COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 99-0864-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEWAYNE E. GOODWIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County: ROBERT F. PFIFFNER, Reserve Judge, and DOUGLAS T. FOX, Judge.[1] *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

[1] Judge Pfiffner presided at the trial; Judge Fox signed the judgment of conviction and presided at the sentencing hearing.

CANE, C.J. DeWayne Goodwin appeals from a judgment of conviction entered upon a jury's verdict finding him guilty of one count each of burglary, theft, concealing stolen property and criminal damage to property, all as party to a crime, in violation of §§ 943.10(1)(a), 943.20(1)(a), 943.34(1)(b) and 943.01(1), STATS. Goodwin argues the following: (1) that he was denied the right to a fair trial because of prosecutorial misconduct; (2) that he was denied due process because he did not knowingly and voluntarily waive his right to testify on his own behalf; (3) that given his conviction for theft and his conviction for concealing stolen property violates the prohibition against double jeopardy; and (4) that despite Goodwin's failure to raise his objections at trial, this court should reverse Goodwin's convictions in the interest of justice.

We conclude that Goodwin waived his claims of prosecutorial misconduct by his failure to either object at trial or present his claims in a postconviction motion. Further, we conclude that Goodwin was not denied due process with respect to his right to testify, as the trial court was not required to make an on-the-record inquiry into Goodwin's waiver of this right. Additionally, because the offense of concealing stolen property is not a lesser included offense of theft, Goodwin's conviction for both offenses does not violate the double jeopardy clause. Finally, the facts of this case, coupled with Goodwin's failure to either argue or even assert ineffective assistance of trial counsel do not warrant a reversal of Goodwin's convictions in the interest of justice. Accordingly, we affirm the judgment.

BACKGROUND

After a jury trial, Goodwin was convicted of one count each of burglary, theft, concealing stolen property and criminal damage to property, all as

party to a crime, arising out of the January 15, 1998, break-in of Kapsy's Market in the Village of Gilman. At trial, the investigating officer, Larry Woebbeking, testified that no identifiable fingerprints were found at the scene and that the stolen items were never recovered. Woebbeking further testified that, in his opinion, a hacksaw was used to gain entry into Kapsy's.

Timothy Sirois, an acquaintance of Goodwin's, testified that on January 15, he awoke at 11 a.m. to find Shane Gibson, Travis Kostick and Goodwin in his home. Because Sirois had trouble recalling various details, his signed police statement was read to the jury and provided, in part, the following:

> One of these three told me to come upstairs and look at some stuff.
>
> We went upstairs, and there was a bunch of candy, cigarettes, gum, and lighters laying on top of the bed. I looked at the stuff, and they gave me two cartons of cigarettes. I knew the stuff was stolen, and they asked if they could keep it here. I said okay.
>
> Shane, [Goodwin], Travis, and I went to the Cutlass and we put it in the trunk. …
>
> They stayed during the day and told me then that they had broken into Kapsy's. …
>
> They also told me they had a hard time getting in the back door and it had taken them a while. [Goodwin] also said he had taken too much time getting things and they could have gotten more in the same amount of time.
>
> ….
>
> One day Shane, [Goodwin] and Travis told me they heard the cops were looking for them for breaking into Kapsy's. They got scared and told me to take the stuff. I told them I didn't want it because I didn't want to get into trouble.

Sirois' statement further revealed that Sirois then moved the "stuff" to the "hay mow," and after Shane, [Goodwin] and Travis refused to relieve Sirois of the items, Sirois moved the items to a building behind his house and had not

looked at them since. The statement itself noted that it was "true and correct," and that the investigator had read it back to Sirois and allowed him to make any changes. Sirois reiterated during his trial testimony that the written statement given to the investigator was true and that it was not made to get Goodwin into trouble, as Sirois had admitted his own wrongdoing in the statement. Sirois further testified that in August of 1998, he pled guilty to receiving and concealing the stolen property from Kapsy's.

Damien Gibson, Shane Gibson's brother, testified that he too gave a statement to police regarding the Kapsy's break-in. Again, because Damien had difficulty recalling various details, his statement was read to the jury, and provided, in relevant part, the following:

> Sometime in January … Tim Sirois drove me to his house. My brother, Shane Gibson, and DeWayne Goodwin and Travis Kostick [were] already there. Shane told me he wanted to show me something, and we walked outside to one of Tim Sirois' cars. I think it was an Olds Cutlass.
>
> Shane opened the trunk. Inside … was cartons of cigarettes, candy bars, chewing tobacco, a large amount of these items.
>
> I said to him, "What did you rob?" And Shane said Kapsy's. Also standing with us at the time was DeWayne Goodwin and Travis Kostick. [Goodwin] and Travis also said they had been with Shane. The three of them had broken into Kapsy's, stolen all of these things.
>
> They told me they had broken in at 3:00 a.m. the night before. They said they used a hacksaw on the back door.

Damien Gibson's statement further noted that a few days later, Sirois told Gibson that he had moved the stolen property out of the trunk and hid it in the hay mow and that later, he had moved it again. Subsequently, Gibson talked with Goodwin, who said that an investigator told him about Kapsy's break-in and showed him Sirois' statement. Gibson described how Goodwin "blew it off,"

stating that "if they were going to arrest him, they would have already … done so."

Gibson's statement described how he took the stolen items from behind Sirois' house and hid them in the woods to keep his brother out of trouble. The statement further revealed that Gibson then told his brother where he had hidden the stolen goods, that Shane Gibson then went to get the goods and that Damien Gibson did not know where his brother relocated the goods. Gibson's written statement, like Sirois' statement, noted that it was "true and correct," and that the investigator had read it back to Gibson and allowed him to make any changes. Gibson's trial testimony reiterated that his statement was true and that he would not lie to get Goodwin into trouble. Damien Gibson testified that he pled guilty for his involvement in receiving and concealing stolen goods from Kapsy's.

Shane Gibson was called to testify, but in the jury's presence, invoked his Fifth Amendment privilege against self-incrimination. Goodwin did not testify at trial and his only witness testified that according to school attendance records, both Goodwin and Shane Gibson arrived late to school on January 15, both at 8:54 a.m., while Travis Kostick and Damien Gibson were absent for the full day.[2] It is undisputed that Goodwin failed to object to either Shane Gibson's invoking the Fifth Amendment in the presence of the jury, or any of the State's allegedly improper comments made in closing argument. Following Goodwin's conviction, he filed no postconviction motions and this appeal followed.

[2] The testimony of Goodwin's witness established that both Goodwin and Shane Gibson arrived at school at 8:54 a.m. on January 15; however, the witness gave no testimony regarding what time they left the school or if they were in attendance for the entire day.

PROSECUTORIAL MISCONDUCT

Goodwin asserts that the State engaged in prosecutorial misconduct when it permitted Shane Gibson to invoke his Fifth Amendment privilege in the presence of the jury and when it later referred to Gibson's Fifth Amendment invocation in closing arguments. Goodwin additionally asserts that the State engaged in prosecutorial misconduct by referencing Goodwin's failure to testify at trial.[3] Section 905.13(1), STATS., provides that "[t]he claim of a privilege … is not a proper subject of comment by judge or counsel," and "[n]o inference may be drawn therefrom." This prohibition against commenting on a claim of privilege was expanded to third-party witnesses, such as Shane Gibson. *See* ***State v. Heft***, 185 Wis.2d 288, 299, 517 N.W.2d 494, 500 (1994). Our supreme court has further recognized that "neither the state nor the defendant should be allowed to call witnesses who either side knows will invoke the fifth amendment in front of the jury and then be subject to inferences in a form not subject to cross-examination." ***Id***. at 302, 517 N.W.2d at 501. During closing arguments, the prosecutor said the following:

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[3] In his reply brief, Goodwin, for the first time, references the following statements made by the prosecutor during closing arguments:

> [Goodwin] confessed to Tim Sirois and Damien Gibson. Those words of confession and all the other evidence, in the case show that evidence, statements that Tim and Damien gave you are truthful.
>
> ….
>
> [Sirois and Gibson] have no reason to lie, ladies and gentlemen. Their statements are truthful, and I ask that you listen and look at those statements very truthfully.

