STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP645-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE KARL HANSON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

A jury found Defendant-Appellant Carl Lee McAdory guilty of two related crimes that involved driving with illegal drugs in his system. A statute provides that a defendant in that situation may be convicted and sentenced for only one charge arising from the same incident, which this Court has construed as requiring dismissal of the charges not resulting in judgment and sentencing. Heeding this Court's directive, the State moved to dismiss one of McAdory's charges after trial but moved to reinstate it and its verdict after he appealed his conviction for the companion charge.

1. Did the circuit court lack authority to reinstate and enter judgment upon the jury's prior verdict?

The circuit court answered no.

This Court should answer no.

2. Did reinstating and entering judgment upon the previously dismissed jury verdict violate McAdory's right to be free from double jeopardy?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary as the arguments are fully developed in the parties' briefs. Publication is warranted under Wis. Stat. § (Rule) 809.23(1)(a)1. to clarify a circuit court's authority to reinstate a guilty verdict for a charge that existing precedent requires the State to dismiss after trial and address the double jeopardy ramifications of that action, if any. This case is also of "substantial and continuing public interest" meriting publication as its decision will impact the State's ability to vigorously prosecute drunk drivers as the legislature commands. Wis. Stat. § (Rule) 809.23(1)(a)5.

STATEMENT OF THE CASE

McAdory fled from a traffic stop, prompting a foot chase and his eventual arrest for obstructing an officer, operating while intoxicated (OWI), and operating while his driving privileges were revoked. (R. 19:2.) Having already amassed seven prior drunk driving convictions, he was charged with each of those crimes and another count of operating a motor vehicle with a restricted controlled substance in his blood (RCS) after post-arrest testing detected both marijuana and cocaine metabolites in his system.[1] (R. 19:2–3; 35.)

A jury found McAdory guilty of all charges at trial, and he later proceeded to sentencing.[2] (R. 126; 152:2; 182:218–19.) At that hearing, the prosecutor moved the court to dismiss the RCS charge on the ground that it was "a duplicative count with" the OWI charge. (R. 152:4.) Acknowledging that the same issue was "on [its] radar," the court granted the State's request and ultimately imposed sentences for McAdory's three convictions. (R. 148; 152:5, 35–38.)

This Court later reversed McAdory's OWI conviction, holding that the State presented sufficient evidence to sustain his conviction, but his due process rights were nevertheless violated when a series of trial errors effectively relieved the State of its burden of proving that he operated a motor vehicle while impaired by cocaine and marijuana. *State v. McAdory*, 2021 WI App 89, ¶¶ 2, 71, 400 Wis. 2d 215, 968 N.W.2d 770. While this Court decided to remand the case to the circuit court for a new trial on the OWI charge, *id.* ¶ 71, it did not address an important issue that became a primary focus of

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[1] For ease of reading, the State refers to the operating-while-intoxicated and operating-with-a-restricted-controlled-substance charges by their common "OWI" and "RCS" initialisms.

[2] While the jury was initially instructed that it would decide the operating after revocation charge, McAdory later pled guilty to that offense at the end of trial. (R. 182:26, 174, 223.)

the parties' oral arguments a month earlier: whether the Double Jeopardy Clause barred the State from retrying McAdory with the RCS offense in the event that he received a new trial for the OWI offense. (*See* R. 270:2–6, 16–20.)

Upon remand, the State moved the court to reinstate what it errantly referred to as McAdory's "conviction" for the RCS offense. (R. 203:1.) Supporting that request, the State offered Seventh Circuit precedent recognizing federal district courts' authority to reinstate previously vacated convictions without requiring a new trial or plea. (R. 203:2.) Additionally, the State offered authority for the principle that "[t]he Double Jeopardy Clause does not bar reinstatement of a conviction on a charge for which a Jury returned a guilty verdict." (R. 203:2.) Finally, the State stressed that the decision granting McAdory a new trial said nothing explicitly barring the circuit court from granting the relief requested. (R. 203:2.)

The court granted the State's motion over McAdory's objection. (R. 210; 219.) Though the court acknowledged a lack of explicit authority providing for the reinstatement of an earlier dismissed charge, it nevertheless found persuasive the State's cited Seventh Circuit authority while also observing that Wis. Stat. § 346.63(1)(c) does not actually contemplate dismissal of those charges for which a jury has returned a guilty verdict but that do not result in a judgment of conviction. (R. 219:3–4.) The court also observed that the "RCS conviction" was neither dismissed and read in pursuant to a plea agreement nor dismissed due to the State's failure to prove its case at trial. (R. 219:4.) The court later adopted the parties' joint sentencing recommendation on McAdory's RCS conviction at a later hearing. (R. 239:6–9.)

McAdory subsequently moved for postconviction relief, renewing his argument that Wis. Stat. § 346.63(1)(c) barred his RCS conviction, that the circuit court lacked the authority to reinstate that charge after its earlier dismissal, and that

the act of doing so violated his constitutional right against double jeopardy. (R. 259; 267.)

The circuit court issued a decision denying McAdory's postconviction motion. (R. 279.) Addressing his constitutional claim first, the court determined that the Double Jeopardy Clause was not violated because McAdory was not prosecuted for the same offense following an acquittal as the jury found him guilty of both the OWI and RCS offenses. (R. 279:4.) The court further held that McAdory was not prosecuted for the same offense after conviction, noting that, at most, he could not be convicted of the RCS offense again at a retrial for his OWI charge. (R. 279:5.) The court further recognized that McAdory was at no risk of suffering multiple punishments as he could be sentenced only for the OWI offense or RCS offense but not both. (R. 279:5.) Finally, the court observed that both the Seventh Circuit and Supreme Court recognized that "[t]he [D]ouble [J]eopardy [C]lause 'does not bar reinstatement of a conviction on a charge for which a jury returned a guilty verdict.'" (R. 279:6.)

Turning to McAdory's statutory argument, the court observed "no statutory bar" that "prohibit[ed] reinstatement of a dismissed or vacated conviction." (R. 279:8–9.) The court also found persuasive the "doctrine of merger," adopted by the Kansas Supreme Court in comparable cases in which multiple charges that could statutorily result in only one conviction would be deemed "merged" for disposition. (R. 279:13.)

McAdory appeals. (R. 280.)

ARGUMENT

I. Entering judgment on the jury's verdict finding McAdory guilty of the RCS offense violated neither this Court's mandate, state statute, nor the rules of appellate procedure.

A. Standards of review

This Court independently reviews a circuit court's authority to take certain actions after an appellate court has reversed a judgment and remanded a case with instructions. *See Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 22, 303 Wis. 2d 94, 735 N.W.2d 418. McAdory's argument separately calls for interpretation of several statutes, which this Court also performs independently. *See id.*

B. The circuit court maintained the inherent authority to reinstate the jury's verdict on the RCS charge and enter judgment, accordingly.

"It is beyond dispute that circuit courts have 'inherent, implied and incidental powers.'" *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350 (quoting *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995)). Circuit courts generally exercise their inherent authority to serve three goals: "(1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice." *Id.*

In McAdory's case, reinstating the jury's verdict finding him guilty of the RCS offense and entering judgment on that verdict fell squarely within the goal of promoting the "efficient and effective functioning of the court." *See id.* Indeed, the errors that McAdory alleged in his preceding postconviction

motion and on appeal involved only his OWI charge and had nothing to do with his RCS charge. (R. 260.)

McAdory had a fair trial on his RCS charge, free of any reversible error, and the reinstatement of the jury's verdict effectively saved the court from holding what would amount to a meaningless trial, regardless of whether a jury at that ensuing trial chose to convict or acquit McAdory of the OWI charge. *See infra* p. 14 (explaining that defendant can be convicted of the OWI or RCS charge stemming from one incident, but not both).

In short, while the circuit court may not have retained explicit statutory authority to reinstate McAdory's earlier RCS verdict, it nevertheless soundly exercised is inherent authority when it reinstated McAdory's verdict on the RCS charge rather than convening an unnecessary retrial on the OWI charge. This Court should affirm on that basis.

C. The circuit court violated neither its post-remittitur authority nor this Court's mandate when it entered judgment on the jury's verdict finding McAdory guilty of the RCS offense.

McAdory argues that the circuit court exceeded its authority when it entered judgment on the jury's guilty verdict on the RCS offense from his first trial rather than retrying his OWI offense as this Court ordered in his prior appeal. (McAdory's Br. 30.) In support, he cites Wis. Stat. § 808.08, *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993), and *State v. Bohacheff*, 114 Wis. 2d 402, 338 N.W.2d 446 (1983), for the principles that circuit courts (1) have limited authority after an appellate court orders that a defendant receive a new trial, and (2) may take certain actions not defined by statute following remand only to the extent that they do not "undo" the appellate court's

decision or "conflict" with its mandate. (McAdory's Br. 29–30 (quoting *Tietsworth*, 303 Wis. 2d 94, ¶ 32).)

