

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 22, 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. 03-0474-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 01CF000103**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DARRIN D. GROSSKOPF,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Darrin Grosskopf appeals from a judgment of conviction and an order denying his postconviction motion. The issue is whether the real controversy was fully tried, in spite of an error in the jury instructions. We conclude it was, and therefore we affirm.

¶2 Grosskopf was alleged to have fatally stabbed Keith Ward late at night in Grosskopf's residence. Grosskopf testified that he awoke to find himself being anally penetrated, and that he then stabbed Ward to terminate the assault. The State disputed that the assault occurred. The jury was given a variety of instructions relating to first-degree intentional homicide, second-degree intentional homicide, the affirmative defense of unnecessary defensive force (formerly called imperfect self-defense), and other related issues. The jury rejected that affirmative defense and found Grosskopf guilty of first-degree intentional homicide. His postconviction motion sought a new trial under WIS. STAT. § 805.15(1) (2001-02)<sup>1</sup> on the ground that the real controversy was not fully tried because of an unobjected-to error in the jury instructions. The court denied the motion.

¶3 Grosskopf renews this argument on appeal. The parties agree that when considering whether to grant a new trial because the real controversy was not fully tried, we need not find that a different result on retrial is probable. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). There is some disagreement between the parties about our degree of deference to the circuit court decision. Grosskopf notes we have previously held that because this court has independent statutory discretion to grant relief on this ground under WIS. STAT. § 752.35, we do not defer to the circuit court's determination. *See State v. Clutter*, 230 Wis. 2d 472, 475-76, 602 N.W.2d 324 (Ct. App. 1999). The State argues that a circuit court is in a better position than we are to determine whether confidence in the correctness of the outcome has been undermined, as the supreme court stated in *Morden v. Continental AG*, 2000 WI 51, ¶87, 235 Wis. 2d 325, 611

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

N.W.2d 659. Ultimately, though, the standard of review is immaterial in this case because we would reach the same result under either standard.

¶4 Grosskopf argues that the jury instruction was erroneous, and the State concedes as much. The instruction concerns essentially the same language that was at issue in *State v. Head*, 2002 WI 99, ¶¶2, 5, 255 Wis. 2d 194, 648 N.W.2d 413. Under WIS. STAT. § 940.01(2)(b), first-degree intentional homicide is mitigated to second-degree intentional homicide if the death was caused “because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.” This is an affirmative defense, but, once the defense has been placed in issue by the evidence, the State must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of first-degree intentional homicide. Section 940.01(3). In *Head*, the court held that, contrary to language in the pattern jury instruction, there is no requirement that the actor have a *reasonable* belief that his or her person was being unlawfully interfered with. *Id.*, ¶146. There is only the requirement of an actual belief. *Id.*, ¶¶103-04.

¶5 In the jury instructions for Grosskopf’s case, this topic was addressed as the third element of the charge of first-degree intentional homicide, in keeping with the concept that it is the State’s burden to disprove the affirmative defense. The jury was instructed that the State could prove this element by proving either that Grosskopf did not reasonably believe he was preventing or terminating an unlawful interference with his person, or that Grosskopf did not actually believe that the force used was necessary to prevent death or great bodily harm to himself. The parties agree that, under the ruling later announced in *Head*,

the instruction should not have allowed the State to prove this element by attacking the reasonableness of his belief.

¶6 Grosskopf argues that because of this error the real controversy was not fully tried. He argues that this error effectively reduced the State's burden of proof by permitting the jury to convict him of the first-degree charge simply by concluding that any belief he held about preventing harm to himself was not reasonable, rather than focusing solely on whether he actually held that belief. The State responds that the reasonableness of his belief was not at issue at trial, and that the dispute centered on whether the sexual assault Grosskopf claimed to have been defending himself against actually happened. The State points out that if the sexual assault genuinely occurred, there is no dispute that Grosskopf could have actually believed that force was necessary, and that such a belief would have been reasonable. Therefore, according to the State, the erroneous portion of the instruction did not seriously enter into the jury's consideration in deciding the real controversy, which was whether the sexual assault occurred.

¶7 We agree with the State's argument. It is important to observe, first, that the error in the instructions was not one in which the jury failed to receive some instruction that should have been given. The jury received all the instructions that it should have. The only error is that the jury also heard additional language that is now acknowledged to have been improper. The question, then, is whether the presence of that additional language somehow prevented the real controversy from being tried. On the facts of this case, we conclude it did not. For the deliberation to have been affected by this instruction, there would have to be some basis upon which the jury could find an actual belief, but then conclude it was unreasonable. We conclude the only way a reasonable jury could find Grosskopf held an actual belief that the force used was necessary

to prevent death or great bodily harm to himself is if it concluded the sexual assault did indeed occur. If that was the jury's conclusion, it is difficult to imagine what evidence the jury could then have relied on to reject his defense by concluding that such a belief was unreasonable. We acknowledge that this possibility is left open by the instruction as given, but we regard it as highly unlikely in light of the posture of this case.

¶8 In reply to the State's argument, Grosskopf argues that it was not the sexual assault itself that the State had to disprove, but Grosskopf's actual belief that the assault occurred. He argues that, even if the assault did not occur, he "could still have entertained a subjective, though mistaken, belief that he was being assaulted, particularly if, as he claimed, he passed out on his bed after consuming a large amount of alcohol and controlled substances." In other words, Grosskopf is arguing that a properly instructed jury might have disbelieved his testimony that the assault occurred, but still have found reasonable doubt in the possibility that Grosskopf imagined the assault was occurring and then responded to that imagined assault.

¶9 As above, we acknowledge that if the jury decided that Grosskopf imagined the assault, the instruction that was given might have led it away from finding in his favor, because the jury might then have concluded that such a belief was objectively unreasonable. However, this possibility is highly unlikely in this case. Grosskopf points to no evidence or argument in the record that supports or advocates this theory of his vivid imagination. In weighing the evidence, a jury is told that reasonable doubt is not a doubt based on mere guesswork or speculation. WIS JI—CRIMINAL 140. We are satisfied that the real controversy in this case is not whether Grosskopf imagined he was being assaulted.

*By the Court.*—Judgment and order affirmed.

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

