

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3352-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BENNIE L. HARVEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Bennie Harvey appeals from a judgment convicting him of armed robbery and battery. He contends that the trial court did not properly instruct the jury on accomplice testimony, and erroneously refused him a continuance to interview and investigate a last minute witness. We affirm on these issues.

Three men robbed a restaurant and beat three of the employees. Two of the robbers, Jackson and Stevenson, were arrested and confessed to police. They also identified Harvey as their accomplice. At Harvey's trial, both accomplices testified that they lied to police about his involvement and that he was not the third robber. The State countered with testimony from a police officer describing their prior inconsistent statements.

Another State witness was Syrena Gullens, who testified that Harvey admitted to her that he participated in the robbery. She also testified that she saw Harvey the night of the robbery with Jackson and Stevenson, and he was driving a car later found with evidence of the robbery in it. The State did not learn of Gullens's potential testimony until the day of jury selection. On the following morning, before the trial commenced, Harvey asked for a continuance to investigate Gullens, but the trial court denied that request.

The State asked for the standard jury instruction on the testimony of accomplices, WIS JI—CRIMINAL 245 (1991), modified to address the prior inconsistent statements and omitting the sentence "[b]ut ordinarily, it is unsafe to convict upon the uncorroborated testimony of an accomplice." Over Harvey's objection to the removal of the quoted sentence, the trial court read the instruction as the State requested.

Harvey contends that the trial court erred by omitting the quoted sentence from the accomplice instruction. We disagree. Failure to give an accomplice instruction, or in this case one part of it, is error only if the accomplice's testimony or statement is uncorroborated. *Linse v. State*, 93 Wis.2d 163, 172, 286 N.W.2d 554, 559 (1980). Here, the testimony of Gullens fully corroborated the statements of Jackson and Stevenson. Even if the jury found her

testimony suspect, other corroborating evidence included the location of the car Harvey drove and the items found in it, and the fact that Harvey fled the State immediately after learning that the police knew of Jackson and Stevenson. Additionally, although the victims were not able to identify the third, masked robber, their descriptions of the robbery fully corroborated Jackson's and Stevenson's statements in all other respects. In short, the trial court did not have to give the instruction and, therefore, omitting part of it was not error.

Furthermore, even if the instruction was necessary, the omitted sentence in the instruction was not. The instruction as given informed the jury that it should "examine [the accomplice testimony] with the utmost care and caution, scrutinize it carefully and weigh it in the light of all of the attending circumstances as shown by all of the evidence. You should not base a verdict of guilty upon it alone, unless after such scrutiny and consideration it satisfies you of the guilt of the defendant ... beyond a reasonable doubt." That language fully conveyed the cautionary message without need of the omitted sentence.

Harvey also contends that the trial court should have instructed the jury that it could not only convict Stevenson on his accomplices' testimony, but acquit him on it as well. Harvey did not request that additional instruction at trial, and the issue is now waived. *State v. Schumacher*, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988).

Finally, Harvey contends that the trial court improperly denied his request for a continuance. Section 971.23(7)(m), STATS., provides sanctions for discovery violations in a criminal proceeding, including in appropriate cases, a recess or a continuance. Here, the record shows that the State notified Harvey of its intent to use Gullens as soon as it discovered her. There were, therefore, no

grounds for sanctions. Harvey also failed to identify the benefit he would have received from additional time to investigate, and the record reveals none. His cross-examination of Gullens addressed all salient issues regarding her credibility and reliability as a witness.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5., STATS.