This Court should affirm because the circuit court did nothing to defy the appellate mandate nor exceed its authority on remand. To be clear, this Court had ordered a new trial for McAdory's OWI offense because the State was relieved of its burden for that charge. *McAdory*, 400 Wis. 2d 215, ¶¶ 66, 71. But its decision said nothing suggesting that the circuit court could not separately enter judgment on the jury's guilty verdict for McAdory's companion RCS charge if the State wished to forego another chance to convict him of the OWI offense that carried the same penalties.

McAdory correctly observes that Wis. Stat. § 808.08(2) requires a circuit court to place a matter on the trial calendar upon receipt of a remitted record if an appellate court orders that a defendant is due a new trial. (McAdory's Br. 29.) But Wis. Stat. § 808.08(2) provides no direction where the State foregoes its ability to retry a defendant. In other words, if the State decides not to retry a defendant, nothing in the language of Wis. Stat. § 808.08(2) would compel the court to forge ahead to trial if intervening events render retrial redundant, such as the State's dismissal of a charge that would be retried.

In short, the circuit court's decision to reinstate the RCS charge and enter judgment on it was not *inconsistent* with this Court's mandate. As McAdory points out, the oral argument from McAdory's first appeal focused extensively on the State's dismissal of the RCS charge, yet this Court's decision reversing McAdory's conviction and directing the circuit court to hold a new trial for the OWI charge was silent as to that issue and did not suggest that the State would be barred from retrying him on the RCS charge or seeking judgment on the jury's verdict finding him guilty of it.

D. Neither Wis. Stat. § 346.63(1)(c) nor cases interpreting it prevented the circuit court from entering judgment on the RCS offense.

1. A person charged with related offenses of impaired driving or driving with an excessive blood alcohol concentration or a restricted controlled substance in his blood may be convicted and sentenced for one charge arising from the same incident.

Wisconsin law prohibits any person from driving or operating a motor vehicle on the state's highways while under the influence of an intoxicant, Wis. Stat. § 346.63(1)(a), with a detectable amount of a restricted controlled substance in his blood, Wis. Stat. § 346.63(1)(am), or with a prohibited alcohol concentration in his blood, Wis. Stat. § 346.63(1)(b). As is too often the case, a person may commit more than one of those delineated offenses during the same incident. When this occurs, the State may charge the driver with any combination of those three offenses, though "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions" even if he is found guilty of more than one of the charged offenses. Wis. Stat. § 346.63(1)(c).

In *Bohacheff*, 114 Wis. 2d 402, an intoxicated motorist who struck a police officer tending an accident scene was charged with related counts of causing great bodily harm to another while driving under the influence of an intoxicant and with a prohibited alcohol concentration as permitted by Wis. Stat. § 940.25(1)(c) (1981–82), which mirrors the current language of Wis. Stat. § 346.63(1)(c) in that it permitted the State to charge several driving offenses arising from one incident but allowed for only one conviction and sentence. *Id*. at 406. In rejecting the claim that this practice violated a defendant's right to be free from double jeopardy, the court concluded that where a defendant is found guilty of violating

Wis. Stat. § 940.25(1)(a) and 940.25(1)(b)—the interrelated impairment and alcohol concentration charges—the case terminated in only *one* conviction "for all purposes." *Id.* at 417–18. This Court went on to echo the same. *State v. Raddeman*, 2000 WI App 190, ¶ 11, 238 Wis. 2d 628, 618 N.W.2d 258.

While the supreme court clarified that multiple guilty verdicts resulted in only one conviction under Wis. Stat. § 940.25(1)(c) (1981–82), it failed to address what must be done for those charges that a jury has returned guilty verdicts that do not result in conviction. Years after *Bohacheff*, however, this Court interpreted Wis. Stat. § 346.63(1)(c) as requiring the dismissal of all other charges, even though the statute does not provide for such. *Bastian*, 178 Wis. 2d at 195 ("In other words, the defendant is to be sentenced on one of the charges, and the other charge is to be dismissed.").

2. The circuit court did not violate Wis. Stat. § 346.63(1)(c) because McAdory was not concurrently convicted and sentenced for the OWI and RCS offenses.

