1795 BAIL JUMPING — § 946.49(1)

Statutory Definition of the Crime

Bail jumping, as defined in § 946.49(1) of the Criminal Code of Wisconsin, is committed by one who has been released from custody on bond[1] and intentionally fails to comply with the terms of that bond.

State's Burden of Proof

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.

Elements of the Crime That the State Must Prove

1. The defendant was (arrested for) (charged with)[2] (a felony) (a misdemeanor).[3]

   (A felony is a crime punishable by imprisonment in the Wisconsin state prisons.[4] _____ is a felony.)[5]

   (A misdemeanor is a crime punishable by imprisonment in the county jail.[6] _____ is a misdemeanor.)[7]

2. The defendant was released from custody on bond.

   This requires that after (arrest) (being charged),[8] the defendant was released from custody on bond under conditions established by a (judge) (court commissioner)[9] (bail schedule).[10]

3. The defendant intentionally failed to comply with the terms of the bond.

This requires that the defendant had the mental purpose to fail to comply with the terms of the bond. This also requires that the defendant knew of the terms of the bond and knew that (his) (her) actions did not comply with those terms.[11]

ADD THE FOLLOWING IF THE VIOLATION OF BOND IS ALLEGED TO INVOLVE THE COMMISSION OF A CRIMINAL OFFENSE[12]

[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 State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant committed the crime of _____.[13]

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.]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1795 was originally published in 1981 and revised in 1987, 1988, 1990, 1994, 1999, 2003, 2005, 2010, and 2015. This revision was approved by the Committee in December 2017; it made an addition to element 3.

This instruction is for an offense under § 946.49(1). The penalty is a Class A misdemeanor if the defendant was released from custody on a misdemeanor charge; the penalty is a Class H felony if the defendant was released from custody on a felony charge.

Subsection (2) of § 946.49 applies to witnesses who fail to comply with conditions of bail after release under § 969.01(3). There is no uniform instruction for that offense.

The three elements set forth in this instruction were cited with approval in State v. Dawson, 195 Wis.2d 161, 170-71, 536 N.W.2d 119 (Ct. App. 1995).

In State ex rel. Jacobus v. Wisconsin, 208 Wis.2d 39, 559 N.W.2d 900 (1997), the court affirmed a conviction for bail jumping based on violation of a condition forbidding the consumption of alcohol. The court concluded that "§ 51.45(1) does not prohibit the criminal prosecution of an individual for bail jumping under these circumstances." 208 Wis.2d 39, 44. This reversed the contrary decision of the court of appeals in this case, see 198 Wis.2d 783, 544 N.W.2d 234 (Ct. App. 1995).

The Wisconsin Court of Appeals has held that where a bail jumping charge is based on the commission of a new crime, that new crime is not a lesser included offense and conviction of both bail jumping and the new crime is not barred by double jeopardy principles. See State v. Nelson, 146 Wis.2d 442, 432 N.W.2d 115 (Ct. App. 1988). In State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698, reversed on other grounds, 2004 WI 89, 273 Wis.2d 352, 681 N.W.2d 871, the court of appeals 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. See the text of the instruction at footnote 12.

The statute is also violated by one who has been released from custody under Chapter 969 and commits a crime in another jurisdiction. State v. West, 181 Wis.2d 792, 512 N.W.2d 207 (Ct. App. 1994).

A defendant may be charged with multiple counts of bail jumping for violating separate terms of the same bond. State v. Anderson, 219 Wis.2d 740, 580 N.W.2d 329 (1998), reversing 214 Wis.2d 126, 570 N.W.2d 872 (Ct. App. 1997).

In State v. Schaab, 2000 WI App 204, 238 Wis.2d 598, 617 N.W.2d 872, the court held that the evidence was insufficient to support a bindover on a charge of bail jumping based on the alleged violation of a "no contact" condition of bond.

In State v. Bowen, 2015 WI App 12, 359 Wis.2d 650, 859 N.W.2d 166, the court of appeals affirmed Bowen's conviction for bail jumping based on a violation of a "no contact" provision of his bond. He challenged his conviction on the ground that the evidence was not sufficient if judged by the jury instruction given in the case, which required that he "had contact with [F.B.]." The word "contact" is not defined in the statutes or in the jury instruction, so the court gave it its common and ordinary meaning, which "can include touching and face-to-face interactions, as Bowen argues, but it can also include auditory observations and indirect contact of the type F.B. testified occurred here." ¶21.

> ¶30 In sum, the jury instruction requiring the State to prove that Bowen made "contact with [F.B.]" did not require the State to show that F.B. saw Bowen or that Bowen directly communicated with F.B. F.B.'s testimony that she saw Bowen's truck in the driveway, heard glass breaking, and heard someone walking up and down her stairs, combined with police officer testimony that Bowen was found intoxicated in F.B.'s basement, was sufficient to demonstrate that Bowen made "contact with F.B."

