COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2253-CR **Cir. Ct. No. 2013CF786**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS D. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. After a traffic stop in Kenosha County, Travis D. Williams tried to elude law enforcement officers by leading them on an eighteen-mile, high-speed chase that ended in Racine County. He was charged first in Racine County and then in Kenosha County with attempting to flee an officer as a repeater and was convicted on his no-contest and guilty pleas, respectively.[1] After his Kenosha County conviction, Williams filed a motion alleging that a second conviction for the single offense of fleeing an officer violated his right to be free of double jeopardy. The motion was denied.

¶2 Here, Williams again alleges multiplicity and a double-jeopardy violation. He asks that we vacate his guilty pleas and sentences and dismiss with prejudice the Kenosha County attempted-fleeing conviction. We affirm the judgment of conviction and the order denying his postconviction motion.[2]

¶3 Both the United States and Wisconsin Constitutions protect a criminal defendant against being twice placed in jeopardy for the same offense. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 8. One of the protections embodied in the double jeopardy clause, and the one germane to this case, is "protection against multiple punishments for the same offense." ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998).

[1] Racine County also charged Williams with first-degree recklessly endangering safety and second-offense reckless driving -- endangering safety. The recklessly-endangering-safety charge was dismissed and read in; the reckless-driving charge was dismissed outright. Besides attempt to flee an officer, Kenosha County charged Williams with first-degree recklessly endangering safety, as a repeater, and taking and driving a motor vehicle without consent. Williams pled guilty to the reckless-endangerment charge; the charge of taking and driving a motor vehicle without consent was dismissed and read in.

[2] As Williams' multiplicity claim can be resolved based on the record, it can be raised despite the generally applied guilty plea waiver rule, and we will address it on the merits. *See* ***State v. Kelty***, 2006 WI 101, ¶39, 294 Wis. 2d 62, 716 N.W.2d 886.

¶4 Williams raises a "continuous offense" challenge. The issue turns on whether his continuous attempt to elude an officer at different places or times constitutes one ongoing crime or several discrete offenses. *See* ***State v. Rabe***, 96 Wis. 2d 48, 65-66, 291 N.W.2d 809 (1980). Convictions are multiplicitous, and thus unconstitutional, when a defendant is charged in more than one count for a single offense. ***Id.*** at 61. "The double jeopardy clause bars the State from dividing a single offense into multiple charges." ***Lechner***, 217 Wis. 2d at 413.

¶5 A multiplicity claim presents "a question of law subject to independent appellate review." ***State v. Multaler***, 2002 WI 35, ¶52, 252 Wis. 2d 54, 643 N.W.2d 437. We analyze multiplicity claims under a two-part test. We first examine whether the offenses are identical in law and fact. ***Id.*** Second, we turn to whether the legislature intended multiple punishments for the conduct and offenses at issue. ***Id.*** "If the offenses are identical in law and fact, a presumption arises that the legislature did not intend to authorize cumulative punishments." ***State v. Ziegler***, 2012 WI 73, ¶61, 342 Wis. 2d 256, 816 N.W.2d 238. "The State may rebut that presumption only by a clear indication of contrary legislative intent." ***Id.*** "Conversely, if the offenses are different in law or fact, the presumption is that the legislature intended to permit cumulative punishments." ***Id.***, ¶62. If different in law or fact, the defendant must show a clear legislative intent that cumulative punishments are not authorized. *See* ***State v. Davison***, 2003 WI 89, ¶45, 263 Wis. 2d 145, 666 N.W.2d 1.

¶6 Since Williams pled guilty or no contest to two separate counts of violating the same statutory provision, the offenses are identical in law. *See* ***Lechner***, 217 Wis. 2d at 414. His challenge thus hinges on persuading us that the two charges are identical in fact. Offenses are not identical in fact if the offenses either were separated in time or are of a significantly different nature. ***State v.***

Eisch, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980). The separated-in-time inquiry "asks whether there was sufficient time for reflection between the acts" to allow a recommitment to the criminal conduct. ***Multaler***, 252 Wis. 2d 54, ¶56. "The test for whether offenses are significantly different in nature is whether a conviction for each offense requires proof of an additional fact that a conviction for the other offense does not," or "if each requires a 'new volitional departure in the defendant's course of conduct.'" ***State v. Warren***, 229 Wis. 2d 172, 180, 599 N.W.2d 431 (Ct. App. 1999) (citation omitted).