McAdory reads *Bastian* and *Bohacheff* to stand for the principle that because the legislature intended for motorists to suffer one conviction if found guilty of multiple violations of Wis. Stat. § 346.63(1)(a), (1)(am), and (1)(b), it must have also intended for irreversible dismissal of any charges that for which judgment and sentence were not imposed. (McAdory's Br. 31.) But neither *Bastian* nor *Bohacheff* established such a rule, and this Court should refuse to do so, too.

To be clear, nothing in the statutory text of Wis. Stat. § 346.63(1)(c) requires a circuit court to dismiss *any* charges after a jury finds a defendant guilty of multiple interrelated driving offenses; the statute merely provides that when "the person is found guilty of any combination of" those offenses

"for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions." Wis. Stat. § 346.63(1)(c).

Although this Court cannot disregard its own decision, *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), the State contends that *Bastian* was wrongly decided, albeit understandably so due to a perceived conflict between Wis. Stat. § 346.63(1)(c), which provides that a defendant may be convicted and sentenced for only one related drunk-driving offense even if a jury finds him guilty of multiple, and Wis. Stat. § 972.13(1), which compels a circuit court to enter a judgment of conviction for a charge that a jury returns a guilty verdict. Certainly, the State would not have dismissed any of McAdory's charges for which the jury found him guilty but for *Bastian*; the court could have just accepted the jury's verdicts, entered judgment and sentence on one charge but not the other, and the issue of whether a circuit court retains the authority to reinstate a dismissed verdict would never have come to fruition.

Be that as it may, without assessing *Bastian*'s validity, there can be no sincere dispute that *Bastian* and Wis. Stat. § 346.63(1)(c) say nothing barring a defendant from being convicted and sentenced for a particular offense so long as he is not also convicted and sentenced of a companion offense. Nor can there be any question that McAdory was no longer convicted and sentenced on the OWI charge after this Court reversed his conviction and remanded his case for a new trial on that charge. In the end, the reversal of McAdory's OWI conviction removed the only statutory hurdle preventing the circuit court from entering judgment on the RCS charge.

E. The circuit court circumvented no postconviction or appellate rules.

McAdory next argues that the circuit court's decision to reinstate his RCS charge verdict and impose judgment on that

verdict disobeyed the rules of appellate procedure and our supreme court's decision in *Henley*, 328 Wis. 2d 544. (McAdory's Br. 31–35.) In support, he points out that *Henley* forecloses a defendant from attacking his conviction outside of the statutory mechanisms for direct and collateral appeals under Wis. Stat. §§ 974.02 and 974.06. (McAdory's Br. 32–33.)

Henley has no bearing on this appeal. In that case, the supreme court addressed the methods by which a criminal *defendant*—not the State—may seek relief from his conviction or sentence. *Henley*, 328 Wis. 2d 544, ¶ 49. *Henley* said nothing limiting the State's authority to seek additional relief in the circuit court after a defendant successfully appeals his conviction as occurred in McAdory's case. The false analogy McAdory attempts to draw from *Henley* should not persuade this Court that the circuit court lacked the authority that it exercised by reinstating McAdory's verdict.

F. The State's failure to cross-appeal a non-adverse decision did not prevent the circuit court from entering judgment on the jury's RCS charge verdict.

Finally, McAdory argues that if the State had any plan to seek reinstatement of the jury's guilty verdict for his RCS offense, it should have sought that relief from this Court by either filing a "'protective' cross-appeal" or by arguing in its prior appellate briefing "that the Court should vacate the dismissal of count two as an alternate ground on which to affirm the judgment of conviction." (McAdory's Br. 37–38.)

The critical flaw in McAdory's argument is that the State had suffered no *adverse* decision for which it could even seek appellate review like in *Bastian* or file a cross-appeal. *See* Wis. Stat. § 974.05(1)(a). And while McAdory faults the State for not asking this Court to affirm his OWI conviction on alternative grounds during his prior appeal, (McAdory's Br. 38), it should go without saying that a verdict finding

McAdory guilty of the RCS offense would not justify upholding a conviction for the separate OWI offense that was secured in violation of his due process rights. McAdory's arguments should not persuade otherwise.

II. McAdory's right against double jeopardy was not violated by the circuit court entering judgment on the jury's guilty verdict on the RCS offense.

