

No. 94-1045-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

ERRATA SHEET

GILBERT J. GROBSTICK,

Defendant-Appellant.

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PLEASE TAKE NOTICE that the attached page 11 is to be substituted for page 11 in the above-captioned opinion which was released on February 15, 1996.

Dated this 6th day of December, 2006.

We decline to exercise our power of discretionary reversal under § 752.35, STATS. For us to reverse under that statute on grounds that it is probable that justice has miscarried, we must first find a substantial probability that a second trial will produce a different result. *State v. Wyss*, 124 Wis.2d 681, 736, 370 N.W.2d 745, 771 (1985); *Vollmer*, 156 Wis.2d at 16, 456 N.W.2d at 804. We are far from satisfied that a second trial will probably produce a different result.

For us to reverse under § 752.35, STATS., on grounds that the real controversy was not tried, we need not find a substantial probability of a different result at the second trial. *Vollmer*, 156 Wis.2d at 16, 456 N.W.2d at 804. Assuming that the trial court erred by submitting the warrant as an alternative basis for his conviction for felony escape, the unobjected-to-instructional error did not prevent the real controversy from being tried. The instruction also referred to disorderly conduct. Deputy Lubinski testified that he arrested Grobstick for disorderly conduct before Grobstick fled from the police car. Disorderly conduct is a crime. It matters not that the State never charged Grobstick with disorderly conduct.¹

The actor's innocence of the crime for which he is in custody is no defense to the crime of escape. WIS J I--CRIMINAL 1772 n.4 (quoting Judiciary

¹ The State concedes that if we reach the question of instructional error and conclude that the State relied on the warrant as an alternative basis for Grobstick's pre-escape custody in presenting its case to the jury, then Grobstick would be entitled to vacation of his conviction of felony escape. This is a concession of law which does not bind an appellate court. *State v. Gomaz*, 141 Wis.2d 302, 307, 414 N.W.2d 626, 629 (1987). The fact is that Grobstick failed to object to the instruction, and as we have said, we lack the power even to review unobjected-to-instructional error, except for purposes of exercising our discretion under § 752.35, STATS.