STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2017AP000913-CR; 2017AP000914-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

AUTUMN MARIE LOVE LOPEZ,

Defendant-Respondent-Petitioner.

On Appeal from an Order of the
Green County Circuit Court,
the Honorable James R. Beer, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532
loshawk@opd.wi.gov

SUSAN E. ALESIA
Assistant State Public Defender
State Bar No. 1000752
alesias@opd.wi.gov

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440

Attorneys for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

OTHER AUTHORITIES CITED

ISSUE PRESENTED

Does Wis. Stat. § 971.36 or prosecutorial charging discretion allow for seven separate acts of retail theft of merchandise valued at $126-$314 each and committed over a two-week period to be charged as a single count of felony retail theft of merchandise totaling $1,452.12?

How the lower courts ruled:

After seven separate incidents taking place over a two-week period, the state charged Ms. Lopez with a single felony count of retail theft. The circuit court dismissed the complaint, holding that multiple incidents of retail theft could not aggregate into a single felony count. The court of appeals reversed, holding that the seven incidents could be charged as one continuous offense pursuant to Wis. Stat. § 971.36(3)(a).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are customary in cases heard by this court.

STATUTES AT ISSUE[1]

971.36 Theft; pleading and evidence; subsequent prosecutions.

> (1) In any criminal pleading for theft, it is sufficient to charge that the defendant did steal the property (describing it) of the owner (naming the owner) of the value of (stating the value in money).
>
> (2) Any criminal pleading for theft may contain a count for receiving the same property and the jury may find all or any of the persons charged guilty of either of the crimes.
>
> (3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; or
>
> (c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

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[1] Due to their length, Ms. Lopez has omitted portions of Wis. Stats. §§ 943.20 and 943.50 that are not germane to the issue before this court.

(4) In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars. On the trial, evidence may be given of any such theft committed on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance if it is proved that any property was stolen during such period. But an acquittal or conviction in any such case does not bar a subsequent prosecution for any acts of theft on which no evidence was received at the trial of the original charge. In case of a conviction on the original charge on a plea of guilty or no contest, the district attorney may, at any time before sentence, file a bill of particulars or other written statement specifying what particular acts of theft are included in the charge and in that event conviction does not bar a subsequent prosecution for any other acts of theft.

943.50 Retail theft; theft of services.

(1m) A person may be penalized as provided in sub. (4) if he or she does any of the following without the merchant's consent and with intent to deprive the merchant permanently of possession or the full purchase price of the merchandise or property:

Intentionally alters indicia of price or value of merchandise held for resale by a merchant or property of a merchant.

Intentionally takes and carries away merchandise held for resale by a merchant or property of a merchant.

Intentionally transfers merchandise held for resale by a merchant or property of a merchant.

Intentionally conceals merchandise held for resale by a merchant or property of a merchant.

Intentionally retains possession of merchandise held for resale by a merchant or property of a merchant.

While anywhere in the merchant's store, intentionally removes a theft detection device from merchandise held for resale by a merchant or property of a merchant.

Uses, or possesses with intent to use, a theft detection shielding device to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft armor sensor.

Uses, or possesses with intent to use, a theft detection device remover to remove a theft detection device from merchandise held for resale by a merchant or property of a merchant.

…

(4) Whoever violates this section is guilty of:

(a) Except as provided in sub. (4m), a Class A misdemeanor, if the value of the merchandise does not exceed $500.

(bf) A Class I felony, if the value of the merchandise exceeds $500 but does not exceed $5,000.

(bm) A Class H felony, if the value of the merchandise exceeds $5,000 but does not exceed $10,000.

(c) A Class G felony, if the value of the merchandise exceeds $10,000.

943.20 Theft

(1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):

(a) Intentionally takes and carries away, uses, transfers, conceals, or retains possession of moveable property of another without the other's consent and with intent to deprive the owner permanently of possession of such property.

(b) By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner. A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his or her possession or custody by virtue of his or her office, business or employment, or as trustee or bailee, upon demand of the person entitled to

receive it, or as required by law, is prima facie evidence of an intent to convert to his or her own use within the meaning of this paragraph.

(c) Having a legal interest in moveable property, intentionally and without consent, takes such property out of the possession of a pledgee or other person having a superior right of possession, with intent thereby to deprive the pledgee or other person permanently of the possession of such property.

(d) Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to perform it if it is part of a false and fraudulent scheme.

(e) Intentionally fails to return any personal property which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement after the lease or rental agreement has expired. This paragraph does not apply to a person who returns personal property, except a motor vehicle, which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement, within 10 days after the lease or rental agreement expires.

…

(3) PENALTIES. Whoever violates sub. (1):

(a) If the value of the property does not exceed $2,500, is guilty of a Class A misdemeanor.

(bf) If the value of the property exceeds $2,500 but does not exceed $5,000, is guilty of a Class I felony.

(bm) If the value of the property exceeds $5,000 but does not exceed $10,000, is guilty of a Class H felony.

(c) If the value of the property exceeds $10,000 is guilty of a Class G felony.

(e) If the property is taken from the person of another or from a corpse, is guilty of a Class G felony.

STATEMENT OF THE CASE

On February 16, 2017, the state filed a complaint charging Ms. Autumn Marie Love Lopez and Ms. Amy Rodriguez with retail theft of merchandise with a value of more than $500 but less than $5000 as parties to a crime in violation of Wis. Stat. § 943.50(1m)(c) and (4)(bf). This is a Class I felony. (2:1; App. 114).

Both women objected to the complaint, arguing that the state improperly aggregated seven separate instances of misdemeanor theft into one felony theft. (6; 9). The circuit court granted the motions to dismiss the complaints without prejudice, ruling that Wis. Stat. § 971.36(3)(a) applied only to the crime of

theft under Wis. Stat. § 943.20 and not to retail theft. (21:20-21; App. 112-113).

The state appealed. (11). The court of appeals reversed the circuit court, holding that the state has the authority pursuant to Wis. Stat. § 971.36(3)(a) to charge multiple acts of retail theft as one continuous felony offense. (*State v. Lopez*, 2017AP000913-CR; App. 101-110).

Ms. Lopez filed a petition for review which this court granted on April 9, 2019.

STATEMENT OF FACTS

Walmart employee Autumn Marie Love Lopez worked at the store's self-checkout registers. In February 2017, the Walmart Asset Protection Manager contacted the police to report thefts that took place in January 2017. Walmart informed police that the company wanted to press charges and receive restitution. (2:3, 5; App. 116).

Walmart surveillance video of each separate transaction showed an unidentified woman arrive at the self-checkout register. Ms. Lopez assisted the woman. Ms. Lopez scanned food items and pretended to scan other items. The unidentified woman paid for the food with her food stamps. The other items, which included tampons, diapers, baby wipes, diaper cream, baby toys, underwear, toilet paper, clothing and household items, were not paid for. This took place on seven separate occasions on seven different days over

a two-week period. (2:5-6, 11; App. 116-117, 122). The amount of stolen merchandise during the two week period totaled $1,452.12. The following is a list of the value of the unpaid items on each day:

- January 10 – $218.99;
- January 12 – $313.95;
- January 13 – $221.46;
- January 16 – $257.49;
- January 19 – $132.62;
- January 20 – $181.28;
- January 25 – $126.33.

(2:6; App. 117).

Officer Chris Hammel of the Monroe Police Department confronted Ms. Lopez at Walmart while she worked. The officer questioned Ms. Lopez in the Walmart manager's office with several other Walmart employees and the Asset Protection Manager present. Admitting that she failed to scan the items, Ms. Lopez said that what she did was wrong. Ms. Lopez explained that she helped the other woman because she was afraid of her. When pressed, Ms. Lopez explained that she worried the woman would take action that might compromise her

husband's citizenship application. Ms. Lopez would not identify the woman to police. (2:5-6, 15; App. 116-117, 126).

Officer Hammel arrested and searched Ms. Lopez. The twenty six year old Ms. Lopez, who had no prior convictions, had no weapons or contraband. The officer handcuffed Ms. Lopez and transported her to the police station in a squad car. (2:6; App. 117).

At the station, Ms. Lopez declined to make a further statement. She was issued a misdemeanor citation for retail theft and released. (2:6; App. 117).

A few days later, the Walmart Asset Protection Manager saw the unidentified woman in the store. The Asset Protection Manager obtained the woman's name, Amy Rodriguez, from customer service and called police. Police arrested Ms. Rodriguez at her home. She waived her Miranda rights and told police her boyfriend and Ms. Lopez's husband were cousins. Ms. Rodriguez explained that her carpal tunnel prevented her from holding items and she required assistance at the self-checkout register. Ms. Lopez was the only Walmart worker willing to help her. Ms. Rodriguez denied that she failed to pay for any items. (2:8-10; App. 119-121).

The state charged Ms. Lopez and Ms. Rodriguez with retail theft, party to a crime. In the complaint, the state aggregated the seven incidents of misdemeanor retail theft into one felony charge. (2: App. 114). Ms. Lopez's attorney argued

that the complaint failed to state probable cause, contending that the incidents could only be charged as multiple misdemeanors. (16:3-4). The circuit court ordered briefing. (16:4).

In her briefs, Ms. Lopez moved to dismiss the complaint arguing that the aggregation permitted in Wis. Stat. § 971.36(3)(a) was specific to the crime of theft in Wis. Stat. § 943.20 and did not apply to retail theft. (9:1). Ms. Lopez also argued that because the offenses took place over a two-week period, the state did not have the prosecutorial discretion to charge these multiple offenses as a single felony. (6:2; 9:4-6).

The circuit court dismissed the complaint without prejudice. (21:21; App. 113). Agreeing with Ms. Lopez's statutory argument, the circuit court noted that in over two decades on the bench, it had never seen multiple incidents of retail theft aggregated to one felony count. The court concluded that "I cannot see where that intent of the statute was to apply to retail theft. I think it was meant to regular theft, but not retail theft." (21:20-21; App. 112-113).

The state appealed and the court of appeals reversed the circuit court. (*State v. Lopez*, 2017AP000913-CR; App. 101-110). The court of appeals held that "if the legislature had intended to restrict the application of § 971.36(3)(a) to one or more of the numerous theft offenses identified in Wis. Stat. ch. 943, that intent could have been made plain by saying so." (App. 107). The court of appeals

concluded that to limit the application of Wis. Stat. § 971.36(3)(a) "would be undertaking judicial legislation…" (App. 108). Rejecting the defendants' arguments that the elements and penalties in theft and retail theft were different, that no case since Wis. Stat. § 971.36(3)(a) was enacted in 1955 has ever held that it applied to retail theft and that aggregation raised duplicity and jury unanimity problems, the court of appeals concluded that "§ 971.36(3)(a) is not limited in its application to § 943.20 and that it applies as well to retail theft under WIS. STAT. § 943.50." (App. 108). The court of appeals did not reach the issue of whether the state's general prosecutorial charging discretion allowed aggregation.

ARGUMENT

I. The state cannot charge seven retail thefts totaling $126-$314 each and committed over a two-week period, as one single felony because Wis. Stat. § 971.36 does not apply to retail theft

A. Introduction and Standard of Review.

The state charged Ms. Lopez with one count of felony retail theft, as party to a crime, in violation of Wis. Stats. §§ 943.50 and 939.05. The complaint alleged that on seven separate occasions during seven separate transactions, Ms. Lopez and Ms. Rodriguez stole items from Walmart. Each separate transaction involved merchandise valued between $126 and $314.

(2:6, App. 117). Rather than properly charge the defendants with seven misdemeanors, the state combined the transactions into one count, aggregating the total loss to the retailer, thereby improperly increasing the penalty from seven misdemeanors to one felony. (2, App. 114).

The circuit court correctly dismissed the charges, ruling that the state lacked authority to charge these acts as one single felony because Wis. Stat. § 971.36 did not apply to acts of retail theft. The court of appeals reversed, holding that Wis. Stat. § 971.36 referred generally to theft, and that nothing in the language of the text suggested the legislature intended to limit its application only to a specific type of theft. (App. 108).

Whether Wis. Stat. § 971.36 applies to retail theft is a question of statutory interpretation. Statutory interpretation presents a question of law for this court to review de novo. ***State v. Hemp,*** 2014 WI 129, ¶12, 359 Wis. 2d 320, 856 N.W.2d 811.

B. Wisconsin Statute § 971.36 is clear on its face and applies only to the five modes of theft under Wis. Stat. § 943.20.

Statutory interpretation begins with the plain language of the statute, which is given "its common, ordinary, and accepted meaning." ***State v. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the language of a statute is clear and unambiguous, the statute is applied according to its plain meaning and further

interpretation is unnecessary. ***Id.*** at ¶46. If the statutory language is deemed ambiguous, courts may look to the language of surrounding or closely-related statutes and may examine extrinsic sources such as legislative history. ***Id.***

"One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." ***Fond Du Lac County v. Town of Rosendale***, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). *See also* Sutherland Statutes and Statutory Construction (7th ed. 2007), § 46.6, "it is also the case that every word excluded from the statute must be presumed to have been excluded for a purpose."

Wisconsin Statute § 971.36 states:

> 1. In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:
>
> (a) The property belonged to the same owner and the thefts were committed pursuant to a single intent or design in execution of a single deceptive scheme;
>
> (b) The property belonged to the same owner and was stolen by a person in possession of it; OR(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

Wis. Stat. § 971.36 (2017-2018).

Wisconsin Statute § 971.36 is explicit and clear—it applies to 'theft.' Theft is found in Wis. Stat. § 943.20. A plain and clear reading of this statute is simple, 'theft' referred to in Wis. Stat. § 971.36 applies to theft as set out in Wis. Stat. § 943.20.