McAdory also argues that the circuit court violated his right to be free from double jeopardy when it reinstated the jury's verdict finding him guilty of the RCS offense at his first trial, entered judgment on that verdict, and sentenced him. (McAdory's Br. 39–47.) He is misguided. The Supreme Court could be no clearer that reinstating a jury's verdict following an appeal as the circuit court did here, unlike ordering a new trial, does not subject a defendant to double jeopardy. Moreover, his remaining arguments falter as he suffered no multiplicitous convictions or punishments, any expectation of finality concerning the RCS charge's dismissal was irrational given that he chose to appeal the conviction that provoked that charge's dismissal, and the revival of the RCS charge and verdict, even if dismissed with prejudice, did not violate his right to be free from double jeopardy.

A. 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, 390 Wis. 2d 570, 939 N.W.2d 519.

B. The Double Jeopardy Clause bars retrying a defendant for the same offense following an acquittal or conviction; it does not bar reinstating a jury's prior guilty verdict.

Both the state and federal constitutions protect against double jeopardy. *Id.* ¶ 18. "The underlying purpose for this protection . . . is to prevent the State from using its resources and power to make repeated attempts to convict a person for the same offense." *State v. Seefeldt*, 2003 WI 47, ¶ 15, 261 Wis. 2d 383, 661 N.W.2d 882. The protection also preserves a criminal defendant's "valued right to have his trial completed by a particular tribunal." *Id.* ¶ 16 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

In assessing whether those vital protections have been preserved, Wisconsin courts "view the United States and Wisconsin Double Jeopardy Clauses as 'identical in scope and purpose.'" *Schultz*, 390 Wis. 2d 570, ¶ 18 (citation omitted). Consistent with that practice, our supreme court announced that "United States Supreme Court decisions interpreting the Fifth Amendment's Double Jeopardy Clause are 'controlling interpretations' of both the federal Constitution and the Wisconsin Constitution." *Id.* (citation omitted).

One of those "controlling interpretations" cited often by Wisconsin courts came in *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989), which identified three protections afforded by the Double Jeopardy Clause: "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." *State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). "The interests underlying these three protections are quite similar. When a defendant has been once *convicted and punished* for a particular crime, principles of fairness and finality require that he not be subjected to the

possibility of further punishment by being *again tried or sentenced for the same offense*." *United States v. Wilson*, 420 U.S. 332, 343 (1975) (emphasis added).

The Supreme Court could be no clearer "that the prohibition against *multiple trials* is the 'controlling constitutional principle'" when assessing whether the Double Jeopardy Clause's second protection has been sustained. *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980) (emphasis added) (quoting *Wilson*, 420 U.S. at 346). "[W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *Wilson*, 420 U.S. at 344. Relevant here, *Wilson* teaches that reinstatement of a jury's guilty verdict from a prior trial does not give rise to "successive prosecutions" triggering a double jeopardy violation. *Id*. at 353.

Conversely, where the jury did *not* return a guilty verdict at a defendant's trial, such as in the situation where the trial court grants a defendant's midtrial motion to dismiss a charge due to the insufficiency of the State's evidence before a jury is sent to deliberate, the Supreme Court explained that reconsideration of a judge's decision that has the practical effect of an acquittal, even if erroneous, violates double jeopardy protections as it involves revisiting the sufficiency of evidence supporting guilt. *Smith v. Massachusetts*, 543 U.S. 462, 473–74 (2005).

C. McAdory's right to be free from double jeopardy was not violated when the circuit court entered judgment on the jury's verdict finding him guilty of the RCS offense at his one and only trial.

Applying those principles articulated by the Supreme Court in *Wilson* and later reaffirmed in *DiFrancesco*, the circuit court's decision to reinstate the jury's verdict finding McAdory guilty of the RCS offense did not violate his right to

be free from double jeopardy since it did not subject him to multiple trials or multiple punishments for the same offense. *DiFrancesco*, 449 U.S. at 132; *Wilson*, 420 U.S. at 344, 353.

To begin, the State does not dispute McAdory's claim that he was placed in jeopardy for the RCS offense at his one and only jury trial. (McAdory's Br. 41.) As he points out, he was clearly at risk of being convicted of the RCS charge at trial as the jury found him guilty of that charge, (McAdory's Br. 41), and jeopardy attaches when "an accused has been subjected to the risk of conviction." *State v. Killian*, 2023 WI 52, ¶ 25, 408 Wis. 2d 92, 991 N.W.2d 387 (quoting *Serfass v. United States*, 420 U.S. 377, 392 (1975)).

