

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 27, 1995

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

**NOTICE**

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

**No. 94-2950-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JERRY MEANS,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Dykman, Sundby, and Vergeront, JJ.

PER CURIAM. Jerry Means appeals from a judgment convicting him of three counts of felony bail jumping as a repeater in violation of §§ 946.49(1)(b) and 939.62, STATS., and one count of escape as a repeater in violation of §§ 946.42(3)(a) and 939.62, STATS. Means contends that the trial court erroneously exercised its discretion when it allowed the State to introduce evidence of his drug sale to minors because its probative value was substantially outweighed by the danger of unfair prejudice. Means also

contends that his constitutional right to be free from double jeopardy was violated when he was charged with both escape and bail jumping based upon the same incident.

We conclude that the trial court did not erroneously exercise its discretion by admitting the other acts evidence. We also conclude that the "elements only" test for double jeopardy has been satisfied. Therefore, Means's convictions for bail jumping and escape do not violate his constitutional protection from double jeopardy. We therefore affirm.

### BACKGROUND

On August 6, 1993, Means was released on bond subject to several restrictions including no consumption of alcohol, no further infractions of the law, and no entry into bars or taverns. On August 7, Means invited several teenagers into his apartment, where he gave them alcohol. On August 8, a police officer observed Means entering a tavern, but delayed his arrest due to an ongoing investigation concerning Means's alleged drug sale to minors.

Later that night, Means was arrested and taken to the local hospital for a blood alcohol test which revealed a .14 blood alcohol level. While Means was being escorted from the hospital to the jail, he ran away, only to be caught about seven or eight minutes later.

Means was charged with four counts of felony bail jumping, based upon his consumption of alcohol, his entering a tavern, his providing alcohol to minors, and his escape. He was also charged with escape. At trial, the State introduced evidence concerning the police investigation of Means's alleged drug sale to minors to prove an element of the escape charge. Means was acquitted of the bail jumping charge relating to his entering a tavern, but was convicted of the remaining charges. Means appeals.

### UNFAIR PREJUDICE

Means contends that the trial court erroneously exercised its discretion when it allowed the State to introduce evidence of the drug sale. The decision to admit evidence of other acts falls within the discretion of the trial court. *State v. Murphy*, 188 Wis.2d 508, 517, 524 N.W.2d 924, 927 (Ct. App. 1994).

The admissibility of other acts evidence is determined by a two-prong test. *State v. Johnson*, 184 Wis.2d 324, 336, 516 N.W.2d 463, 466 (Ct. App. 1994). First, the court must determine if the other acts evidence fits within one of the exceptions in § 904.04(2), STATS. *Id.* Section 904.04(2) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

These exceptions are not mutually exclusive, but illustrative only. *State v. Johnson*, 181 Wis.2d 470, 492, 510 N.W.2d 811, 818 (Ct. App. 1993).

The evidence of the drug sale was presented at trial to show that at the time of the escape, Means had been legally arrested. Thus, the evidence was offered to satisfy an element of the crime of escape rather than to show Means's character. The admission of this evidence was therefore proper.

The second prong requires the trial court to determine whether prejudice resulting from the admission of other acts evidence substantially outweighs its probative value under § 904.03, STATS. *Johnson*, 184 Wis.2d at 337, 516 N.W.2d at 466. The evidence of the drug sale had substantial probative value. It showed that the police had probable cause to legally arrest Means and satisfied the State's burden of proving an element of the crime of escape. Means claims that the inclusion of this evidence biased the jury and resulted in his being improperly convicted. Evidence of the drug sale, however, was but a small part of the prosecution's case, and cautionary instructions were available

to protect Means from potential unfair prejudice. The dangers of unfair prejudice did not substantially outweigh the probative value of the evidence. Thus, we conclude that the trial court did not erroneously exercise its discretion when it admitted this evidence.

## DOUBLE JEOPARDY

Means also argues that because all of the elements of escape had to be proven in order to convict him of bail jumping, the convictions for bail jumping and escape constituted multiple punishment for the same offense in violation of Means's constitutional right to be free from double jeopardy. Whether Means's double jeopardy rights were violated is a question of law that we review *de novo*. *State v. Harris*, 190 Wis.2d 719, 723, 528 N.W.2d 7, 8 (Ct. App. 1994). Where a single course of conduct leads to multiple charges being prosecuted in a single trial, the "elements only" test is used to determine whether there is a double jeopardy situation. *Id.* The "elements only" test involves examining the two offenses to determine whether each offense requires proof of an additional element which the other does not. *Id.* at 723-24, 528 N.W.2d at 8.

In *Harris*, we concluded that double jeopardy protection did not prohibit charging a defendant with both bail jumping and possession of cocaine because the latter offense satisfied an element of the bail jumping charge and because the two charges contained different elements. *Id.* at 724-25, 528 N.W.2d at 8-9. The elements of felony bail jumping are: (1) defendant was charged with a felony; (2) defendant was released from custody under conditions; and (3) defendant intentionally failed to comply with the conditions of his or her release. *See* § 946.49(1)(b), STATS. The elements of escape are: (1) defendant was in custody; (2) custody resulted from legal arrest for a crime; (3) the defendant escaped from custody; and (4) the escape from custody was intentional. *See* § 946.42(3)(a), STATS. In comparing the elements of bail jumping and escape, the "elements only" test is satisfied because each offense contains elements that the other lacks.

Once the "elements only" test has been met, multiple punishments are presumed to be allowed unless a defendant can demonstrate contrary legislative intent. *Harris*, 190 Wis.2d at 724, 528 N.W.2d at 8-9. Means has

failed to submit any evidence of a contrary legislative intent; therefore, the charges against Means do not constitute double jeopardy.

*By the Court.* – Judgment affirmed.

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