A positive urine test is sufficient to establish a bail jumping charge based on the violation of a "no drug" condition of bond. State v. Taylor, 226 Wis.2d 490, 595 N.W.2d 56 (Ct. App. 1999).

Two counts of bail jumping are permissible under the following circumstances: the defendant was released on one bond covering 2 cases; the preliminary hearing was set for the same date and time for each case; and, the defendant failed to appear. While the bail jumping offenses are "identical in law," each requires "an individual factual inquiry" so multiple charges are lawful. State v. Eaglefeathers, 2009 WI App 2, 316 Wis.2d 152, 762 N.W.2d 690.

In State v. Dewitt, 2008 WI App 134, 313 Wis.2d 794, 758 N.W.2d 201, the defendant was charged with nine counts of bail jumping based on nine phone calls he made from jail in violation of a no contact order. He was entitled to release on his signature on one misdemeanor charge but could not post bail on two other charges. So, while he was in jail, he was "released" on the one charge and was properly charged with violating conditions of that release.

A conviction for bail jumping can stand despite the same jury finding "not guilty" on the felony that was the basis for the bail jumping charge. State v. Rice, 2008 WI App 10, 307 Wis.2d 335, 743 N.W.2d 517.

1. The 1994 revision changed the wording from "released from custody under conditions" to "released from custody on bond." The statute refers to "released from custody under Chapter 969." The Committee concluded that the offense is committed only by someone who violates a "term of his bond." Persons may be released under Chapter 969 without a bond being required. Thus, it is logical to limit the instruction to situations where release is "on bond." This interpretation was approved in State v. Dawson, 195 Wis.2d 161, 171, n.1, 536 N.W.2d 119 (Ct. App. 1995). The court held that Dawson could not be charged with bail jumping where he had been released from custody without bail and where there was no evidence that a bond had been executed before his release. "[T]he express language of the statute requires that defendants must be under a bond before they can 'fail to comply' with the terms of that bond." 195 Wis.2d 161, 168.

"Bond" is defined as follows in § 967.02(4):

> 'Bond' means an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein.

2. The appropriate alternative should be selected. It appears that the alternatives are required because the statute could apply in two different situations. The "arrested for" alternative would be used where the defendant is arrested, released on bail under a bail schedule, and is alleged to have violated a condition of that release before being officially "charged with" a crime. See note 8, below. The "charged with" alternative would be used where a defendant appears in court in response to a summons, receives a copy of the criminal complaint, and is released on bond without an official arrest having taken place.

3. The nature of the underlying crime for which the defendant was in custody determines the penalty range, see § 946.49(1)(a) and (b), and must be established at trial.

4. See § 939.60.

5. In the Committee's judgment, the jury may be told that a certain crime is in fact a felony or a misdemeanor. The jury must find that the defendant was actually arrested for or charged with that crime.

6. See §§ 939.60 and 939.12. "County jail" includes the Milwaukee County House of Correction.

7. See note 5, supra.

8. Chapter 969 governs release on bail and applies to any "defendant arrested for a criminal offense." (§ 969.01(1).) In the Committee's judgment, § 946.49 applies to any person released under Chapter 969, whether or not the person has been officially charged with a crime in a criminal complaint. Thus, the statute applies to persons released by reference to a misdemeanor bail schedule (§ 969.06) or by a duty judge or court commissioner prior to being charged.

For a similar interpretation of the word "charged" in connection with Wis. Stat. Ch. 969, see 65 Opinions of the Attorney General 102 (1976).

9. A court commissioner's power to set bail is governed by §§ 967.07 and 757.69(1)(b).

10. The Committee concluded that release on a uniform bail schedule is, in effect, release on conditions set by a judge because the schedule has been approved by the court. When a court continues a bond, it adopts and approves all conditions of that bond and it becomes an act of the court.

11. Section 939.23(3) provides that the word "intentionally" means that the actor must have had the purpose to cause the result specified or be aware that his or her act is practically certain to have that result and that the actor have knowledge of those facts necessary to make his or her conduct criminal and which are set forth after the word "intentionally." See § 939.23(3) and Wis JI-Criminal 923A and 923B.

In some cases, defendants may wish to challenge the legality of the condition they are charged with violating. In the Committee's judgment, this should be done prior to trial upon proper motion and not at trial by interpreting the statute to require failure to comply with a "legal" or "valid" condition. See the discussion at note 1, Wis JI-Criminal 2031.

12. In State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698, the court of appeals 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.
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> NOTE: Henning was reversed as to the remedy ordered by the Court of Appeals. See State v. Henning, 2004 WI 89, 273 Wis.2d 352, 681 N.W.2d 871. The part of the decision relating to defining the new crime was not affected.

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.

13. This sentence was added in the 2005 revision to make it clear to the jury that the State must prove, beyond a reasonable doubt, that the defendant committed the new crime on which the bail jumping charge is based.

