a Monte Carlo driven by CW and a Toyota Rav4 driven by CD. (R. 1:4.) Wise was arrested attempting to climb out the back-driver's window. (R. 1:3.) QLH, a teenaged girl, was found unconscious in the back of the car. (R. 1:3.) She was taken to a hospital and treated for numerous extremely severe injuries. (R. 1:3.) QRD, a teenaged boy, was also found unresponsive in the car. (R. 1:3.) He was taken to the hospital as well but died from his injuries. (R. 1:3.)

The State charged Wise with four counts of fleeing resulting in different harm to each victim: QRD's death, QLH's great bodily harm, damage to CW's Monte Carlo, and damage to CD's Rav4. (R. 4.) A jury found him guilty of all four charges. (R. 64.) The court sentenced him to 12 years of initial confinement and 8 years of extended supervision. (R. 80:1–2.)

Wise filed a motion to vacate his convictions on counts 2 through 4, claiming they were multiplicitous with count 1 and therefore his trial counsel was ineffective for failing to move to dismiss them. (R. 91:2.) The circuit court found that Wise's charges were not the same in law or the same in fact

and denied the motion without holding a *Machner*[1] hearing. (R. 100:5.)

Wise appeals.

ARGUMENT

The circuit court properly exercised its discretion in denying Wise's ineffective assistance claim without holding an evidentiary hearing because failure to challenge the charges on multiplicity grounds was neither deficient nor prejudicial.

A. Standard of review

"Whether a defendant's [postconviction motion] . . . 'on its face alleges facts which would entitle the defendant to relief' and whether the record conclusively demonstrates that the defendant is entitled to no relief' are questions of law that [an appellate court] review[s] de novo." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted). If the motion does not allege sufficient facts that would entitle the defendant to relief, or relies on conclusory allegations, or the record conclusively refutes the defendant's claims, the circuit court has discretion to deny the motion without a hearing. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

B. Defendants claiming ineffective assistance of counsel must allege sufficient facts in the motion to establish both deficient performance and prejudice.

Ineffective assistance claims are evaluated using the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail under *Strickland*, a defendant

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[1] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

must prove that his counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687.

"To prove deficient performance, a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Romero-Georgana*, 2014 WI 83, ¶ 41, 360 Wis. 2d 522, 849 N.W.2d 668.

C. Trial counsel's failure to challenge the charges on multiplicity grounds was neither deficient nor prejudicial because the charges are different in both law and fact, and Wise cannot show that the legislature did not intend multiple punishments for them.

Wise's charges are not multiplicitous because the charges are different in both law and fact, and Wise cannot show that the legislature clearly did not intend multiple punishments for multiple harms to different victims arising out of a single incident of fleeing from the police. Accordingly, the circuit court appropriately denied without a hearing Wise's motion alleging that counsel was ineffective for failing to challenge the charges on multiplicity grounds, because the challenge could not have succeeded. *State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369.

Multiplicity arises where the defendant is convicted and punished in more than one count for offenses where the Legislature did not intend cumulative punishments. *State v. Davison*, 2003 WI 89, ¶¶ 34–46, 263 Wis. 2d 145, 666 N.W.2d 1. There is an "established methodology" for reviewing multiplicity challenges. *Id.* ¶ 42. "First, the court determines whether the charged offenses are identical in law and fact

using the *Blockburger*[2] test." *Id.* ¶ 43. This test asks whether each crime charged "requires proof of a fact which the other does not." *Id.* ¶ 22 (citation omitted). The offenses are different in law if they have different elements. *Id.* ¶ 41. They are different in fact if the elements are the same but the State has to prove a different set of facts to meet one or more of the elements to convict on each charge. *Id.*

The question then turns to legislative intent to impose cumulative punishments. *Id.* ¶ 43. If the offenses are identical in both law and fact, a presumption arises that the legislature did not intend to impose multiple punishments. *Id.* ¶ 43. The State can rebut this presumption by clear indication of legislative intent to impose such punishments. *Id.* ¶ 44. If the legislature did not so intend, then the multiple punishments violate the double jeopardy clauses of the state and federal constitutions. *Id.* ¶ 37.