Missing from the text of Wis. Stat. § 971.36 is anything regarding retail theft. Missing also from the text is anything regarding the application of this section to other crimes against property under Chapter 943. Had the legislature intended Wis. Stat. § 971.36 to include more than Wis. Stat. § 943.20, it would have explicitly said so. The exclusion by the legislature of any additional language regarding the application of Wis. Stat. § 971.36 requires this court to read the statute's plain and ordinary meaning to mean that Wis. Stat. § 971.36 only applies to the five modes of commission of a 'theft' delineated in Wis. Stat. § 943.20.

Ms. Lopez is not asking this court to limit the reading of Wis. Stat. § 971.36—rather, Ms. Lopez is asking that the court read the plain words of the specific statute that clearly and unambiguously refer only to the five modes of theft and apply it narrowly, as written and required, avoiding absurd results from an overbroad and improper application.

It is the state that is asking this court to read extra words into the statute, requesting an improper expansion of the plain and clear meaning of Wis. Stat. § 971.36 to more than the legislature intended. Endorsing the state's argument to expand

and add to the plain statute would lead to absurd results. For example, if this court finds that Wis. Stat. § 971.36 applies to all misappropriations in Chapter 943, there will be inevitable confusion about how to properly charge aggregated counts of issuance of worthless checks under Wis. Stat. § 943.24, which has its own provisions for aggregation.

Or, for example, if the state's position is expand the application of Wis. Stat. § 971.36 to the whole of Chapter 943, does the state intend on aggregating charges for criminal damage to property under Wis. Stat. § 943.01, as to constitute a felony charge? If so, how?

Reading Wis. Stat. § 971.36 as applying to more than the five modes of theft in Wis. Stat. § 943.20 would lead to a multitude of absurd results. This reading is overbroad and inconsistent with the plain meaning of the statute.

This court need not go further than the plain language of the statute to avoid these results and properly determine that, because the legislature explicitly said 'theft,' it limited the application of Wis. Stat. § 971.36 to 'theft.'

C. Even if this court finds that it needs to look further than the plain language of Wis. Stat. § 971.36, it still does not apply to Wis. Stat. § 943.50.

If this court determines that the words of the statute are not clear, the state's argument and

application of Wis. Stat. § 971.36 to Wis. Stat. § 943.50 is still improper when considering other context in order to determine meaning.

Furthermore, even if the court disagrees with Ms. Lopez's argument and somehow finds that the statute is ambiguous, then this court should apply the rule of lenity. ***State v. Cole***, 2003 WI 59, ¶13, 262 Wis. 2d 167, 663 N.W.2d 700 ("When there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused.").

1. The difference in statutory structure between retail theft and theft suggests that Wis. Stat. § 971.36 applies only to Wis. Stat. § 943.20.

Retail theft and theft are two distinct crimes, with separate statutory sections, and with distinct statutory elements the state must prove.

As a starting point, Wis. Stat. § 943.20 delineates five distinct modes of commission of theft: simple theft, theft by contractor, theft by one having undisputed interest in property from one having superior right of possession, theft by fraud, and theft by failure to return leased or rented property. (Wis. Stat. § 943.20(1)(a)-(e)).

As to the first mode of commission of theft under Wis. Stat. § 943.20(1)(a), the state must prove that a person "intentionally takes and carries

away…the movable property of another without consent and with intent to deprive the owner permanently of possession of the property." Wisconsin JI Criminal 1441.

Theft by contractor[2] in Wis. Stat. § 943.20(1)(b) is the second alternative mode of theft under Wis. Stat. § 943.20, and criminalizes the unauthorized use of money for any other purpose than the contractual use. (*See* Wisconsin JI Criminal 1443).

Wisconsin Statute § 943.20(1)(c) sets forth the third mode of commission of theft, theft by one having an undisputed interest in property from one having superior right of possession. To prove this crime, the state must demonstrate an individual, having a legal interest in movable property, intentionally and without consent, took the property out of the possession of a person having a superior right of possession with intent to permanently deprive possession. (*See* Wisconsin JI Criminal 1450).

The fourth mode of commission of theft is Wis. Stat. § 943.20(1)(d)[3], theft by fraud, which is

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[2] Also included as a section of Wis. Stat. § 943.20(1)(b), theft by contractor: defendant is a corporate officer, theft by employee, trustee, or bailee (Embezzlement), with corresponding Wisconsin JI Criminal 1443A and 1444.

[3] Also included within this section is theft by fraud: failure to disclose as a representation and theft by fraud: representations made to an agent, with the corresponding Wisconsin JI Criminal 1453B and 1453C.

committed by a person who obtains title to property of another by intentional deception by false representation. (*See* Wisconsin JI Criminal 1453A).

The fifth and final mode of commission of theft is Wis. Stat. § 943.20(1)(e), theft by failure to return leased or rented property, which is committed by someone who intentionally fails to return personal property which is in their possession by virtue of a written lease within 10 days of its expiration. (*See* Wisconsin JI Criminal 1455).

While these five modes of commission of theft have different elements and do not necessarily require the same facts to prove those elements, the legislature wrote Wis. Stat. § 943.20 to include these five specific modes of commission. What the legislature did not include as one of the modes, however, is retail theft. Retail theft is not one of the five modes of commission of a theft, nor can it be. The statutory section for retail theft appears much later in misappropriations, with a completely different statute number (Wis. Stat. § 943.50), title, and elements:

> 1. The defendant intentionally (altered the indicated price or value of)(took and carried away)(transferred)(concealed)(retained possession of) property.
>
> 2. The property was merchandise held for resale by a merchant.
>
> 3. The defendant knew that property was merchandise held for resale by a merchant.

> 4. The merchant did not consent to (altering the indicated price or value of)(taking and carrying away)(transferring)(concealing)(retaining possession of) property.
>
> 5. The defendant knew that the merchant did not consent.
>
> 6. The defendant intended to deprive the merchant permanently of possession of the merchandise.

Wisconsin JI Criminal 1498 (2013).

The legislature included five different ways to commit a theft under Wis. Stat. § 943.20. Retail theft was not included as one of the modes of commission of theft under Wis. Stat. § 943.20. Had the legislature intended to include retail theft as one of the five modes of commission, it would have done so. Instead, the legislature explicitly did not include retail theft as a mode of commission, instead giving retail theft its own distinct subsection, penalty structure, and distinctly different elements than theft. Thus, theft is a distinct crime from retail theft, and retail theft is not the same as theft.

Similarly, had the legislature intended on Wis. Stat. § 971.36 applying to retail theft, it would have explicitly done so. Instead, the legislature chose the term theft, not retail theft, not theft of farm-raised fish, not theft of video service, or any of the other subsections in Chapter 943 not included in Wis. Stat. § 943.20.

Additionally, the language of the Jury Instructions relating to Chapter 943 crimes also demonstrate that Wis. Stat. § 971.36 only applies to theft in Wis. Stat. § 943.20.

The only reference Wis. Stat. § 971.36 within all of the jury instructions can be found in Wis. Stat. § 943.20, signifying yet again that Wis. Stat. § 971.36 is only applicable to that specific section.

If Wis. Stat. § 971.36 was to be read expansively to cover Chapter 943 in its entirety, or to any section other than Wis. Stat. § 943.20, the jury instructions would have been included, given that the jury must decide, as part of its deliberations, on the amount of the items stolen.

The difference in statutory structures, elements, and jury instructions leads to only one logical conclusion, that the application of Wis. Stat. § 971.36, which says 'theft,' is only to the five modes of theft under Wis. Stat. § 943.20, and not to retail theft or to any other, separate and distinct statute for crimes against property in Chapter 943.

2. Different penalty structures between theft and retail theft suggest that Wis. Stat. § 971.36 applies only to Wis. Stat. § 943.20, not Wis. Stat. § 943.50.

The differing penalty structures of Wis. Stats. §§ 943.20 and 943.50 yet again illustrate that the legislature intended the two types of crimes to be

treated and punished differently, thus signifying that Wis. Stat. § 971.36 does not apply to retail theft.

For theft, a person is guilty of a "Class A misdemeanor theft if the value of the property does not exceed $2,500." Wis. Stat. § 943.20(3)(a)(2017-2018). A person is guilty of a "Class I felony theft if the value of the property exceeds $2,500 but does not exceed $5,000." Wis. Stat. § 943.20(3)(bf)(2017-2018).

Contrast this with the penalty for retail theft: "Except as provided in sub. (4m), a Class A misdemeanor, if the value of the merchandise does not exceed $500" or "A Class I felony, if the value of the merchandise exceeds $500 but does not exceed $5,000." Wis. Stat. § 943.50(4)(a)-(bf) (2017-2018).

The facts of this case illustrate how a defendant is treated differently if subject to a charge of theft under Wis. Stat. § 943.20 versus a charge of retail theft under Wis. Stat. § 943.50. The defendants here stole from Walmart on seven separate occasions. On each occasion they stole between $126 and $314 worth of merchandise with the total amount of merchandise for all occasions valued at $1,452.12. If the state had aggregated the counts into one charge of theft under Wis. Stat. § 943.20, the state would only have been able to charge the defendants with a Class A misdemeanor because the property did not exceed $2,500.

Here the state chose to charge the defendants with retail theft, not theft, and the penalty structure for retail theft states that if the value of the

merchandise does not exceed $500, the individual can only be found guilty of a Class A misdemeanor. If the state was allowed to aggregate claims of retail theft pursuant to Wis. Stat. § 971.36, the state would be able to charge the defendants with a felony because the value of all merchandise together exceeds $500. *See* Wis. Stat. § 943.50(4)(bf).

The misdemeanor/felony distinction is important. A felony conviction can make it difficult for a person to secure housing or employment. Further, felony convictions prevent an individual from possessing a firearm or voting and can have significant immigration consequences.

Allowing aggregation of the seven misdemeanor charges into one felony is a manipulation of the penalty structures by the state. Wisconsin Statute § 971.36 applies to theft as covered by Wis. Stat. § 943.20. The legislature may very well have elected to allow for aggregation of claims of theft because under the penalty structure of Wis. Stat. § 943.20 it takes merchandise of significant value to be stolen to reach the felony threshold. The same is not true for retail theft which allows for felony charges if the merchandise in question is worth more than $500. The state wants this court to adopt an interpretation of Wis. Stat. § 971.36 that makes it easier for an individual to be charged with a felony. Presumably the legislature would have been clear about including retail theft in Wis. Stat. § 971.36 if it wanted it to be even easier for defendants to be charged with felonies.

It makes little sense to assume that the legislature intended for Wis. Stat. § 971.36, which refers to "theft," with a penalty structure that requires a misdemeanor charge for amounts below $2,500, to also allow for counts of retail theft with a penalty structure that allows felony charges for merchandise valued at $500 or more to be combined under Wis. Stat. § 971.36. If the legislature meant to authorize the altering of the penalty structure of Wis. Stat. § 943.50 or any other statute, through aggregation, it would have said so in Wis. Stat. § 971.36.

3. Other aggregating statutes within Chapter 943 suggest that Wis. Stat. § 971.36 applies only to Wis. Stat. § 943.20.

An expansive reading of Wis. Stat. § 971.36 does not make sense, as it is inconsistent with other provisions in Wis. Stat. § 943.20 that have their own specific language and jury instructions regarding how the state can aggregate charges.

For example, Wis. Stat. § 943.24, Issuance of worthless checks, and Wis. Stat. § 943.41, Financial transaction card crimes both appear in Subsection III of Chapter 943 along with retail theft and theft. Issuance of worthless checks has its own language regarding how separate charges could be aggregated:

> Whoever issues any single check or other order for payment of more than $2,500 or whoever within a 90-day period issues more than one

> check or other order amounting in the aggregate to more than $2,500, at the time of issuance, the person intends shall not be paid is guilty of a Class I Felony.

Wis. Stat. § 943.24(2).

Similarly, Wis. Stat. § 943.41 has its own statutory language regarding aggregation of more than one charge for financial card transaction crimes in the penalty section:

> Any person violating any provision of sub. (5) or (6) (a), (b), or (d), if the value of the money, goods, services, or property illegally obtained does not exceed $2,500 is guilty of a Class A misdemeanor; if the value of the money, goods, services, or property exceeds $2,500 but does not exceed $5,000, in a single transaction or in separate transactions within a period not exceeding 6 months, the person is guilty of a Class I felony; if the value of the money, goods, services, or property exceeds $5,000 but does not exceed $10,000, in a single transaction or in separate transactions within a period not exceeding 6 months, the person is guilty of a Class H felony; or if the value of money, goods, services, or property exceeds $10,000, in a single transaction or in separate transactions within a period not exceeding 6 months, the person is guilty of a Class G felony.

Wis. Stat. § 943.41.

An expansive reading and application of Wis. Stat. § 971.36 to these sections would have an absurd result—the penalties from the individual

subsections would be at odds with Wis. Stat. § 971.36, leading to confusion in the law as to the applicable penalty.

It is hard to believe that the legislature would have intended on causing this type of confusion, again demonstrating the legislature's intent in Wis. Stat. § 971.36 was that it only applied to 'theft' as defined in Wis. Stat. § 943.20, not expansively to any crime defined in Chapter 943 or its other subsections.

Additionally, there are provisions surrounding Wis. Stat. § 971.36 that demonstrate the legislature's intention. Wis. Stat. § 971.366 discusses how multiple instances of misdemeanor identity theft, as defined in Wis. Stat. § 943.201, can be aggregated into a single felony charge. Thus again begging the question, if the legislature meant to include *all* titled theft crimes in Wis. Stat. § 971.36, why create another, exclusive mechanism for aggregating a different type of theft in Chapter 943?

The state's expansive reading of Wis. Stat. § 971.36, to include all of Wis. Stat. § 943.20, or to include all of Subsection III of Chapter 943, or even to include any provision within the subsection that has 'theft' in the title, would lead to absurd, confusing, and inconsistent results. This overly broad reading of the statute defies logic.