¶7 A Kenosha County sheriff's deputy stopped Williams for speeding. As he walked toward Williams' car, Williams drove off. The deputy gave pursuit. Williams cut through a store parking lot; cut abruptly in front of cars; passed vehicles in no-passing zones and another as it entered a construction zone where workers were present, causing the car to brake suddenly to avoid a collision; drove through an intersection on a red light; forced numerous vehicles either off the road or to take sudden evasive action; ran clearly posted stop signs at up to 50 mph; and slowed to 10 mph when a large front-end loader pulled out in front of him, then passed that vehicle and again sped up. The deputy stopped his pursuit due to safety concerns. Williams continued his flight.

¶8 A state trooper activated his squad's emergency lights and took up the chase. Williams sped on, driving over 100 mph; repeatedly crossed the center line; passed cars despite oncoming traffic; passed a school bus that had its red lights flashing and "stop arm" extended; continued on into Racine County where he ignored posted speed limits of 35 and 55 mph and accelerated to 110 mph; and drove around vehicles to dodge tire-deflation devices law enforcement officers had set up. The trooper finally was able to force Williams' vehicle to stop.

¶9 Williams was convicted of two counts of attempting to flee an officer, contrary to WIS. STAT. § 346.04(3) (2015–16).[3] Under that statute:

> (1) No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle,
>
> (2) shall knowingly flee or attempt to elude any traffic officer,
>
> (3) by wil[l]ful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians.

State v. Sterzinger, 2002 WI App 171, ¶9, 256 Wis. 2d 925, 649 N.W.2d 677. As is relevant here, the second element may be demonstrated by willful disregard of an officer's signal so as to interfere with or endanger the officer, vehicles, or pedestrians or by increasing the speed of the vehicle. ***State v. Beamon***, 2013 WI 47, ¶35, 347 Wis. 2d 559, 830 N.W.2d 681.

¶10 In a similar case, the defendant argued that his two convictions for second-degree recklessly endangering safety violated double jeopardy because they arose from a single half-mile episode of reckless driving lasting only thirty seconds. ***Lechner***, 217 Wis. 2d at 413, 415. The ***Lechner*** court disagreed, concluding that Lechner's brief flight comprised separate acts of reckless driving. ***Id.*** at 415. He did not simply pass a string of cars in one action but, while driving well over the posted speed limit, at least twice passed vehicles in a no-passing zone and abruptly reentered his lane, forcing the other drivers to take evasive action to avoid a collision. ***Id.*** at 415-16. Each decision to recklessly pass each successive vehicle, the court said, was the result of "a fresh impulse" involving "a

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

separate, conscious decision to act," and thus constituted "at least two separate and distinct criminal acts of second-degree reckless endangerment." ***Id.*** at 416.

¶11 So too here. Williams's actions of cutting through a store parking lot, slowing behind a piece of large machinery then re-accelerating, continuing his flight when the deputy abandoned pursuit and the trooper took up the chase, failing to slow for a stopped school bus, crossing the county line, accelerating to 110 mph, and evading tire-deflation devices provided an opportunity for "a separate, conscious decision to act," ***id.***—time in which he recommitted himself to the criminal conduct, s***ee Multaler***, 252 Wis. 2d 54, ¶56.

¶12 To illustrate, in Kenosha County, Williams riskily and repeatedly passed other vehicles, accelerated to high speeds in an attempt to flee from the deputy and from the state trooper, both of whom signaled him to stop, and failed to stop for two stop signs, a red light, and a school bus. In doing so, he endangered the deputy and the trooper, the occupants of the vehicles he passed, oncoming traffic, construction workers, and possibly schoolchildren.

¶13 In Racine County, Williams endangered the trooper and the occupants of nearby vehicles as he fled, driving 110 mph in zones with posted speed limits of 35 and 55 mph. Williams thus violated WIS. STAT. § 346.04(3) at least once in each county.[4] The two counties' allegations also necessarily are different in fact, as "the conduct had to have occurred at different times [because

[4] Where two or more acts are requisite to the commission of any offense, venue may be in any county in which any of the acts occurred. *See* WIS. STAT. § 971.19(2); *see also* ***State v. Swinson***, 2003 WI App 45, ¶¶20-21, 261 Wis. 2d 633, 660 N.W.2d 12.

Williams] could not have been in two different locations at the same time." ***State v. Nommensen***, 2007 WI App 224, ¶9, 305 Wis. 2d 695, 741 N.W.2d 481.

