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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2020AP1756

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROMAN T. WISE Defendant-Appellant

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

DEFENDANT-APPELLANT'S REPLY BRIEF

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Wisconsin Stat. §346.17(3) does not create "stand-alone crimes with different elements."

The State argues that "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." See State's brief at page. 6. With regard to this argument, the State urges that Wise "makes no attempt to reconcile" the language of §346.17(3) with §346.04. See State's brief at page 6. Not true. At pages 19 through 21, and 25 of Wise's brief, Wise specifically addresses the relationship between §346.17(3) and §346.04. Wise explains that "[a]s interpreted by *Beamon* and the pattern jury instruction, the plain language of Sec. 346.04(3) serves to fully define the offense of fleeing," whereas §346.17(3) "provides the penalty structure for a violation under Sec. 346.04(3)." As reflected by the language used in WIS JI-CRIMINAL 2630, that penalty structure is determined only *after* the jury finds a defendant guilty of the substantive offense, and then proceeds to the question,

"[d]id the defendant's operating a vehicle (to flee)(in an attempt to elude) an officer result in (bodily harm to)(damage to the property of)(great bodily harm to)(death to) another?"

WIS JI-CRIMINAL 2630.

Quite simply, §346.17 provides for the penalty to be imposed for the offense defined in §346.04.

The State additionally argues that "Wise fails to explain why the fact 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 harm." See State's brief at page 12. The State argues that the "Legislature frequently adds elements to a base crime to create a new crime in different statutory sections," and refers the court to criminal damage to property under Wis. Stat. §943.01, and offenses set forth in Wis. Stat. §§943.011-.017. See State's brief at page 13. The State's argument here defeats itself. In this regard, §§943.011 through .017 each create, in and of themselves, specific

substantive offenses, and specific penalties with no reference to, or dependence on, §943.01:

§943.011 "Damage or threat to property of witness," defined and penalized in subsection (2)(a) and (b);

§943.012, "Criminal damage to or graffiti on religious and other property," defined and penalized in §943.12;

§943.013, "Criminal damage; threat; property of judge," defined and penalized in subsection (2);

§943.014, "Demolition of historic building without authorization," defined and penalized in subsection (2);

§943.015, "Criminal damage; threat; property of department of revenue employee," defined and penalized in subsection (2);

§943.017, "Graffiti," defined in subsection (1) and penalized in subsection (2).

The above-referenced statutes don't "incorporate" and "add" new elements to the basic offense of criminal damage to property defined in §943.01. Instead, by nomenclature, structure and content, they create offenses separate from that created by §943.01. As such, the State's comparison of §943.01 and 943.011-.017, to §346.04 and §346.17, is misplaced. If anything, §943.01 and 943.011-.017 illustrate that if the Legislature intended to create discrete and

stand-alone substantive offenses based on the nature of the harm or damage caused, it would have done so. It did not. Instead, the nomenclature, plain language and structure of §§346.04 and 346.17 inform that the Legislature intended the nature of the harm or damage caused by the violation under §346.04 to determine only the penalty structure for such violation.

Wises' convictions are not different in fact.

The State argues that "[a]ll 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." See State's brief at page 13. Not true. The circuit court specifically instructed the jury that the State only needed to prove two elements for all four counts:

> First, that the defendant operated a motor vehicle on a highway after receiving a visual or audible signal from a marked police vehicle, and second, the defendant knowingly fled a traffic officer by increasing the speed of the vehicle to flee. 114:63.

The circuit court then advised the jury as follows:

> If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved with respect to County 1, 2, 3, or 4, you should find the defendant guilty of that count.
>
> If you are not so satisfied, you must find the defendant not guilty.
> 114:63.

The facts necessary to prove these two elements for all four counts were identical. No count required proof of any other fact before the jury could properly make a finding of guilty for that count. The circuit court's instructions were consistent with WIS JI-CRIMINAL 2630 as discussed in Wise's brief at page 20. Contrary to the State's assertion, the State did not need to prove separate property damage to different victims to sustain each charge. It is true that the jury was asked to make, and did make, a finding as to whether property damage, bodily harm, great bodily harm, or death resulted from Wise's fleeing. 114:64. But that finding came only after the finding of guilty as to the substantive offense of fleeing. The finding was not necessary to "sustain each charge" as argued by the State. Indeed, WIS JI-CRIMINAL 2630 makes this point clear:

> [*If you find the defendant guilty*, you must answer the following question:

> "Did the defendant's operating a vehicle (to flee)(in an attempt to elude) an officer result in (bodily harm to)(damage to the property of)(great bodily harm to)(death to) another?"

WIS JI-CRIMINAL 2630. Italics added.