4. The Annotations to Wis. Stat. § 971.36 demonstrate that it is only applicable to theft in Wis. Stat. § 943.20.

No Wisconsin case, other than the court of appeals decision here, discusses the application of theft in Wis. Stat. § 971.36 to anything other than to theft as discussed in Wis. Stat. § 943.20. The two cases that appear in the Annotations of Wis. Stat. § 971.36, ***State v. Jacobsen,*** 2014 WI App 13, 352 Wis. 2d 409, 842 N.W.2d 365, and ***State v. Elverman,*** 2015 WI App 91, 367 Wis. 2d 126, 876 N.W.2d 511, are distinguishable from this case.

In ***Jacobsen,*** the court of appeals discussed prosecutorial discretion in charging multiple acts of theft as a single crime as defined in Wis. Stat. § 971.36(3)(a)-(c). In that case, the court noted that defense counsel challenged as multiplicitious and duplicitous only the thefts charged under Wis. Stat. § 943.20, not under any of the other Chapter 943 subsections. As such, its application to this particular issue is not relevant, as Ms. Lopez does not ask this court to overturn any ruling in that case, but, rather, follow the same logic as the court of appeals did in ***Jacobsen*** and rule the application of Wis. Stat. § 971.36 only pertains to one of the five modes of commission of theft in Wis. Stat. § 943.20.

The only other case that appears in the annotations to Wis. Stat. § 971.36 is ***Elverman,*** a case that again supports Ms. Lopez's position, as it

references Wis. Stat. § 971.366(3)(a) and its application to crimes charged as one in Wis. Stat. § 943.20(1)(a), not any other section in Chapter 943.

While the lack of substantial case law regarding the application of Wis. Stat. § 971.36 could suggest this is an issue of first impression, it does not suggest that this court should expand the plain meaning of the statute to encompass additional, unintended crimes, for the state to aggregate to a felony offense. Because there is no other case that has addressed this issue, it again suggests the statute is clear and should be read based on the clear meaning of the words themselves, not the words the state wants it to mean.

II. The state does not have inherent authority to charge seven retail thefts as one single felony and doing so is error on duplicity grounds.

A. Introduction and Standard of Review.

The state should be prohibited from charging this case as one, felonious action, as the acts were not committed at substantially the same time and were not part of a continuous transaction.

Grouping the acts raises duplicity concerns. "A duplicitous charge is defective because the jury may find the defendant guilty without the state proving each element of the offense beyond a reasonable doubt." ***State v. Copening***, 103 Wis. 2d 564, 572, 309 N.W. 2d 850 (Ct. App. 1981). Lumping together

multiple instances of misdemeanor retail theft and packaging it as a felony retail theft is defective, as it is duplicitous and presents issues of jury unanimity. The state's attempt to convict an individual of a felony instead of misdemeanors creates serious proof issues in future cases. These issues are exactly what this court guarded in previous rulings regarding duplicitous charges.

The question of whether the charge is duplicitious or raises duplicity concerns is also a question of law for this court to review de novo. ***State v. Fawcett***, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988).

B. The state does not have discretion to charge these seven acts as one because the acts were not committed at substantially the same time and were not part of a continuous transaction.

This court has previously held that the state can charge multiple acts together as one criminal offense if the acts were: (1) committed by the same person, (2) were committed at substantially the same time, and (3) related to one continued transaction. ***State v. Lomagro***, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983).

Here, the state did not have the authority to charge these seven acts as one single felony because although the acts were committed by the same people, they were not committed at substantially the

same time and were not part of a continued transaction.

These seven, different, retail thefts happened over the course of two weeks. These retail thefts included seven distinct and separate transactions, consistent with this court's reasoning in ***State v. Spraggin***, 77 Wis. 2d 89, 252 N.W.2d 94 (1977). There, this court determined, in the context of receiving stolen property, that receipt of:

> " 'different articles of stolen property at different times and on separate and unconnected occasions, constitute separate offenses and cannot be prosecuted as one crime, in one count, though all of the property is afterwards found in the possession of the defendant at the same time and place.'"

Id. at 613 (quoting ***Hamilton v. State***, 129 Fla. 219, 176 So. 89, 92 (1937)).

Furthermore, "[u]nder Wisconsin law, offenses…are different in fact if [they] are either separated in time or are significantly different in nature." ***State v. Stevens***, 123 Wis. 2d 303, 322, 367 N.W.2d 788 (1985).

In ***State v. Tappa***, this court concluded it was appropriate to punish the defendant separately for concealing and transferring property for multiple distinct instances of conduct because "there was ample time for the Defendant to reflect on his actions and recommit himself to the criminal enterprise." 127 Wis. 2d 155, 170, 378 N.W.2d 883 (1985).

Here, the offenses constitute separate, unconnected occasions over the course of a two-week period. In between offenses, there were likely days that Ms. Lopez did not work. There were also likely days when Ms. Lopez was working where Ms. Rodriguez did not visit Walmart. The defendant's here completed each separate transaction, each with a separate receipt from that transaction, and went home, with time to reflect on their actions, and make a separate, conscious decision whether or not to do this again.

The state here seems to inappropriately conflate simple shoplifting with a felonious act. However, this court's previously ruling in ***Spraggin*** forecloses the state's attempt, given the courts indication that

> "when the reception of stolen items occurs on separate occasions, the ends of justice and the form of the defined crime are met by multiple misdemeanor counts, not by the forbidden joinder of separate crimes into one count for an aggregate felony value."

77 Wis. 2d at 614.

These charges are different acts, not one continuous transaction. As such, the state does not have discretion to charge them as one single felony.

C. These charges are improperly duplicitous.

Even if this court determines that the state has discretion to charge these as one single act, the

charges still run contrary to the purposes of the prohibition against duplicity and are therefore improper.

The state does not have unfettered charging discretion. The state cannot, for example, recharge a defendant with the same crime after an acquittal. Similarly, "a prosecutor's discretion to charge separately chargeable offenses as a single crime is limited by "the purposes of the prohibition against duplicity,"" ***State v. Jacobsen***, 2014 WI App 13, ¶22, 352 Wis. 2d 409, 842 N.W.2d 365, citing ***State v. Lomagro***, 113 Wis. 3d 582, 588, 335 N.W.2d 583 (1983).

These purposes include:

> (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity.

Id. at 586-87.

"If any of these dangers are present, the acts of the defendant should be separated into different counts even though they may represent a single, continuing scheme." ***Id.*** at 588.

The charges here are duplicitous, as they implicate issues with jury unanimity. "A duplicitous charge is defective because the jury may find the defendant guilty without the state proving each element of the offense beyond a reasonable doubt." ***Copening,*** 103 Wis. 2d at 572. Put another way, duplicity concerns exist where there is "the possibility that some but not all members of a jury could believe defendant guilty of one offense and others believe him guilty of another," but, despite disagreement on the essential facts of the case, still find guilt on the one, felonious, duplicitous count. ***State v. George***, 69 Wis. 2d 92, 99, 230 N.W.2d 253 (1975).

Imagine a situation similar to what happened here, the state aggregates seven counts of retail theft over two weeks into one felony count. As evidence of the crimes, the state must prove each of the underlying retail theft counts. In only four of the counts, there is video surveillance. In another count, the only evidence is a co-defendant's statement against the defendant. And, yet, in another, the evidence that exists is only the co-defendant's receipt and a store employee's observations. It is possible that different jury members could determine that the state proved only five of these retail thefts, while another jury member could reasonably find that 4, or 5, or 6 had been proven, given the different evidence used to prove each count. This type of confusion is exactly what is contemplated as concern for duplicitous charges.

How far would the state's charging discretion take it in other retail theft cases? Could it charge an individual with a felony for all retail thefts committed at any big box store? What if the evidence of some incidents was weaker, perhaps lacking video proof, or what if the jury believed witnesses on some counts but not on others? What about retail thefts committed at the same named store, but different locations?

These problems become even more apparent when considering the jury instructions for how to consider aggregated charges, which, as previously mentioned, only appear in the instructions for theft. The absence of any of the same language in the instructions for retail theft fails to provide clear guidance to a jury on how to consider multiple instances of retail theft.

Clearly, the slippery slope of aggregating retail thefts into one felony theft presents major issues and concerns with jury unanimity. These issues cannot be dealt with on a case by case basis, and require this court to determine that these charges constitute multiple misdemeanors, all requiring their own proof, and charging them as one felony is duplicitous and improper, even if the court determines that the seven different instances are a single, continuing scheme.

D. The existence of other aggregation statutes is also proof that the state lacks general discretionary authority to charge a series of acts as one offense.

If the state had discretionary authority to aggregate in any situation, why would Wis. Stat. § 971.36 exist at all? Why would Wis. Stat. § 971.366, which authorizes violations under Wis. Stats. §§ 943.201 or 943.203 to be charged as a single crime if pursuant to a single intent and design, exist? Why would Wis. Stats. §§ 971.365 and 971.367 exist? The answer is simple. The legislature has seen fit to extend the state's discretionary charging powers in violations of Wis. Stat. § 943.20 and select other crimes to allow for a series of transactions specifically because the state's original discretionary charging powers did not allow such aggregation.

The legislature presumably had its reasons for believing the state's original discretionary charging powers in those types of cases was too limited and thus acted to increase the state's power for those cases. The legislature has not similarly seen fit to extend the state's charging powers for acts of retail theft in violation of Wis. Stat. § 943.50.

To be clear, a ruling that aggregation of charges under Wis. Stat § 971.36 applies only to charges of theft under Wis. Stat. § 943.20 would not open the floodgates for defendants to avoid punishment for retail theft in the future. To the contrary, requiring the state to properly charge the

defendants in this case, under Wis. Stat. § 943.50, with multiple misdemeanors for multiple, separate instances of retail theft, would still subject Ms. Lopez to seven misdemeanor convictions. Upon conviction for three of the separate offenses, she would not only be subjected to repeater status for any future crimes, but also could face more total custody time than she would for a conviction on one felony retail theft. (The total maximum term of imprisonment for seven Class A Misdemeanor counts of retail theft would equal 63 months, whereas the total maximum penalty for a Class I Felony Retail theft is 41 months).

The state's broad discretion to charge is not unfettered and is, in this case, clearly limited by the statute and applies only to theft, not retail theft. As such, this court should reverse the court of appeals and remand with directions for the state to charge these acts as multiple misdemeanors.

CONCLUSION

For the reasons stated above, the circuit court appropriately dismissed the defective complaint. It is therefore requested that this court reverse the court of appeals and affirm the decision of the circuit court.

Dated this 10th day of June, 2019.

Respectfully submitted,

KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
loshawk@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,547 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of June, 2019.

Signed:

KELSEY LOSHAW
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of June, 2019.

Signed:

KELSEY LOSHAW
Assistant State Public Defender

APPENDIX

INDE X
TO
APPENDIX

Page

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP913-CR & 2017AP914-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

AUTUMN MARIE LOVE LOPEZ

and

AMY J. RODRIGUEZ,

Defendants-Respondents-Petitioners.

ON APPEAL FROM AN ORDER OF THE GREEN COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER, PRESIDING

BRIEF OF THE PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

Page

Page

Additional Authorities

ISSUES PRESENTED

I. Does the aggregation-of-thefts statute, Wis. Stat. § 971.36, apply—as it states—to "any criminal pleading for theft," or only to criminal pleadings alleging violations of Wis. Stat. § 943.20?

The circuit court held the latter, and dismissed the complaint.

On the State's appeal, the court of appeals reversed, holding the former.

This Court should affirm the court of appeals.

II. Alternatively, could the State determine the unit of prosecution and charge the seven thefts in this case as a single felony theft under its general charging authority because: (1) the offenses were committed by the same perpetrators, (2) at substantially the same time, (3) as part of a single deceptive scheme, and (4) none of the dangers of a duplicitous charge were present?

The circuit court and court of appeals did not reach this question.

This Court should hold that the State had the authority to charge these thefts as a single crime.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case before this Court, publication and oral argument are appropriate.

INTRODUCTION

Autumn Lopez worked at Walmart. Her acquaintance, Amy Rodriguez, frequented the store. On seven occasions between January 10 and January 25, 2017, Lopez helped

Rodriguez steal merchandise by manipulating her purchases at the self-checkout registers. The value of the merchandise stolen each day totaled between $126 and $314.

Based on the aggregate amount stolen in this case—$1452.12, the State charged Lopez and Rodriguez each with one count of felony retail theft of merchandise valuing more than $500. The sole issue in this case is whether the State could so charge Lopez and Rodriguez.

It could, for two reasons. First, the plain language and context of Wis. Stat. § 971.36 authorizes the aggregation of multiple thefts of any type into a single charge. Alternatively, the State has inherent authority to join criminal acts that can be characterized as a continuing offense into a single unit of prosecution. And here, that exercise of authority was appropriate given that the offenses involved the same perpetrators, occurred at the same time, were part of a single deceptive scheme, and did not risk duplicitous charges.

STATEMENT OF THE CASE

In February 2017, Officer Chris Hammel of the Monroe Police Department responded to Walmart to investigate a report of theft. (R. 2:1–3.)[1] When he arrived, the Walmart Asset Protection Manager told him that she had been investigating several thefts of merchandise

[1] There are two different appellate records in this case. To avoid confusion, the State will refer to the record for 2017AP913 unless otherwise indicated. Citations to documents found in the record for 2017AP914 will be indicated by the designation (R2).

committed during a two-week period in January by Autumn Lopez, who was employed at the store, and an unidentified woman. (R. 2:5.)

