COURT OF APPEALS DECISION DATED AND FILED

January 27, 2004

Cornelia G. Clark
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 No. 03-1511-CR

Cir. Ct. No. 01CF000241

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID KRAUSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: EDWARD R. BRUNNER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Krause appeals a judgment convicting him of first-degree intentional homicide, arson and mutilating a corpse. Krause's defenses included claims that the shooting of John Styer was an accident and that Krause was acting in self-defense. Krause argues, and the State agrees, that the trial court improperly instructed the jury on self-defense as it relates to second-

degree intentional homicide (imperfect self-defense). Krause argues that he is entitled to a new trial on all three charges based on the erroneous instruction, that his trial counsel were ineffective for failing to object to the instruction and that he is entitled to a new trial in the interest of justice because the true controversy was not tried, justice miscarried and a different result is likely on retrial. Because we conclude that Krause is estopped from challenging the instruction and that he was not entitled to any instruction on self-defense, we affirm the judgment of conviction and the order denying his motion for a new trial.

¶2 Krause was married to Styer's ex-wife and was the stepfather to his children. The acrimonious divorce and continuing custody disputes created hostility between Krause and Styer. It is undisputed that Krause drove two-and one-half hours from his home in Minnesota to Styer's farm, arriving after 2:00 a.m. Styer was shot in the back with a shotgun and died shortly thereafter. Within two hours of his death, Styer's house burned to the ground, substantially damaging his corpse.

¶3 The State's case is substantially based on the testimony of Krause's longtime friend, Richard Harvey, who spoke with Krause on the telephone numerous times after the incident. One of the conversations was recorded. Harvey testified that Krause parked one-quarter mile away from Styer's house and then walked to the house to avoid detection. He was wearing latex gloves and was armed with a 9 millimeter pistol and a sawed-off shotgun. Krause struggled with Styer and cut his hand in the process. After he killed Styer, he found some oil in an outbuilding and started a fire in the house to destroy any trace of his DNA. He then changed his clothes and he left. At his home, he burned the clothing and destroyed his shotgun with a welding torch and threw the residue in a river. In the tape-recorded conversation, Krause stated, "what I did was wrong" and, when

asked what made him decide to go to Styer's farm and "cap him," Krause replied, "a lot of different things." Harvey testified that in his numerous conversations with Krause about the incident, Krause never stated that the shooting was an accident or that he was acting in self-defense.

¶4 Krause testified that Harvey misunderstood much of what Krause said and that Krause sometimes pretended to agree with Harvey in order to terminate conversations. He admitted that he went to Styer's home to "mess with him." He stated that he first drove past Styer's driveway and then turned around and entered the driveway from the opposite direction to avoid shining his lights on Styer's house. He testified that he left his shotgun in the car but took his pistol into the house. Krause denied wearing latex gloves. He testified that when he entered the house, Styer went to put on some clothes. When Styer returned, he had a shotgun and hit Krause with the gun. They fought over the gun. Styer, a much smaller man, eventually tripped and fell, releasing his grip on the gun. Krause claimed that the gun, which was missing its trigger guard, caught on something and went off, striking Styer in the back. Krause testified that he attempted to clean up his blood spots using an oily substance that he lit with a match. He claimed that when he left Styer's house, the house was not on fire and he did not intentionally burn down the house or mutilate Styer's body. Krause testified that he took Styer's shotgun and shotgun shells with him, dismantled the shotgun and threw its remnants in the river under a bridge. Police divers were not able to locate any remnants of the gun under the bridge.

¶5 The trial took place one week after the Wisconsin Supreme Court's decision in ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413, which concluded that the pattern jury instruction on imperfect self-defense did not accurately state the law. The trial court and the attorneys spent six hours

attempting to rewrite the instruction. The instruction as given, however, erroneously required the jury to decide whether Krause "reasonably believe[d]" rather than that he "actually believed" that he was preventing or terminating an unlawful interference with his person. The effect of the instruction was that it allowed jurors to convict Krause of first-degree intentional homicide by rejecting perfect self-defense without considering whether the State had also disproved imperfect self-defense.

¶6 Krause is estopped from challenging the language regarding imperfect self-defense because he requested that the court not instruct the jury on that theory. The position Krause asserts on appeal is inconsistent with his expressed preference at trial. *See* ***State v. McCready***, 2001 WI App 68, ¶1, 234 Wis. 2d 110, 608 N.W.2d 762. Personally and through counsel, Krause objected to any instruction on imperfect self-defense, preferring an all-or-nothing verdict on first-degree intentional homicide. By allowing the jurors to convict Krause of first-degree intentional homicide by rejecting perfect self-defense, without considering whether the State had also disproved imperfect self-defense, the error in the instruction gave Krause what he requested.

¶7 Krause's arguments also fail because he was not entitled to any instruction on self-defense. A defendant has a right to a self-defense instruction when the evidence, viewed in the light most favorable to the defendant, would support a self-defense claim. ***State v. Mendoza***, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977) The jury rejected Krause's claim of accidental shooting and, despite his arguments to the contrary of the alleged errors in the jury instructions, none relates to that finding. By Krause's own testimony, he and Styer fought over a shotgun and, at the time of the shooting, Krause had succeeded in disarming Styer. Krause's testimony and the jury's finding that the shooting was not accidental

show that Krause intentionally shot Styer in the back after he succeeded in disarming him. That conduct does not constitute self-defense, perfect or imperfect. Although the State bears the burden of persuasion on self-defense, a defendant carries the initial burden of producing evidence to establish self-defense. *See* ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604. Krause's testimony did not establish that, at the time of the shooting, he held an actual belief that he needed to use deadly force to prevent or terminate an unlawful interference or that he held an actual belief that the force used was necessary to defend himself. ***Head*** at ¶124.

¶8 Krause correctly notes that his right to a self-defense instruction does not depend solely on his testimony, but on all of the evidence received at trial. Krause's testimony was the only evidence received at trial regarding his behavior and his thought process that might suggest self-defense at the time of the shooting. All of the remaining evidence supports the State's theory that Krause murdered Styer in cold blood. Evidence Krause and Styer struggled at some point before the shooting does not satisfy Krause's burden of producing some evidence at the time of the shooting, he actually believed he was in imminent danger of death or great bodily harm and the force he used was necessary to defend himself. *See* ***id.***

¶9 The actions Krause described and his thought process do not compare with the self-defense established in ***Head*** or in ***State v. Watkins***, 2002 WI 101, ¶¶13-16, 255 Wis. 2d 265, 647 N.W.2d 244. In ***Head***, the defendant testified that she shot her husband after he clenched his fists, threw back the covers, and rolled across the bed "like he was going to reach for something." She knew that he kept a handgun under his side of the bed, the side on which she was now standing. "Harold made the first move like he was coming after me, and I

reacted to protect myself." She pointed the gun at her husband who was six feet tall, 278 pounds, and "he made a move to come toward [her]." ***Id.*** at ¶¶16-18. Likewise, in ***Watkins***, Watkins testified that he told the victim not to move but he "kept approaching until he got to the foot of the bed face to face with Watkins." ***Watkins*** stated that when the victim got a couple of feet away, he grabbed Watkins' gun arm and Watkins shot him "by instincts." ***Id.***

¶10 In contrast, the physical evidence showed and Krause testified that Styer had fallen away from him and had his back to Krause at the time of the shooting. Krause did not testify that Styer was coming toward him or was moving toward any weapon. Unlike the imminent danger described by the defendants in ***Head*** and ***Watkins***, Krause faced no imminent danger from Styer after he disarmed him and Styer was facing away from Krause.

By the Court.—Judgment and order affirmed.

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