

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2850-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARVIN D. CLEMENTS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 SCHUDSON, J.¹ Marvin D. Clements appeals from the judgments of conviction, following a jury trial, for two counts under WIS. STAT. § 813.12(8),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

for knowingly violating a domestic abuse temporary restraining order or injunction, and one count of bail jumping, habitual criminality,² and from the order denying his motion for postconviction relief. He argues that the trial court erred in instructing the jury on the issue of intent. With respect to the two counts of violation of § 813.12, he is correct; with respect to bail jumping, however, he is incorrect. Accordingly, this court reverses his two convictions for knowingly violating a domestic abuse temporary restraining order or injunction, but affirms his conviction for bail jumping, habitual criminality.

¶2 The facts relevant to resolution of this appeal are undisputed. During its deliberations, the jury sent the trial court two questions, the second of which—Does the defendant's intention matter in this case?—provides the background for the issue on appeal. When the parties and jurors returned to the courtroom, the trial court stated, in relevant part:

Please be seated. Ladies and gentlemen of the jury, two questions came down to the Court which you requested response to....

The first question that was asked is does the verdict need to be unanimous, and the answer to that is yes. It's in your jury instructions. Read the jury instructions....³

Second, does the defendant's intention matter in this case, and the answer to that with regard to both charges can be found in Jury Instruction 2040, violating a temporary restraining order or an injunction; and 1795, bail jumping. *With regard to Jury Instruction 2040, violating a*

² The judgment of conviction for bail jumping does not reflect the habitual criminality. Other portions of the record, however, including Clements' three-year stayed sentence for bail jumping, establish that this conviction included the habitual-criminality penalty enhancement. Accordingly, on remand, the circuit court is instructed to correct the judgment.

³ Lest anyone conclude, from this question, that *the jury* was inattentive to the instructions it had received, this court notes that *the verdict forms submitted to the jury in this criminal case contained two spaces for the signatures of dissenting jurors*. Such verdict forms should only be used in *civil* cases.

temporary restraining order or an injunction, the answer to the question does the defendant's intention matter in this case, no, it does not.

(Footnote and emphasis added.)

¶3 The trial court then reread the essential portions of jury instruction 2040 to the jury, and further explained: “Again, the parties have stipulated that the defendant knew that the injunction had been issued. As to whether or not he knew that his act violated its terms, that's a question of fact for the jury.”

¶4 The trial court then stated, “As to bail jumping,” and went on to reread the essential portions of jury instruction 1795 on bail jumping, including the accurate instruction on intent.

¶5 Clements argues that “the court's clearly erroneous oral instructions effectively relieved the State of its burden of proving the *mens rea* required by each offense beyond a reasonable doubt.” He explains that his “sole defense at trial” was that, when he made the telephone calls that formed the basis for the charges, “he did not know he was violating the restraining order, injunction, or the terms of his bond because he had been trying to contact his children, not Valisha Walker, who was the mother of four of his children,” and who was the person with whom he had been ordered to have no contact.⁴

⁴ Additionally, Clements notes that his postconviction motion also alleged that the trial court “prohibited [him] from testifying concerning his understanding of what conduct was prohibited by the restraining order/injunction and bond, and whether he knew that attempting to contact his children was a violation of either or both.” On appeal, however, he fails to direct this court to any ruling that foreclosed his defense. Indeed, he does not challenge the trial court's statement, in its decision denying his motion for postconviction relief, that it “declined to preclude any such evidence [that the defendant intended to make contact with his children when he called Walker's residence] *in limine* and indicated that it would address any relevancy-based objections made by the State to questions relating to intent at trial.”

¶6 The State responds by acknowledging that “had the judge simply instructed the jury that intent does not matter for violating a temporary restraining order or injunction, that instruction alone may have constituted error,” and that “[t]hat instruction alone may have arguably relieved the State of proving that the defendant ‘knowingly’ violated the injunction.” The State then argues, however, that the balance of the trial court’s instructions “specifically instructed three times that it was a question of fact for the jury to decide whether the defendant knowingly violated the injunction.”

¶7 Jury instructions are not erroneous if, in their entirety, they “adequately and properly inform[] the jury.” *Nowatske v. Osterloh*, 198 Wis. 2d 419, 429, 543 N.W.2d 265 (1996). Here, with respect to the two counts of knowingly violating a domestic abuse temporary restraining order or injunction, they did not do so. Instead, the trial court’s answers to the jury’s question about intent were contradictory. And, as the State concedes, the trial court’s comment referring to the two counts—“the answer to the question does the defendant’s intention matter in this case, no, it does not”—was simply wrong.

¶8 The State notes, however, that the supreme court, in *Nowatske*, reiterated that “[o]n review, the language of a jury instruction should not be fractured into segments, one or two of which, when considered separately and out of context, might arguably be in error.” *Nowatske*, 198 Wis. 2d at 429 (quoting *State v. Paulson*, 106 Wis. 2d 96, 108, 315 N.W.2d 350 (1982)). True enough, but here, *in context*, one of the trial court’s answers directly, and incorrectly, responded to the jury’s question about intent. While the balance of the trial court’s response was correct, which answer was the jury to follow?

¶9 This court presumes that the jury followed the instructions the trial court provided. *See State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). In this case, however, it is impossible to tell whether the jury followed the correct instruction on intent, or the incorrect one that allowed for conviction on the charges under WIS. STAT. § 813.12 even though “intention” did not “matter.”

¶10 The trial court’s oral instructions on bail jumping, however, were accurate. Indeed, Clements does not claim otherwise. Instead, he seems to suggest that the trial court’s erroneous instruction somehow bled into the bail-jumping instruction.

¶11 This court appreciates Clements’ concern. Consequently, this court has carefully considered the trial court’s comments in response to the jury’s questions in an effort to assess whether, in context, the erroneous instruction relieved the State of its burden to prove intent regarding bail jumping. This court concludes that it did not for two reasons. (1) The trial court’s answers to the jury’s question about intent specifically separated the charges under WIS. STAT. § 813.12 from the bail-jumping charge; the erroneous instruction was stated only in addressing the former. (2) The trial court’s oral instructions on the bail-jumping charge were accurate; they correctly informed the jury of the State’s burden to prove that Clements “knew that his actions did not comply with those terms [of his bond].” Thus, the trial court never erroneously instructed the jury on bail jumping, and this court presumes that the jury followed the accurate instructions the trial court provided on that charge. *See Truax*, 151 Wis. 2d at 362.

¶12 Accordingly, this court reverses Clements' convictions for two counts of knowingly violating a domestic abuse temporary restraining order or injunction, but affirms his conviction for bail jumping, habitual criminality.

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded with directions.

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