Lopez frequently manned the self-checkout registers. (*See* R. 2:5–6.) Surveillance videos showed seven occasions where a woman, later identified as Amy Rodriguez, approached a self-checkout register with a cart full of merchandise and was assisted by Lopez. (R. 2:5.) Lopez then checked Rodriguez out, but would scan only food items. (R. 2:5.) Lopez would pretend to scan the rest of Rodriguez's items, but would cover the bar code or void the transaction before Rodriguez paid. (R. 2:5.) On seven days in January 2017, the women stole merchandise worth the following amounts:

1. January 10, 2017, $218.99;
2. January 12, 2017, $313.95;
3. January 13, 2017, $221.46;
4. January 16, 2017, $257.49;
5. January 19, 2017, $132.62;
6. January 20, 2017: $181.28;
7. January 25, 2017: $126.33.

(R. 2:6.) The total value stolen was $1452.12.[2]

---

[2] The exhibits attached to the criminal complaint allege that the total value of the merchandise taken was $1489.15, but that is not the total reached by adding the seven respective amounts, which is $1452.12. (R. 2:11–12.) The discrepancy does not affect the outcome of this case; therefore, the State will assume that the total amount stolen was $1452.12.

When confronted, Lopez admitted the thefts to both the asset protection manager and Officer Hammel but would not tell them who the unidentified woman on the video was. (R. 2:5–6.) Lopez explained that the woman on the video was the same person each time, and Lopez said she felt she had to help the woman steal because the woman "had something on" Lopez and her family. (R. 2:5–6.) Hammel arrested Lopez. (R. 2:6.)

Police arrested Rodriguez a few days later after the asset protection manager saw her in the Walmart and was able to learn her name. (R. 2:8–9.) After waiving her constitutional rights, Rodriguez told police that her boyfriend and Lopez's husband are cousins. (R. 2:9.) Rodriguez said she frequently used the self-checkout registers and needs assistance checking out due to carpal tunnel syndrome. (R. 2:9.) She claimed Lopez was the only employee willing to help her, and she denied taking anything without paying. (R. 2:9.)

The State charged Lopez and Rodriguez with Retail theft of merchandise with a value of more than $500 but less than $5000 as a party to a crime pursuant to Wis. Stat. §§ 943.50.(1m)(c) and (4)(bf), a Class I felony. (R. 2:1.) Both defendants objected to the complaint. They claimed that the single felony charge was unsubstantiated by the complaint's description of the seven separate instances of theft of merchandise less than $500, but they did so on different grounds. (*See* R. 6:1.)

Lopez alleged that Wis. Stat. § 971.36(3)(a), the statute permitting aggregation of charges for thefts, was applicable only to charges of theft pursuant to Wis. Stat. § 943.20. (R. 6:1.) She argued that the State could charge her with either a single Class A Misdemeanor for theft by

employee of less than $2500 as a single continuing scheme under Wis. Stat. § 943.20(3)(a), or with seven Class A Misdemeanors for seven separate charges of Retail Theft less than $500 pursuant to Wis. Stat. § 943.50(4)(a). (R. 6:2.)

Rodriguez, for her part, argued that the single felony charge was duplicitous and violated her rights to due process and protection from double jeopardy. (R2. 7:1.)

The circuit court granted each of the defendants' motions to dismiss the complaints without prejudice based on the arguments Lopez advanced. (R. 21:22.) It determined that the two-week period over which the thefts occurred was not too long for the State to charge the thefts as a continuing offense. (R. 21:20.) But, it concluded, because Wis. Stat. § 971.36 referenced "thefts" and not "retail thefts," the Legislature intended section 971.36 to apply to only the crime of theft pursuant to Wis. Stat. § 943.20. (R. 21:20.) It did not address whether the State had discretionary authority to charge a felony. (R. 21:20.)

The State appealed. The court of appeals reversed, recognizing that "nothing in § 971.36(3)(a) indicates that the legislature intended to limit that provision to a specific type or types of theft," and accordingly "the State may under Wis. Stat. § 971.36(3)(a) charge multiple acts of retail theft as one continuous act of retail theft." *State v. Lopez*, 2019 WI App 2, ¶¶ 12, 14, 385 Wis. 2d 482, 922 N.W.2d 855. Lopez and Rodriguez petitioned this Court for review, which this Court granted on May 10, 2019.

STATUTES AT ISSUE

The statutes at issue provide in relevant part:

971.36 Theft; pleading and evidence; subsequent prosecutions.

(1) In any criminal pleading for theft, it is sufficient to charge that the defendant did steal the property (describing it) of the

owner (naming the owner) of the value of (stating the value in money).

(2) Any criminal pleading for theft may contain a count for receiving the same property and the jury may find all or any of the persons charged guilty of either of the crimes.

(3) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if:

(a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme;

(b) The property belonged to the same owner and was stolen by a person in possession of it; or

(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

(4) In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars. On the trial, evidence may be given of any such theft committed on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance if it is proved that any property was stolen during such period. . . .

943.20 Theft.

(1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):

(a) Intentionally 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.

(b) By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner. . . .

(c) Having a legal interest in movable property, intentionally and without consent, takes such property out of the possession of

a pledgee or other person having a superior right of possession, with intent thereby to deprive the pledgee or other person permanently of the possession of such property.

(d) Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.

(e) Intentionally fails to return any personal property which is in his or her possession or under his or her control by virtue of a written lease or written rental agreement after the lease or rental agreement has expired.

. . . .

(3) PENALTIES. Whoever violates sub. (1):

(a) If the value of the property does not exceed $2,500, is guilty of a Class A misdemeanor.

(bf) If the value of the property exceeds $2,500 but does not exceed $5,000, is guilty of a Class I felony.

(bm) If the value of the property exceeds $5,000 but does not exceed $10,000, is guilty of a Class H felony.

(c) If the value of the property exceeds $10,000, is guilty of a Class G felony.

(e) If the property is taken from the person of another or from a corpse, is guilty of a Class G felony.

943.50 Retail theft; theft of services.

(1m) A person may be penalized as provided in sub. (4) if he or she does any of the following without the merchant's consent and with intent to deprive the merchant permanently of possession or the full purchase price of the merchandise or property:

(a) Intentionally alters indicia of price or value of merchandise held for resale by a merchant or property of a merchant.

(b) Intentionally takes and carries away merchandise held for resale by a merchant or property of a merchant.

(c) Intentionally transfers merchandise held for resale by a merchant or property of a merchant.

(d) Intentionally conceals merchandise held for resale by a merchant or property of a merchant.

(e) Intentionally retains possession of merchandise held for resale by a merchant or property of a merchant.

(f) While anywhere in the merchant's store, intentionally removes a theft detection device from merchandise held for resale by a merchant or property of a merchant.

(g) Uses, or possesses with intent to use, a theft detection shielding device to shield merchandise held for resale by a merchant or property of merchant from being detected by an electronic or magnetic theft alarm sensor.

(h) Uses, or possesses with intent to use, a theft detection device remover to remove a theft detection device from merchandise held for resale by a merchant or property of a merchant.

. . . .

(4) Whoever violates this section is guilty of:

(a) Except as provided in sub. (4m), a Class A misdemeanor, if the value of the merchandise does not exceed $500.

(bf) A Class I felony, if the value of the merchandise exceeds $500 but does not exceed $5,000.

(bm) A Class H felony, if the value of the merchandise exceeds $5,000 but does not exceed $10,000.

(c) A Class G felony, if the value of the merchandise exceeds $10,000.

STANDARD OF REVIEW

The sufficiency of a complaint presents a question of law, reviewed de novo. *State v. Manthey*, 169 Wis. 2d 673, 685, 487 N.W.2d 44 (Ct. App. 1992).

Statutory interpretation presents a question of law that this Court reviews de novo. *State v. Hemp*, 2014 WI 129, ¶ 12, 359 Wis. 2d 320, 856 N.W.2d 811.

Whether a complaint is duplicitous also is a question of law that this Court reviews de novo. *See State v. Fawcett*, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988.)

ARGUMENT

I. The language and context of Wis. Stat. § 971.36(3)(a) unambiguously show that the statute applies to pleadings alleging any type of theft, including retail theft.

Lopez and Rodriguez first argue that the State could not charge them under Wis. Stat. § 971.36(3)(a) for their combined retail thefts. But, as discussed below, the plain language and context of the statute demonstrates that they are wrong.

A. Interpreting a statute requires reading the statute's plain language in context and in relation to the language of surrounding and closely related statutes.

Courts employ statutory interpretation to determine the meaning of a statute "so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Submission to the plain meaning of a statute requires courts to begin with the language of the statute, which is given "its common, ordinary, and accepted meaning." *Id.* ¶ 45.

If the language of a statute is clear and unambiguous, the court applies the statute according to its plain meaning and the inquiry ceases. *Kalal*, 271 Wis. 2d 633, ¶ 46. That does not mean, though, that the words of the statute are read in a vacuum: "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* Extrinsic sources, such as legislative history, are not considered unless the language is

declared ambiguous and is therefore in need of further interpretation. *Id.*

B. Plain language, context, and the evolution of the statute demonstrate that the Legislature intended Wis. Stat. § 971.36 to apply to criminal pleadings for any theft.

1. By the plain language of Wis. Stat. § 971.36, theft means "theft," not just "Theft" as defined in section 943.20.

There are many different types of theft.[3] The language of these statutes indicates that the Legislature created them to criminalize acts that would not otherwise neatly fit into the definition of "Theft" under Wis. Stat. § 943.20.

But as the statutes themselves unambiguously show, they are all still "thefts." And multiple "thefts may be prosecuted as a single crime" pursuant to Wis. Stat. § 971.36 if:

a. the property belonged to the same owner and the thefts were all committed pursuant to a single intent and design or in execution of a single deceptive scheme;

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[3] *See* Wis. Stat. § 943.20, "Theft"; Wis. Stat. § 943.205, "Theft of trade secrets"; Wis. Stat. § 943.45, "Theft of telecommunications service"; Wis. Stat. § 943.455, "Theft of commercial mobile service"; Wis. Stat. § 943.46, "Theft of video service"; Wis. Stat. § 943.47, "Theft of satellite cable programming"; Wis. Stat. § 943.50 "Retail theft; theft of services"; Wis. Stat. § 943.61, "Theft of library material"; Wis. Stat. § 943.74, "Theft of farm-raised fish"; Wis. Stat. § 943.81, "Theft from a financial institution."

b. the property belonged to the same owner and was stolen by a person in possession of it; or

c. the property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

Wis. Stat. § 971.36(3). And when the State prosecutes more than one theft as a single crime, "it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars." Wis. Stat. § 971.36(4).

Nothing in Wis. Stat. § 971.36 suggests that by creating different statutory types of theft that the Legislature meant to exempt those acts from the criminal procedure pleading statute applying generally to pleadings for thefts. Wis. Stat. § 971.36.

To the contrary, the language of Wis. Stat. § 971.36 frames the Legislature's understanding of "thefts" broadly. The statute provides that "[i]n *any* criminal pleading for theft, it is sufficient to charge that the defendant did steal the property (describing it) of the owner (naming the owner) of the value of (stating the value in money)." Wis. Stat. § 971.36(1). And "in *any* case of theft involving more than one theft, *all* thefts may be prosecuted as a single crime" if, as relevant here, "the property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme." The statute also indicates that "[i]n *any* case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars." Wis. Stat. § 971.36(3)–(4).

"When the legislature does not use words in a restricted manner, the general terms should be interpreted

broadly to give effect to the legislature's intent." *State v. Quintana*, 2008 WI 33, ¶ 32, 308 Wis. 2d 615, 748 N.W.2d 447. Notably absent from Wis. Stat. § 971.36 is any language indicating that the Legislature meant the word "thefts" to apply only to complaints alleging violations of Wis. Stat. § 943.20, or any restrictive definition of the word "theft." It simply says, "in *any* criminal pleading for theft." Wis. Stat. § 971.36(1). The word "theft" in Wis. Stat. § 971.36 should therefore be construed broadly.

If the Legislature meant "in criminal pleadings for Theft under Wis. Stat. § 943.20" only, it could have easily said so. But it did not; it said, "in any criminal pleading for theft." The ordinary dictionary meaning of "any" is "one or some indiscriminately of whatever kind."[4] And the Legislature plainly believes that "Retail theft" is a kind of theft: they use the word "theft" to define the crime, and five of the nine modes of commission of Retail theft match exactly the five modes of commission of Theft of moveable property of another under Wis. Stat. § 943.20(1)(a).[5] A

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[4] *Any*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/any (last visited June 14, 2019).

[5] *Compare* Wis. Stat. § 943.20(1)(a) (a person commits theft if the person "[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") *with* Wis. Stat. § 943.50(1m)(b)–(e) (a person commits Retail theft by doing "any of the following without the merchant's consent and with the intent to deprive the merchant permanently of possession or the full purchase price of the merchandise or property:" sub (b), "[i]ntentionally takes and carries away," sub (c), "[i]ntentionally transfers," sub (d) "[i]ntentionally conceals," (e), "[i]ntentionally retains possession" of merchandise or property of the merchant.)

pleading for Retail theft is therefore encompassed by the words, "any criminal pleading for theft." Wis. Stat. § 971.36.

Nor is there anything in Wis. Stat. § 943.20 or Wis. Stat. § 943.50 indicating that the Legislature intended for Wis. Stat. § 971.36 to apply to Theft, but not Retail theft. Retail theft under Wis. Stat. § 943.50 and Theft under Wis. Stat. § 943.20 both involve theft of property, and the severity of both offenses increases as the value of the property stolen increases. *Compare* Wis. Stat. § 943.20(1)(a)–(e), (3) *with* Wis. Stat. § 943.50(1m)–(1r), (4). It is illogical to conclude that the Legislature did not intend Retail theft to be considered a theft when it called the crime a theft and defined it exactly the same way it defined the modes of commission of "Theft" in Wis. Stat. § 943.20(1)(a).