Any alleged errors have been waived by Goodwin's failure to timely object. *See* ***State v. Seeley***, 212 Wis.2d 75, 81, 567 N.W.2d 897, 900 (Ct. App. 1997). We nevertheless conclude that these statements were permissible given the latitude allowed counsel in closing arguments coupled with the fact that references to the truthfulness of the witness's statements had been presented to the jury and read into the record.

> Eyewitnesses, well, there would be one, and that would be Shane Gibson because he was there with the defendant, and what did Shane do? He got on the stand and took the fifth, which he has a right to do.

The prosecutor then made the following comment in reference to the fact that both Goodwin and Shane Gibson arrived at school at 8:54 a.m. on January 16: "And you're late for school, late for school, but you're with an individual that committed the offense with you, Shane Gibson, who takes the fifth." Regarding Goodwin, the prosecutor said, "You don't need the defendant to get up here and confess. He confessed to Tim Sirois and Damien Gibson."

We recognize that "[i]t is the duty of the prosecutor to deal fairly with the accused, and statements by the prosecutor that [he or she] believes, on the basis of facts known to [him or her] but not revealed to the jury, that a defendant is guilty is sufficient to warrant a reversal." ***Hoppe v. State***, 74 Wis.2d 107, 120, 246 N.W.2d 122, 130 (1976). However, the general rule is that "improper remarks by a prosecutor are not necessarily prejudicial where objections are promptly made and sustained and where curative instructions and admonitions are given by the court." ***Id***. The determination of the appropriateness of counsel's remarks during closing arguments is left to the discretion of the trial court. *See* ***State v. Seeley***, 212 Wis.2d 75, 81, 567 N.W.2d 897, 900 (Ct. App. 1997). "However, when no objection is made to an alleged error, the trial court has no opportunity to exercise its discretion and the error is deemed waived." ***Id***. As such, a defendant is generally "not entitled to any review of the prosecutor's statements unless a timely objection is made." ***Id***. Despite the general rule, "this court may independently consider alleged constitutional errors not raised in a timely fashion in the trial court, if there are no unresolved factual issues, and it is in the interest of justice to do so." ***Id***. at 81, 567 N.W.2d at 900-01.

Here, Goodwin failed to timely object to either Gibson's Fifth Amendment invocation or the State's comments during closing arguments. In addition to Goodwin's failure to timely object, he has failed to either assert or even argue ineffective assistance of trial counsel. Despite Goodwin's failures to either timely object or assert ineffective assistance of trial counsel, he urges this court to reverse his convictions on two grounds: (1) under § 752.35, STATS., this court is given discretion to reverse a judgment despite the absence of timely objections or proper motions if "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried"[4]; and (2) under § 901.03(4), STATS., nothing in § 901.03 "precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."

We must reiterate that "unobjected-to errors are generally considered waived; and the rule applies to both evidentiary and constitutional errors." ***State v. Davis***, 199 Wis.2d 513, 517, 545 N.W.2d 244, 245 (Ct. App. 1996) (citing ***State v. Boshcka***, 178 Wis.2d 628, 642, 496 N.W.2d 627, 632 (Ct. App. 1992)). Furthermore, counsel is generally "allowed latitude in closing argument." ***State v. Neuser***, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). A prosecutor's

[4] In his reply brief, Goodwin asserts, for the first time, that the real controversy was never fully tried because his inability to cross-examine Shane Gibson effectively violated his Sixth Amendment right to confront his accuser. In essence, Goodwin argues that he may not properly be convicted because of a hearsay association with Shane Gibson, where Gibson's invocation of the Fifth Amendment prevented Goodwin from cross-examining him.