However, that is only one half of the equation; for McAdory to succeed on his double jeopardy claim, he also had to show that he was retried for the same offense following an earlier acquittal or conviction. *Wilson*, 420 U.S. at 343. We know that he could not succeed in making that showing since the Supreme Court confirmed that reinstatement of a jury's guilty verdict does *not* constitute successive prosecution triggering a double jeopardy violation, *Id.* at 344. Because neither the State's motion to reinstate the jury's verdict finding McAdory guilty of the RCS offense nor the court's decision granting that motion resulted in a *retrial* for the same offense a second time, this Court must conclude, consistent with *Wilson*, that McAdory's right to be free from double jeopardy was not violated.

D. McAdory's three counterarguments should not persuade.

Despite clear direction by the Supreme Court in *Wilson*, McAdory maintains that his right to be free from double jeopardy was violated because (1) multiplicity considerations prevented the court from replacing one of his convictions for another, (2) he held an expectation of finality that he would no longer be prosecuted or punished for the RCS offense; and

(3) the State's dismissal of the RCS charge after his trial was with prejudice. (McAdory's Br. 41–47.) This Court should reject each of his arguments for the reasons stated below.

1. McAdory's multiplicity argument fails because he never suffered multiple convictions or punishments for the same offense.

McAdory begins with a multiplicity claim. (McAdory's Br. 41–43.) As the State understands his argument, he insists that the circuit court's willingness to leave his OWI charge on the trial calendar after it had already entered judgment on the jury's verdict on the RCS offense, paired with hypothetical "absurd and unjust outcomes" prompted by manipulative prosecutors who could game the system to gain the upper hand at sentencing or on appeal, might present cases where a criminal defendant is "subjected to multiple convictions" contrary to Wis. Stat. § 346.63(1)(c). (McAdory's Br. 43.)

To understand why McAdory's argument is misguided, it's vital to first grasp what multiplicity is and the protection that the Double Jeopardy Clause provides. Multiplicity arises when a defendant is convicted and punished in more than one count for offenses where the Legislature did not intend for cumulative punishments. *State v. Davison*, 2003 WI 89, ¶¶ 34–46, 263 Wis. 2d 145, 666 N.W.2d 1. This Court and our supreme court have concluded that simultaneous prosecution of interrelated driving offenses under Wis. Stat. § 346.63(1)(c) obviates any multiplicity concern because the statute permits just one conviction and sentence regardless of the charges the State brings. *Raddeman*, 238 Wis. 2d 628, ¶ 5; *Bohacheff*, 114 Wis. 2d at 405.

In other words, *Raddeman* and *Bohacheff* confirm that a defendant charged with or tried for any combination of related drunk driving offenses will suffer no multiplicitous convictions or punishments as long as he stands convicted of

and is sentenced for only one charge. Since McAdory concedes that he was "never actually convicted on both counts [the OWI and RCS offenses] simultaneously," (McAdory's Br. 43), and because he does not suggest that he ever suffered cumulative punishments for those two offenses, his multiplicity claim therefore fails. *Davison*, 263 Wis. 2d 145, ¶¶ 34–46.

Still, McAdory implies that the court's willingness to leave his OWI charge on the trial calendar after it had entered judgment on the RCS charge was consequential. (McAdory's Br. 42–43.) It's not. Although the court's calendaring practice could have proven problematic had the State proceeded to trial to secure a conviction and sentence for the OWI offense while McAdory remained convicted and sentenced for the RCS offense, McAdory concedes that did not happen, (McAdory's Br. 43.) In short, temporarily leaving McAdory's OWI charge on the court's trial calendar did not subject him to either multiplicitous convictions or punishments.

McAdory also argues that "allow[ing] the State to freely swap in and out the charge serving as the basis for the single conviction. . . . could lead to absurd and unjust outcomes." (McAdory's Br. 43.) His concerns are overblown. To be clear, the State did not dismiss his OWI charge or move to reinstate his RCS charge to shop for a better sentence or to gain "the upper hand on appeal." (*See* McAdory's Br. 43.) Rather, the State sought judgment on the jury's guilty verdict for the RCS charge because it already convinced a jury that he was guilty of that offense at his first and only trial, and since that verdict rested on no trial errors, it only made sense to seek conviction and sentencing on that charge rather than going through the time and expense of retrying his OWI charge. In short, any concern about what a vindictive prosecutor could do in some hypothetical scenario has no bearing on whether McAdory suffered multiplicitous convictions or sentences.

