COURT OF APPEALS DECISION DATED AND FILED

June 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2004AP2610-CR

Cir. Ct. No. 2002CF396

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD E. MCQUITTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS and ROBERT J. KENNEDY, Judges. *Reversed*.

¶1 ANDERSON, P.J.[1] Although a jury acquitted Richard E. McQuitter of two counts of substantial battery, it did convict him of one count of misdemeanor bail jumping, as a repeater, and the trial court sentenced him to three years of prison. After the trial court denied his WIS. STAT. RULE 809.30 motion, McQuitter brought this appeal, raising the same three issues he did in the trial court. First, he contends that the verdicts of not guilty on two counts of substantial battery and the verdict of guilty of misdemeanor bail jumping by committing new crimes are inconsistent and illegal. Second, he asserts that the trial court committed reversible error in answering a question posed by the jury during deliberations. Finally, he insists that his trial counsel was ineffective for failing to object to the court's answer to the jury's question.

¶2 As we explain, we resolve this case on the sufficiency of the evidence. To secure a conviction for misdemeanor bail jumping, the State was required to prove beyond a reasonable doubt that McQuitter committed a new criminal offense while released on bond; however, when the jury returned a verdict of "not guilty" on two counts of substantial battery, the State failed to meet its burden.

Background

¶3 When he joined in a barroom brawl in 2002, McQuitter was on a personal recognizance bond issued in a misdemeanor case. A condition of that bond required him to not commit any new crimes. For his role in the bar fight, the

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[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All other references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. Judge Gibbs presided over the trial, sentencing and all pretrial proceedings, while Judge Kennedy presided over postconviction proceedings.

State charged McQuitter in an Information with two counts of substantial battery, as a repeater, in violation of WIS. STAT. §§ 940.19(2) and 939.62(1)(b); it also tacked on two counts of misdemeanor bail jumping, as a repeater, in violation of WIS. STAT. §§ 946.49(1)(a) and 939.62(1)(a). The count on appeal is for violating the condition of the bond that McQuitter not commit any new crimes.[2]

¶4 The matter proceeded to a jury trial. The State's theory on the bail jumping charge was that McQuitter violated the condition that he not commit any new crimes by becoming involved in a barroom brawl that resulted in injury to two victims. In support of this theory, the only evidence the State presented was certified copies of the bail bond, the criminal court minutes sheet and the criminal complaint. The trial court instructed the jury on the bail jumping charge by reading the 1999 version of WIS JI—CRIMINAL 1795:

> Bail jumping, as defined in Section 946.49(1) of the Criminal Code of Wisconsin, is committed by one who has been released from custody on bond and intentionally fails to comply with the terms of that bond.
>
> Before you may find the Defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:
>
> The first element requires that the Defendant was charged with a misdemeanor.
>
> A misdemeanor is a crime punishable by imprisonment in the county jail. Simple battery and disorderly conduct are misdemeanors.

[2] A second count of misdemeanor bail jumping, as a repeater, in violation of WIS. STAT. §§ 946.49(1)(a) and 939.62(1)(a), was charged in the Information, based on the allegation that McQuitter violated a separate condition of the bond that he was not to have any contact with the victim in the pending misdemeanor case. This count was severed on the day of the trial and McQuitter entered a guilty plea.

> The second element requires that the Defendant was released from custody on bond. This element requires that after being charged, the Defendant was released from custody on bond under conditions established by a judge.
>
> The third element requires that the Defendant intentionally failed to comply with the terms of the bond. This element requires that the Defendant knew of the terms of the bond and knew that his actions did not comply with those terms.
>
> If you are satisfied beyond a reasonable doubt that the Defendant was charged with a misdemeanor, was released from custody on bond, and intentionally failed to comply with the terms of that bond, you should find the Defendant guilty.
>
> If you are not so satisfied, you must find the Defendant not guilty.

¶5 After the jury began deliberations it sent two questions to the trial court concerning the bail jumping charge.[3] The first question was, *What are the terms of the bond?* The court replied, *See Exhibit No. 1*. The second question was, *What substantiates a violation?* And the court replied, *That's a question of fact that you have to determine*.

