

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 31, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2008AP940-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2007CF5

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES ALLEN NICHOLS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Marinette County:  
DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. James Nichols appeals a judgment of conviction for second-degree intentional homicide with the use of a dangerous weapon, contrary to WIS. STAT. §§ 940.05(1) and 939.63, being a felon in possession of a firearm, contrary to WIS. STAT. § 941.29(2)(a), and hiding a corpse, contrary to WIS. STAT.

§ 940.11(2), all as a habitual criminal under WIS. STAT. § 939.62(1)(c).<sup>1</sup> Nichols contends the circuit court erroneously admitted other acts evidence and should have suppressed statements he made to police. He also contends the court should not have instructed the jury on second-degree intentional homicide. We affirm the judgment.

### **BACKGROUND**

¶2 On the afternoon of January 5, 2007, Cha Vang and three friends went squirrel hunting in the Peshtigo Harbor Wildlife Area. They agreed to meet back at their vehicle before sunset and went their separate ways. Vang never returned. After looking for him, his friends contacted law enforcement. Marinette County sheriff's deputies were dispatched around 6:30 p.m. and commenced a search for Vang.

¶3 At approximately 7:00 p.m., deputy Jason Ducane was dispatched to the Bay Area Medical Center in Marinette because a man had apparent gunshot wounds to his hands. The man turned out to be Nichols. Ducane interviewed Nichols and recorded their conversation. The entire conversation lasted about thirty-six minutes. Nichols' fiancée, Dacia James, was present in the room, and medical personnel came in and out. Ducane sat next to Nichols' hospital bed, while Nichols sat in the bed in a reclined position. Nichols stated he was squirrel hunting in the Athelstane area around 4:00 p.m. when he was shot in the hand. He did not know who shot him or where the shot came from. Nichols said he started

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

running and was shot in the finger. He then drove home, called James to pick him up, and stopped at James's mother's house before coming to the hospital.

¶4 Ducane believed some aspects of Nichols' story were odd. When shot by the unseen shooter, Nichols did not call out to warn that he was downrange. He did not call police afterward. He also stated he did not like Michigan much. When asked why Michigan was relevant, Nichols stated it would have been closer to go to a hospital in Michigan. Nichols further stated he was hunting with a pellet gun that he put in James's car and brought to the hospital. When asked why he brought the gun to the hospital, Nichols stated it was his "baby." He also joked about shooting city squirrels before stating he thought police would want to see it.

¶5 Ducane questioned Nichols about his criminal history. Nichols stated he was convicted of burglary and was on parole. Ducane pointed out that aspects of Nichols' story were questionable and expressed concern that Nichols could get in trouble with his parole agent if he were being untruthful. Ducane told Nichols he would give him a few minutes to think and left the room.

¶6 When Ducane returned, Nichols asked about hypothetical cases of self-defense. Ducane asked whether Nichols encountered someone police should be looking for. He further asked whether Nichols had been hunting in the Peshtigo Harbor Wildlife Area, and Nichols indicated that was one of his "main spots." Ducane then left the room again.

¶7 Ducane returned and Nichols again raised the issue of self-defense. Ducane again asked whether there was someone else they should be looking for, and Nichols indicated there was. Nichols stated Vang's approximate location and that he was dead. Ducane attempted to end the conversation, but Nichols kept

talking. He gave a rambling account about telling a Hmong hunter to hunt somewhere else, being shot, charging the hunter, being shot again, and that the hunter “didn’t get off a third shot.” Nichols stated “he was chokin’ me when I was wrestling. He tried to rip out my fuckin’ eye and I got the best of him.” Nichols also referred to the “Hmong group” as “bad.”

¶8 Following Ducane’s interview, detective Anthony O’Neill arrived at the hospital and interviewed Nichols. O’Neill informed Nichols he was not under arrest and did not have to talk. O’Neill also asked James to leave the room. During the interview, which lasted about fifteen minutes, Nichols gave a more detailed account of what happened. He referred to Hmong hunting practices, describing the Hmong as “mean” because they “kill everything.” Nichols stated he was hunting with a shotgun and had treed a squirrel when he noticed Vang watching him. He directed Vang to go elsewhere, after which Vang shot at him with a .22 caliber rifle, striking Nichols in the right hand. Nichols estimated Vang was about fifty feet away. Nichols stated he ran and ducked behind a tree, adding about forty feet of distance between himself and Vang. He further stated he fired a wild shot off in Vang’s direction, but did not know whether it hit him. Nichols stated he was then shot in the left hand and noticed Vang appear to have problems with his gun. Nichols stated he charged Vang, wrestled Vang’s gun away, threw the gun about twenty feet, and stabbed Vang in the neck.

