

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 31, 1995

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.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-3440-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JEFFREY A. COBB,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Defendant, Jeffrey A. Cobb, acted as a drug informant for the Dane County Narcotics Enforcement Team and the City of Fitchburg Police Department. However, the police concluded that Cobb had made unauthorized drug deals. Detective Summers forwarded this case to the district attorney for prosecution.

The State concedes that Cobb was denied a jury trial on all the elements of the offense of delivery of cocaine as a party to the crime. The State concedes that *State v. Villarreal*, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), requires that the defendant must waive on the record his or her right to a jury trial when the court removes any element of the crime from the jury's consideration. Plainly, Cobb is entitled to a new trial.

However, the State requests this court to decide that the trial court properly refused to give a privilege instruction requested by Cobb. Any such advice on our part would be gratuitous. Cobb joins in the State's request because a decision on that issue will be needed to provide guidance to the trial court at the new trial. We decline to give such advice because Cobb's request for such an instruction will undoubtedly be based at the new trial on different facts. Surely, Cobb will attempt to construct a record which will provide greater justification for the instruction. We therefore decline the parties' invitations.

However, this court may not accept the state's concession of error without satisfying ourselves that the concession is properly made. *Rudolph v. State*, 78 Wis.2d 435, 447, 254 N.W.2d 471, 476 (1977) ("We deem it to be the duty and responsibility of this court to carefully examine the record before setting aside a conviction, even where error has been confessed ...."), *cert. denied*, 435 U.S. 944 (1978). We agree with the State that *State v. Villarreal* requires that the defendant waive proof of an element of the crime personally and on the record.

*By the Court.*--Judgment and order reversed and cause remanded with directions.

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