Again, Goodwin has waived this argument via his failure to timely object, *see* ***State v. Davis***, 199 Wis.2d 513, 517, 545 N.W.2d 244, 245 (Ct. App. 1996); nevertheless, we note that hearsay of Gibson's statements to Sirois and Damien Gibson may be admitted where, as here, Gibson invoked his testimonial privilege. The invocation of testimonial privilege by a witness makes him unavailable within the meaning of the statute governing hearsay exceptions, § 908.04, STATS. *See* ***West v. State***, 74 Wis.2d 390, 400, 246 N.W.2d 675, 681 (1976).

argument is impermissible where it "goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." ***Id***. "The constitutional test is whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Id***. (quoting ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992)). Additionally, "when curative and admonitory instructions are given we may conclude that any possible prejudice has been erased." ***State v. Patino***, 177 Wis.2d 348, 379, 502 N.W.2d 601, 614 (Ct. App. 1993). However, where "the pattern of misconduct by a prosecutor is egregious and repetitive, objections and curative instructions may be insufficient to dispel the prejudice to the defendant." ***Hoppe***, 74 Wis.2d at 120, 246 N.W.2d at 130. Thus the prosecutor's comments must be examined in context of the entire trial. *See* ***Neuser***, 191 Wis.2d at 136, 528 N.W.2d at 51.

Viewing the prosecutor's conduct in context of the entire trial, we conclude that although the prosecutor's references to Shane Gibson's Fifth Amendment invocation and to Goodwin's not needing "to get up here and confess" were improper, they did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. During closing arguments, the prosecutor made two references to Gibson's Fifth Amendment invocation. In context of the prosecutor's entire closing argument, the Goodwin reference served to emphasize the fact that Goodwin had confessed to both Sirois and Damien Gibson. Although negative inferences could arguably be drawn from the prosecutor's comments, we conclude that in context of the entire trial, these

comments coupled with the trial court's curative instructions, dispeled any possible prejudice to Goodwin.[5]

THE RIGHT TO TESTIFY ON ONE'S OWN BEHALF

Goodwin asserts for the first time on appeal that his due process rights were violated because there is no record of a knowing and voluntary waiver of his right to testify on his own behalf. Again, "unobjected-to errors are generally considered waived; and the rule applies to both evidentiary and constitutional errors." ***Davis***, 199 Wis.2d at 517, 545 N.W.2d at 245 (citing ***Boshcka***, 178 Wis.2d at 642, 496 N.W.2d at 632). However, a constitutional issue may be considered for the first time on appeal if it is in the best interests of justice, the parties have had an opportunity to brief the issue, and the facts are undisputed. *See* ***In re Baby Girl K.***, 113 Wis.2d 429, 448, 335 N.W.2d 846, 856 (1983).

Our supreme court has recognized that "there is a constitutional due process right on the part of the criminal defendant to testify in his own behalf." ***State v. Albright***, 96 Wis.2d 122, 129, 291 N.W.2d 487, 490 (1980). The constitutional right to testify "should be treated as fundamental in nature." ***State v. Wilson***, 179 Wis.2d 660, 670, 508 N.W.2d 44, 48 (Ct. App. 1993). Moreover, the record must "support a knowing and voluntary waiver of the defendant's right to

[5] In its instructions to the jury, the trial court stated:

> Remarks of the attorneys are not evidence. If the remarks implied the existence of certain facts not in evidence, discard any such implications and draw no inference from the remarks.
>
> Consider carefully the closing arguments of the lawyers, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions, your own inferences from the evidence, and decide upon your verdict according to the evidence under the instructions that I've given you.