¶6 The jury reached "not guilty" verdicts on the two charges of substantial battery and a "guilty" verdict on the charge of misdemeanor bail jumping. Approximately eighteen months after the jury verdict, McQuitter brought a WIS. STAT. RULE 809.30 postconviction motion. In seeking relief, he argued that the "not guilty" verdicts on the battery charges and the "guilty" verdict on the bail jumping charge were "inconsistent and illegal." He contended that in order to prove bail jumping premised upon the commission of a new crime, there must be some reasonable proof that a new crime occurred. He pointed out that in

[3] A third question involving the battery charges is not relevant to this appeal.

acquitting him of the two battery charges, the jury obviously concluded that proof of a new crime was not evidenced. In addition, he argued that because the jury was never instructed on any lesser-included offenses, it was possible that it based the guilty verdict on noncriminal conduct.[4]

¶7 The State responded in the trial court first with an argument that logical consistency among verdicts in criminal cases is not required. It went on to cite ***State v. Hauk***, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393, for the proposition that "conviction of the underlying crime for which the bail jumping was charged is not necessary." It also relied upon ***State v. Henning***, 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871, to support its position that a prosecution for bail jumping based on a violation of a "no criminal activity" condition of bond does not require that the defendant be convicted of the underlying criminal activity.

¶8 The trial court denied McQuitter any relief:

> Um, what they did in this particular case, I'm not sure; but what I do know is that there was evidence taken in the light most favorable to the state that would justify them feeling that he had, finding beyond a reasonable doubt that he committed battery and that thereby he also violated those bond conditions.
>
> There was also sufficient evidence, I might add, to have proved the battery; but for some reason, they did not convict him of the battery. And we will not go underneath their decision, as inconsistent as that may sound, because to

[4] In his postconviction motion, McQuitter also argued that the trial court erred in answering the first two questions posed by the jury—trial counsel was ineffective for not challenging the court's answers to the jury's questions and trial counsel was ineffective for not attempting to block the introduction of "other acts" evidence. We do not discuss these issues because we resolve this appeal on McQuitter's contention that the verdicts are inconsistent and illegal. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

> do so for the very reasons set forth in the numerous cases in the state's brief, the courts of this state have taken a policy we will not do that; and I think that's a proper position and, as I say, established for countless years now.

¶9 McQuitter appeals.

Discussion

¶10 While McQuitter structures his first issue in terms that the verdicts are inconsistent and cannot stand, we believe that the issue is really one of sufficiency of the evidence. The question is whether the failure of proof on the two charges of battery is also a failure of proof on the charge of bail jumping. Because we are not bound by the issues as they are framed by the parties, ***State v. Joyner***, 2002 WI App 250, ¶13, 258 Wis. 2d 249, 653 N.W.2d 290, we will proceed with a sufficiency of the evidence analysis. Moreover, sufficiency of the evidence was discussed at the hearing on McQuitter's postconviction motion.

¶11 As our supreme court has reminded us, "[t]he Due Process Clause of the Fourteenth Amendment places upon the prosecution in state criminal trials, the burden of proving all elements of the offense charged and the burden of proving 'beyond a reasonable doubt' every fact necessary to establish those elements." ***State v. Avila***, 192 Wis. 2d 870, 887, 532 N.W.2d 423 (1995) (citations omitted). In reviewing whether the State has fulfilled this obligation—i.e., the sufficiency of the evidence to support a conviction—we may not reverse the trier of fact unless the evidence, viewed in the light most favorable to the outcome of the proceeding, is so deficient that, as a matter of law, no reasonable fact finder could have reached the same result. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The test is whether this court can conclude that the trier of fact could, acting reasonably, be convinced of the defendant's guilt by evidence it

had a right to believe and accept as true. *See **id.*** It is the function of the trier of fact—not the appellate court—to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from it. ***Id.*** at 506.

¶12 When the State chooses to prosecute a person for bail jumping, it must prove three elements:

> [B]efore a defendant may be found guilty of the offense of bail jumping under § 946.49(1), STATS., the State must prove by evidence beyond a reasonable doubt the following three elements: first, that the defendant was either arrested for, or charged with, a felony or misdemeanor; second, that the defendant was released from custody on a bond, under conditions established by the trial court; and third, that the defendant intentionally failed to comply with the terms of his or her bond, that is, that the defendant knew of the terms of the bond and knew that his or her actions did not comply with those terms. *See* WIS JI—CRIMINAL 1795.

State v. Dawson, 195 Wis. 2d 161, 170-71, 536 N.W.2d 119 (Ct. App. 1995) (footnote omitted).