If "the charged offenses are different in law or fact, a presumption arises that the legislature did intend to permit cumulative punishments." *Id.* ¶ 44. "This presumption can only be rebutted by clear legislative intent to the contrary." *Id.* (citation omitted). When the offenses are different in either law or fact, it is the defendant's burden to show a clear legislative intent not to authorize cumulative punishments. *Id.* ¶ 45. If the defendant can make this showing, the multiple punishments do not violate the double jeopardy clause because double jeopardy is only concerned with multiple punishments for "the same offense," meaning an offense that is identical in law and fact. *See id.* ¶ 46. Instead, multiple punishments for different offenses contrary to legislative intent violate due process. *Id.*

A court considers the second step of the analysis regardless of the result of the first step. *State v. Patterson*,

[2] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

2010 WI 130, ¶ 16, 329 Wis. 2d 599, 790 N.W.2d 909. The first step determines which presumption a court will apply when analyzing legislative intent under the second step. *Id.* "The second part of the test focuses on the legislative intent as to the allowable unit of prosecution under the statute in question." *State v. Swinson*, 2003 WI App 45, ¶ 29, 261 Wis. 2d 633, 660 N.W.2d 12.

In order to show that defense counsel was ineffective for failing to challenge his convictions as multiplicitous in violation of the double jeopardy clause, then, Wise must show that the offenses are the same in law and fact and the legislature did not intend cumulative punishments. If he did not plead sufficient facts to establish this, then the circuit court could properly deny his motion without a hearing.

1. Wisconsin Stat. §§ 346.04 and 346.17(3) make fleeing an officer resulting in different harms stand-alone crimes with different elements, so Wise's convictions are different in law.

Wise contends that Wis. Stat. § 346.04(3) alone defines the crime of fleeing an officer, and consequently all four of his convictions are the same in law because the plain language of that statute describes only two elements to the offense: receiving a signal from a law enforcement officer and then attempting to flee or elude that officer. (Wise's Br. 13–15.) He makes no attempt to reconcile that language with the language of the various subsections of Wis. Stat. § 346.17(3). (Wise's Br. 9–22.) Below, Wise claimed that Wis. Stat. § 346.17(3) simply imposes penalty enhancers for escalating harms resulting from violating Wis. Stat. § 346.04(3). (R. 91.) Neither argument has any merit.

Statutes are not interpreted in isolation, meaning Wise's argument before this Court focusing solely on the language of Wis. Stat. § 346.04(3) fails. *State ex rel. Kalal v.*

Circuit Court for Dane County, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. The statutory scheme and plain language of Wis. Stat. §§ 346.04(3) and 346.17(3), properly read in conjunction, show that Wise's charges were different in law. Wise's charges for counts one, two, and three, and counts one, two, and four, each have an element that the others do not, and thus his convictions cannot amount to a double jeopardy violation even though they all arise from Wise's single act of fleeing police.[3]

Wisconsin Stat. §§ 346.04 through 346.16 set forth rules for operating vehicles on Wisconsin roadways. Wisconsin Stat. § 346.04 mandates that people comply with official traffic signals and obey any lawful order, signal, or direction of a traffic officer. The State does not dispute that the simple act of fleeing, as defined in Wis. Stat. § 346.04(3), has two elements: (1) operating a vehicle on a highway after receiving a visual or audible signal from a law enforcement officer; and (2) knowingly fleeing from or attempting to elude the officer. (*See* Wise's Br. 13–15.) There are no felony classifications or other criminal penalties described in Wis. Stat. § 346.04 itself, nor in any of the other rules of the road set forth in Wis. Stat. §§ 346.05 through 346.16.

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[3] The State acknowledges that this analysis does dispose of the legal relationship between counts three and four, Wise's two convictions for fleeing causing property damage to CW and CD by destroying their vehicles in the crash. (R. 6:2.) Those two charges are the same in law because they are both convictions for violations of Wis. Stat. §§ 346.04(3) and 346.17(3)(b), meaning they both have the following elements: (1) Wise operated a motor vehicle on a highway after receiving a visual or audible signal from a marked police officer; (2) Wise knowingly fled the officers by increasing the speed of the vehicle; and (3) Wise's operation of the vehicle to flee the officer caused property damage to a victim. The State contends that these two charges are nevertheless different in fact from each other and will discuss them in the next subsection.