¶9 O’Neill read Nichols his *Miranda*<sup>2</sup> rights and Nichols invoked his right to an attorney.<sup>3</sup> O’Neill stated he would not ask Nichols any more questions

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<sup>2</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> Earlier in the interview, O’Neill asked Nichols whether he had been read his rights before. Nichols responded, “I know my Miranda rights. You don’t even have to go there.”

about the circumstances of the case, but suggested that Nichols could still choose to help find Vang. O'Neill left the room and asked a Marinette Police Officer, Jeffrey Cate, to stay in the room with Nichols.<sup>4</sup>

¶10 After leaving the room, O'Neill testified he was summoned back because Nichols wanted to help find Vang. O'Neill confirmed that Nichols understood his rights, he did not have to help police, and he was doing so of his own free will. Nichols then travelled to the Peshtigo Harbor Wildlife Area in O'Neill's vehicle with O'Neill, another officer, and James. Nichols was not handcuffed and was allowed to smoke a cigarette along the way. He casually conversed with O'Neill about hunting and the vehicle's GPS navigation system.

¶11 After arriving at the Peshtigo Harbor Wildlife Area, Nichols and James accompanied officers into the woods. Nichols led them down a trail and indicated the area where he thought Vang was located. Nichols and James remained on the trail with an officer while other officers searched the woods. As officers searched, they asked Nichols to describe where Vang was located. Nichols told officers that he dragged Vang's body toward a tree in a low area and covered it with leaves and a log. It was dark and officers were unable to find Vang. With flashlights dying, the officers called off the search. Nichols was then taken into custody by a correctional officer due to parole violations. He was placed in restraints by the correctional officer, who accompanied Nichols to a hospital in Appleton for surgery on his hand. During his transport to the hospital,

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<sup>4</sup> Cate had arrived at the hospital sometime during Ducane's interview and before O'Neill's arrival. For the most part, during Ducane's and O'Neill's interviews, Cate waited just outside Nichols' room and sometimes in the open doorway. At no time did Cate question Nichols. At some point, Cate followed Ducane into Nichols' room, but not for any particular reason.

Nichols referred to a Sawyer County case in which a Hmong hunter had killed seven other hunters.

¶12 The next day, police found Vang's body covered with a log and leaves. They also found Vang's .22 caliber bolt action rifle concealed with a piece of bark. The rifle had a fired cartridge in the chamber. The rifle's magazine was also found among some leaves. Blood was on leaves covering the ground.<sup>5</sup> An autopsy revealed Vang had been shot with a shotgun, with pellets striking him in the face, neck, upper chest, right arm and shoulder, and the right side of his upper back. He also sustained a stab wound to the face and five stab wounds to the front of his neck, severing both jugular veins.

¶13 Nichols was charged with first-degree intentional homicide, hiding a corpse, and being a felon in possession of a firearm. At trial, Nichols did not testify, but his recorded interviews with Ducane and O'Neill were played to the jury, as well as a recording of the conversation during the trip from the hospital to the Peshtigo Harbor Wildlife Area. Ultimately, Nichols' version of events provided the only narrative of what happened. Police recovered the single shot, twelve gauge shotgun that Nichols used to shoot Vang, which still contained the fired shell casing. They also recovered the knife Nichols used. Expert testimony revealed Vang was shot from approximately twenty-seven to thirty-six feet away from the muzzle of the shotgun. The pattern of blood on Vang's jeans indicated he was either on his knees or standing when he was stabbed in the neck. Nichols also had some scratches on his face and under his chin.

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<sup>5</sup> While it was January, there was no snow on the ground.

¶14 In closing arguments, the State argued primarily for a first-degree intentional homicide verdict. It relied on statements Nichols made regarding the Hmong and their hunting practices, arguing that he held prejudices against the Hmong that led him to kill Vang when a hunting dispute arose. It also relied on inconsistencies in Nichols' stories. The State argued that Vang, not Nichols, fired in self-defense. It contended Vang only fired one shot, not two, arguing Nichols' wounds to both hands were caused by a single bullet fired while Nichols was pointing his gun at Vang.

¶15 The jury did not find Nichols guilty of first-degree intentional homicide, instead finding him guilty of second-degree intentional homicide. The jury also found Nichols guilty of hiding a corpse and being a felon in possession of a firearm—charges that were essentially undisputed at trial.

