



In an unpublished memorandum decision, this court affirmed Jenkins's conviction of dealing in a Schedule III controlled substance as a class B felony. *See Jenkins v. State*, No. 68A01-1008-CR-417 (Ind. Ct. App. April 26, 2011). Among other things, we held that Jenkins had waived the issue of the admissibility of certain evidence under Rule 616 of the Indiana Rules of Evidence. Jenkins contends upon petition for rehearing that we erred in so holding because his reply brief pointed out where in the transcript this argument had been made and thus preserved. We write to explain more fully why this argument was waived.

A brief review of the facts reveals that Jenkins was convicted with the aid of a confidential informant whose name was Carol Lynn Rodgers Hale. The transaction in question involved Hale purchasing from Jenkins nine pills that contained Hydrocodone, a generic for Vicodin, a Schedule III controlled substance. There was a second charge – dealing marijuana – in the original charging information. That charge was based upon Hale's claim that Jenkins had sold marijuana to her ten days before the aforementioned sale of Hydrocodone. The day before trial was to commence, the State moved to dismiss the marijuana charge and also sought a motion in limine forbidding the introduction of evidence pertaining to that alleged transaction. Jenkins objected to the motion in limine, arguing that he was entitled to introduce the testimony of Joshua Miller, who Jenkins claimed would testify that someone named Welch, not Jenkins, sold the marijuana to Hale. The trial court granted the State's motion in limine and later excluded evidence concerning the alleged marijuana transaction.

Jenkins appealed that ruling on two bases, contending that the evidence was admissible under Rules 608 and 616 of our rules of evidence. We disposed of the Rule 608

argument on the merits in our original opinion. We disposed of the Rule 616 argument on the basis that Jenkins did not raise that ground before the trial court and therefore waived it, an argument the State made in its Appellee’s Brief. In his reply brief, Jenkins cited three excerpts in the transcript where he claimed he did, in fact, argue before the trial court for admissibility under Rule 616, which provides, “For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.” We reviewed those excerpts and determined otherwise. Although we did not comment upon these contentions in Jenkins’s reply brief, our conclusion that he did not present a Rule 616 argument in those portions of the transcript informed our decision that he had waived the issue. Upon rehearing, Jenkins contends we were obligated to address the issue on the merits because he “appropriately documented that objection in the Reply Brief of Appellant in response to the State’s claim of waiver.” *Appellant’s Petition For Rehearing* at 4.

We have considered his arguments upon rehearing and reviewed the excerpts cited in support of this argument yet again and have reached the same conclusion – Rule 616 was not presented to the trial court as a basis for admitting the disputed evidence. The strongest argument to be made to the contrary concerns a discussion between the court and defense counsel regarding what questions could be asked of Hale on cross-examination. The following colloquy ensued:

COURT: Folks. All right. First of all with regard to the prior convictions it is either not relevant, strike that as either not coming within the annumbered [sic] criminal offenses that can be used for conviction or because of the time limit. Court is going to grant motion in limine regarding those convictions. Now, with regard

to being a drug addict. That goes to her ability to observe, see. I think that the Defendant has the right to question there.

PROSECUTION: Well, I agree.

COURT: I think he's got a right to question with regard to bias, prejudice, things of this nature that she may have an axe to grind against the Defendant in this particular in this case [sic] who if I understand correctly is the father of one of her children.

*Transcript* at 54. Jenkins points out upon rehearing that in its final comments the court invoked terms used in Rule 616, i.e., bias and prejudice. Although this is true, the court did not reference Rule 616 either directly or by inference, and its comment was not made in response to a discussion regarding that rule. Rather, the trial court merely listed the various subjects of appropriate cross-examination with respect to Hale. Such would include matters admissible under several rules, one of which was Rule 616. We reiterate that Jenkins had not theretofore argued that the alleged marijuana transaction was admissible under Rule 616. The court's passing reference to terms that are by happenstance used in Rule 616 does not constitute argument on that issue by Jenkins, nor can it be deemed a surrogate thereof. As indicated in our original opinion, Jenkins did not argue admissibility under Rule 616 and therefore the argument is waived.

Subject to the foregoing comments, our resolution of the issues presented in this appeal remains unchanged.

BAILEY, J., and BROWN, J., concur.