

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 2009

David R. Schanker
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 Nos. 2008AP2824-CR
2008AP2825-CR
2008AP2826-CR**

**Cir. Ct. Nos. 2007CF52
2007CF81
2007CF84**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER A. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Iron County:
PATRICK J. MADDEN, Judge. *Affirmed in part; reversed in part.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Christopher Thomas appeals judgments, entered upon a jury's verdict, convicting him of seven counts of felony bail jumping and one count each of disorderly conduct and misdemeanor battery. Thomas

challenges his bail jumping convictions as multiplicitous and unsupported by the evidence. The State concedes error with respect to five of Thomas's seven convictions for felony bail jumping, though on different grounds than Thomas asserts. Based on the State's concession of error, we reverse five of the seven felony bail jumping convictions. To the extent Thomas also challenges the sufficiency of the evidence to support his convictions for the remaining two bail jumping convictions, we reject Thomas's argument and affirm those convictions.

BACKGROUND

¶2 Thomas was charged with a total of twenty-one separate offenses, arising from four Iron County Circuit Court cases—three counts of disorderly conduct, two counts of second-degree reckless endangerment, three counts of stalking, four counts of battery, seven counts of felony bail jumping and one count each of false imprisonment and burglary.¹ The majority of the charges arose from domestic abuse allegations involving Thomas's girlfriend, Carla Fahrner. The charges also included one count of misdemeanor battery to Travis Tobisch and one count of disorderly conduct involving Jeffery Peterson. After a trial, the jury found Thomas guilty of all seven bail jumping counts, misdemeanor battery of Tobisch and disorderly conduct with regard to Peterson. Thomas filed a motion for judgment notwithstanding the bail jumping verdicts. The circuit court denied the motion after a hearing and entered judgment upon the verdicts. This appeal follows.

¹ Thomas was acquitted of the disorderly conduct and battery charges arising from Iron County Circuit Court case No. 2007CF29. That case is, therefore, not a part of this appeal.

DISCUSSION

¶3 Thomas contends there can be only one conviction for bail jumping because the jury found he committed only one act that violated the conditions of his bond. We disagree. As the State correctly asserts, a defendant can be convicted of multiple counts of bail jumping for committing a single act that violates a condition included in each of several bail bonds. *State v. Richter*, 189 Wis. 2d 105, 525 N.W.2d 168 (Ct. App. 1994). That the jury found only one bond violation—namely, the battery to Tobisch—does not necessarily preclude Thomas’s convictions for seven counts of bail jumping.

¶4 As the State notes, however, the battery of Tobisch formed the basis for only two of the seven counts of bail jumping charged. As a condition of the bonds arising from two separate cases, Thomas was not to commit another crime. Counts one and two of Iron County case No. 2007CF84 alleged that on October 6, 2007, Thomas violated that condition of both bonds. The battery of Tobisch was one of three crimes alleged to have occurred that day. The State concedes the jury could not properly convict Thomas of any of the other five counts of bail jumping on the basis of the battery to Tobisch because Thomas was not charged with bail jumping by battering Tobisch in any of those counts. Based on the State’s concession, we reverse the remaining five bail jumping convictions arising from Iron County case Nos. 2007CF52, 2007CF81 and 2007CF84.²

² Although the State concedes error with respect to the five bail jumping convictions, it argues that Thomas may be retried on the five reversed counts if based on a different theory. Because that issue is not properly before us, we express no opinion on the State’s assertion.

¶5 Thomas nevertheless argues there was insufficient evidence to support the bail jumping convictions based on the battery of Tobisch. Thomas's argument hinges on the court's jury instruction for bail jumping. The court defined bail jumping under WIS. STAT. § 946.49(1)³ and instructed the jury on the elements of the offense. Relevant to this appeal, the court's instruction included the following:

Three, the Defendant intentionally failed to comply with the terms of the bond. This requires the Defendant knew of the terms of the bond and knew that his actions did not comply with those terms.

The Defendant is charged with violating a condition of bond that required that he not commit any crime. The State alleges that the Defendant committed the crime of battery. The State must prove by evidence which satisfies you beyond a reasonable doubt that the Defendant committed the crime of battery.

The crime of battery is committed by one who causes *substantial* bodily harm to another by an act done with the intent to cause bodily harm to that person or another. (Emphasis added.)

¶6 Thomas argues that because the evidence established Tobisch suffered only ordinary bodily harm, rather than substantial bodily harm, the State failed to satisfy its burden of proving Thomas committed the crime of battery, as it was instructed to the jury, while he was released on bond. The State concedes that Tobisch suffered only ordinary bodily harm, but nevertheless contends that the question here is not whether the evidence was sufficient to convict Thomas of the

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

crime described in the instructions but, rather, whether it was sufficient to convict him of the crime charged in the complaint. We agree.

¶7 The test for determining the sufficiency of the evidence assesses whether the State has met its burden of proving every essential fact of the crime charged. *Turner v. State*, 76 Wis. 2d 1, 10, 250 N.W.2d 706 (1977). The elements of felony bail jumping are that the defendant was charged with a felony, that he or she was released from custody on bond, and that he or she intentionally failed to comply with the conditions of his or her bond. WIS. STAT. § 946.49(1)(b). The theory of guilt presented to the jury in this case was that Thomas violated the condition of his bonds forbidding him to commit another crime by committing the crime of battery.

¶8 The State introduced evidence showing that Thomas was released on bond in two felony cases and a condition of bond in both cases was that Thomas not commit another crime. Battery is a crime committed by intentionally causing bodily harm to another person without that person's consent. WIS. STAT. § 940.19(1). The evidence adduced at trial showed that Thomas punched Tobisch without his consent, giving Tobisch a black eye. There was, therefore, sufficient evidence of an ordinary battery to prove a bond violation in both of the underlying felony cases.

¶9 Although the court ultimately misspoke by advising the jury there had to be substantial bodily harm for a battery, we conclude the error was harmless. As the State points out, an earlier instruction advising the jury of the elements of the crime of battery properly indicated that a battery is committed by causing ordinary bodily harm. A correct statement of the law in another part of the charge can render an incorrect statement harmless when the charge as a whole

does not misdirect the jury. *State v. Hoover*, 2003 WI App 117, ¶29, 265 Wis. 2d 607, 666 N.W.2d 74. Further, the error was favorable to Thomas because it suggested the State had to prove a greater degree of harm than was actually required for a battery. A jury instruction error is harmless when the verdict would not be different under a correct instruction. *See id.* Because there was sufficient evidence adduced at trial to support Thomas's convictions for felony bail jumping based on the battery to Tobisch, we affirm those convictions.⁴

By the Court.—Judgments affirmed in part; reversed in part.

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

⁴ We note that Thomas offers no argument countering the State's harmless error analysis. Arguments not refuted are deemed admitted. *See Charolais Breeding Ranches Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