## DISCUSSION

¶16 Nichols contends the court erroneously admitted other acts evidence regarding two conversations in which he made statements about the Hmong. Nichols also argues he was in custody during Ducane's interview, before he was read his *Miranda* rights, and therefore subsequent statements should be suppressed. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). Finally, Nichols contends the court should not have instructed the jury on second-degree intentional homicide.

### **I. Other Acts Evidence**

¶17 Whether to admit other acts evidence is a discretionary determination for the circuit court. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). The court must assess whether the evidence is offered for a

permissible purpose, including proving “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” WIS. STAT. § 904.04(2). The evidence must also be relevant, considering the two facets of relevance under WIS. STAT. § 904.01. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Finally, the evidence’s probative value must not be outweighed by “unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” *Id.*

¶18 The circuit court permitted other acts evidence regarding two conversations Nichols had in the months before Vang’s death. The first conversation was with Nichols’ employer, John Spaulding. Spaulding testified:

[Spaulding]: [Nichols] told me that he was riding around way up north in the middle of nowhere on a dirt road and he come across a Hmong all by himself and that he wished he would have killed him.

[District Attorney]: Did he say anything else?

[Spaulding]: Well, I asked him why and he said he hated them little fuckers.

The second conversation was with Reid Rathjen, who owned property adjacent to the Peshtigo Harbor Wildlife Area:

[Rathjen]: Well, he was – I don’t know if he was stopping everybody, but he stopped me obviously and he asked me if I had any problems with Hmongs on my property, and I said no. And we had a very casual conversation from that.

[District Attorney]: Was there anything specifically about Hmongs that he was concerned about?

[Rathjen]: Well, he said that he was bow hunting in the area and someone stole his tree stand and he thought the Hmongs did it, the Hmongs stole his tree stand.

¶19 We conclude the court appropriately exercised its discretion when admitting this evidence. The court concluded the other acts evidence was being offered for the permissible purpose of showing Nichols' motive and intent. *See* WIS. STAT. § 904.04(2). Addressing the two facets of relevance under WIS. STAT. § 904.01, the court determined the evidence was probative as to the consequential fact of whether Nichols acted in self-defense. *See Sullivan*, 216 Wis. 2d at 772-73. The court noted the evidence was relevant to who shot first and, regarding the Spaulding conversation, that "The similarity of the situations is, quite frankly, eerie." The court stated the Rathjen conversation built upon other evidence of Nichols' attitude toward the Hmong and that he blamed them for everything wrong with his hunting situation. The court also relied on the fact that both conversations occurred within a few months of Nichols' confrontation with Vang.

¶20 When addressing whether the probative value of the evidence was outweighed by unfair prejudice, the court concluded the probative value of the Spaulding conversation was "very high" and a limiting instruction could be used to explain the purpose of the evidence to the jury. The court also concluded that the risk of prejudice regarding the Rathjen conversation did not outweigh its probative value because Nichols had already volunteered similar statements to police.

¶21 Nichols contends the probative value of the Spaulding conversation was outweighed by the risk of unfair prejudice. He also contends the Rathjen conversation was irrelevant. Nichols essentially argues the court's conclusions were unreasonable. We disagree. Both the Spaulding and Rathjen conversations were relevant to whether Nichols killed Vang in self-defense or because of his grievances with Hmong hunters. Further, the court reasonably concluded the probative value of the Spaulding conversation outweighed any risk of unfair

prejudice. As the circuit court alluded, the Spaulding conversation was highly probative because it suggested Nichols had thought about killing a Hmong hunter shortly before his encounter with Vang.

## **II. Statements to Police**

¶22 Nichols' second claim is that the court erroneously denied his motion to suppress statements he made to police. Nichols contends he was in custody for Miranda purposes before he made inculpatory statements to police and before he was read his rights. The State argues Nichols was not in custody until he was formally arrested, which did not occur until after Nichols helped search for Vang. The circuit court concluded Nichols was in custody after O'Neill read Nichols his rights and stationed Cate in Nichols' room. The court concluded subsequent statements were admissible under the rescue doctrine. Nichols further argues the court erroneously applied the rescue doctrine.

¶23 We conclude Nichols was not in custody before O'Neill read him his rights and stationed Cate in Nichols' room. Therefore Nichols' statements up to that point, including his versions of events, were admissible. Beyond that point, we need not determine whether Nichols was in custody or whether the rescue doctrine applied because we conclude any failure to suppress subsequent statements was harmless.

