

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 30, 2005**

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. 2005AP122-CR**

**Cir. Ct. No. 2003CF359**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID W. NELSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. David Nelson appeals a judgment convicting him of intimidating a victim and an order denying his postconviction motion. He asks this court to exercise our discretionary power to reverse in the interest of justice because the real controversy was not fully tried due to a faulty jury instruction.

Because we conclude the case was fully and fairly tried despite the alleged defect in the instruction, we affirm the judgment and order.

¶2 The jury convicted Nelson of battery, violating a domestic abuse order and intimidating the victim by taking her cell phone and throwing it to the ground while she was attempting to call the police.<sup>1</sup> He argues that the jury instruction did not require the jury to find that Nelson had the mental purpose of preventing the victim from reporting the crimes when he took her phone. Because Nelson did not object to the instruction, he cannot directly challenge the instruction on appeal. *See* WIS. STAT. § 805.13(3) (2003-04). However, this court can reverse in the interest of justice if an erroneous instruction prevented the real controversy from being tried. *See State v. Harp*, 161 Wis. 2d 733, 780-82, 469 N.W.2d 210 (Ct. App. 1991).

¶3 We decline to exercise our discretionary power of reversal because we conclude the controversy was fully and fairly tried. Nelson's defense was not related to the alleged defect in the jury instructions. The defense argued that the victim fabricated the entire incident. In her closing argument, defense counsel noted the victim's motive to make false accusation, inaccuracies in the victim's testimony, contradictions in eyewitnesses testimony, the absence of any other voices on the police recording of the 911 call and the lack of damage to the phone after Nelson threw it to the ground. The defense raised no issue regarding the State's proof of Nelson's intent. Because the controversy did not relate to the error alleged on appeal, we conclude the controversy was fully tried and we decline to exercise our discretionary power of reversal in the interest of justice.

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<sup>1</sup> Nelson's appeal only relates to the intimidation charge.

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

This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)5 (2003-04).