To be sure, each statute provides some modes of commission that the other does not. But those differences show only that the Legislature meant to criminalize different methods of stealing. For example, the Retail theft statute provides that a person can commit Retail theft if the person, "[w]hile anywhere in the merchant's store, intentionally removes a theft detection device from merchandise held for resale by a merchant or property of a merchant." Wis. Stat. § 943.50(1m)(f). While that particular act would not be chargeable as "Theft" under Wis. Stat. § 943.20, intentionally removing a theft detection device to steal property is still a type of theft. The person is still engaged in an act of stealing property, and the Legislature expressly called the crime a "theft." Wis. Stat. § 943.50.

To that end, the Legislature's creation of separate theft statutes serves multiple purposes. First, it identifies the broad array of acts that deprive someone of payment, property, or services that may not fit into the general definition of "Theft" under Wis. Stat. § 943.20. It also

prevents confusion, debate, and inconsistent application of what constitutes "moveable property" or "personal property" under Wis. Stat. § 943.20(1)(a). In addition, it allows the Legislature to provide different penalties for thefts that it deems more egregious than others.[6] But it does not logically serve to suggest that these types of thefts that do not fit its general "Theft" statute in Wis. Stat. § 943.20 are not "thefts" under Wis. Stat. § 971.36.

Additionally, just as for "Theft" under Wis. Stat. § 943.20, the Legislature provided a progressive penalty structure for "Retail theft" under Wis. Stat. § 943.50. *See, e.g.*, Wis. Stat. § 943.20(3)(a)–(e); Wis. Stat. § 943.50(4)(a)–(c). This structure shows that the Legislature contemplated "Retail theft" as a type of theft that could constitute a continuing crime within the meaning of Wis. Stat. § 971.36. *Cf. State v. Schumacher*, 144 Wis. 2d 388, 411, 493 N.W.2d 23 (1992) ("Use of a progressive penalty structure must, within reason, contemplate a continuing crime.").

Consequently, the plain language and context of Wis. Stat. § 971.36 and Wis. Stat. § 943.50 indicate that a criminal pleading for Retail theft falls in the category of "any criminal pleading for theft." And if more than one Retail theft is alleged, it falls in the category of "any case of theft involving more than one theft," allowing the State to aggregate the value of the property stolen. Wis. Stat. § 971.36(3). The court of appeals properly interpreted the plain language of section 971.36.

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[6] *Compare, e.g.*, Wis. Stat. § 943.46(4)(a) (defining first-time theft of video service with no intent for financial gain as a Class C misdemeanor) *with* Wis. Stat. § 943.46(4)(d) (defining second or subsequent theft of video services for commercial advantage or financial gain as a Class I felony).

2. Statutory context likewise supports the court of appeals' interpretation of Wis. Stat. § 971.36.

"[S]tatutory language is interpreted . . . in relation to the language of surrounding or closely-related statutes." *Kalal*, 271 Wis. 2d 633, ¶ 46. In addition to the plain language of Wis. Stat. § 971.36 and the theft statutes themselves, the closely related aggregation statutes surrounding Wis. Stat. § 971.36 also show that the Legislature did not intend Wis. Stat. § 971.36 to be limited to criminal pleadings under Wis. Stat. § 943.20.

And when read in "relation to the language of surrounding or closely-related" aggregation statutes, *see Kalal*, 271 Wis. 2d 633, ¶ 46, what Wis. Stat. § 971.36 *doesn't* say is perhaps more telling than what it *does* say. That is so because the other aggregation statutes surrounding Wis. Stat. § 971.36 all contain language limiting those statutes to pleadings for specific statutory crimes. *See* Wis. Stat. §§ 971.365, 971.366, and 971.367. Wisconsin Stat. §§ 971.365, 971.366, and 971.367 allow "all violations" only of specific statutory sections to be prosecuted "as a single crime if the violations were pursuant to a single intent and design." *Id.* Such limiting language is absent from Wis. Stat. § 971.36.

For example, Wis. Stat. § 971.366, "Use of another's personal identifying information: charges," provides that "[i]n any case under s. 943.201 or 943.203 involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design." Similarly, Wis. Stat. § 971.367, "False statements to financial institutions: charges," provides, "[i]n any case under s. 946.79 involving more than one violation,

all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design."

Wisconsin Stat. § 971.365, the very next statute in sequence to Wis. Stat. § 971.36, demonstrates that the Legislature would have expressly limited section 971.36 to pleadings for Theft under section 943.20 if that was its intent. As relevant here, Wis. Stat. § 971.365, titled "Crimes involving certain controlled substances," identifies—and, in effect, limits—the precise crimes that may be aggregated:

> **(1)**
>
> **(a)** In any case under s. 961.41(1)(em), 1999 stats., or s.961.41(1)(cm), (d), (e), (f), (g), or (h) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.
>
> **(b)** In any case under s. 961.41(1m)(em), 1999 stats., or s.961.41(1m)(cm), (d), (e), (f), (g), or (h) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.
>
> **(c)** In any case under s. 961.41(3g)(a)2., 1999 stats., or s.961.41(3g)(dm), 1999 stats., or s.961.41 (3g)(am), (c), (d), (e), or (g) involving more than one violation, all violations may be prosecuted as a single crime if the violations were pursuant to a single intent and design.

Unlike Wis. Stat. § 971.365 and the other surrounding aggregation statutes, Wis. Stat. § 971.36 lacks similar limiting language. Section 971.36 does not say "thefts under section 943.20" or "in any case under s. 943.20" or give any indication that the statute is limited to pleadings alleging violations of Wis. Stat. § 943.20. In fact, Wis. Stat. § 971.36 does not mention Wis. Stat. § 943.20 at all.

The surrounding aggregation statutes show that if the Legislature meant to limit Wis. Stat. § 971.36's application to cases under section 943.20, it knew how to do so. Further, the Legislature has amended Wis. Stat. § 971.365, the statute immediately following section 971.36, multiple times since its enactment in 1985 only to add or remove specific statutory sections to which it applies.[7] The Legislature has made no attempt to add similar language to Wis. Stat. § 971.36. That is a strong indication that Wis. Stat. § 971.36 is not limited to pleadings for violations of Wis. Stat. § 943.20 only, and instead applies to pleadings for any type of theft.

Because that limiting language is absent, this Court would have to write "under section 943.20" into the statute to adopt Lopez and Rodriguez's interpretation. (Pet. Br. 13–16.) This is something Lopez and Rodriguez recognize that this Court cannot do. (Pet. Br. 14 ("One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." (*quoting Fond Du Lac County v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989))).) *See also, e.g., Employers Mut. Fire Ins. Co v. Haucke*, 267 Wis. 72, 76, 64 N.W.2d 426 (1954) ("To interpret [the statute] as respondent would have us do it would be necessary to add words to the statute to cover such meaning. This we cannot do."). As shown, writing those words in is also something that the Legislature itself has declined to do.

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[7] *See* 1987 Wis. Act 339, § 103; 1989 Wis. Act 121, §§ 117–18; 1993 Wis. Act 98, §§ 150–52; 1993 Wis. Act 118, §§ 17–18; 1995 Wis. Act 448, §§ 504–07; 1999 Wis. Act 48, §§ 14–17; 2001 Wis. Act 109, §§ 1109–12; 2003 Wis. Act 49, §§ 7–8.

As Lopez and Rodriguez note, "every word excluded from the statute must be presumed to have been excluded for a purpose." (Pet. Br. 14 (quoting Sutherland Statutes and Statutory Construction (7th ed. 2007).) The Legislature must be presumed to have excluded the limiting language that Lopez and Rodriguez would like this Court to write into the statute while including it in the surrounding statutes for a reason. Accordingly, this Court should decline Lopez and Rodriguez's invitation to do so.

Lopez and Rodriguez invoke irrelevant statutes—namely, Wis. Stat. §§ 943.24 and 943.41—to argue that the Legislature must have meant to limit Wis. Stat. § 971.36 to pleadings alleging Theft under Wis. Stat. § 943.20. (Petitioner's Br. 24–26.) Those statutes are irrelevant to the analysis because they are not closely related to Wis. Stat. § 971.36. "Statutes are closely related when they are in the same chapter, reference one another, or use similar terms." *State v. Reyes Fuerte,* 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773. "Being within the same statutory scheme may also make two statutes closely related." *Id.* Sections 943.24 and 943.41 do not satisfy any of those parameters in relation to Wis. Stat. § 971.36.

To start, sections 943.24 and 943.41 appear in Chapter 943 creating and defining Crimes Against Property, a different chapter than section 971.36, which appears in Chapter 971 establishing pretrial criminal procedure. None of these statutes reference each other or deal with the same subject. Moreover, the statutes serve different functions. Sections 943.24 and 943.41 define the crimes of issuing worthless checks and financial transaction card crimes. In contrast, section 971.36 does not create a crime; it is a pleading statute. Nor are the three statutes even a part of

the same statutory scheme: Wis. Stat. §§ 943.24 and 943.41 appear in the Criminal Code, whereas Wis. Stat. § 971.36 appears in the Criminal Procedure portion of the code.

Furthermore, the portions of Wis. Stat. §§ 943.24 and 943.41 that Lopez and Rodriguez reference are not aggregation statutes. (Pet. Br. 24–25.) They are the portions assigning penalties for issuing worthless checks or committing fraudulent use of a financial transaction card. And, importantly, neither of these crimes is designated a "theft." To the extent they have any relevance, these statutes support, rather than refute, the State's interpretation of Wis. Stat. § 971.36.

In all, the plain language of Wis. Stat. § 971.36, when properly interpreted in relation to the surrounding statutes in the same chapter, section, and which appear in succession with Wis. Stat. § 971.36, shows that the Legislature intended Wis. Stat. § 971.36 to apply not just to the crime of Theft under section 943.20, but as it says, to "any criminal pleading for theft," which would include Retail theft.

3. The previous versions of Wis. Stat. § 971.36 support the State's interpretation.

Evaluation of the context of a statute under a plain-meaning analysis also includes consideration of "previously enacted and repealed provisions of a statute." *United States v. Franklin*, 2019 WI 64, ¶ 13 (citation omitted). Here, the evolution of the aggregation-of-thefts statute also supports the State's interpretation.

The first version of this statute appears in Wis. Rev. Stat. § 141.10 (1849). It stated that "in any prosecution for the offence of embezzling the money, bank notes, checks, drafts, bills of exchange, or other security for money of any

person" it was sufficient to allege generally the amount embezzled. *Id.* In 1913, the statute was amended to read, "In any prosecution for the offense of embezzling under section 4418 or for larceny as a bailee under section 4415," a general allegation of the amount stolen and a general date range was sufficient. Wis. Rev. Stat. § 189.4667 (1913). By 1939, the statutes had been renumbered and section 4667 was then Wis. Stat. § 355.31. *See* Wis. Stat. § 355.31 (1939–40). The statute then read, "[i]n any prosecution for the offense of embezzling under 343.20 or for larceny as a bailee under section 343.17," a general allegation was sufficient. *Id.*

In the 1943–44 version of the statutes, the "under section 343.20" and "under section 343.17" language was removed. Wis. Stat. § 355.31 (1943–44.) The statute was amended to read,

> [i]n any case of larceny where 2 or more thefts of money or property belonging to the same owner have been committed pursuant to a single intent or design or in execution of a common fraudulent scheme, and in any case of embezzlement or larceny by bailee, all thefts or misappropriations of money or property belonging to the same owner may be prosecuted as a single offense . . . .

Id.

In 1951, the statute was again broadened to apply to pleadings "[i]n any case of larceny or of obtaining money or property by false personation or pretenses or by means of a confidence game, where 2 or more thefts have been committed. . . and in any case of embezzlement or larceny by a bailee." Wis. Stat. § 355.31 (1951–52). The statute said that in any such case, "all thefts and acts of obtaining or misappropriations of money or property belonging to the owner may be prosecuted as a single crime." *Id.*

By 1953, the statute had become a complicated, 303-word, unbroken paragraph titled "Larceny, false pretenses, confidence game and embezzlement; pleading and evidence; subsequent prosecution." It provided in part,

> where 2 or more thefts of, or acts of obtaining, money or property belonging to the same owner have been committed pursuant to a single intent and design or in execution of a common fraudulent scheme, and in any case of embezzlement or larceny by bailee, all thefts and acts of obtaining or misappropriations of money or property belonging to the owner may be prosecuted as a single crime. In the complaint, indictment or information it shall be sufficient to allege generally a larceny, obtaining or embezzlement of money to a certain amount or property to a certain value committed between certain dates, without specifying any particulars thereof.

See Wis. Stat. § 355.31 (1953–54).

In 1955, the Legislature sought to clarify, modernize, and reorganize the statutes. *See* 1955 Wis. Act 660. In doing so, the Legislature repealed Wis. Stat. § 355.31 and replaced it with the modern version stating simply that "in any criminal pleading for theft it is sufficient to charge that the defendant did steal the property (describing it) of the owner (naming him) and the value of (stating the value in money)." *See* 1955 Wis. Act 696, § 315. Apart from renumbering and an amendment in 1993 to use gender-neutral language,[8] what is now Wis. Stat. § 971.36 has remained untouched by the Legislature since it was simplified in 1955.

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[8] *See* 1993 Wis. Act 486, § 731.

The Legislature then enacted nine other statutes since 1955 describing crimes as "thefts" and did not amend section 971.36 to exclude them from it. *See* n.6.

The evolution of section 971.36 shows that the Legislature did not intend to limit it to pleadings for the statutory crime of Theft under Wis. Stat. § 943.20. To the contrary, the Legislature had included language in prior versions of Wis. Stat. § 971.36 that limited it to specific statutory sections, but removed it to cover a broader array of acts. Then, in a push to simplify the statutes in 1955, the longer version of the statute was replaced simply with the generic reference to "thefts." And despite creating numerous types of thefts since then, the Legislature has not attempted to limit Wis. Stat. § 971.36's application to exclude pleadings for any of them.