¶24 We first address the time period before O'Neill read Nichols his *Miranda* rights and stationed Cate inside Nichols' room. Under *Miranda*, police may not interrogate a suspect in custody without first advising the suspect of his or her constitutional rights. When statements are obtained in violation of *Miranda*, those statements must be suppressed. *Miranda*, 384 U.S. at 444-45. When reviewing a court's ruling on a suppression motion, we uphold the court's findings

of fact unless clearly erroneous, and we review whether the facts resulted in a constitutional violation without deference. *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998).

¶25 Custody is evaluated from the perspective of a reasonable person in the suspect's position. *State v. Pounds*, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993). A suspect is in custody when the suspect's freedom to act is restrained "to a degree associated with formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (citation omitted). Whether a suspect is in custody depends on the totality of the circumstances, with relevant factors including the suspect's freedom to leave, the purpose, place, and length of the interrogation, and the degree of restraint. See *State v. Morgan*, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23. When evaluating the degree of restraint, we consider whether the suspect was handcuffed, the manner of restraint, whether the suspect was frisked, whether the suspect was moved to another location, whether questioning took place in a police vehicle, and the number of officers involved. *Id.*

¶26 We note that Nichols was in the hospital, not at a police station or in a police vehicle. Nichols was at the hospital voluntarily, having sought treatment on his own initiative. Police merely questioned him while he was there.

¶27 During Ducane's interview, Nichols' fiancée, James, was in the room, and hospital personnel came in and out of the room.<sup>6</sup> At the outset of O'Neill's interview, Nichols was informed that he was not under arrest and did not

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<sup>6</sup> Neither Nichols nor James testified at the suppression hearing.

have to speak with police. Throughout both Ducane's and O'Neill's interviews, Nichols was not restrained in any way, and the door to Nichols' hospital rooms remained open. After listening to the recordings, the circuit court noted the officers' conversations with Nichols were not confrontational and that Nichols was "jovial throughout."

¶28 Nichols argues he was in custody during Ducane's interview because Ducane knew about Nichols' criminal record, expressed concern about Nichols getting in trouble with his parole agent if he were being untruthful, and gave Nichols some time to think before returning to recommence the interview. Nichols argues these facts demonstrate Ducane suspected him of being untruthful and of committing a crime. Nichols also argues Ducane giving Nichols time to think implied that Nichols was not free to leave. Nichols also relies on Cate's testimony that he followed Ducane into Nichols' room at some point and that he was waiting around the doorway.

¶29 None of these circumstances resulted in Nichols being restrained to a degree associated with formal arrest. *See Berkemer*, 468 U.S. at 440. That Ducane thought Nichols' initial story was "a little abnormal" and expressed concern about Nichols getting in trouble with his parole agent did not create a custodial situation. Further, Nichols' contention that Ducane clearly considered Nichols a suspect in a crime is unconvincing, given the lack of information known at the time.

¶30 We are also not convinced that Ducane giving Nichols time to think created a custodial situation. While Ducane's statement that he would return in a few minutes implied Nichols would still be there, that does not suggest police

were limiting his ability to leave. Instead, Ducane's comment reflected the fact that Nichols was receiving continuing medical treatment at the hospital.

¶31 Finally, nothing about Cate's presence at the hospital, prior to being stationed in the room after O'Neill's interview, indicates Nichols was in custody. Cate's testimony was basically that he waited outside Nichols' hospital rooms in case the sheriff's department needed any assistance. He did not question Nichols. During Ducane's interview, Nichols was in the middle bed of a three-bed hospital room separated by curtains. During O'Neill's interview, Nichols was sitting in a reclined position facing away from the doorway.<sup>7</sup> Therefore, it is unclear whether Nichols even saw Cate waiting outside his hospital rooms. Further, Nichols was in a Marinette hospital with gunshot wounds. The mere appearance of a Marinette officer would not lead a reasonable person in Nichols' position to believe he or she was in custody.

¶32 Regarding the time period after O'Neill's interview and Cate being stationed in Nichols room, we need not determine whether Nichols was in custody or whether the rescue doctrine applied because any error was harmless. An error is harmless if there is no reasonable probability the error contributed to the conviction. *See State v. Fischer*, 2003 WI App 5, ¶38, 259 Wis. 2d 799, 656 N.W.2d 503. "A reasonable possibility is a possibility sufficient to undermine our confidence in the outcome." *Id.* We may consider the entire record when considering whether an error is harmless. *Id.*

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<sup>7</sup> At some point before O'Neill's interview, medical personnel moved Nichols to an individual exam room.

¶33 We first note that Nichols does not address the State’s argument that any failure to suppress statements was harmless, and he therefore concedes the argument. *See State v. Peterson*, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments deemed conceded). Even so, suppressing Nichols’ statements made after his interview with O’Neill would not have affected the outcome of his trial. *See Fischer*, 259 Wis. 2d 799, ¶38.