testify." ***Id***. at 672, 508 N.W.2d at 48. In ***Wilson***, during an off-the-record side-bar conference at trial, the trial court asked defense counsel if Wilson was going to testify, to which counsel responded that Wilson wished to exercise his Fifth Amendment right. *See* ***id***. at 672, 508 N.W.2d at 48. The prosecutor then noted for the record that "[Wilson] has indicated or [defense counsel] indicated that his client made the decision not to take the witness stand." ***Id***. at 673, 508 N.W.2d at 49. Because Wilson voiced no objection to or disagreement with the prosecutor's statement, this court held Wilson's silence to be "presumptive evidence of a valid waiver, by his counsel, of his right to testify." ***Id***. Moreover, our supreme court has held that "the decision whether to testify should be made by the defendant after consulting with counsel," but "counsel, in the absence of the express disapproval of the defendant on the record during the pretrial or trial proceedings, may waive the defendant's right to testify." ***Albright***, 96 Wis.2d at 133, 291 N.W.2d at 492.[6] The ***Albright*** court further held that "[i]f counsel waives the defendant's right to testify, and that decision was prejudicial to the defendant, the objection of the defendant should be on the failure to obtain the effective assistance of counsel." ***Id***.

[6] The ***Albright*** court recognized a criminal defendant's constitutional due process right to testify on his own behalf; however, the court refused to categorize that right as fundamental. *See* ***State v. Albright***, 96 Wis.2d 122, 129, 291 N.W.2d 487, 490 (1980). In ***State v. Wilson***, 179 Wis.2d 660, 508 N.W.2d 44 (Ct. App. 1993), this court recognized that the United States Supreme Court modified ***Albright*** in ***Rock v. Arkansas***, 483 U.S. 44 (1987), where the Court indicated that the constitutional right to testify should, in fact, "be treated as fundamental in nature." ***Wilson***, 179 Wis.2d at 670, 508 N.W.2d at 48 (citing ***Rock***, 483 U.S. at 53 n. 10).

In ***Wilson***, the defendant urged this court to adopt a procedure requiring the trial court to undertake an on-the-record colloquy with the defendant at the close of the defense's case-in-chief concerning his or her right to testify. We determined that "[b]ecause the principles of waiver as set forth in ***Albright*** were not affected by the Supreme Court's ruling in ***Rock***," we would not mandate such a requirement. ***Wilson***, 179 Wis.2d at 672 n.3, 508 N.W.2d at 48 n.3.

Here, the discussion regarding whether Goodwin would testify occurred at the pretrial, during which time Goodwin appeared in person and by his counsel. The discussion went as follows:

> [PROSECUTOR]: Defense counsel has informed me, because I don't believe they've responded to discovery, that it would be the defendant possibly and then this Peg Hinkel.
>
> [DEFENSE COUNSEL]: Well, Peggy Hinkel would be the only witness. I may be calling another for the purpose of rebutting any testimony of Tim Sirois which may need rebutting.
>
> THE COURT: All right.
>
> [PROSECUTOR]: The jury instructions will be coming out shortly. We don't have the jury instructions as the defendant as his own witness. It appears he won't be testifying?
>
> [DEFENSE COUNSEL]: I don't believe so.
>
> [PROSECUTOR]: If he does, if you want that in the jury instruction, please inform the court and it will be changed.

As in ***Wilson***, Goodwin voiced no objection to nor disagreement with his counsel's informing the court that he would not be testifying. *See* ***Wilson***, 179 Wis.2d at 673, 508 N.W.2d at 49. We therefore hold Goodwin's silence to be presumptive evidence of a valid waiver, by his counsel, of his right to testify.

DOUBLE JEOPARDY

Goodwin argues that the offense of concealing stolen property is a lesser included offense of theft and that his conviction for both offenses therefore violates the double jeopardy clause. The double jeopardy protections of the state and federal constitutions prohibit multiple convictions for the same offense. *See* ***State v. Reynolds***, 206 Wis.2d 356, 363, 557 N.W.2d 821, 823 (Ct. App. 1996). "Whether a violation exists in a given case is a question of constitutional law

which we review de novo." ***Id***. The ***Reynolds*** court outlined the test used to analyze claims of multiplicity:

> We employ a two-step test to analyze claims of multiplicity. We first apply the "elements only" test of ***Blockburger v. United States***, 284 U.S. 299 (1932), to determine whether each charged offense requires proof of an additional element or fact which the other does not … The analysis focuses entirely on the statutes defining the offenses and has been codified in § 939.66(1), STATS., which provides that a defendant "may be convicted of either the crime charged or an included crime, but not both," and defines "included crime" as one "which does not require proof of any fact in addition to those which must be proved for the crime charged."

