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DISTRICT I

June 20, 2023

To:

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Circuit Court Judge
Electronic Notice

Hon. Michelle Ackerman Havas
Circuit Court Judge
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Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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You are hereby notified that the Court has entered the following opinion and order:

2022AP318-CR State v. Remington Damon Duke (L.C. # 2018CF5898)

Before Brash, C.J., Donald, P.J., and White, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Remington Damon Duke appeals a judgment convicting him after a jury trial of one count of first-degree recklessly endangering safety by use of a dangerous weapon and one count of unlawfully possessing a firearm after being convicted of a felony. He also appeals an order denying his motion for postconviction relief. Duke argues that his convictions violate the Double Jeopardy Clauses of the United States and Wisconsin Constitutions. Based upon our

review of the briefs and record, we conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2021-22).[1] Upon review, we affirm.

"The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and its parallel provision in the Wisconsin Constitution, Article I, Section 8(1), prohibit multiple punishments for the same offense." ***State v. Ziegler***, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. To determine whether two offenses are the same offense for purposes of double jeopardy, we begin by looking at "whether the offenses are identical in law and fact using the [***Blockburger***] 'elements-only' test[.]" ***Id.***, ¶60; ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). Crimes are the same in law unless each requires proof of an element that the other does not. ***State v. Davison***, 2003 WI 89, ¶22, 263 Wis. 2d 145, 666 N.W.2d 1. However, even if the crimes are the same in law, there is no double jeopardy violation "if it is evident that a state legislature intended to authorize cumulative punishments[.]" ***Id.***, ¶28 (citation omitted). This is because "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." ***Id.*** (citation omitted).

To be convicted of unlawfully possessing a firearm after being convicted of a felony, the State must establish two elements: (1) the person possessed a firearm; and (2) the person was convicted of a felony before the date of the offense. *See* WIS. STAT. § 941.29(1m); WIS JI—CRIMINAL 1343. To be convicted of first-degree recklessly endangering safety by use of a dangerous weapon, the State must establish four elements: (1) the person endangered the safety of another human being; (2) the person did so by criminally reckless conduct; (3) the

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

circumstances of the conduct showed utter disregard for human life; and (4) the person committed the crime with use of a dangerous weapon. *See* WIS. STAT. § 941.30(1); WIS. STAT. § 939.63(1)(b); WIS JI—CRIMINAL 990; WIS JI—CRIMINAL 1345.

The two crimes are not the same in law under the ***Blockburger*** test because the elements of the crimes are not the same. Even so, Duke argues that the crimes are the same in law because the State charged Duke with a sentence enhancer pursuant to WIS. STAT. § 973.123(4) (2019-20).[2] That statute enhances a defendant's sentence by requiring the circuit court to impose consecutive sentences when a defendant is convicted of certain violent felonies *and* is also convicted of unlawfully possessing a firearm arising from the same occurrence. Duke contends that the State's decision to charge first-degree recklessly endangering safety pursuant to § 973.123(4) (2019-20) renders it identical in law to the crime of unlawfully possessing a firearm after being convicted of a felony. Duke cites ***Alleyne v. United States***, 570 U.S. 99, 113-14 (2013), where the United States Supreme Court said that facts that give rise to a statutory mandatory minimum sentence become part of the substantive offense.

We reject Duke's argument for two reasons. First, Duke's reliance on ***Alleyne*** is misplaced. ***Alleyne*** held that any fact that increases the penalty for a crime "is an 'element' that must be submitted to the jury and found beyond a reasonable doubt" under the Sixth Amendment, which provides the right to a jury trial. ***Id.*** at 103. Duke has not persuaded us that this analysis bears on whether crimes are identical in law under the Double Jeopardy Clause.

[2] We note that WIS. STAT. § 973.123 is no longer in use because it applied only to sentences imposed through July 1, 2020. *See* WIS. STAT. § 973.123(5) (2019-20). As it pertains to this case, the statute provided: "If a court sentences a person under this section and also imposes a sentence pursuant to s. 941.29(4m) arising from the same occurrence, the court shall order the person to serve the sentences consecutively." Sec. 973.123(4) (2019-20).

Second, even if Duke's crimes were identical in law under ***Blockburger***, Duke's multiplicity claim under the double jeopardy clause fails because the statute itself required the sentencing court to impose consecutive sentences on Duke, and thus the legislature clearly intended to authorize consecutive punishment in these circumstances. *See* ***Davison***, 263 Wis. 2d 145, ¶43 (providing that convictions are not multiplicitous where the legislature clearly intended to authorize cumulative punishments).

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals