

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1491-CR

Cir. Ct. No. 2005CF959

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTA L. JENKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Donta Jenkins appeals a judgment convicting him of second offense possession of more than forty grams of cocaine with intent to deliver, solicitation to commit perjury and felon in possession of a firearm. The jury acquitted him of attempted first-degree intentional homicide and an additional

count of solicitation to commit perjury. He also appeals an order denying his postconviction motion. He argues the State violated his constitutional and statutory rights when it failed to disclose impeachment evidence pertaining to one of its key witnesses and the trial court erred by permitting the jury to view a video recording of a witness' police interview. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The charges against Jenkins arose out of the shooting of Prince Gibbs. Cordell Cole testified that he, Jenkins and Jenkins' brother purchased a kilogram of cocaine. After equally splitting the cocaine, Jenkins and his brother placed most of their cocaine in Jenkins' storage unit. Shortly thereafter, the storage unit was broken into and the cocaine was stolen. They suspected Gibbs and brought an associate from Chicago to extract revenge on Gibbs. Just before the shooting, Jenkins spoke with Gibbs in a nightclub rest room for twenty minutes. Gibbs left, and while sitting alone in his car, two men approached and one of them fired multiple shots at Gibbs. One shot struck Gibbs in the waist. He did not seek medical attention because there was a warrant for his arrest.

¶3 Cole testified pursuant to a plea agreement. He admitted that he had sold a lot of cocaine. On cross-examination, he testified that he was retired and was now an "at home dad." The alleged discovery violations occurred when the district attorney did not notify the defense that Cole was suspected of continuing drug activity. Cole was in fact arrested the day after he testified. Five days before he testified, an informant contacted Cole and attempted to set up a controlled buy. Cole failed to follow through with the delivery. On the first day of trial, Cole

contacted the informant about delivering the cocaine. The delivery occurred after Cole testified. Jenkins contends the information regarding the State's investigation of Cole was exculpatory because, if it had been disclosed, Cole would not have testified. Cole provided the sole evidence regarding the amount of cocaine Jenkins possessed. Jenkins also argues the investigation could have been used to impeach Cole's testimony that he no longer sold drugs.

¶4 Flentora Adams, the mother of one of Jenkins' children, testified as a hostile State witness. She confirmed drug activity, but denied that she told detective Donn Adams some of the details contained in his report. She said he pressured her with threats of arrest and losing her child. The court allowed the State to play a video recording of the interview to show Flentora Adams' demeanor and the absence of threats. Jenkins contends the video-recorded statements included hearsay and were more prejudicial than probative. He also faults the trial court for allowing the State to play the recording without first viewing it.

DISCUSSION

¶5 Jenkins has not established that the State violated his discovery rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the investigation of Cole's continuing drug activity. To establish a *Brady* violation, a defendant must show that undisclosed evidence was both favorable and material. *State v Harris*, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. Evidence is favorable to an accused when, if disclosed, it may make a difference between conviction and acquittal. *Id.*, ¶12. Evidence is material if there is a reasonable probability that the result of the proceeding would have been different if the

evidence had been disclosed. A reasonable probability is one that undermines confidence in the outcome. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¶6 Evidence of the Cole investigation was not favorable or material. It was well established at trial that Cole was a drug dealer. He admitted his role involving purchasing and redistributing a kilogram of cocaine. Cole testified for the State as part of a plea agreement after he was caught selling drugs, and he had six prior convictions. Cole admitted that he worked only two months out of his twenty-one year life and had been selling drugs for most of his life. He referred to himself as “the dope man.” Cole’s testimony that he no longer sold drugs was not vital to his testimony against Jenkins and it is highly unlikely that the verdicts would have been different if the investigation had been disclosed.

¶7 Jenkins argues that he was prejudiced by the State’s failure to disclose the investigation because, if it had been disclosed, Cole would not have testified. The prejudice that is required to establish a *Brady* violation refers to the effect the missing information might have had on the defense or the jury’s assessment of a witness’ credibility. It does not refer to the willingness of the State’s witnesses to testify. Jenkins cites no authority that requires a prosecutor to disclose information merely because it might cause a State’s witness to refuse to testify.

¶8 Jenkins next argues that the trial court erred when it allowed the jury to view the video recording of Flentora Adams’ interview with the police. Jenkins offers no explanation of exactly how any statement in the video recording or the court’s failure to view the recording in advance caused him any prejudice. Jenkins argues that the video recording contained hearsay. The court gave a curative instruction before playing the tape, alerting the jury to the hearsay and directing

them to disregard those statements. The jury is presumed to have followed that instruction. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶9 Jenkins also argues that the recording should have been excluded under WIS. STAT. § 904.03 (2005-06) because its probative value was substantially outweighed by the danger of unfair prejudice. The recording was relevant to impeach Flentora Adams' testimony that she was pressured into making incriminatory statements about Jenkins. The recording was introduced solely for the purpose of impeaching her testimony by showing her demeanor and the absence of coercion. The jury was instructed to disregard statements she made about what other people had said and to disregard detective Adams' statements during the interview. The curative instruction presumptively erased any potential prejudicial effect. *See State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

