COURT OF APPEALS
DECISION
DATED AND RELEASED

August 1, 1995

No. 94-2125-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERRY P. DOWDLEY,

Defendant-Appellant,

CHRISTOPHER BUSH,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Jerry P. Dowdley appeals from the judgment of conviction for armed robbery, party to a crime, following a jury trial. He argues that the evidence was insufficient to support the conviction because it

"consist[ed] primarily of uncorroborated accomplice testimony." We conclude that the evidence was sufficient and affirm.

Geneva Miller testified that she was on her way home from work on August 17, 1993, when, at about 11:45 P.M., she stopped at a service station to buy cigarettes. After making her purchase and returning to her car she was confronted by Christopher Bush, the co-defendant in this case. Bush forced his way into the car and ordered Miller to move over. Miller then noticed another man approaching the car with a gun in his hand. This second man (Dowdley) entered the back seat and Bush ordered Miller to give him her money. She said that the man in the back seat put the gun to her head. The men robbed her of her money, jewelry and the contents of her purse. The man in the back seat then told Bush to pull the car up to a less-lit portion of the gas station lot. A short distance away, Miller and the man in the back seat got out of the car. When Miller then pleaded for her life, the man told her to count to fifty and not look back. She then saw the car leave the lot. Miller was able to identify Bush but not the man in the back seat (Dowdley).

Bush testified at Dowdley's trial after pleading guilty to armed robbery, party to the crime, in exchange for an agreement with the State that the State would make no specific sentencing recommendation and that the State would inform the sentencing court of Bush's cooperation with regard to Dowdley's prosecution. Bush testified that he lived directly behind Dowdley's residence on the 3000 block of North 2nd Street. He said that at approximately 10:30 P.M. on August 17, 1993, Norman ("Grover") Boykins and Delmont Walker came over to his house and said they wanted to steal a car. Bush said that he and Dowdley agreed to go with them and they all drove together to the service station where they saw Miller. Bush then confirmed Miller's account of the crime, admitted that he was the one who initially confronted her, and identified Dowdley as the accomplice who entered the back seat.

Bush also testified that after Miller and Dowdley exited the car, he did not know what happened to them. He said that he then returned to the car in which he had come to the station and went back home. When he arrived there he saw that Dowdley already had parked Miller's car in the alley behind their residences. After Delmont Walker then moved the car a few houses down the block, they all looked through the car and took more property that they found.

Dowdley concedes that the State complied with the procedures required to protect a defendant's rights when facing an accomplice's testimony. *See* ***State v. Nerison***, 136 Wis.2d 37, 46-53, 401 N.W.2d 1, 5-8 (1987). Dowdley also concedes that the trial court correctly instructed the jury regarding the special care required for consideration of an accomplice's credibility. *See* WIS J I—CRIMINAL 245. Dowdley argues, nonetheless:

> Between the scarcity of physical evidence placing the appellant at the scene of the crime, the failure of the victim to identify the appellant, and the failure of ... witnesses to affirmatively link the appellant to the commission of the armed robbery, rather than mere participation in the division of the "spoils", it is clear that Christopher Bush's testimony must be examined with a heightened scrutiny....
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> ....
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> Given the scant evidence provided by the State to corroborate the testimony of Christopher Bush, the victim's inaccurate description of the appellant, and the inherent danger of relying so heavily on testimony tainted by the self-interest of an accomplice witness, the State's evidence was not entitled to belief by the jury.

We disagree. Although Bush's testimony was essential to the State's case, it did not stand alone. Bush's account was corroborated by other evidence including: (1) Miller's description of the crime, corresponding closely to Bush's description; (2) Dowdley's residence in close proximity to Bush's residence; (3) police testimony that some of Miller's property was recovered from Bush's residence and from the yard between Bush and Dowdley's residences; (4) testimony from Kendell Hymes, a sixteen year-old acquaintance of Dowdley, that he observed Bush, the Walkers, and Dowdley leave the 3000 block of North 2nd Street together the night of the crime and return later that evening, and that he observed Dowdley searching the stolen car in the alley.

In reviewing a challenge to the sufficiency of evidence to support a criminal conviction, we will not reverse unless the evidence, viewed most favorably to the conviction, is so lacking in probative value that, as a matter of law, we can conclude that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Determining the credibility of witnesses is within the jury's province. ***Whitaker v. State***, 83 Wis.2d 368, 377, 265 N.W.2d 575, 580 (1978).

Here, although Dowdley points to certain inconsistencies in Miller's testimony, and certain reasons why a jury could have doubted the testimony of Bush and Hymes, he offers nothing to suggest that anything about their testimony or other evidence in the trial was inherently incredible. *See* ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974) ("'incredible evidence'" is evidence "'in conflict with ... nature or with fully established or conceded facts'"). Although he argues that the State's corroborative evidence was "scant," clearly the jury was entitled to believe Bush and conclude that the several lines of corroborative evidence confirmed his account that Dowdley was his accomplice.

Dowdley also argues that we should order a new trial in the interest of justice. We will grant a new trial in the interest of justice "if there has been an apparent miscarriage of justice and it appears that a retrial under optimum circumstances will produce a different result." ***State v. Cuyler***, 110 Wis.2d 133, 142, 327 N.W.2d 662, 667 (1983) (inner quotations omitted). We see no miscarriage of justice in this case, and Dowdley's arguments are but a re-hash of his contention that the jury's verdict was supported by insufficient evidence. *See* ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976) ("Zero plus zero equals zero."). Therefore, we reject Dowdley's arguments and affirm the judgment of conviction.

By the Court. – Judgment affirmed.

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