The Legislature is presumed to know the law when it writes statutes. *City of Kenosha v. Labor and Industry Review Commission*, 2000 WI App 131, ¶ 17, 237 Wis. 2d 304, 614 N.W.2d 508. Here, the Legislature expressly removed the very language the defendants are asking this Court to write back into the statute and has itself declined to write it back in, while creating multiple crimes designated as "thefts," but did not limit Wis. Stat. § 971.36 to any particular type of theft. That is a powerful statement that "thefts" in Wis. Stat. § 971.36 should not be construed as "Thefts under section 943.20 only."

C. Lopez and Rodriguez's arguments fail.

Lopez and Rodriguez, in arguing to the contrary, take the following approach: (1) they misread *Kalal*; (2) they apply a faulty analysis to the statute and attribute arguments to the State that it did not make; (3) they advance an interpretation that creates absurd results; and

(4) they focus on irrelevant differences between the retail theft and theft statutes. Finally, they argue that the rule of lenity should apply. None of their arguments persuade.

1. Lopez and Rodriguez misread *Kalal*.

Lopez and Rodriguez's reading of *Kalal* is wrong. (*See* Pet. Br. 13–14.) They claim that "courts may look to the language of surrounding or closely-related statutes" only "[i]f the statutory language is deemed ambiguous." (Pet. Br. 14.) But *Kalal* says the opposite:

> [c]ontext is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; *in relation to the language of surrounding or closely-related statutes*; and reasonably, to avoid absurd or unreasonable results.

Kalal, 271 Wis. 2d 633, ¶ 46 (emphasis added). Indeed, this Court recently reaffirmed that "[e]valuation of the context of a statute *is part of a plain-meaning analysis* and includes a review of the language of 'surrounding or closely-related statutes, . . ." *Franklin*, 2019 WI 64, ¶ 13 (citing *Kalal*, 271 Wis. 2d 633, ¶ 46) (emphasis added).

This Court is obligated to consider the language of the surrounding statutes when interpreting Wis. Stat. § 971.36, because that context is part of a plain-meaning analysis. *Franklin*, 2019 WI 64, ¶ 13. And as explained, all of the surrounding statutes contain language limiting them to specific statutory sections. But no such language appears in Wis. Stat. § 971.36. Such a limitation therefore does not exist.

2. Lopez and Rodriguez's interpretation of the statute relies on faulty premises.

Lopez and Rodriguez then insist, with no support, that the word "theft" in Wis. Stat. § 971.36 must refer only to "Theft" under Wis. Stat. § 943.20. (Pet. Br. 15.) But they do not attempt to explain why that is so. Wisconsin Stat. § 943.20 is indeed called "Theft." And Wis. Stat. § 943.50 is called "Retail theft," just as Wis. Stat. § 943.46 is titled "Theft of video service," and Wis. Stat. § 943.74 is called "Theft of farm-raised fish." Lopez and Rodriguez do not explain why the word "theft" in Wis. Stat. § 943.20 is significant, but the word "theft" in all the other theft statutes is not. (Pet. Br. 15.)

Next, Lopez and Rodriguez contend that Wis. Stat. § 971.36 does not apply to Wis. Stat. § 943.50 because "[m]issing from the text of Wis. Stat. § 971.36 is anything regarding retail theft." (Pet. Br. 15.) That argument fails under its own weight. Wisconsin Stat. § 971.36 does not say anything about Theft under Wis. Stat. § 943.20, either. By Lopez and Rodriguez's logic, Wis. Stat. § 971.36 necessarily applies to nothing. But Wis. Stat. § 971.36 is not limited to any particular statutory section. It simply says in "any criminal pleading for theft." Wis. Stat. § 971.36(1). A pleading charging a defendant with Retail theft is a criminal pleading for theft. To hold otherwise is to ignore the commonsense meaning of "any criminal pleading for theft" and would also ignore the fact that there is no limitation to Wis. Stat. § 943.20 in Wis. Stat. § 971.36.

Lopez and Rodriguez accuse the State of asking this Court to "expand the application of Wis. Stat. § 971.36 to the whole of Chapter 943," and notes that it would then apply to

charges for criminal damage to property under Wis. Stat. § 943.01. (Pet. Br. 16.) But it is not, and has never been, the State's position that Wis. Stat. § 971.36 applies to the entirety of Chapter 943. Rather, the only reasonable interpretation of Wis. Stat. § 971.36's generic references to "any criminal pleading for theft," without any kind of language limiting it to a particular statutory type of theft, is that it applies to all types of theft. As the Legislature clearly did not designate criminal damage to property as a "theft" of such property, Wis. Stat. § 971.36 does not apply to criminal pleadings for criminal damage to property, nor to any other non-theft crime in Chapter 943.

3. Lopez and Rodriguez's interpretation of the statute leads to absurd results.

Lopez and Rodriguez further claim that "[r]eading Wis. Stat. § 971.36 as applying to more than the five modes of theft in Wis. Stat. § 943.20 would lead to a multitude of absurd results," but fail to explain how. (Pet. Br. 16.) Yet, as discussed below, it is Lopez and Rodriguez's interpretation of Wis. Stat. § 971.36, not the State's, that leads to absurd results.

The progressive penalty for Retail theft shows that the Legislature did not intend pleadings for Retail theft to require a separate charge for each separate event in a single case, because doing so would completely gut that penalty structure. *Cf. Schumacher*, 144 Wis. 2d at 411. If Lopez and Rodriguez are correct that Wis. Stat. § 971.36 does not apply to Retail theft under Wis. Stat. § 943.50, an offender could be charged with felony Retail theft only if the merchandise

stolen during any single incident meets the monetary threshold.[9]

By that logic, if an offender steals $358 worth of merchandise from the same store in the same manner every day for a week, the State could charge him only with seven Class A misdemeanors if it charged him with Retail theft.[10] This would be so even though he stole $2506 worth of merchandise—well over the $500 felony threshold—from the same merchant as part of a single design and plan because the amounts could not be aggregated. Illogically, though, if the State decided to charge him with Theft under Wis. Stat. § 943.20, *then* the amounts could be aggregated and the State could charge him with a single felony count of Theft of more than $2500.

Under that interpretation an offender could steal $499 worth of merchandise from the same store every day for a year (which would amount to $182,135 worth of merchandise), and the State could not charge the person with even a single count of felony Retail theft. Instead, under Lopez and Rodriguez's interpretation, the State could charge the person with: 365 Class A misdemeanor Retail thefts under Wis. Stat. § 943.50; 72 Class I felony Thefts under Wis. Stat. § 943.20(bf); 36 Class H felony Thefts under

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[9] Assuming that the State could not meet the criteria to aggregate the crimes under its inherent charging authority, as will be discussed in section II, *infra*.

[10] Though again, as will be explained in section II, in that scenario the State would have discretion to charge the thefts as a continuing event even without Wis. Stat. § 971.36 because they were committed at substantially the same time.

Wis. Stat. § 943.20(bm); 18 Class G felony Thefts under Wis. Stat. § 943.20(c); or one Class G felony Theft under Wis. Stat. § 943.20(c) for a single theft of property exceeding $10,000. But the State could not charge the person with *any* counts of felony Retail theft.

This result makes no sense, and it would render the progressive penalty structure for Retail theft and theft of services largely toothless. *Cf. State v. Grayson*, 172 Wis. 2d 156, 166–67, 493 N.W.2d 23 (1992) (holding that multiple charges for a continuing offense of failing to pay child support were necessary to assure proportionality between the harm caused and the punishment received). If Wis. Stat. § 971.36 does not apply to Retail theft, offenders who steal from the same store in the same manner on multiple occasions can be charged with a Class G felony for Retail theft only if the merchandise they steal on any single occasion is worth more than $10,000. But if they steal $10,000 worth of merchandise by stealing lesser amounts in a series of thefts, the State cannot charge the person with anything other than a litany of misdemeanor retail thefts. Indeed, a person who steals $2499 worth of retail merchandise from a single retailer could not be charged with *any* felony—either under Wis. Stat. § 943.50 or Wis. Stat. § 943.20—as long as he or she stole no more than $499 worth of merchandise at a time. That result cannot be right, given that the Legislature has designated theft of retail merchandise valuing $500 or more as a felony.

4. Lopez and Rodriguez's reliance on the jury instructions, the details of the two theft crimes, and non-theft statutes is inapposite.

Finally, Lopez and Rodriguez attempt to evade the logical, plain-meaning interpretation of Wis. Stat. § 971.36 by focusing on the differences between the crimes of Retail

theft and Theft. (Pet. Br. 17–24.) This attempt fails for multiple reasons.

First, Lopez and Rodriguez are wrong that the two crimes have a different statutory and penalty structures. (Pet. Br. 17–24.) Apart from the fact that the Wisconsin Jury Instructions on which they base their argument are an extrinsic source that should not be consulted unless the statutes are ambiguous, *Kalal*, 271 Wis. 2d 633, ¶ 46—and Lopez and Rodriguez have made no argument that any statute at issue here is ambiguous—Lopez and Rodriguez have shown only that the details of the two crimes are different, not the statutory structure.

As explained, Retail theft under Wis. Stat. § 943.50 and Theft under Wis. Stat. § 943.20 actually have an identical statutory structure. (*See supra* section I.B.) Both begin with a general statement that a person may be penalized as provided in the penalty subsection for committing any of the acts listed. Wis. Stat. § 943.20(1); Wis. Stat. § 943.50(1m). Both statutes then list the various modes of commission. Wis. Stat. § 943.20(1)(a)–(e); Wis. Stat. § 943.50(1m)–(1r). Five of the nine modes of committing Retail theft or theft of services match exactly the modes of committing Theft of moveable property under Wis. Stat. § 943.20(1)(a). *Compare* Wis. Stat. § 943.20(1)(a) *with* Wis. Stat. § 943.50(1r)(a)–(e). And both statutes then provide escalating penalties as the value of the property stolen increases. Wis. Stat. § 943.20(3); Wis. Stat. § 943.50(4)–(5). The two crimes have the same statutory structure.

Second, that the monetary thresholds for the penalties under sections 943.20 and 943.50 are different is also irrelevant; again, those are the details of the penalties, not the structure. (Pet. Br. 21–24.) Both crimes have escalating penalties as the value of the property taken increases; that

is the "penalty structure" for both Retail theft under Wis. Stat. § 943.50 and for Theft under Wis. Stat. § 943.20. The identical escalating penalty structure in the two statutes shows that the Legislature intended the two crimes to be treated as continuing offenses. *Cf. Schumacher*, 144 Wis. 2d at 411–12.

Next, Lopez and Rodriguez's argument that aggregating the crimes allows the State to "manipulate" the penalty for Retail theft is also unavailing. (Pet. Br. 22–23.) By Lopez and Rodriguez's logic, allowing any aggregation of the value of property stolen allows the State to "manipulate" the penalty for stealing. But it is Lopez and Rodriguez's position, not the State's, that arguably fosters "manipulation" of the penalty scheme. As shown above, if Lopez and Rodriguez are correct that Retail thefts cannot be aggregated in any circumstance, savvy thieves could steal hundreds of thousands of dollars from a retailer without ever facing a felony conviction by stealing no more than $499 of merchandise in any given episode.

Again, the Legislature provided that stealing more than $500 worth of merchandise from a single retailer is a felony. Lopez and Rodriguez stole $1452 worth of merchandise from one retailer over a 15-day period using a single deceptive scheme. They committed felony retail theft, and Wis. Stat. § 971.36 permits aggregation of the value of the property they stole to ensure that they receive the correct penalty.

The lack of case law addressing whether Wis. Stat. § 971.36 applies to any type of criminal pleading for theft does not carry the persuasive force Lopez and Rodriguez attempt to give it. (Petitioner's Br. 27–28.) As Lopez, Rodriguez, and the court of appeals noted, "the absence of any pertinent case law means no more than that this may be

an issue of first impression." *Lopez*, 385 Wis. 2d 482, ¶ 13; (Pet. Br. 28).

In short, the language of the Retail theft statute shows that the Legislature meant to penalize stealing $500 worth of merchandise or services from a merchant or intentionally possessing and using tools to prevent retail theft detection to steal merchandise as a felony, which the elements of Wis. Stat. § 943.20 did not necessarily allow. *Compare* Wis. Stat. § 943.20(1)(a)–(e) *with* Wis. Stat. § 943.50(1m)(f)–(h), (1r). And the lower monetary thresholds for the escalating penalties for Retail theft charges, *compare* Wis. Stat. § 943.20(3) *with* Wis. Stat. § 943.50(4), (4m), shows only the Legislature's recognition that Retail theft is a serious crime that typically involves thefts of lower-valued merchandise. Neither difference means that Retail theft is not a type of theft or that the Legislature exempted it from section 971.36 dealing with pleadings for theft.

This Court "look[s] to the common sense meaning of the statute to avoid unreasonable and absurd results." *State v. Kittilstad*, 222 Wis. 2d 204, 210, 585 N.W.2d 925 (Ct. App. 1998) *citing State v. Keith*, 216 Wis. 2d 61, 70, 573 N.W.2d 888 (Ct. App. 1997). But as shown, Lopez and Rodriguez's interpretation of Wis. Stat. § 971.36 is contrary to the common-sense meaning of the statute and leads to an absurd result. This Court should therefore reject it.

5. The rule of lenity does not apply here.

Lopez and Rodriguez also claim that if this Court "disagrees with [the defendants] argument and somehow finds the statute is ambiguous, then this court should apple the rule of lenity." (Pet. Br. 17.) There are two fundamental flaws with that contention.

First, Lopez and Rodriguez have made no argument that the statute is ambiguous. (Pet. Br. 12–36.) This Court does not find a statute ambiguous "simply because either the parties or the courts differ as to its meaning." *Seider v. O'Connell*, 2000 WI 76, ¶ 30, 236 Wis. 2d 211, 612 N.W.2d 659. A rejection of Lopez and Rodriguez's overly narrow interpretation of the statute does not equate to a finding that the statute is ambiguous.

