

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2010

David R. Schanker
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. 2009AP772-CR

Cir. Ct. No. 2007CF203

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLY S. ROSENTHAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Bradley Rosenthal appeals a judgment convicting him of arson and an order denying his postconviction motion in which he alleged ineffective assistance of counsel in part based on counsel's failure to object to the prosecutor's closing argument. The closing argument misstated the law relating to

reasonable doubt. On appeal, Rosenthal requests a new trial in the interest of justice because the real controversy was not fully tried based on the prosecutor's error. The State concedes the error, but argues that the interest of justice standard should not be used to supplant claims of ineffective assistance of counsel.¹ Because we conclude that Rosenthal has not established that the real controversy was not fully tried, we affirm the judgment and order.

¶2 In his closing argument, the prosecutor attempted to relate the reasonable doubt instruction to the process of buying a house. He said even if he did pause and hesitate before his purchase, he went ahead and bought the house and was convinced beyond a reasonable doubt to do so. The prosecutor's closing statement is inconsistent with the pattern jury instruction that describes a reasonable doubt as "such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life." *See* WIS JI—CRIMINAL 140 (2000). However, the court twice read the jury the correct definition of reasonable doubt and twice informed the jury that it should reach its verdict under the instructions given by the court. The transcript also indicates that the jury instructions were sent to the jury room for the jury's consideration during deliberations. The jury is presumed to follow the court's instruction. *State v. Deer*, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985).

¹ The State acknowledges that *State v. Williams*, 2006 WI App 212, ¶17, 296 Wis. 2d 834, 723 N.W.2d 719, allows the issue to be framed in this manner and that *Williams* is binding on this court. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We need not address the State's argument because we conclude that Rosenthal fails to establish a basis for granting a new trial in the interest of justice.

¶3 Rosenthal relies heavily on *State v. Neuser*, 191 Wis. 2d 131, 528 N.W.2d 49 (Ct. App. 1995), for the proposition that the real controversy is not fully tried when the prosecutor misstates the law in a closing argument. However, in *Neuser* the prosecutor presumed to speak for the court and then spoke incorrectly. *Id.* at 138. The incorrect statement went unchecked by opposing counsel and the trial court. *Id.* at 140. Here, the court's repeated correct explanation of the reasonable doubt standard and its instructions to follow the court's instructions regardless of the comments of counsel defeat Rosenthal's argument that the controversy was not fully tried.

By the Court.—Judgment and order affirmed.

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

