

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2011

A. John Voelker
Acting 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. 2010AP2294-CR

Cir. Ct. No. 2008CF1358

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CASEY T. GOGOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Casey Gogos appeals a judgment of conviction upon a jury verdict for first-degree reckless homicide by delivery of heroin and two counts of felony bail jumping. The conviction arose from selling heroin to seventeen-year-old Ryan Rockstroh on which he fatally overdosed. Gogos argues

the State breached an agreement to reduce the homicide charge to two counts of delivery of heroin if Gogos would waive his preliminary hearing. Gogos also argues the circuit court erred when it permitted a witness to testify that she overdosed on heroin that Gogos sold her. We affirm the conviction.

¶2 Gogos insists the remedy for the State’s breach of its promise is specific performance. Gogos contends that we should order that the homicide charge be amended to two counts of delivery of heroin. However, Gogos never asked the circuit court to order the State to reduce the homicide charge, and his request for specific performance on appeal is therefore forfeited. *See State v. Gary M.B.*, 2004 WI 33, ¶27, 270 Wis. 2d 62, 676 N.W.2d 475. Gogos filed a motion in the circuit court asserting that the State violated the agreement, but he only asked that he be given a new preliminary hearing.¹ Moreover, at the hearing on Gogos’ motion, he did not request specific performance. Gogos’ motion was insufficient to preserve his request for specific performance on appeal.

¶3 Regardless, the State did not violate its agreement with Gogos. On the day of the preliminary hearing, the deputy district attorney wrote a note to Gogos’ attorney stating that “in the event Mr. Gogos waives the preliminary hearing I will recommend the charge be reduced from homicide to 2 deliveries[.]” Contrary to Gogos’ perception, this was not “a promise to amend the charge.” As the circuit court properly recognized, “[T]he verb used by [the deputy district attorney] ... was ‘recommend.’ He says, ‘I will recommend it be reduced.’ It

¹ This request appears to be similar to Gogos’ alternative argument on appeal that he “should be returned to the position he was in before the preliminary hearing and should be granted a new trial.” As discussed herein, we reject this alternative argument because the State did not violate the agreement.

wasn't a commitment by the State that the State shall amend.” The deputy district attorney in fact made the recommendation to the primary prosecutor on the case, but she declined to reduce the charge. At the hearing on Gogos' motion, the primary prosecutor explained that the deputy district attorney “wasn't aware of Mr. Gogos sitting on a burglary case in Door County and another felony in Brown County”

¶4 We also note that Gogos' trial attorney conceded at the preliminary hearing that Gogos was prepared to waive his right to the preliminary hearing based upon the fact that “the State would probably be able for all intents and purposes to meet the burden with regard to the fact that a felony was probably committed.” When the court asked counsel if there had been any specific offer conveyed by the State for the waiver, he answered “[n]o Your Honor, nothing that needs to be placed on the record.” During the court's colloquy, Gogos also denied that “anybody made any promises to [him] to waive the hearing today.” A defendant may not rely on his own expectations to prove a breach of an agreement. Instead, he must show the violation of a specific prosecutorial promise. *See State v. Parker*, 2001 WI App 111, ¶7, 244 Wis. 2d 145, 629 N.W.2d 77. Gogos received the benefit of his bargain and he is not entitled to further relief.

¶5 Gogos' other claim on appeal is that the circuit court erred when it allowed the State's witness, McKenzie Collins, to testify that she overdosed on heroin that Gogos sold her. Collins was a seventeen-year-old student at Green Bay East High School. Before Collins testified, the court ruled she could testify that she bought the heroin from Gogos, but not that she had overdosed. The court concluded the latter information was impermissibly prejudicial.

¶6 During Collins’ direct testimony, she testified that she purchased heroin from Gogos. Gogos also told her “he was scared that the heroin that he provided killed someone, and he was going to lay low for a while.”² On cross-examination, Gogos impeached Collins’ testimony with a previous statement in which she said she did not purchase heroin. Collins testified this statement was not true. On redirect examination, the State asked Collins where she was when she gave the statement that she did not purchase heroin. Collins answered that she was in St. Vincent Hospital. Collins also stated that when she gave the statement she was not in a “good sound mind” because “I was in an overdose.”

¶7 The circuit court properly allowed Collins to testify about her overdose because Gogos opened the door to this testimony. *See Jones v. Dane Cnty.*, 195 Wis. 2d 892, 936, 537 N.W.2d 74 (Ct. App. 1995). Gogos challenged Collins’ credibility based upon her inconsistent statement. By doing so, he opened the door to the circumstances under which Collins gave the statement.

¶8 Gogos argues the circuit court erred by not taking steps to mitigate Collins’ “overdose” testimony, by either giving the jury a limiting instruction or preventing the State from referencing the testimony in its closing argument. However, Gogos acknowledges he did not request a limiting instruction, and the

² Defense counsel objected to the statement. The State responded that the statement was “a party opponent admission” and the court overruled the objection.

court was thus under no obligation to give one.³ *See* WIS. STAT. § 901.06⁴ (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly.”) (emphasis added); *see also State v. Payano*, 2009 WI 86, ¶100, 320 Wis. 2d 348, 768 N.W.2d 832 (“Although cautionary jury instructions are preferred and should normally be provided when admitting other acts evidence, they are not required unless requested.”) (footnotes omitted).