Instead, criminal penalties for violating sections 346.04 through 346.16 are found in Wis. Stat. § 346.17. Subsection (3) addresses violations of Wis. Stat. § 346.04 and provides:

> (a) Except as provided in par. (b), (c), or (d), any person violating s. 346.04(3) is guilty of a Class I felony.
>
> (b) If the violation results in bodily harm, as defined in s. 939.22(4), to another, or causes damage to the property of another, as defined in s. 939.22(28), the person is guilty of a Class H felony.
>
> (c) If the violation results in great bodily harm, as defined in s. 939.22(14), to another, the person is guilty of a Class F felony.
>
> (d) If the violation results in the death of another, the person is guilty of a Class E felony.

Wis. Stat. § 346.17(3).

So, the simple act of fleeing by performing the two elements described in Wis. Stat. § 346.04(3) alone is itself a Class I felony pursuant to Wis. Stat. § 346.17(3)(a). Subsections (b) through (d) of Wis. Stat. § 346.17(3), however, then incorporate that baseline definition of fleeing articulated in Wis. Stat. § 346.04(3) and each add a third, distinct element of causing a particular type of harm, as defined in the criminal statutes, to that baseline definition to create a new crime. This is evident not only by the plain language of the subsections, but by the fact that subsections (b) through (d) change the felony classification for fleeing depending on the additional element present. Wis. Stat. § 346.17(3)(b)–(d). This means each of these subsections defines a distinct crime that is different in law than the others, because they each have an element the others do not: the type of harm caused.

Further supporting this interpretation is the fact that there is no penalty designated in subsections (b) through (d) that can be added to the Class I felony penalty designated in

subsection (a) for the act of fleeing causing no harm. One cannot "add" a separate Class H felony for fleeing causing bodily harm to the penalty for the Class I felony of fleeing causing no harm. Nor could multiple additional felony classifications for causing multiple deaths or injuries be added to the penalty for a Class I felony for a single conviction for violation of Wis. Stat. §§ 346.04 and 346.17(3)(a) causing no harm. Accordingly, Wis. Stat. § 346.17(3)(b)–(d) define stand-alone crimes rather than penalty enhancers. Wise's charges for counts one and two are legally different from each other and from counts three and four, and therefore he was charged with and convicted of three different substantive, stand-alone crimes.

This Court reached a similar conclusion on nearly identical facts when discussing Wis. Stat. § 943.10 (1997–98), the burglary statute, in *State v. Beasley*, 2004 WI App 42, 271 Wis. 2d 469, 678 N.W.2d 600. Subsection (1) of the burglary statute first defined the basic crime of burglary as entering a place without consent of the lawful possessor and with intent to steal or commit a felony, and designated it a Class C felony. *Id.* ¶ 12 (citing Wis. Stat. § 943.10(1)). Subsection (2) then stated,

> Whoever violates sub. (1) under any of the following circumstances is guilty of a Class B felony:
>
> (a) While armed with a dangerous weapon or a device or container described under s. 941.26(4)(a); or
>
> (b) While unarmed, but arms himself with a dangerous weapon . . . while still in the burglarized enclosure; or
>
> (c) While in the burglarized enclosure opens, or attempts to open, any depository by use of an explosive; or
>
> (d) While in the burglarized enclosure commits a battery upon a person lawfully therein.

Wis. Stat. § 943.10(2) (1997–98).

The defendant, Shawn Beasley, participated in a home invasion and fatal shooting. *Beasley*, 271 Wis. 2d 469, ¶ 2. He was tried and found guilty of seven charges related to the incident, including one for burglary with intent to steal while armed with a dangerous weapon in violation of Wis. Stat. § 943.10(2)(a) (1997–98) and one for burglary with intent to steal while committing battery upon a person lawfully in the burglarized enclosure in violation of Wis. Stat. § 943.10(2)(d) (1997–98). *Id.* ¶ 3. Like Wise, Beasley contended that his two burglary convictions were multiplicitous, arguing that the "while armed" element of count five and the "battery" element of count six were not separate crimes but were rather penalty enhancers that enhanced the same underlying Class C felony, burglary, to a Class B felony. *Id.* ¶ 4.

