COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1997

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. 96-2182-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS C. HOLDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Thomas C. Holden appeals from a judgment of conviction of delivery of marijuana within a prison as a habitual offender and as a habitual drug offender. He also appeals from an order denying his motion for a new trial based on newly discovered evidence and prosecutorial misconduct. We affirm the judgment and the order.

Holden was convicted of selling marijuana to Michael Poivey, a prisoner at the Racine Correctional Institution (RCI). The sale was a controlled buy conducted as part of a sting operation of drug trafficking within RCI.

By a letter dated August 6, 1993, Poivey offered his assistance to the Department of Corrections in doing undercover drug buys at RCI. On August 22, 1993, Poivey signed a "statement of understanding" with Captain Roland Molnar of RCI and Department of Justice Special Agent David Spakowicz. The understanding was that Poivey's cooperation with the Division of Narcotics Enforcement would be brought to the attention of the appropriate prosecutor's office. Poivey purchased the marijuana from Holden on October 10, 1993. Holden's trial was held on January 9 and 10, 1995.

Holden claims that the prosecution withheld information relevant to Poivey's status an in informant, and as a result, he was denied a fair trial. He cites Spakowicz's knowledge of a letter dated August 17, 1993, from Poivey to his state senator. The letter indicated that Poivey was working with Molnar and Spakowicz, that he offered to help on three conditions related to release on parole, and that perhaps Poivey would have a memory lapse at the drug trials if his release was not obtained. Holden also cites Spakowicz's knowledge that certain sums of money were paid to Poivey and Poivey's wife in March, April and October 1994.

We will assume without deciding that Spakowicz's knowledge of the August 17 letter and monies paid was knowledge by the prosecution and that such information was exculpatory evidence subject to disclosure under ***Brady v.***

Maryland, 373 U.S. 83, 87 (1963), as it would have served to impeach Poivey.[1] We address whether the information was material, a prerequisite to a ***Brady*** violation.

> [C]onstitutional error results from [the] suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."
>
> … The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worth of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1565-66 (1995) (quoting ***United States v. Bagley***, 473 U.S. 667, 682, 678 (1985)) (citations omitted). *See also* ***State v. Pettit***, 171 Wis.2d 627, 644, 492 N.W.2d 633, 641 (Ct. App. 1992) (we may assume arguendo that prosecution was obligated to disclose information and look to whether the failure to disclose the information was prejudicial).

Poivey wore a wire during the drug transaction with Holden. The tape of the transaction was played for the jury. The presence of Holden's voice on the tape and Poivey's return with the marijuana were corroborated by prison personnel. The direct evidence was strong and sufficient to support the conviction. Our confidence in the outcome is not undermined by the

[1] We strongly admonish both Department of Justice investigators and prosecutors that the failure to communicate such information is inexcusable. Investigators cannot offer inducements to confidential informants and then not advise the prosecutor that such inducements have been offered and provided. Likewise, prosecutors have an obligation to inquire about inducements, actual or perceived, so that the prosecution can fulfill its obligation to disclose exculpatory evidence. *See* ***Kyles v. Whitley***, 514 U.S. 419, 115 S. Ct. 1555, 1567-68 (1995). Failure to do so imperils the case.

nondisclosure of information which would have served to impeach only Poivey's trial testimony.

We acknowledge that a ***Brady*** violation may exist when there is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***Kyles***, 115 S. Ct. at 1566. Here, Poivey's credibility was challenged before the jury. Poivey was impeached by his admission that he used drugs while in prison despite his claim in the August 6, 1993 letter to the DOC that he abhorred drugs and he never uses drugs. Poivey admitted that he promised not to consume illegal drugs while working in the sting operation and that he breached that agreement. Poivey also admitted that since his cooperation in the sting operation he had been released on parole status, that the prosecutor wrote a letter to his sentencing judge, and that he served less than five years of a fifteen-year sentence. Further, the impeaching quality of the information not disclosed was minimized by Spakowicz's testimony at the postconviction hearing. Spakowicz acknowledged that Poivey's suggestion that he would have a memory lapse was typical of an informant's attempt to control an investigation. In discussing the August 17 letter with Poivey, Spakowicz made clear that Poivey was not guaranteed release on parole and Poivey would not control the investigation. Spakowicz also explained that the minimal sums of $20, $100 and $150 paid to Poivey in 1994 were related to facilitating Poivey's court appearances.

We are not convinced that the additional information would have more effectively impeached Poivey or have radically changed the jury's view of the case. The test of materiality is not satisfied. There was no ***Brady*** violation.