¶34 First, virtually all of Nichols’ statements after his interview with O’Neill were volunteered, including his questions about the Sawyer County case and self-defense. Further, Nichols’ other statements about the Hmong and self-defense were already in evidence, both from his earlier interviews at the hospital and from the other acts evidence.

¶35 As for Nichols responding to police questions about Vang’s location when they were unable to locate Vang in the woods, it is unclear how suppressing Nichols’ responses would have affected the outcome of the trial. Nichols concedes police would have found Vang eventually. Further, in his interviews with police, Nichols already admitted killing and leaving Vang in the Peshtigo Harbor Wildlife Area. Finally, Nichols’ statements about hiding Vang were harmless because the fact he hid Vang’s body was evident from the condition in which Vang was found.

### **III. Second-degree Intentional Homicide Instruction**

¶36 Finally, Nichols claims the court erred by instructing the jury on the lesser-included offense of second-degree intentional homicide. The jury was instructed on first-degree intentional homicide, second-degree intentional homicide due to the mitigating factor of unnecessary defensive force, as well as the absolute privilege of self-defense.

¶37 Under WIS. STAT. § 940.01(1), a person is guilty of first-degree intentional homicide if he causes the death of another with intent to kill that person. However, under WIS. STAT. §§ 940.01(2)(b) and 940.05(1), first-degree intentional homicide is mitigated to second-degree intentional homicide if the defendant believed he was in imminent danger of death or great bodily harm and believed the force used was necessary to defend himself, but at least one of those beliefs was unreasonable. Section 940.01(2) refers to this mitigating factor as unnecessary defensive force, though it is also known as “imperfect” self-defense. *See State v. Head*, 2002 WI 99, ¶¶61-63, 255 Wis. 2d 194, 648 N.W.2d 413. Finally, WIS. STAT. § 939.48(1) provides an absolute privilege for self-defense if the defendant *reasonably* believed that another is unlawfully interfering with his person, and if he used such force as he *reasonably* believed was necessary to prevent or terminate the unlawful interference. *See Head*, 255 Wis. 2d 194, ¶¶64-66.

¶38 Second-degree intentional homicide is a lesser-included offense of first-degree intentional homicide. WIS. STAT. § 939.66(2). Whether a trial court should have instructed the jury on a lesser-included offense is a question of law that we review de novo. *See State v. Gomaz*, 141 Wis. 2d 302, 307, 414 N.W.2d 626 (1987).

The standard to be applied in a determination of whether an instruction should be given to a jury has been consistently stated to require submission of a lesser-included offense instruction only where ‘under a different, but reasonable view,’ the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower ....

*Id.* at 309 (citations omitted).

¶39 In *Gomaz*, our supreme court addressed giving an imperfect self-defense instruction where the jury was instructed on perfect self-defense. *See id.* at 309-10. At the time, imperfect self-defense under WIS. STAT. § 940.05 (1985-86), was called manslaughter. *See id.* The *Gomaz* court stated:

[U]nder *Ross v. State*, 61 Wis. 2d 160, 211 N.W.2d 827 (1973), it is inconsistent and reversible error to deny the imperfect self-defense instruction where an instruction is given as to perfect self-defense. The privilege of self-defense under sec. 939.48(1), Stats., is the “right to use force against another to prevent what the actor reasonably believes to be an unlawful interference with his person.” *Ross*, 61 Wis. 2d at 166. To be within the scope of the absolute privilege of sec. 939.48, however, both the actor’s belief and the amount of force used must be reasonable. Manslaughter, under sec. 940.05(2), operates where the actor actually believed the force used was necessary for self-defense but the belief or amount of force used was unreasonable. *Id.* at 166-68; *Roe v. State*, 95 Wis. 2d 226, 243-44, 290 N.W.2d 291 (1980). Thus, and as noted in *Ross*, since a self-defense instruction inherently requires examination of “reasonableness,” it is inconsistent and improper to deny a manslaughter self-defense instruction where the jury is properly, as the state concedes, instructed as to the privilege of complete self-defense.

*Gomaz*, 141 Wis. 2d at 309-10 (footnotes omitted).

¶40 The State contends the above-quoted reasoning from *Gomaz* governs here, and we agree. Nichols does not dispute that the jury was properly instructed on perfect self-defense. He also concedes that the jury had to consider the reasonableness of his beliefs. Nichols further fails to respond to the State’s argument regarding *Gomaz* in his reply brief and therefore concedes it. *See Peterson*, 222 Wis. 2d at 459.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