¶13 Here, the State handily proved beyond a reasonable doubt that McQuitter was charged with a misdemeanor when it introduced a certified copy of the criminal complaint and a certified copy of the criminal court's minutes sheet to establish that the case was active. The State also proved that McQuitter had been released on bond with the condition, "Defendant shall not commit any crime," by introducing a certified copy of the recognizance bond. These exhibits also established that McQuitter signed the bond and knew the terms of his bond, including the condition that he not commit any new crime. *See **State v. Taylor***, 226 Wis. 2d 490, 502, 595 N.W.2d 56 (Ct. App. 1999).

¶14 The State failed to prove the third element—that McQuitter "intentionally failed to comply with the terms of the bond," WIS JI—CRIMINAL

1795—beyond a reasonable doubt. In this case, the State's theory was that McQuitter intentionally failed to comply with the term of the bond that prohibited him from committing any new crime when he jumped into the middle of a bar fight. To prove this theory the State needed to present evidence to convince the jury beyond a reasonable doubt that McQuitter committed a crime, specifically, substantial battery as charged in the first two counts of the Information.

¶15 In ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), the supreme court reversed a conviction for obstructing because the defendant was convicted by a six-person jury rather than a twelve-person jury as required by the Wisconsin Constitution. ***Id.*** at 230. The supreme court also reversed the defendant's conviction for bail jumping since it was based upon the guilty verdict for obstructing. ***Id.*** In reversing the bail jumping charge, the supreme court first acknowledged that ***Dawson*** correctly stated the three elements of bail jumping. ***Hansford***, 219 Wis. 2d at 244. The court then explained why Hansford's bail jumping conviction had to be reversed:

> Because the bail jumping conviction was premised solely upon the Defendant's obstructing conviction, which we now reverse, the bail jumping conviction must also be reversed. Absent a finding that the Defendant committed a crime, the State has not proved beyond a reasonable doubt an element of the bail jumping charge—that the Defendant intentionally failed to comply with the term of his bond prohibiting criminal activity. The State must prove each element of a crime beyond a reasonable doubt before a Defendant may be found guilty. Because we are reversing the Defendant's conviction for obstructing, we conclude as a matter of law that the evidence, viewed most favorably to the State, does not support the Defendant's conviction for bail jumping. Accordingly, we reverse the Defendant's conviction for bail jumping.

Id. at 245 (citations omitted).

¶16 ***Hansford*** clearly explains that when the State's theory is that a defendant violated a condition of bond by committing a crime, the State must prove beyond a reasonable doubt that the defendant committed a crime. This explanation finds further support in ***Hauk***. In that case, Hauk was out on bond and attempted to arrange to have two people killed. ***Hauk***, 257 Wis. 2d 579, ¶7. The State charged her with bail jumping rather than attempted murder, conspiracy or solicitation. ***Id.*** What transpired at Hauk's jury trial is summarized in our opinion:

> Hauk's attorney filed a document with the court stating that the defendant wished to stipulate to some of the elements of bail jumping. The circuit court approved it on the first day of trial. As a result, the jury was not informed that Hauk was charged with bail jumping and did not decide whether Hauk was charged previously with a felony or misdemeanor, whether she was released from custody on bond, or whether she intentionally failed to comply with the terms of her bond. Instead, the jury was asked to determine only whether Hauk had committed a crime. The court, however, did not decide prior to trial which crime would be submitted to the jury.
>
> After testimony … the circuit court concluded that it would instruct the jury on the crime of solicitation under WIS. STAT. § 939.30. The jury found Hauk guilty and the circuit court entered a judgment of conviction for bail jumping.

Id., ¶¶8-9.

¶17 On appeal, Hauk argued that if the State wants to obtain a conviction for violating a bond by committing a crime, it must charge the defendant with both bail jumping and the underlying crime. ***Id.***, ¶14. We rejected this argument by pointing out that "Hauk's bond does not prohibit her from being *convicted* of a crime but rather required her not to *commit* any crimes." ***Id.***

¶18 Hauk asserted that ***Hansford*** holds that "a conviction for the underlying crime is a prerequisite to finding that a defendant has violated a term of his or her bond by committing a crime." ***Hauk***, 257 Wis. 2d 579, ¶16. In rejecting this argument, we explained that in ***Hansford***, when the supreme court reversed the conviction for obstructing, there was no evidence left to support a bail jumping conviction. ***Hauk***, 257 Wis. 2d 579, ¶16. We quoted the supreme court's explanation, ***Hansford***, 219 Wis. 2d at 245, that there must be a finding that a defendant committed a crime to support a conviction for bail jumping for intentionally failing to comply with the term of the bond prohibiting the committing of a crime. ***Hauk***, 257 Wis. 2d 579, ¶16.