This Court disagreed, holding that while Beasley's argument had some superficial appeal, "[a] clear-eyed review of the statutes shows that the legislature did not fashion the subsections of § 943.10(2) as penalty enhancers." *Id.* ¶ 13. "Penalty enhancers, such as those defined in Chapter 939, authorize specified increases to separate specified penalties for underlying crimes." *Id.* ¶ 14. In other words, "the underlying crime has a penalty, and the enhancer adds an additional penalty." *Id.* "Because of this structure, when the facts support multiple penalty enhancers, multiple enhancers may normally be applied to the same underlying crime." *Id.*

But that was not the structure of Wis. Stat. § 943.10(2) (1997–98). *Id.* The language of the subsections of Wis. Stat. § 943.10(2) (1997–98) did not add an additional penalty to an underlying crime; they each defined a complete, stand-alone crime with its own Class B felony classification. *Id.* ¶ 15. "Further, unlike penalty enhancers, the various aggravating circumstances in the subsections of Wis. Stat. § 943.10(2) cannot be added to the underlying crime of burglary, either singly or in multiples." *Id.* ¶ 16.

That is nearly identical to the structure of the fleeing an officer statute at issue here. The *Beasley* analysis thus compels the same result in this case. The subsections of Wis. Stat. § 346.17(3) define different, stand-alone crimes by adding elements to the crime of fleeing as defined by Wis. Stat. § 346.04(3), just as the subsections of Wis. Stat. § 943.10(2) (1997–98) defined different, stand-alone crimes one could commit as part of a burglary by adding elements to that offense.

Moreover, just like Wise, Beasley relied on the structure of the jury instructions and verdict forms to argue that burglary constituted the only crime and the various aggravating circumstances were penalty enhancers. (Wise's Br. 14–16, 20–22.) Like the instructions and verdicts at issue here, the jury verdict forms in *Beasley* informed the jury that it had to decide if Beasley was guilty of burglary, and if it answered yes, it then had to decide whether he committed that offense with a dangerous weapon (or committed a battery while he committed it for the other count). *Beasley*, 271 Wis. 2d 469, ¶ 17. This Court held that the composition of the jury instructions was not germane to the statutory analysis and that Beasley's argument "really constitutes a challenge to the structure of the jury instructions, not a challenge to the propriety of multiple convictions under the statutes." *Id.* ¶ 17.

This Court further held that "[t]he result would be the same even if the form verdicts had given Beasley's jury the opportunity to find Beasley guilty of simple burglary alone," like Wise's verdict forms did here. *Id.* ¶ 19; (R. 64). This Court noted that "[i]n that situation, the verdict forms would have included two extra answers, but Beasley's jury still would have found the existence of all of the elements of the Class B felony defined in Wis. Stat. § 943.10(2)(a), and all of the elements of the separate Class B felony defined in § 943.10(2)(d)." *Id.* Wise's claim that the form of the jury verdicts or instructions means the legislature did not define

separate crimes in Wis. Stat. § 346.17 simply has no support in the law.

Wise acknowledges *Beasley* but attempts to distinguish it, contending that it "involved an altogether different statutory framework" than Wis. Stat. § 346.17. (Wise's Br. 22–28.) But his distinction between the two statutory schemes is one without a difference, and he overlooks the salient parts of this Court's decision.

While it is true that the burglary statute at issue in *Beasley* defined the crime of simple burglary in Wis. Stat. § 943.10(1) (1997–98) and then defined the other possible crimes involving a burglary in Wis. Stat. § 943.10(2) (1997–98), that is not a material difference to the composition of Wis. Stat. §§ 346.04(3) and 346.17(3). (Wise's Br. 24–27.) The State does not dispute that the legislature fully outlined the elements of the offense of fleeing causing no harm in Wis. Stat. § 346.04(3). (Wise's Br. 25.) As the statutory structure of all of Wis. Stat. § 346.04–.17 shows, though, the legislature chose to establish the substantive rules of the road in Wis. Stat. §§ 346.04 through 346.16 and then assign them penalties, as well as define the other, more serious crimes that could be committed by violating them in a different statutory section, Wis. Stat. § 346.17. It then defined several different crimes of fleeing in Wis. Stat. § 346.17(3)(b)–(d).

Wise fails to explain why the fact that the Legislature's choosing to place these crimes in a separate statutory section means that the subsections of Wis. Stat. § 346.17(3)(b) through (d) don't incorporate the elements described in Wis. Stat. § 346.04(3) and then add new elements to the offense of fleeing causing no harm. (Wise's Br. 25–27.) Indeed, the Legislature frequently adds elements to a base crime to create a new crime in different statutory sections. The mere fact that criminal damage to property is defined in Wis. Stat. § 943.01 does not mean that none of the other ways of damaging

property defined and criminalized in Wis. Stat. § 943.011–.017 are not separate crimes with different elements.