Second, even if this Court were to deem Wis. Stat. § 971.36 ambiguous, the rule of lenity would not necessarily apply. The rule applies only "if a 'grievous ambiguity' remains *after* a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must 'simply guess' at the meaning of the statute." *State v. Guarnero*, 2015 WI 72, ¶ 27, 363 Wis. 2d 857, 867 N.W.2d 400 (emphasis added). Where no grievous ambiguity remains after the Court interprets the statute, the rule of lenity does not apply. *Id.*

Furthermore, "the rule of strict construction (of penal statutes) is not violated by taking the common-sense view of the statute as a whole and giving effect to the object of the legislature, if a reasonable construction of the words permits it." *State v. Rabe*, 96 Wis. 2d 48, 70, 291 N.W.2d 809 (1980) (citation omitted). There is no ambiguity, let alone a grievous one, that would cause a court to simply guess at the meaning of the statute after taking a commonsense view of the statute as a whole and the context in which it appears. The rule of lenity does not apply here.

In sum, the principles of statutory construction, including the plain language, context, and evolution of section 971.36 support the State's and the court of appeals' understanding of the statute. This Court should affirm for that reason. It could also affirm for a second reason: the

State nevertheless had inherent authority to charge as it did, as discussed below.

II. Even absent section 971.36, the State has inherent authority to determine the unit of prosecution and charge these seven retail thefts as a single crime.

A. Legal principles on the State's discretion to determine the unit of prosecution.

The State has discretion to determine the unit of prosecution—in other words, "to charge a defendant with one continuing offense based on multiple criminal acts"—when certain criteria are met. *State v. Jacobsen*, 2014 WI App 13, ¶ 18, 352 Wis. 2d 409, 842 N.W.2d 365. Those criteria include circumstances where "the separately chargeable offenses are committed by the same person at substantially the same time and relating to one continued transaction." *Id.* (quoting *State v. Miller*, 2002 WI App 197, ¶ 23, 257 Wis. 2d 124, 650 N.W.2d 850).

"This court has consistently held that acts which alone constitute separately chargeable offenses, 'when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense' without violating the rule against duplicity." *State v. Lomagro*, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983) (citation omitted). "If the defendant's actions in committing the separate offenses may properly be viewed as one continuing offense, it is within the state's discretion to elect whether to charge 'one continuous offense or a single offense or series of single offenses.'" *Id.* (citation omitted).

When "a complaint joins several criminal acts that can properly be characterized in one count and is challenged by the defendant on grounds of duplicity, the trial court must

examine the allegations in light of the purposes of the prohibition against duplicity." *Lomagro*, 113 Wis. 2d at 589. There are five purposes for the prohibition against duplicity. *Id.* at 586–87. They are:

> (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity.

Id. A complaint joining multiple acts that can be characterized as a continuing offense into one count "may be found duplicitous only if any of these dangers are present and cannot be cured by instructions to the jury." *Id.* at 589.

B. The State had discretion to charge these seven thefts as a single felony because they were committed by the same people at substantially the same time as part of a continuing transaction, and there are no duplicity concerns.

All the criteria described in *Jacobsen*, 352 Wis. 2d 409, ¶ 23, are present here.

To start, there is no dispute that these seven offenses were committed by the same persons and against the same victim: Lopez, Rodriguez, and Walmart.

Contrary to Lopez and Rodriguez's assertion, these incidents occurred at substantially the same time. (Pet. Br. 29–30.) Seven incidents occurring over two weeks—essentially a theft every other day—is a much shorter time span than this Court has found permissible in other cases. *See, e.g.*, *State v. George*, 69 Wis. 2d 92, 100, 230 N.W.2d 253 (1975); *Miller*, 257 Wis. 2d 124, ¶¶ 32–34 (holding that a four-year time span covering 30 to 40 sexual assaults was

permissible); *Blenski v. State*, 73 Wis. 2d 685, 688–89, 692, 245 N.W.2d 906 (1976) (a single charge for soliciting charitable contributions without registration spanning the Christmas seasons of 1972 and 1973 was not duplicitous); *cf. State v. Molitor*, 210 Wis. 2d 415, 421–23, 565 N.W.2d 248 (Wisconsin Stat. § 948.025 allowing several sexual assaults that occurred over a six-week period to be charged as a continuous crime did not violate constitutional prohibition against duplicitous charges.).

Finally, the seven thefts were part of a single continuing offense. "[A] continuing offense is one which consists of a course of conduct enduring over an extended period of time." *Miller*, 257 Wis. 2d 124, ¶ 13. Here, Lopez and Rodriguez engaged in a course of conduct: they pretended to ring up all of Rodriguez's items by manipulating her transactions at the self-checkout register. And that course of conduct endured over an extended period of time: 15 days. All seven of the thefts were perpetrated according to this scheme, the same way each time, and only days apart. It does not matter that "there were likely days that Ms. Lopez did not work" or that "[t]here were also likely days when Ms. Lopez was working where Ms. Rodriguez did not visit Walmart." (Pet. Br. 31.) Over the extended period of days including those when Lopez was working and Rodriguez did visit Walmart, they stole merchandise according to the same course of conduct; they therefore committed a continuing offense.

Lopez and Rodriguez make no real argument that these retail thefts were not a continuous event and instead rely on the fact that they were committed on seven separate days. (Pet. Br. 30–31.) That, though, is an argument that the crimes were not committed at substantially the same time, albeit a misplaced one.

Lopez and Rodriguez's citations to *State v. Stevens*, 123 Wis. 2d 303, 322, 367 N.W.2d 788 (1985), and *State v. Tappa*, 127 Wis. 2d 155, 170, 378 N.W.2d 883 (1985), are also misplaced. (Pet. Br. 31.) Neither case dealt with duplicity challenges.

In *Stevens*, the defendant alleged that he was convicted of both a greater offense and a lesser included offense of the same crime. *Stevens*, 123 Wis. 2d at 321–323. That is a multiplicity concern, not a duplicity one. *Tappa* also dealt with a multiplicity challenge. There the State charged the defendant with two counts of violating Wis. Stat. § 943.20(1)(a) for concealing and for transferring the same property. *Tappa*, 127 Wis. 2d at 160–61.

Multiplicity is charging a single offense in more than one count, if the Legislature did not intend multiple punishments. *State v. Ziegler*, 2012 WI 73, ¶¶ 59–63, 342 Wis. 2d 256, 816 N.W.2d 238. It is only when considering whether the offenses are identical in fact under the *multiplicity* test that this Court asks whether the offenses are "separated in time or are significantly different in nature." (Pet. Br. 30); *Ziegler*, 342 Wis. 2d 256, ¶ 60; *Stevens*, 123 Wis. 2d at 322; *Tappa*, 127 Wis. 2d at 161–63. But this test is irrelevant for a duplicity challenge. When duplicity is at issue, the State has charged multiple acts as a single continuous offense—the acts are always different in fact if duplicity is at issue. *See Lomagro*, 113 Wis. 2d at 589. Simply put, Lopez and Rodriguez rely on the wrong principle and the wrong test for their claim that their conduct cannot be a continuous transaction because it involved separate acts on different days. Therefore, their argument must fail.

Further, *State v. Spraggin*, 71 Wis. 2d 604, 239 N.W.2d 297 (1976), on which Lopez and Rodriguez principally rely, does not assist them. (Pet. Br. 31.) The question there was whether two counts of receiving stolen

property for buying a stolen TV on one occasion and two stolen guns on another could properly be charged as a single felony under a conspiracy theory of liability. *Spraggin*, 71 Wis. 2d at 614–15. This Court held that it could not, but there was never any allegation that the defendant received the two items of stolen property as part of an ongoing transaction or continuous offense. *Id.* This result makes sense: a person who simply buys something from a thief when an opportunity arises is not part of a continuing transaction or ongoing deceptive scheme.

But *Spraggin* has no bearing on this case. Unlike in *Spraggin*, Lopez and Rodriguez were not charged with receiving stolen property, they were not charged with conspiracy, and the evidence showed that they were indeed engaged in a continuing offense of stealing merchandise together according to their deceptive scheme. *Spraggin* is inapposite here.

Rather, the question is whether combining the offenses would violate any of the principles against duplicity listed in *Lomagro*, and a jury instruction could not cure the violation. *Lomagro*, 113 Wis. 2d at 589. And under the correct analysis, the complaint is not duplicitous.

The complaint alleged very clearly the dates on which the seven acts occurred, and the amount the State was alleging the two stole on each date. (R. 2:6.) There is no possibility the complaint insufficiently informed Lopez and Rodriguez of the basis for the charge. *Lomagro*, 113 Wis. 2d at 587.

There is no danger that Lopez and Rodriguez could be subject to double jeopardy. There are "three interests that are protected by the double jeopardy provision: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the

same offense after conviction. And it protects against multiple punishments for the same offense." *Tappa*, 127 Wis. 2d at 162 (citation omitted). The dates alleged in the complaint set clear limits on what acts were included. (R. 2:6.) The State could not hereafter charge Lopez and Rodriguez again for one of these thefts after either conviction or acquittal. Since the State has charged them with only one crime, there is no possibility they will face multiple punishments for a single offense.

And the question in this case is simple: did Lopez and Rodriguez steal more than $500 worth of merchandise from Walmart between January 10 and January 25? There is no question that they did: all seven thefts were caught on surveillance video with such clarity that Walmart was able to detail to the penny the amount of each theft and the specific day it occurred. (R. 2:6.) Thus, there is no suggestion that any prejudice or confusion will arise from evidentiary rulings, that Lopez and Rodriguez risk being inappropriately sentenced, or that there is any risk of uncertainty about a unanimous verdict. And even if any of these risks were present, the simplicity of this case ensures that they could be cured by a jury instruction.

Lopez and Rodriguez claim that this charge implicates "issues with jury unanimity," but they again fail to explain how or why there would be a jury unanimity problem on the facts *of this case*. (Pet. Br. 33–35.) They instead rely on a hypothetical, and multiple rhetorical questions, and none of them are remotely close to these facts—so, their only argument is that in a different case there could be jury unanimity problems. (Pet. Br. 33–34.) But that says nothing about why there would be a jury unanimity problem in this case.

Nor do Lopez and Rodriguez attempt to explain why any unanimity issue could not be cured by a jury instruction

informing the jury that in order to find the defendants guilty, they must unanimously agree that Lopez and Rodriguez stole merchandise valuing more than $500 between January 10 and January 25. (Pet. Br. 33–34.) That alone means Lopez and Rodriguez's jury unanimity argument must fail. *Lomagro*, 113 Wis. 2d at 589.

Finally, Lopez and Rodriguez argue that statutes like Wis. Stat. § 971.36 would not be necessary if the State had discretion to charge a series of events like this as a single crime.[11] (Pet. Br. 35–36.) But they have overlooked the major difference between when the State has inherent prosecutorial discretion to charge multiple acts as a single offense and when it needs statutory authority to do so: the time frame.

In the absence of a statute, the State can charge multiple acts as a single offense only if they were *committed at substantially the same time* as part of a single continuing scheme. *Lomagro*, 113 Wis. 2d at 587–88. Section 971.36 and its neighboring statutes eliminate that time frame and allow all violations that are committed as part of a single intent or design to be prosecuted together no matter when the acts were committed. *See* Wis. Stat. § 971.36(3) (allowing multiple thefts to be prosecuted as a single crime if any of the conditions in subsections (a) through (c) are met regardless of the time frame over which the separate thefts took place.)

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[11] Lopez and Rodriguez seem to argue that the State has no discretionary aggregation authority at all. (Pet. Br. 35.) But as *Lomagro* discusses, this Court has recognized the State's authority to charge multiple acts committed by the same person at substantially the same time in a single count for over 100 years. *Lomagro*, 113 Wis. 2d at 587.

The State properly exercised its discretion to determine the unit of prosecution in this case. These seven thefts were committed by the same parties against the same victim at substantially the same time as part of a continuing transaction. The State did not need statutory authorization to properly join these offenses into a single charge.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 28th day of June 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

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 10,900 words.

_____
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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 with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of June, 2019.

_____
LISA E.F. KUMFER
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2017AP000913-CR; 2017AP000914-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

AUTUMN MARIE LOVE LOPEZ,

Defendant-Respondent-Petitioner.

On Appeal from an Order of the
Green County Circuit Court,
the Honorable James R. Beer, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532
loshawk@opd.wi.gov

SUSAN E. ALESIA
Assistant State Public Defender
State Bar No. 1000752
alesias@opd.wi.gov

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440

Attorneys for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

I. The plain language of the statute is clear, Wis. Stat. § 971.36 applies to Wis. Stat. § 943.20.

To reiterate, theft means theft. Wis. Stat. § 971.36 says "any *theft* proceeding," and Wis. Stat. § 943.20 delineates fives modes of *theft*. The statute could not be any clearer. This court held in ***Kalal*** that "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel.* ***Kalal v. Circuit Court for Dane County,*** 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110, quoting ***Seider v. O'Connell,*** 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659; *see also* ***State v. Setagord,*** 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997); ***State v. Williams,***198 Wis. 2d 516, 525, 544 N.W.2d 406 (1996); ***State v. Martin,*** 162 Wis. 2d 883, 893–94, 470 N.W.2d 900 (1991). "Statutory language is given its common, ordinary, and accepted meaning." *Id.*, quoting ***Bruno v. Milwaukee County,*** 2003 WI 28, ¶¶8, 20, 260 Wis. 2d 633, 660 N.W.2d 656; *see also* Wis. Stat. § 990.01(1).

It is true that "statutory language is interpreted in the context in which it is used; not isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Kalal***, 2004 WI 58, ¶46. What the state

attempts to do, however, is manipulate the statute in order to give the plain meaning of theft an absurdly broad application. The state argues that absent from Wis. Stat. § 971.36 is any restrictive definition for the word "theft." (State's brief at 12). But, the state's argument fails to address that Wis. Stat. § 971.36 does not *include* any language regarding its application to other, newer statutes that are theft-like.