¶19 ***Hansford*** and ***Hauk*** establish that to secure a conviction for bail jumping premised on the commission of a crime, the State must prove beyond a reasonable doubt that the defendant committed a crime. There are two ways the State can meet this due process requirement. First, as in ***Hansford***, the State can charge the defendant with the underlying crime and bail jumping and obtain a conviction of the underlying crime by presenting evidence that meets the burden of proof. In such a situation, by proving the defendant guilty of the underlying crime beyond a reasonable doubt, the State has also proven the third element of bail jumping—the defendant intentionally failed to comply with the terms of his or her bond. ***Dawson***, 195 Wis. 2d at 170. Second, as in ***Hauk***, the State can charge a defendant only with bail jumping but at trial the State must present evidence of the underlying crime, the jury must be asked if the State has proven that crime beyond a reasonable doubt, and the jury must answer that question in the affirmative. In either case there must be "evidence sufficient to allow a reasonable

jury to conclude beyond a reasonable doubt that a defendant intentionally violated his or her bond by committing a crime." ***Hauk***, 257 Wis. 2d 579, ¶19.[5]

¶20 ***State v. Henning***, 2003 WI App 54, 261 Wis. 2d 664, 660 N.W.2d 698, *rev'd on other grounds*, 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871, is instructive in this appeal. In that case, the defendant was charged with two counts of possession of controlled substances with intent to deliver and three counts of bail jumping. ***Id.***, ¶8. The parties entered into a stipulation, approved by the court, that Henning had no defense to the bail jumping charges if the jury found him guilty of at least one count of possession with intent to deliver. ***Id.***, ¶9. The jury was informed of this stipulation and cautioned during closing arguments that it could find him guilty of bail jumping only if it found him guilty of possession with intent to deliver. ***Id.***, ¶10. Unfortunately, these "best laid" plans soon fell victim to the jury's questions. ***Id.***, ¶12. In answering questions from the jury, the court told the jury that it could find Henning guilty of bail jumping on the basis of simple possession as opposed to possession with intent to deliver. ***Id.***, ¶¶13-14. Unfortunately, the court did not give any further instructions relating to the law of lesser-included offenses nor did it provide the jury with verdict forms pertaining to simple possession. ***Id.***, ¶14.

¶21 The jury acquitted the defendant on the two counts of possession with intent to deliver but convicted him on the three counts of bail jumping. ***Id.***, ¶15. In reversing the bail jumping convictions we concluded:

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[5] The requirement that the State prove an underlying crime beyond a reasonable doubt is seen in ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), where we affirmed a conviction for bail jumping where the evidence was sufficient to prove the defendant guilty of the underlying crime, marijuana possession. ***Id.*** at 385-86.

> We think it self-evident that when a bail jumping charge is premised upon the commission of a further crime, the jury must be properly instructed regarding the elements of that further crime. We think it equally self-evident that when a bail jumping charge is premised upon the commission of a lesser-included offense of such further crime, the jury must be properly instructed under the law of lesser-included offenses.

Id., ¶25.[6] ***Henning*** teaches us that before a jury can find a defendant guilty of bail jumping, premised on the commission of an underlying crime, the jury must be

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[6] As a result of ***State v. Henning***, 2003 WI App 54, 261 Wis. 2d 664, 660 N.W.2d 698, *rev'd on other grounds*, 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871, in 2003 the Criminal Jury Instructions Committee revised WIS JI—CRIMINAL 1795, *Bail Jumping–§ 946.49* to include an instruction and explanatory material for the third element of the crime where the violation of bond is premised on the commission of a crime:

> ADD THE FOLLOWING IF THE VIOLATION OF BOND IS ALLEGED TO INVOLVE THE COMMISSION OF A CRIMINAL OFFENSE[fn12]
>
> [The defendant is charged with violating a condition of bond that required that (he) (she) not commit any crime. The state alleges that the defendant committed the crime of _________.
>
> The crime of ___________ is committed by one who
>
> LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.]
>
> [fn12] In State v. Henning, 2003 WI App 54, ¶25, 261 Wis. 2d 664, 660 N.W.2d 698, the court held that when a bail jumping charge is based on the commission of a new crime, the jury must be instructed on the elements of that crime:
>
> We think it self-evident that when a bail jumping charge is premised upon the commission of a further crime, the jury must be properly instructed regarding the elements of that further crime. We think it equally self-evident that when a bail jumping charge is premised upon the commission of a lesser-included offense of such further crime, the jury must be properly instructed under the law of lesser-included offenses.

(continued)

instructed on the underlying crime. Moreover, if the State's theory is that the defendant committed a lesser-included offense of the underlying crime the jury must be instructed on the law of lesser-included offenses and given verdict forms pertaining to the lesser-included offenses.

¶22 In this case, the State's theory was that McQuitter violated a condition of his bond by committing one or more counts of substantial battery. The State presented evidence of the batteries in support of the underlying battery counts and the bail jumping count. In addition, the State presented documentary evidence on the battery counts to prove McQuitter had been released on a recognizance bond in a case pending at the time of the barroom brawl and was aware of the condition of the bond that he not commit any crimes. The trial court instructed the jury on the elements of substantial battery and of bail jumping. The court also instructed the jury that before it could find McQuitter guilty of any of the offenses, the State must prove each element with evidence that satisfied the jury beyond a reasonable doubt of his guilt. After hearing the State's evidence and the instructions, the jury returned a "not guilty" verdict on the two substantial

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> In the Committee's judgment, a full instruction on the "further crime" is not necessary if that crime was also charged separately and the jury was instructed on it. Stating to the jury that "the crime of ____ has already been defined for you and you should apply the same definition here" should be sufficient. As specified in Henning, it can be necessary to include instructions on a lesser included offense if appropriate. The instruction provided here does not address that issue. See SM-6 on lesser included offenses, generally. See Wis JI—Criminal 112 for an instruction providing the transition between a charged crime and a lesser included offense.

In this case, the trial court did not have the benefit of the 2003 revision to WIS JI—CRIMINAL 1795. The court instructed the jury using the 1999 version of the jury instruction that did not include any material for situations where the violation of the bond is premised upon the commission of a criminal offense.

battery counts. With these "not guilty" verdicts, the jury told the trial court that the State failed to satisfy it, beyond a reasonable doubt, that McQuitter committed either count of substantial battery.

¶23 With these "not guilty" verdicts the State's ability to establish the third element of bail jumping beyond a reasonable doubt evaporated. The State's failure to secure a conviction on one or more counts of substantial battery dooms its attempt to secure a conviction on bail jumping. It could be argued that under ***Hauk*** a conviction on an underlying crime is not required to support a conviction for bail jumping. ***Hauk***, 257 Wis. 2d 579, ¶16. However, that argument is only partially correct. While ***Hauk*** holds that a conviction of an underlying crime is not necessary to support a conviction for bail jumping, it did hold there must be "evidence sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that a defendant intentionally violated his or her bond by committing a crime." ***Id.***, ¶19.

¶24 As in ***Henning***, the jury here was not instructed on a lesser-included offense of substantial battery; therefore, we cannot hold that the jury based its conviction on bail jumping upon a finding, beyond a reasonable doubt, that McQuitter committed simple battery. We also reject as illogical that upon the same evidence, arguments and instructions a reasonable jury could find that it was not satisfied beyond a reasonable doubt that McQuitter was guilty of substantial battery but find that it was satisfied beyond a reasonable doubt that he was guilty of bail jumping for committing substantial battery.

Conclusion

¶25 To convict McQuitter of bail jumping the State had to present evidence sufficient to allow a reasonable jury to conclude beyond a reasonable

doubt that McQuitter intentionally violated his bond by committing the underlying crime of substantial battery. When the jury returned a verdict acquitting him of both counts of substantial battery, there was insufficient evidence to convince a jury, beyond a reasonable doubt, that McQuitter was guilty of the third element of bail jumping—he intentionally failed to comply with the term of his bond that he not commit any crime while released. Therefore, we reverse McQuitter's conviction for bail jumping because of insufficient evidence and direct the trial court to dismiss count three of the Information in this case. ***Henning***, 273 Wis. 2d 352, ¶22. ("[D]ouble jeopardy principles prevent a defendant from being retried when a court overturns his conviction due to insufficient evidence.").

By the Court.—Judgment and order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4 (2003-04).