Finally, McAdory concludes with an unrelated claim that the Double Jeopardy Clause "protects a defendant from

repeated attempts by the State to convict the defendant for an alleged offense." (McAdory's Br. 43 (quoting *State v. Jaimes*, 2006 WI App 93, ¶ 7, 292 Wis. 2d 656, 715 N.W.2d 669).) As the State has already pointed out, however, there is no double jeopardy concern with reinstating a jury's prior guilty verdict, and even so, repeated attempts to convict a defendant of the same offense involves the protection from serial prosecutions, not protection from multiplicity. *Sauceda*, 168 Wis. 2d at 492. This Court should reject McAdory's meritless multiplicity argument.

2. McAdory had no expectation of finality in the State's dismissal of his RCS charge given his efforts to seek relief from the conviction responsible for its dismissal.

McAdory next argues that reinstatement of the jury's verdict on his RCS charge violated his expectation that the State's dismissal of that same charge after his trial would be final. (McAdory's Br. 43.) Offering egregious hypotheticals of legal system abuse, he insists that nothing would stop the State from waiting "indefinitely long" before asking the circuit court to reinstate a jury's verdict, thereby forcing a defendant "to live his life in fear, worry, and frustration about when, if ever, the State might suddenly decide to file its reinstatement motion." (McAdory's Br. 44.)

That's not what happened in McAdory's case, but even if it had, that still would not mean that he was subjected to double jeopardy. To be clear, the State did not wait some extended time to seek reinstatement of the jury's guilty verdict on the RCS charge; it was only McAdory's decision to attack his conviction for the OWI charge that led to the State's request. Having proceeded to trial where a jury found him guilty of both the OWI and RCS offenses, and unquestionably aware that the only reason the State moved to dismiss the RCS charge is this Court's *Bastian* decision, McAdory cannot

feign surprise that the State would refuse to abandon a charge if his appellate strategy ultimately proved successful. After all, a jury found McAdory guilty of both driving offenses at trial, and he should not have expected to gain a windfall of later facing only one of those two charges after his case was remanded following his appeal.

McAdory's case was not one in which the State tried to substitute one charge after another to vindictively target him in perpetuity and force him to live in fear. If a jury finds a defendant guilty of any combination of drunk-driving-related offenses, he will ultimately suffer at most only one conviction and sentence and possibly none depending on the nature of his appeal. The State would have no grounds to randomly move a circuit court to reopen his conviction and sentence for that single charge at some later date, all just to dismiss that charge and enter a conviction on another charge.

In short, McAdory could enjoy no expectation of finality in his case's resolution when he made the decision to appeal his conviction, thereby removing the statutory impediment to entering judgment on the jury's other verdict.

3. By logical extension of *Wilson*, reinstatement of McAdory's RCS charge did not violate his right to be free from double jeopardy even if its earlier dismissal was with prejudice.

Finally, McAdory argues that the dismissal of the RCS charge after his trial was with prejudice, thereby barring its later reinstatement. (McAdory's Br. 44–47.) In support, he cites *State v. Miller*, 2004 WI App 117, 274 Wis. 2d 471, 683 N.W.2d 485, and *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980), to suggest that because the jury had previously reached a decision on the merits of his case, and because the State could not recharge him for the RCS offense at some later time, the dismissal of that charge after trial was

with prejudice, thus foreclosing its reinstatement. (McAdory's Br. 44–47.)

However, if *Wilson* teaches us that the reinstatement of a charge and corresponding guilty verdict dismissed by the court at a trial's conclusion does not violate a defendant's right to double jeopardy, it's difficult to see how dismissal under identical circumstances would somehow violate a defendant's right to double jeopardy just because the State moved to dismiss the charge at that time instead of the court dismissing the charge on its own accord.

In other words, even accepting McAdory's assertion that the dismissal of his RCS charge was with prejudice because it followed a jury's decision on the merits, his right to be free from double jeopardy was still protected since reinstatement of the charge and the jury's verdict would not result in his retrial for that offense. *Wilson*, 420 U.S. at 343.

CONCLUSION

This Court should affirm McAdory's judgment of conviction and the order denying postconviction relief.

Dated this 3rd day of November 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,624 words.

Dated this 3rd day of November 2023.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 3rd day of November 2023.

Electronically signed by:

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