Id. at 363-64, 557 N.W.2d at 823 (citing ***State v. Johnson***, 178 Wis.2d 42, 48-49, 503 N.W.2d 575, 576 (Ct. App. 1993)). Under the ***Blockburger*** test, as recognized in ***Reynolds***:

> [A]n offense is a "lesser included" one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the "greater" offense … [and an] offense is not a lesser-included one if it contains an additional statutory element.

Reynolds, 206 Wis.2d at 364, 557 N.W.2d at 823 (quoting ***Johnson***, 178 Wis.2d at 49, 503 N.W.2d at 576). If each offense requires proof of an element that the other does not, thereby satisfying the ***Blockburger*** test, "a presumption arises that the legislature intended to permit cumulative punishments unless other factors indicate otherwise." ***Reynolds***, 206 Wis.2d at 364, 557 N.W.2d at 824. The question becomes "whether there are 'other factors which evidence a contrary legislative intent.'" ***Id***. (quoting ***Johnson***, 178 Wis.2d at 49, 503 N.W.2d at 576).

Turning to the instant case, theft, as defined in § 943.20(1)(a), STATS., is committed by one who "[i]ntentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of such property." Despite the statute's inclusion of the term 'conceals,' § 943.20(1)(a), STATS., is "to be read as five disjunctive acts." ***State v. Seymour***, 177 Wis.2d 305, 316, 502 N.W.2d 591, 596 (Ct. App. 1993), *aff'd*, 183 Wis.2d 683, 515 N.W.2d 874 (1994) (quoting ***State v. Tappa***, 127 Wis.2d 155, 167-68, 378 N.W.2d 883, 888 (1985)). Each of the disjunctive terms—takes and carries away, uses, transfers, conceals, retains—"describes a separate type of 'theft' or property deprivation."[7] ***Tappa***, 127 Wis.2d at 168, 378 N.W.2d at 889.

Here, the jury was instructed on the "takes and carries away" form of theft. Their instructions on this offense were as follows:

> The state must prove, which satisfies you beyond a reasonable doubt, that the following four elements of theft were present.
>
> First, that the defendant or another person intentionally took and carried away movable property of another.
>
> Second, that the defendant or another person took and carried away the property without the consent of the owner.
>
> Third, that the defendant or another person knew that taking and carrying away the property was without consent.

[7] In ***State v. Tappa***, 127 Wis.2d 155, 378 N.W.2d 883 (1985), our supreme court held "that a person may be convicted under section 943.20(1)(a), Stats., for concealing the movable property of another and be separately convicted under the same statute for transferring (such as selling) that property." ***Id***. at 158, 378 N.W.2d at 884. The ***Tappa*** court noted that because each count required proof of additional facts which the other counts did not, multiple counts under the theft statute were not violative of double jeopardy. *See* ***id***. at 164, 378 N.W.2d at 887.

> Fourth, that the defendant or another person took and carried away the property with intent to deprive the owner permanently of its possession.

Regarding the offense of concealing stolen property, § 943.34, STATS., prohibits one from intentionally receiving or concealing stolen property. Instructions to the jury were as follows:

> The state must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements of concealing stolen property were present.
>
> First, that the defendant or another person intentionally concealed the cigarettes, cigars, snuff, lighters, lighter fluid, candy, gum, soda pop, and cash.
>
> Second, that the cigarettes, cigars, snuff, lighters, lighter fluid, candy, gum, soda pop, and cash were stolen property.
>
> Third, that when the property was concealed, the defendant knew or believed it was stolen property.

Applying the ***Blockburger*** test, the offense of concealing stolen property, unlike the taking and carrying away form of theft, requires that a person "intentionally conceal." Because the concealing stolen property offense includes an additional element, it is not a lesser included offense of the taking and carrying away act of theft. Therefore, Goodwin's convictions for both offenses do not violate the double jeopardy clause. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.