¶14 As Williams' attempted-fleeing charges were factually distinct, he had to show a clear legislative intent that cumulative punishments are legislatively unauthorized. *See* ***Davison***, 263 Wis. 2d 145, ¶45. He made no effort in that regard, however, and thus has not defeated the presumption that the legislature intended to permit multiple punishments. While we technically need not address legislative intent any further, *see* ***State v. Koller***, 2001 WI App 253, ¶30, 248 Wis. 2d 259, 635 N.W.2d 838, *modified on other grounds by* ***State v. Schaefer***, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760, we will do so for the sake of completeness.

¶15 We examine four factors to determine legislative intent: (1) the statute's relevant language, even if unambiguous; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct. ***State v. Patterson***, 2010 WI 130, ¶16, 329 Wis. 2d 599, 790 N.W.2d 909. First, WIS. STAT. § 346.04(3)[5] uses singular phrasing: "a vehicle," "a visual or audible signal," "a traffic officer, or marked police vehicle," "any traffic officer," "the police vehicle," "the traffic

[5] WISCONSIN STAT. § 346.04(3) provides:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

officer," "an attempt." In another case, this court examined whether the intended unit of prosecution under WIS. STAT. § 948.12 is each individual image or the device on which multiple images are stored. We concluded that the statute's use of singular terminology indicated that the legislature intended prosecution for each image on a computer disk, just as it would be appropriate to bring separate charges for separate photographs in a traditional photo album. ***Multaler***, 252 Wis. 2d 54, ¶¶64, 66. Similarly here, we conclude that the language of § 346.04(3) should be read to mean that a person violates this statute every time he or she performs an act that constitutes an attempt to flee or elude an officer.[6]

¶16 The legislative history likewise indicates that multiple convictions are proper here. In 1993, the legislature amended the penalty scheme to more

[6] Williams argues that the circuit court erroneously concluded that the two convictions were proper because Williams disregarded the two officers' signals to stop *and* repeatedly accelerated in an attempt to elude the officers. He contends increasing speed or disregarding an officer's signal are only alternative means of committing the same crime, not separate volitional acts that each could support another charge. We read the court's statement to mean that Williams' actions supported two charges whether viewed as a failure to heed an officer's signal *or* viewed as increasing his speed so as to elude an officer. He then argues:

> [U]nder the circuit court's rationale, if six police cars had been chasing Mr. Williams at the same time, the State could have charged him [with] six counts of attempting to flee/elude an officer under Wisconsin Statute § 306.04(3), because he purportedly would have been making the "different intelligent acts" to not comply with each of these signals. Or, under the circuit court's rationale, the State could have charged Mr. Williams with a separate count for every time he increased his speed.

Conversely, the State argues that limiting "a defendant who forces 100 vehicles off the road during an hour-long, high-speed chase" to one fleeing conviction—the same "as a defendant who engaged in a one-minute flight that endangered nobody except perhaps the pursuing officer"—would produce an absurd result.

We entertain neither hypothetical, and address only the two-conviction question that is before us.

harshly punish fleeing, due to the inherent safety risks created regardless of whether actual injury or property damage results. *See* ***Sterzinger***, 256 Wis. 2d 925, ¶18. Multiple convictions for separate acts of fleeing serve the legislative goal of discouraging behavior that poses a risk or likelihood of harm to others.

¶17 The nature of the proscribed conduct also supports multiple convictions. Multiple charges under a single statute are permissible if the facts underlying the charges "are either separated in time *or* significantly different in nature." ***Warren***, 229 Wis. 2d at 180. As shown above, Williams committed separate volitional acts that were both separated in time and different in nature. Accordingly, it is appropriate to punish him separately for each offense. *See* ***State v. Bergeron***, 162 Wis. 2d 521, 536, 470 N.W.2d 322 (Ct. App. 1991).

¶18 And just as in ***Lechner***, we presume the legislature intended to allow a separate punishable offense for separate volitional acts. *See* ***Lechner***, 217 Wis. 2d at 417. Multiple punishments are both appropriate and essential if the statute is to provide deterrence and proportionality. *See* ***State v. Grayson***, 172 Wis. 2d 156, 166, 493 N.W.2d 23 (1992). As the circuit court observed, if Williams could ignore the signals of two law enforcement officers and lead them on a two-county, high-speed chase in an effort to elude them yet face only one fleeing conviction, there would be no legal incentive to obey the law after his initial impulse to flee. Indeed, he "could have driven from Kenosha to Superior with no risk of additional counts of this dangerous crime." Williams has not overcome the presumption that the legislature intended to permit multiple punishments. His right to be free of double jeopardy was not violated.

By the Court.—Judgment and order affirmed.

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