¶9 During the State’s closing argument, Gogos also did not contemporaneously object to a reference to Collins’ “overdose” testimony, and he has thus forfeited any right to complain about it on appeal. *See State v. Guzman*, 2001 WI App 54, ¶¶24-25, 241 Wis. 2d 310, 624 N.W.2d 717. Further, it is not apparent that the State’s closing argument was objectionable. As noted, the court properly admitted the evidence about Collins’ overdose because Gogos opened the door to it. A prosecutor is allowed to comment on trial evidence during closing argument. *See State v. Lammers*, 2009 WI App 136, ¶16, 321 Wis. 2d 376, 773 N.W.2d 463.

³ Gogos concedes that the circuit court was not required to give a cautionary instruction unless requested. However, Gogos argues “a court should inquire if either party requests the instruction.” Gogos relies upon *State v. Payano*, 2009 WI 86, ¶100, 320 Wis. 2d 348, 768 N.W.2d 832. The *Payano* court set forth footnote 1 from Criminal Jury Instruction 275 in its entirety “as a reminder to counsel and to the courts the best course of action for dealing with cautionary instructions for other acts evidence.” *Id.* at n.21. That footnote indicates, “*It may be desirable, therefore, for the trial judge to inquire of the defense whether a cautionary instruction is requested and, if the defendant’s tactical decision is not to request the instruction, to make a record of that decision.*” *Id.* (quoting WIS JI—CRIMINAL 275 (2003) (emphasis in *Payano*)).

⁴ References to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶10 In any event, any perceived error stemming from Collins' testimony was harmless because the evidence against him was overwhelming. Gogos was convicted of first-degree reckless homicide by delivery of heroin and two counts of felony bail jumping. In order to be convicted of the homicide charge, the jury needed to find that Gogos delivered heroin and that Rockstroh used the heroin and died as a result. *See* WIS. STAT. § 940.02(2)(a); WIS JI—CRIMINAL 1021 (2006). In order to be convicted for bail jumping, the jury had to find that Gogos had been charged with a felony, was released on bond, and failed to comply with the terms of the bond.⁵ *See* WIS. STAT. § 946.49(1)(b); WIS JI—CRIMINAL 1795 (2006).

¶11 Rockstroh's mother testified that she discovered him dead in her apartment on October 27, 2008. She testified when she got up she noticed him lying under a blanket on the futon bed in the study, but thought he was sleeping. After she went to work, the secretary at Ashwaubenon High School called to tell her that her son did not show up for school. When he did not answer his cell phone, she returned to her residence and discovered his body. She also said Rockstroh had a heroin addiction, and had recently returned from a rehabilitation center.

¶12 Law enforcement discovered foil-wrapped heroin in a wallet in a pair of pants that were found on the floor next to the futon. Tests showed that Rockstroh had a toxic level of heroin in his body and his cause of death was listed as heroin overdose.

⁵ The parties stipulated that Gogos was charged with felonies in Door County and Brown County cases. The parties also stipulated Gogos was released from custody on bond in those two criminal cases. Gogos was charged with violating the condition of bond requiring that he not commit any crime. The State alleged Gogos committed the crime of delivery of heroin.

¶13 Records from Rockstroh's cell phone showed that he had numerous contacts with Gogos on October 24 and 26. Rockstroh's cousin, Matthew Matzke, testified that he asked Rockstroh to buy heroin for him on both of those dates. Matzke said on each of those days, he gave Rockstroh money to buy the heroin and Rockstroh later brought it to him.

¶14 Kyle Bigelow, a seventeen-year-old high school friend of Rockstroh's, said that he accompanied Rockstroh when he went to buy heroin from Gogos on October 24. Bigelow observed Gogos give Rockstroh the heroin in either foil or cellophane. Rockstroh told Bigelow that he was getting the heroin for his cousin, but that he would be keeping some for himself.⁶ Bigelow said that Rockstroh typically did this when buying heroin for his cousin. Bigelow also testified that Rockstroh only got his heroin from Gogos.

¶15 Jessica Sizemore, a friend of Gogos, said that she saw Gogos in possession of "a bag full of heroin" on October 24. She also saw Gogos meet with Rockstroh on that day, and overheard them talking about "selling some stuff."

¶16 The evidence left little room for doubt that Gogos delivered heroin and that Rockstroh used the heroin and died as a result. The jury also heard testimony that Gogos was a heroin dealer, as well as Collins' properly admitted testimony that Gogos was worried that his heroin had caused someone to overdose

⁶ Bigelow testified on cross-examination that Rockstroh told him that Rockstroh was getting the heroin for his cousin. Defense counsel, over objection from the State, was allowed to attempt to impeach Bigelow with a statement he gave to police that Rockstroh only got the drugs from Gogos. Bigelow gave another statement to police indicating that he and Rockstroh obtained drugs from another source. However, on re-direct examination, Bigelow explained that the drugs from other sources referred to cocaine. Bigelow testified it was true that Rockstroh only got his heroin from Gogos. Bigelow also testified under re-cross-examination that he did not know how much heroin Rockstroh kept for himself.

and die. Given this overwhelming evidence, any error in admitting Collins' testimony about her own overdose from Gogos' heroin was harmless.

By the Court.—Judgment affirmed.

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