In short, Wise's attempt to distinguish *Beasley* fails. The facts of *Beasley* are directly on point here, and thus *Beasley* controls the outcome of this case. Wise's charges are different in law.

2. All of Wise's convictions are different in fact because the State had to prove separate property damage to different victims to sustain each charge, and thus they cannot be multiplicitous.

Even if Wise were correct that his offenses were all the same in law, though—and again, the State does not dispute that counts three and four are the same in law—Wise could not prevail because the charges supporting his convictions are all different in fact. *See Davison*, 263 Wis. 2d 145, ¶ 41 ("[D]ifferent elements of law distinguish one offense from another when different statutes are charged. Different facts distinguish one count from another when the counts are charged under the same statute.").

When engaging in this step of the multiplicity analysis, a reviewing court inquires "into whether 'the acts . . . committed are sufficiently different in fact to demonstrate that separate crimes have been committed.'" *State v. Pal*, 2017 WI 44, ¶ 19, 374 Wis. 2d 759, 893 N.W.2d 848 (citation omitted). Longstanding case law holds that "[i]n cases where the defendant commits one criminal act which has several victims," the different in fact test will always be met, "since the identity of the victim is an additional proof of fact in each case." *State v. Rabe*, 96 Wis. 2d 48, 67, 291 N.W.2d 809 (1980) (citation omitted).

Accordingly, Wise's charges are different in fact because to convict Wise on each the State had to prove that Wise harmed a different victim and prove the causal relationship

between Wise's actions and the separate harm to each. *See Rabe*, 96 Wis. 2d at 66–67. For count one, the State had to prove that Wise's fleeing caused QRD's death; for count two, it had to prove that Wise's fleeing caused great bodily harm to QLH; for count three, it had to prove that Wise's fleeing caused damage to CW's property; and for count four, it had to prove that Wise's fleeing caused damage to CD's property. (R. 6.) The fact that all of these harms arose as the result of a single act is immaterial. In *Pal*, and on facts indistinguishable from those here, the Wisconsin Supreme Court recently—and unanimously—reaffirmed that where a single act results in harm to several separate victims, charges for causing the harm to each separate victim are different in fact for a multiplicity analysis. *Pal*, 374 Wis. 2d 759, ¶ 22.

In *Pal*, the defendant hit two motorcyclists with his car in a single crash and fled the scene. *Id.* ¶¶ 5–8. They both died, and Pal subsequently pled guilty to two counts of hit and run causing death in violation of Wis. Stat. § 346.67, one for each victim. *Id.* ¶ 8. He then contended, just as Wise does here, that the two counts were multiplicitous because he only left the scene of one accident and therefore couldn't be charged with two counts of hit and run causing death. *Id.* ¶¶ 20–22. The supreme court disagreed and found that the offenses were different in fact because in each count, the State had to prove that Pal failed to fulfill his statutory obligations after an accident toward each victim and consequently he committed two crimes under the hit and run statute even though he left the scene of only one crash. *Id.* ¶¶ 22–23.

Here, there were four individuals harmed by Wise's single act of fleeing in four different ways. By fleeing causing harm to four separate people, then, Wise committed four separate crimes that were different in fact even though he committed only a single act of fleeing. *See Rabe*, 96 Wis. 2d at 66–67.

Wise attempts to distinguish *Pal*, but as with his attempt to distinguish *Beasley*, the attempt fails. (Wise's Br. 28–31.) Wise claims that the result in *Pal* was compelled solely because the hit and run statute explicitly created duties owed to each victim in an accident. (Wise's Br. 29.) He then contends that because Wis. Stat. § 346.04(3) makes no mention of victims or any duties owed to them, his offenses cannot be different in fact. (Wise's Br. 29–31.)

Wise's analysis founders on his failure to account for the language in Wis. Stat. § 346.17(3)(b)–(d) and his failure to address *Rabe*. Wisconsin Stat. § 346.17(3)(b)–(d) all reference victims and make separate crimes for causing various types of harm to them. And the statute at issue in *Rabe,* Wis. Stat. § 940.09, did not explicitly create any statutory duties to victims, yet the supreme court still held that Rabe's four charges for homicide by intoxicated use of a vehicle arising from a single crash were different in fact because the State had to prove the identity of each victim and the causal relationship between Rabe's actions and each victim's death. *Rabe*, 96 Wis. 2d at 66–67. *Rabe* is identical to this case. Wise's failure to address it or even mention it other than a passing reference in a string citation means his argument must fail. (Wise's Br. 10.) Wise's charges are different in fact.

3. Because each of Wise's charges is either different in law or different in fact from the others, the burden is on Wise to show that the legislature did not intend cumulative punishments for multiple harms arising from one act of fleeing, which he cannot do.

Because Wise's charges are neither identical in law nor fact, they cannot amount to a double jeopardy violation. *Davison*, 263 Wis. 2d 145, ¶ 46. Wise's cumulative punishments for four convictions arising out of a single act of fleeing may still amount to a legitimate due process claim,

and therefore a possible ineffective assistance claim for failing to move to dismiss them, if he can show clearly that "the legislature did not intend to authorize multiple convictions and cumulative punishments." *Id.* He cannot carry his burden, because there is clear legislative intent to impose such punishments for multiple harms arising from a single act of fleeing police.

"[L]egislative intent in multiplicity cases is discerned through study of" four sources. *Pal*, 374 Wis. 2d 759, ¶ 15. First, "all applicable statutory language." *Id.* (citation omitted). Second, "the legislative history and context of the statutes." *Id.* Third, "the nature of the proscribed conduct." *Id.* And fourth, "the appropriateness of multiple punishments for the conduct." *Id.*

First, the applicable statutory language indicates that the Legislature authorized multiple punishments here. Wise contends that because the language of Wis. Stat. § 346.17(3)(b)–(d) speaks of "the violation" of Wis. Stat. § 346.04(3), singly, there cannot be multiple charges brought for harms caused by a single act of fleeing. (Wise's Br. 33–34.) But that language actually supports multiple charges from a single act of fleeing, rather than refutes it. The Legislature must have contemplated that a single "violation" of Wis. Stat. § 346.04(3) could give rise to multiple crimes, because it expressly predicated each separate crime in Wis. Stat. § 346.17(3) on the "results" of the act of fleeing. Wis. Stat. § 346.17(3)(b)–(d). Indeed, subsection (a) states that "any person *violating* s. 346.04(3) is guilty of a Class I felony." Wis. Stat. § 346.17(3)(a) (emphasis added). But the next subsections use different language. Wisconsin Stat. § 346.17(b)–(d) each begin with "if the violation *results in*" a particular harm to another, the offender is guilty of a different felony. A single violation of Wis. Stat. § 346.04(3) can result in multiple harms to multiple victims. The fact that the Legislature chose to predicate the different crimes listed in

Wis. Stat. § 346.17(3)(b)–(d) on the result of violating Wis. Stat. § 346.04(3) instead of on the fact of the violation itself shows that the Legislature intended separate charges for each harm resulting from a single violation of Wis. Stat. § 346.04(3).

Moreover, as the supreme court observed in *Pal*, "multiple victim accidents are not so rare that we can say the legislature did not take them into consideration when drafting the statute. Had the legislature intended that only one penalty could be imposed per accident, it could have more clearly done so." *Pal*, 374 Wis. 2d 759, ¶ 25. Multiple victim accidents arising from a dangerous activity like fleeing the police—which often involves high speeds, running traffic signals, sudden turns, and general reckless driving—are even more foreseeable than from other types of road violations, so the fact that the Legislature did not clearly state that only one conviction could be imposed per accident resulting from fleeing is instructive. *Cf.* Wis. Stat. § 346.63(1)(c) (stating that a person may be prosecuted for any combination of offenses in Wis. Stat. § 346.63(1)(a), (am), or (b) arising from a single incident, but only one conviction may be entered if the person is found guilty); *see also* Wis. Stat. §§ 939.71, 939.72 (expressly prohibiting subsequent prosecution for the same act under a different statutory subsection after acquittal or conviction and prohibiting conviction for both an inchoate offense and the completed offense which was the objective of the inchoate offense).