Significantly, WIS JI-CRIMINAL 2630 expressly provides that this question is to be answered by the jury only *after* the jury makes a finding of guilty. WIS JI-CRIMINAL 2630 also expressly provides that the question is determinative of whether "the evidence would support a finding that the fact *increasing the penalty was present*." Italics added. This language plainly supports Wise's position that nature of the harm or injury caused is determinative only of the penalty structure. In contrast, this language contradicts the State's argument that the nature of the harm or injury caused provides for an additional element for an additional, stand-alone offense. Curiously, the State fails to explain how proof of a fact regarding the harm or injury caused by fleeing can be part of an additional, stand-alone offense, when the jury instruction does not advise the jury that the existence of such fact is an additional element of the offense

which the State needes to prove beyond a reasonable doubt. Curiously, the State fails to explain how proof of such fact is determinate of a defendant's guilt when the jury has already found him guilty at the time it is instructed to consider the question regarding the harm or injury caused. Perhaps the State doesn't given an explanation because there is no sensible one other than Wise's explanation, that the question regarding the harm or injury caused is determinative only of the penalty structure for the substantive offense rather than the substantive offense itself.

The State's reliance on State v. Rabe, 96 Wis.2d 48, 291 N.W.2d 809 (1980) is misplaced.

The State argues that "*Rabe* is identical to this case," and that Wise's analysis fails because he doesn't address it. See State's brief at page 15. *Rabe* is far from "identical" from this case, and the State's reliance on it is misplaced. The reason for this is that *Rabe* involved four charges of homicide by intoxicated use of a vehicle under Wis. Stat. §940.09. The elements of each substantive offense required the State to prove that the defendant's operation of the vehicle caused

the death of each specific victim. The three elements of an offense under §940.09 are as follows:

First, that the defendant operated a vehicle.

Second, that the defendant's operation of the vehicle caused the death of (name of victim).

Third, that the defendant was under the influence of an intoxicant at the time he operated the vehicle.

WIS JI-CRIMINAL 1185.

Plainly, the second element of each substantive offense under §940.09 requires a different proof of facts to sustain the offense, specifically, that the defendant's operation of the vehicle caused the death of a different person. As discussed in *Wise*'s brief-in-chief, and also in this brief, proof of the substantive offense of fleeing does not require proof that the defendant caused any harm or injury to any specific person. *Rabe* is not "identical" or even substantially similar to this case, and the State's reliance on it falls short.

Final considerations

The State argues that "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." See State's brief at page 18. The State argues that "[u]nder 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." See State's brief at page 18. The State ignores the reality that it has the discretion to charge the defendant with a variety of criminal charges. For instance, in the State's example, with respect to each victim, the State could bring charges of first-degree reckless homicide (Wis. Stat. §940.02), second-degree reckless homicide (Wis. Stat. §940.06) or homicide by negligent operation of a vehicle (Wis. Stat. §940.10). It could then also assert one fleeing charge. The homicide charges would countenance "crimes against life and bodily security" of the individual persons, and the fleeing charge would countenance the "rules of the road" violation. It is hyperbole to argue that Wise's theory would leave the victims "with

no justice." Given that first-degree reckless homicide is a Class B felony, such a charge would arguably provide the victims with more "justice." In terms of this case, if the State was so focused on the harm caused to each individual person, it could have charged first-degree reckless homicide, second-degree-reckless homicide, or homicide by negligent operation of a vehicle as to QRD. It could have charged first-degree reckless injury or second-degree reckless injury as to QLH. It similarly could have charged recklessly endangering safety. Plainly, there were other charges that could have addressed the harm caused to each individual person. The State instead made the decision to charge four counts of fleeing.

Finally, Wise wishes to address the State's argument that he did not "allege sufficient facts to show that counsel's failure to raise this challenge was deficient or prejudicial." See State's brief at page 19. Wise plainly alleged facts in his motion showing how the charges were identical in fact and law. 91:10-14. Wise additionally alleged facts showing how trial counsel's failure to raise the challenge was deficient and prejudicial. 91:16-17. With respect to the State's

argument that "there is no law interpreting Wis. Stat. §346.17 in the manner Wise suggests," State's brief at page 20, Wise's motion cited the "established authorities" of *State v. Brantner*, 2020 WI 21, ¶24, 390 Wis.2s 494, 939 N.W.2d 546, *Blockburger v. United States, 284 U.S. 299, 304 (1932),* and *State v. Tappa*, 127 Wis.2d 155, 161, 378 N.W.2d 883, 885 (1985), as providing a legal basis for the challenge which should have been made. 91:5-7.

Dated this 5th day of February 2021.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 1986 words.

Dated this 5th day of February 2021.

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CERTIFICATION 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 have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). 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 upon all opposing parties.

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