Additionally, the legislature did not need to include Wis. Stat. § 943.20 in the text of Wis. Stat. § 971.36, because it was perfectly clear that theft means theft. The state focuses on the word *any* in "in any criminal pleading for theft," and completely misses the fact that any criminal pleading for theft plainly refers to the five modes of theft delineated in Wis. Stat. § 943.20. To read the statute more broadly would be absurd.

The state indicates that it is illogical to conclude that the legislature did not intend retail theft to be considered a theft when it called the crime a theft and defined it exactly the same way as theft. (State's brief at 13). This statement ignores the requirement of this court to read the plain meaning of the text and to "presume that a legislature says in a statute what it means and means in the statute what is says there." ***Conneticut Nat'l Bank v. Germain,*** 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992*).; see also* ***Hartford Underwriters Ins. v. Union Planters Bank,*** 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000).

Theft means theft. Asking this court to read in extra words such as "retail" or "of farm raised fish" is inconsistent with this court's precedent.

II. The state's argument regarding statutory context and legislative history are misplaced.

The court need not go further than the plain meaning of the statute. However, if the court determines that the statute is ambiguous, then extrinsic evidence demonstrates what the legislature meant, and the state's arguments do not support its position.

A. The state's legislative history argument fails.

The state argues that the legislature hasn't excluded anything from the statute after passage of other Wis. Stat. Ch. 943 crimes. However, the legislature has not included any of the crimes, either. In fact, while the legislature added additional, new crimes to Ch. 943, Wis. Stat. § 971.36 has stayed the same. There was no addition to include any other newly created statutes that are 'theft-like.' Thus, the only reasonable interpretation of the unchanging nature of Wis. Stat. § 971.36 is that it is meant, and has always meant, to cover only Wis. Stat. § 943.20, as theft refers to theft. The state's recitation of the evolution of Wis. Stat. § 971.36 simply provides additional support that, if the legislature meant to expand the meaning of theft in Wis. Stat. § 971.36 to

cover any and all theft-like proceedings in Wis. Stat. Ch. 943, it would have explicitly done so.

B. The state's argument regarding other aggregation statutes also fails.

Wisconsin Statute § 971.365 covers certain controlled substances. While it is true that those substances are defined by a statutory number instead of name, this makes sense—the legislature did not feel the need to include Wis. Stat. § 943.20 in Wis. Stat. § 971.36 because theft means theft, and no further explanation was required—the application was simple and clear.

Furthermore, the state's reliance on other aggregating statutes such as Wis. Stats. §§ 971.366 and 971.367 directly contradicts its position that Wis. Stat. § 971.36 "applies to all types of theft." (State's brief at 25). Use of another person's identifying information is a 'theft-like' offense. Basically, it criminalizes the use of another's information to obtain anything of value. *See* Wis. Stat. § 943.201(2). But what purpose, then, would Wis. Stat. § 971.366 serve if Wis. Stat. § 971.36 applies to "all types of theft"? The same can be said for Wis. Stat. § 971.367, which discusses aggregation of cases of false statements to financial institutions. Wisconsin Statute § 946.79, in short, criminalizes the falsification of one's identity during a financial transaction with a financial institution. *See* Wis. Stat. § 946.79. This is also theft-like, in that it involves acts that deprive a person or entity of

some good or service without consent. If Wis. Stat. § 971.36 is to apply broadly to all theft-like offenses, then the §§ 971.366 and 971.367 are meaningless. The state does not and cannot provide an explanation for the problematic interpretation and application of Wis. Stat. § 971.36 when read in conjunction with Wis. Stat. § 971.366 and Wis. Stat. § 971.367.

C. The state's argument that other aggregation statutes are irrelevant fails.

As the state cites, "[s]tatutes are closely related when they are in the same chapter, reference one another, or use similar terms." ***State v. Reyes Fuerte***, 2017 WI 104, ¶27, 378 Wis. 2d 504, 904 N.W.2d 773. The state argues that because the Wis. Stats. §§ 943.24 and 943.41 are not in the same chapter as Wis. Stat. § 971.36 or do not reference each other that the argument is irrelevant. (State's brief at 18). However, what the state seemingly fails to address is the use of similar terms and functions.

The state fails to address the similarities in language between the statutes. Wisconsin Statute § 943.24 states "whoever within a 90-day period issues more than one check or other order amounting in the *aggregate* to more than $2,500." Wisconsin Statute § 943.41 states "if the value of money, goods, services, or property exceeds $2,500 but does not exceed $5,000, in a *single transaction or in separate transactions within a period not exceeding 6 months*." The state offers no explanation for the

similarities between these two statutes and language in Wis. Stat. § 971.36 regarding prosecution of multiple thefts as a single crime. The state provides no explanation for why these statutes, that contain similar references and language, do not serve the same purpose, although found in different places.

The state doesn't want the other aggregation statutes to be meaningful, because it shows that there is a fundamental flaw in their application of Wis. Stat. § 971.36 to anything other than Wis. Stat. § 943.20.

III. The state's interpretation and application of Wis. Stat. § 971.36 is overbroad leads to absurd results.

A. The state's argument that retail theft and theft "match exactly" and are both covered under § 971.36 is incorrect.

The state argues that retail theft is a kind of theft encompassed by the words "any criminal pleading for theft" because the word "theft" is used to define the crime, and "five of the nine modes of commission of Retail theft match exactly the five modes of commission of Theft of moveable property of another under Wis. Stat. § 943.29(1)(a)." (State's brief at 12-13). While the statutory layout is the same for both crimes, i.e. it lays out the definitions, the substantive crime, and the penalties, retail theft

contains elements that theft does not.[1] Specifically, theft does not require that the state prove that property was held for resale by the merchant and that the defendant knew that the property was merchandise held for resale by the merchant. For the state to suggest that the crimes are exactly the same is disingenuous. And, in fact, the state concedes that there are additional modes of retail theft not contemplated in the Wis. Stat. § 943.20. (State's brief at 28).

B. The state's absurd results argument fails.

The state argues that Wis. Stat. § 971.36 must apply broadly, otherwise offenders could steal $499 worth of merchandise from the same store everyday but only be charged with misdemeanors. (State's brief at 26). This is exactly right. The state seems to be concerned with an inability to manipulate the law in order to charge someone with a felony when they have only committed misdemeanors under the statute. This is not a legitimate concern, as these crimes typically do not involve savvy criminals, bringing a calculator to total up merchandise in order to avoid going over the $500 threshold, coming back without being detected or caught, day after day, to the same retailer, as part of some big scheme.

If the state feels it could charge a defendant under Wis. Stat. § 943.20 for theft in this situation, it certainly would have the option to do so. However,

[1] Notably, this same statutory layout is common, and can be found even in statutes pertaining to homicide.

there would be clear proof issues, as theft is a different crime than retail theft, requiring different elements to be proven before findings of guilt can be entered. That problem, however, is not a result for this court to be concerned with, and, rather, is a simple application of the law. It may not be one that the state likes, but the state cannot have it both ways.

C. The state fails to provide support for some assertions.

It should be noted that while the state asserted that Lopez's reliance on the jury instructions is 'inapposite,' it does not provide any support or argument to support the premise, and therefore is a concession by the state. The state completely ignores the jury instructions, as it directly contradicts its position. (State's brief at 27-28).

The rule of lenity does apply. The state asserts that Lopez has made no argument regarding the ambiguity of the statute and therefore cannot assert this position. (State's brief at 31). This is incorrect. Lopez has consistently argued that this court need not find the statute ambiguous, and therefore, the rule of lenity need not apply. However, Lopez, as is consistent with many arguments this court has heard, argues without conceding, that if this court determines that the statute is ambiguous, then extrinsic evidence still supports Lopez's position. In that case, the rule of lenity would apply.

The state also asserts that the rule does not apply as there is no grievous ambiguity. (State's brief at 31). This position completely discounts the difference in what would be a misdemeanor conviction versus a felony conviction. To suggest that the collateral consequences of a felony conviction, issues with housing, inability to own a firearm, or vote, are not grievous, as compared to misdemeanor consequences ignores the real world.

IV. The state does not have the inherent authority to charge individual retail thefts as one theft.

The state cannot use its inherent authority to charge these seven retail thefts as a single felony. Lopez agrees that the state has discretion to determine the unit of prosecution. ***State v. Jacobsen,*** 2014 WI App 13, ¶18, 352 Wis. 2d 409, 842 N.W.2d 365. (State's brief at 32). However, ***Jacobsen*** does not give the state unfettered discretion. Pursuant to ***State v. Lomagro***, 113 Wis. 2d 582, 587, 335 N.W.2d 583 (1983), the state can only charge multiple acts as one criminal offense if the incidents occur at substantially the same time and are part of a continuing transaction. *Id.* Neither of those criteria are met in this case.

A. The criteria in ***Jacobsen*** has not been met.

As to timing, the state's only support for their position relies on inapplicable cases. The state asserts that the two-week span in this case is shorter than the time spans found permissible by the court in

other cases of sexual assault. *See* ***State v. Miller***, 2002 WI App 197, 257 Wis. 2d 124, 650 N.W.2d 850; ***State v. George,*** 69 Wis. 2d 92, 100, 230 N.W.2d 253 (1975); ***State v. Molitor***, 210 Wis. 2d 415, 421-23, 565 N.W.2d 248 (Ct. App. 1997). It makes sense that sexual assaults may be grouped because it is often hard for victims to pinpoint exact days and there is often delayed reporting. The same is not true of retail theft, where there is no delay in reporting or question as to when they occurred. Furthermore, sexual assault statutes are different from retail theft, which sets penalties based on the value of merchandise stolen. The structure of the retail theft statute itself indicates the legislature intended for charges to be based on the values of items taken on specific dates. Finally, in ***Molitor***, the court pointed out the language of Wis. Stat. § 948.025 itself showed that the legislature intended to create a single crime for repeated sexual assaults. 210 Wis. 2d 415, 421. The same is not true of the retail theft statute, which is void of language regarding grouping separate acts.

B. This case implicates duplicity, not multiplicity.

The state argues citation of ***State v. Tappa,*** 127 Wis. 2d 155, 378 N.W.2d 883 (1985) and ***State v. Stevens,*** 123 Wis. 2d 303, 367 N.W.2d 788 (1985), are inapplicable because those cases did not deal with duplicity concerns. (State's brief at 35). However, the state seems to miss the point of Lopez's argument. Lopez does not rely on these cases to assert that her case involves multiplicity.

Tappa demonstrates how this court has determined if a defendant has committed "separate volitional acts." 127 Wis. 2d 155, 170. This inquiry is relevant to the determination of whether or not the retail thefts in this case were committed at substantially the same time and related to one continued transaction, as to satisfy the test in ***Lomagro***. The seven misdemeanor retail thefts committed here are separate acts, given that there was "ample time for the Defendant to reflect on [her] actions and recommit [herself] to the criminal enterprise." *Id.* at 170.

Similarly, Ms. Lopez cites ***Stevens*** to illustrate how the separation of offenses by a significant period of time is relevant to the determination of whether offenses are different in fact. Again, in this case, the discussion in ***Stevens*** provides relevant guidance for this court on how to determine whether the seven, separate, misdemeanor instances of retail theft are not part of a continued transaction.

The state also argues that reliance on ***State v. Spraggin,*** 71 Wis. 2d 604, 239 N.W.2d 297 (1976) does not assist. (State's brief at 35-36). This is simply wrong. While it is true that the charges at issue in ***Spraggin*** involved conspiracy to receiving stolen property, the state's attempt to charge conspiracy of different acts of receiving stolen property as one felony act because of the aggregate felony value of the property was forbidden. *Id*. In fact, the court discusses a similar issue as is presented here in its analysis*:* "[a] conspiracy of successful nickel-and-

dime shoplifters still are criminally responsible for only misdemeanors, not felony theft." *Id*. at 615.

The state misses the relevance of these cases and therefore failed to address the actual substance of the arguments.

C. This case deals with problems surrounding jury unanimity, not double jeopardy.

The state seems to argue a red herring to this court regarding double jeopardy. (State's brief at 36-37). As discussed previously, the state's charging discretion is limited by the purposes of the prohibition against duplicity. (*See* Brief in Chief at 32). Apparently the state thinks that Lopez has asserted a claim of double jeopardy, which she has not. Instead, Lopez argues that there is a problem with guaranteeing jury unanimity.

The state further argues that there are no concerns with guaranteeing jury unanimity in this case. However, while Lopez's case may not yet have specific implications regarding jury unanimity, it might, depending how the case was presented to a jury. Ultimately, this court can and must look to the broader implications of this decision and how it would affect other, similar cases. This court must protect jury trials as the fundamental basis for our justice system, requiring that procedure and process is fair and that juries cannot and do not convict someone improperly.

The state's suggestion that unanimity problems could be cured by a jury instruction is not sufficient. The hypothetical presented by Lopez, which is completely appropriate when assessing problems with how a case will have a broader impact, demonstrates that the potential problems with a jury verdict may not become apparent until after the verdict is read, or when polling the jury, or until juror questionnaires are sent out after trial. A jury instruction is not sufficient to cure issues unknown to the parties before deliberations. Endorsing the state's argument would suggest that this court is content with the inevitable mistrials and retrials that would result from jury unanimity issues.

CONCLUSION

The charges against Lopez are duplicitous and implicate jury unanimity. The state does not have the authority to charge Lopez with felony theft, and therefore this court should reverse the court of appeals.

Dated this 15th day of July, 2019.

Respectfully submitted,

KELSEY LOSHAW
Assistant State Public Defender
State Bar No. 1086532

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2879
loshawk@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,991 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of July, 2019.

Signed:

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KELSEY LOSHAW
Assistant State Public Defender