Second, as to the legislative history and context of the statute, the drafter's note on which Wise relies again supports the imposition of multiple penalties rather than refutes it. (Wise's Br. 34; *see also* R. 97.) The drafter's note says that the intent was to "[m]ake [the] penalties [for fleeing] similar to those for OWI [i.e., higher penalties where OWI results in injury or death]" (R. 97:2) (last set of brackets in original). Wise claims this means the Legislature "did not intend to

provide for multiple punishments based on multiple injuries, but graduated punishment based on the severity of the injuries." (Wise's Br. 34.) The problem with this argument is that in 1985 when Wis. Stat. § 346.17 was being drafted, the supreme court in *Rabe* had already held that the Legislature *did* intend multiple punishments for multiple injuries arising from an OWI offense. *See Rabe*, 96 Wis. 2d at 69–70. The Legislature is presumed to know the law when enacting legislation. *Spence v. Cooke*, 222 Wis. 2d 530, 537, 587 N.W.2d 904 (Ct. App. 1998). If the Legislature did not intend for the fleeing statute to be interpreted the same way the OWI statutes were, it presumably would have said so instead of seeking to give the two similar treatment.

Turning to the third and fourth factors, the nature of the proscribed conduct and the appropriateness of allowing multiple punishments both also support imposing multiple punishments for multiple harms arising from a single incident of fleeing. Wise is incorrect that "the gravamen of the offense is the knowing flight from . . . the officer." (Wise's Br. 34.) The gravamen of the offenses for which Wise was convicted is causing harm to people while fleeing. Because many, many people can be harmed by a single act of fleeing, including innocent people merely going about their day, it makes sense to impose multiple punishments for the damage caused to each, just as it makes sense to impose multiple punishments when an OWI offender harms multiple victims.

Wise's analysis allowing only one charge to be brought for fleeing no matter how many people were harmed in the incident would unduly depreciate the severity of the harm caused. Under Wise's theory, if he had driven down the sidewalk and killed 10 people while fleeing, he could only be charged with one crime of fleeing causing death to another. (Wise's Br. 34–35.) So, he would face no repercussions for killing nine other people, and their families, who are also victims, would be left with no justice. "[V]ictims' rights play

an important role within our criminal justice system," *State v. Bokenyi*, 2014 WI 61, ¶ 63, 355 Wis. 2d 28, 848 N.W.2d 759, and the fact that Wise's interpretation of the statute would potentially leave many victims unaccounted for and unremunerated for their losses shows that multiple punishments are appropriate for causing harm to multiple people while fleeing police.

In short, it is Wise's burden to show a clear legislative intent not to permit multiple punishments for causing multiple harms to multiple victims by a single act of fleeing from police. He has not done so, and all of the factors a court uses to discern legislative intent in a multiplicity analysis favor imposing multiple punishments here. Accordingly, Wise's multiplicity claim must fail.

4. Wise did not allege sufficient facts to show that counsel's failure to raise this challenge was deficient or prejudicial.

"In determining whether counsel's performance was deficient for failing to bring a motion, [a court] may assess the merits of that motion." *State v. Sanders*, 2018 WI 51, ¶ 29, 381 Wis. 2d 522, 912 N.W.2d 16. And "[c]ounsel does not perform deficiently by failing to bring a meritless motion." *Id.*

Given that Wise's four charges are different in fact (and three are different in law), and he cannot show that the Legislature did not intend multiple punishments, Wise did not allege sufficient facts to establish that either a double jeopardy violation or a due process violation occurred from his multiple convictions. That means that he did not plead sufficient facts in his motion to show either deficient performance or prejudice. *Ziebart*, 268 Wis. 2d 468, ¶ 14 (counsel's failure to make a motion that would have been denied is neither deficient nor prejudicial).

At the least, though, counsel could not be deficient for failing to raise this claim because there is no law interpreting

Wis. Stat. § 346.17 in the manner Wise suggests. Indeed, there is no case law that interprets the statute in any respect. "In order to constitute deficient performance, the law must be settled in the area in which trial counsel was allegedly ineffective." *State v. Hanson*, 2019 WI 63, ¶ 28, 387 Wis. 2d 233, 928 N.W.2d 607. "When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." *State v. Jackson*, 2011 WI App 63, ¶ 10, 333 Wis. 2d 665, 799 N.W.2d 461. With no case law establishing the interpretation Wise urges, counsel could not be deficient for failing to move to dismiss the charges based on this novel interpretation of the statute.

Accordingly, the circuit court had discretion to deny Wise's ineffective assistance of counsel claim without holding a hearing, and appropriately did so here.

CONCLUSION

This Court should affirm the judgment of conviction and order denying Wise's postconviction motion.

Dated this 27th day of January 2021.

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 6,014 words.

Dated this 27th day of January 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 27th day of January 2021.

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