

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-2199-CR
STATE OF WISCONSIN**

Cir. Ct. No. 02CF000206

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JUAN CARLOS ABARCA-GUERRERO

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Juan Carlos Abarca-Guerrero appeals judgments convicting him of recklessly causing harm to a ten-year-old child and bail jumping. He was also convicted of attempted sexual assault of the same child and another count of bail jumping, but he does not challenge those convictions. Abarca-Guerrero was initially charged with intentional injury to the child. The

jury convicted him of the lesser-included offense of recklessly causing injury. He argues that the evidence did not support instructing the jury on the lesser charge and the evidence was not sufficient to support the verdict. He also argues that one of the bail jumping convictions was based on this conviction and should be overturned. We reject these arguments and affirm the judgments.

¶2 When the State requested a jury instruction on reckless injury of the child, it argued that Abarca-Guerrero's admission that he tickled the child could lead the jury to believe that he recklessly and not intentionally injured her. The issues Abarca-Guerrero raises on appeal are based on the assumption that tickling was the source of the child's injury. On appeal, the State cites the victim's testimony that Abarca-Guerrero's conduct resulted in hickeys and abrasions on her neck and chest area. Abarca-Guerrero argues that the State should not be allowed to change the theory on which it bases the allegation of criminal recklessness.

¶3 That argument fails because the trial court and the jury are not bound by the State's theory, but by the evidence presented at trial. The trial court should instruct the jury on a lesser-included offense if the evidence would be sufficient to prove guilt of the lesser offense beyond a reasonable doubt and also leave a reasonable doubt as to some element in the greater offense. *See State v. Loomer*, 153 Wis. 2d 645, 653-54, 451 N.W.2d 470 (Ct. App. 1989). Likewise, the sufficiency of the evidence to support the conviction is not determined by the prosecutor's theory, but by the evidence presented at trial. *See State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Because the jury could reasonably find that Abarca-Guerrero recklessly injured the child as he attempted to sexually assault her, the trial court appropriately instructed the jury on that offense and sufficient evidence supports the jury's verdict.

¶4 The child's testimony and the photographs of her neck and shoulders support the trial court's decision to instruct the jury on reckless injury and are sufficient to support the jury's verdict. The victim testified that she and Abarca-Guerrero were wrestling and playing a tickling game when he began kissing her. He held her down with his arms and legs, got on top of her and pinned her to the bed. She testified that he kissed her on her neck, back and chest. She resisted by trying to push him away and fight with him, but he overpowered her for approximately five minutes. She testified that it hurt when he was doing this and she rated the pain level as a three on a scale of ten. Photographs of her neck and shoulders showed substantial discoloration from hickeys, whisker burn or abrasions.

¶5 The child's testimony is sufficient to support a finding that Abarca-Guerrero recklessly caused her bodily harm. The physical pain she suffered satisfies the definition of "bodily harm." *See* WIS. STAT. § 939.22(4). Reckless conduct is conduct that creates an unreasonable risk of harm and demonstrates a conscious disregard for the child's safety. *See* WIS. STAT. § 948.03(1). Factors that the jury could reasonably consider when determining whether Abarca-Guerrero's conduct created an unreasonable risk of harm and showed a conscious disregard for the child's safety include what he was doing, why he was doing it, how dangerous the conduct was, how obvious the danger was and whether the conduct showed any regard for the child's safety. WIS JI—CRIMINAL 2112. Because the jury found that Abarca-Guerrero was attempting to sexually assault the child and because it is reasonable to believe that the child would suffer pain during the struggle, the jury appropriately found that the State proved this element beyond a reasonable doubt.

¶6 Because sufficient evidence supports the reckless injury charge, Abarca-Guerrero has no basis for challenging the second bail jumping conviction. In addition, because he was released on two bonds at the time he committed these offenses, a conviction for any other crime would constitute two bail jumping offenses. *See State v. Richter*, 189 Wis. 2d 105, 107, 111, 525 N.W.2d 168 (Ct. App. 1994).

By the Court.—Judgments affirmed.

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

