COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP373 **Cir. Ct. No. 2003CF2408**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QUINCY LEE GRANT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Quincy L. Grant, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2009-10)[1] motion. He argues that he

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

should be allowed to withdraw his guilty pleas to two counts of first-degree recklessly endangering safety while armed, *see* WIS. STAT. §§ 939.63 and 941.30(1) (2003-04), because the two counts are multiplicitous. In the alternative, Grant asks this court to vacate the second count for the same reason. We affirm.

BACKGROUND

¶2 In 2003, Grant was charged with four felonies after fleeing from and shooting a gun at police officers. He entered a plea agreement with the State pursuant to which he pled guilty to: (1) two counts of first-degree recklessly endangering the safety of Officer Richard Schellhammer, while armed; and (2) two other felonies not relevant to this appeal. After sentencing, postconviction counsel filed a postconviction motion alleging that Grant should be allowed to withdraw his pleas because the trial court did not adequately advise Grant about the sentences he faced due to the penalty enhancers. In the alternative, Grant sought to reduce his terms of extended supervision to comply with applicable statutes. The trial court granted Grant's second request.

¶3 Grant appealed, again arguing that he should be allowed to withdraw his guilty pleas because the trial court "did not advise him that a dangerous weapon penalty enhancer may extend only the confinement portion of a bifurcated sentence." *See* ***State v. Grant***, No. 2006AP2034-CR, unpublished slip op. ¶1 (WI App Aug. 21, 2007). We rejected his argument and affirmed his convictions. *See* ***id.***

¶4 In October 2011, Grant filed the *pro se* postconviction motion that is the subject of this appeal. He argued that he was denied the effective assistance of

trial counsel because counsel allowed Grant to plead guilty to multiplicitous charges: two counts of recklessly endangering the same officer's safety.[2] This issue was not raised in Grant's first postconviction motion or on direct appeal. To avoid the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), Grant asserted that his postconviction counsel provided ineffective assistance by not raising the issue on direct appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996) (The ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise a claim on direct appeal.).

¶5 The circuit court ordered a written response from the State on the multiplicity issue. It subsequently issued a written decision denying Grant's motion, concluding that the two counts of first-degree recklessly endangering safety are not multiplicitous because the facts alleged in the criminal complaint "show that [Grant's] actions fall into two distinct shooting episodes, separated in time by his movements during the incident." The circuit court explained: "These episodes represent, at a minimum, the two times that the defendant recklessly endangered the safety of Officer Schellhammer." This appeal follows.

DISCUSSION

¶6 Grant's postconviction motion and this appeal both assert trial counsel and postconviction counsel ineffectiveness with respect to the multiplicity

[2] Grant also argued that his trial counsel was not prepared for trial and that the trial court erroneously denied trial counsel's motion for adjournment. The trial court rejected Grant's claims in a written order. Grant has not pursued those issues on this appeal and, therefore, they will not be addressed. *See* ***Reiman Assoc., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 307 n.1, 306 N.W.2d 292, (Ct. App. 1981) (issues not briefed deemed abandoned).

issue. In response, the State first asserts that there is no need to address trial counsel ineffectiveness because postconviction counsel could have raised the multiplicity challenge on direct appeal without alleging that trial counsel was ineffective. The State further argues that "the issue on this appeal is not whether the charges to which Grant pleaded guilty were multiplicitous," but is instead whether postconviction counsel "could reasonably conclude that an argument that the charges to which Grant pleaded guilty were multiplicitous would not have enough merit to justify raising it in an effort to reverse Grant's conviction." The State concludes: "The law and the facts show that counsel's decision not to argue multiplicity was reasonable."

¶7 While we appreciate the distinctions the State is making, we conclude that this case is most easily resolved by addressing the merits of Grant's claim that the two charges are multiplicitous. Because we conclude they are not multiplicitous, it follows that Grant is not entitled to relief and that the circuit court did not err when it denied Grant's WIS. STAT. § 974.06 motion.

¶8 We turn to the merits of Grant's multiplicity argument. "Multiple punishments for a single criminal offense violate an individual's constitutional right to be free from double jeopardy." ***State v. Schaefer***, 2003 WI App 164, ¶43, 266 Wis. 2d 719, 668 N.W.2d 760. Whether charges are multiplicitous is a "question of law subject to *de novo* review." ***Id.*** (italics added). In ***Schaefer***, we summarized the applicable analysis:

> We employ a two-prong test when analyzing a multiplicity challenge: (1) whether the charged offenses are identical in law and fact; and (2) whether the legislature intended multiple offenses to be charged as a single count. The first step is a constitutional issue. If the charges are identical in law and in fact, they violate the double jeopardy clauses of the state and federal constitutions. Only if we conclude that the charges are different do we

> reach the second prong, a question of statutory construction regarding the allowable unit of prosecution intended by the legislature.

Id., ¶44 (citations and footnote omitted).

¶9 Beginning with the first prong, we consider whether the offenses are identical in law and fact. *See* ***id.*** Grant was charged with two counts of the same crime, so the two crimes are identical in law, which the State acknowledges. *See* ***State v. Lechner***, 217 Wis. 2d 392, 414, 576 N.W.2d 912 (1998) (where defendant entered pleas to "two separate counts of violating the same statutory provision, the offenses are identical in law").

¶10 Determining whether the two crimes are identical in fact "involves a determination of whether the charged acts are 'separated in time or are of a significantly different nature.'" ***State v. Koller***, 2001 WI App 253, ¶31, 248 Wis. 2d 259, 635 N.W.2d 838 (citation omitted). ***Koller*** explained: "The 'different nature' inquiry is not limited to an assessment of whether the acts are different types of acts. Rather, even the same types of acts are different in nature if each requires a new volitional departure in the defendant's course of conduct." ***Id.*** (citations and two sets of quotation marks omitted). With respect to time, ***Koller*** observed that "time is an important factor, but even a brief time separating acts may be sufficient." ***Id.*** (citing ***Harrell v. State***, 88 Wis. 2d 546, 572, 277 N.W.2d 462 (Ct. App. 1979)) ("That the interval is merely minutes or even seconds, as with the other elements and factors discussed, cannot be a solely determinative factor. The resolution of this factor is not solved by a stopwatch approach.").

¶11 Because Grant pled guilty to the crimes at issue, we will base our analysis on the facts stated in the criminal complaint, which were summarized at

the plea hearing and which were the stipulated factual basis for the plea. *See* ***Schaefer***, 266 Wis. 2d 719, ¶¶2, 47 (looking at facts in criminal complaint and statements made at pretrial hearing to determine whether crimes were identical in fact, in case where defendant raised multiplicity issue after pleading no contest). The criminal complaint stated in relevant part:

> Officer Schellhammer observed … Grant … crouched between two houses. Officer Schellhammer observed that Grant was pointing a shiny object at Officer Schellhammer and he believed the item to be a firearm. A short time later Grant fired multiple shots in the direction of Officer Schellhammer. Officer Schellhammer stated that he was standing on the sidewalk and had an unobstructed view of Grant from head to toe. Officer Schellhammer stated that while he had this view he also had no cover to protect himself from the on-coming shots. Officer Schellhammer stated that he returned fire at least five times and then observed defendant Grant stand up and begin moving eastbound. While moving eastbound, Grant again pointed his firearm at Officer Schellhammer and fired one to two shots in his direction.

¶12 We agree with the circuit court's statement that the facts outlined in the complaint demonstrate that there were "two distinct shooting episodes, separated in time by [Grant's] movements during the incident." Further, we agree that when Grant stopped firing the first time and moved from his crouched position between the houses and "beg[a]n moving eastbound," there was a "volitional departure" that separated his first shooting episode from his second shooting episode. *See* ***Koller***, 248 Wis. 2d 259, ¶31 (citations and two sets of quotation marks omitted). We conclude that the two counts are not identical in fact.

¶13 Our conclusion is consistent with the analysis our supreme court employed in ***Lechner***, where the defendant pled no contest to two counts of second-degree recklessly endangering safety and later alleged that the counts were

multiplicitous. *See* ***id.***, 217 Wis. 2d at 413. ***Lechner*** involved a defendant who weaved in and out of traffic as he passed a succession of cars on a highway. *See* ***id.*** at 398. The court concluded that during the thirty-second period of time that Lechner drove one-half mile, he "committed at least two distinct acts of reckless conduct." ***Id.*** at 415. The court considered not only the fact that more than one person's life was put at risk—which was not the case with respect to the two charges against Grant—but also the fact that each successive pass of a vehicle "was a fresh impulse." *See* ***id.*** at 415-16. The court explained:

> Each of the defendant's acts of reckless conduct had come to an end before a separate act began. Each time he pulled his vehicle out and passed a different vehicle, the defendant commenced a separate, conscious decision to act. Each time the defendant exited and reentered the traffic lane, he completed a separate, distinct act of criminally reckless conduct.

Id. at 416. Similarly, after Grant made the decision to finish the first round of shooting and move from his position, he subsequently "commenced a separate, conscious decision to act" when he began shooting at Schellhammer again. *See* ***id.*** His second round of shooting after leaving his crouched position "completed a separate, distinct act of criminally reckless conduct." *See* ***id.***

¶14 Having concluded that the charged offenses are not identical in fact, we must next consider "whether the legislature intended multiple offenses to be charged as a single count." *See* ***Schaefer***, 266 Wis. 2d 719, ¶44. We presume "that the legislature did intend to permit cumulative punishments," but that presumption may be rebutted by a showing of "'clear legislative intent to the contrary.'" ***State v. Davison***, 2003 WI 89, ¶44, 263 Wis. 2d 145, 666 N.W.2d 1 (citation omitted). Here, Grant offers no argument or analysis as to the legislature's intent and we decline to develop his argument for him. *See* ***State v.***

Gulrud, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (reviewing court will not consider undeveloped arguments). Grant has failed to rebut the presumption that the legislature intended that multiple punishments would be permitted under facts like those presented here. Grant's multiplicity challenge fails.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.