Holden argues that other acts evidence was admitted in violation of a pretrial order limiting the scope of such evidence. Before trial, the prosecution proposed to present the testimony of Daniel Luedke regarding drugs he purchased from Holden in 1989 and contact he had with Holden in prison in 1993 when Holden offered drugs for sale. At the pretrial hearing, the parties worked off of a written report of Spakowicz's interview of Luedke. Luedke reported that in early October 1993, Holden offered to sell him "ready rock," cigarettes laced with cocaine base. When Luedke declined the offer, Holden told Luedke that if he knew other individuals interested in controlled substances, Luedke should contact Holden. The interview report related in a separate paragraph how Luedke had served as the middleman for a drug purchase by "Casper," another prisoner at RCI, from Holden. The transaction occurred before Luedke's transfer to another institution on October 8, 1993, and involved the transfer of packs of cigarettes. The record exhibit of the report bears the notation that this information was "not offered by state at other acts motion." Evidence of Luedke's contact with Holden in RCI in early October 1993 was ruled admissible.

At trial, Luedke testified about his October 1993 contact with Holden in which Holden offered to sell him drugs and advised Luedke to contact him if Luedke knew anyone who wanted drugs. He went on to explain that he found an individual who wanted to buy the laced cigarettes Holden had offered and that he acted as the middleman in the transaction. The trial court called a short recess at that point in Luedke's testimony and inquired of the parties whether this was the other acts evidence ruled admissible before trial.[2] The prosecution

[2] Judge Nancy E. Wheeler presided over the motion hearing. Holden's trial was conducted before Judge Emmanuel J. Vuvunas.

answered, "This is exactly the other acts motion that Judge Wheeler heard." Defense counsel replied, "That's right. Judge, I'm just looking, though, to see if it really is the same, but this would be the one." The trial resumed.

Holden points out that at the pretrial hearing, the prosecution indicated that other acts evidence involving "Casper" was not at issue and that the prosecution only sought admission of Luedke's 1989 contact with Holden and Holden's October 1993 offer to sell drugs to Luedke at RCI. The State concedes that the prosecutor did not seek leave to introduce evidence that Luedke obtained a buyer for Holden.

There was no objection from Holden that Luedke's testimony went beyond the scope of the other acts evidence approved before trial. Unobjected to errors are considered waived. *See* ***State v. Boshcka***, 178 Wis.2d 628, 642, 496 N.W.2d 627, 632 (Ct. App. 1992). Here, both parties misrepresented to the trial court what had been determined in the pretrial hearing. Error cannot be invited and then later relied upon to reverse a conviction. *See* ***Turnbough v. Wyrick***, 551 F.2d 202, 204 (8th Cir. 1977). *See also* ***Shawn B.N. v. State***, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992) (we will not review invited error).

Even if preserved for review, the error in admission of the evidence was harmless. "An error is harmless if there is no reasonable possibility that the error contributed to the conviction." ***Pettit,*** 171 Wis.2d at 645, 492 N.W.2d at 641. We consider whether there is a reasonable possibility of a different outcome or a "'probability sufficient to undermine confidence in the outcome' of the proceeding." ***State v. Dyess***, 124 Wis.2d 525, 545, 370 N.W.2d 222, 232 (1985) (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

We first note that it was not as if the trial court had affirmatively ruled that testimony about the drug deal Holden transacted through Luedke was inadmissible. The issue had never been decided. Further, after the hearing ruling that Luedke's testimony would be admissible in part, Holden was granted an adjournment to investigate Luedke's statement. An adequate opportunity to meet the evidence was granted.

The jury was given an admonitory instruction that the other acts evidence was admissible only for consideration on the issue of opportunity. Juries are presumed to follow properly given admonitory instructions. *See* ***State v. Leach***, 124 Wis.2d 648, 673, 370 N.W.2d 240, 253-54 (1985). Also, the prosecutor did not take unfair advantage of the other acts evidence. The prosecutor's argument to the jury limited the testimony to opportunity.

Holden makes the additional claim that the complaint was insufficient because it failed to establish the reliability of Poivey. A challenge to the sufficiency of a criminal complaint must be made prior to the preliminary hearing. *See* ***State v. Berg***, 116 Wis.2d 360, 365, 342 N.W.2d 258, 260 (Ct. App. 1983); § 971.31(5)(c), STATS. Holden did not timely challenge the complaint. The issue is waived. *See* ***Berg***, 116 Wis.2d at 365, 342 N.W.2d at 260-61.

By the Court.—Judgment and order affirmed.

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