

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

JUNE 3, 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. 96-2510**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRYON BUHSE,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Marathon County:  
RAYMOND THUMS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Bryon Buhse appeals a trial court order that denied his § 974.06, STATS., postconviction motion challenging his 1990 felony conviction for strong-armed robbery, together with his misdemeanor convictions for obstructing an officer and battery. During the trial, the trial court barred Buhse from asking the victim, Bryan Kaseno, on cross-examination about his residence,

the county jail. Buhse argues that this violated his constitutional right to confront witnesses, citing United States Supreme Court cases that gave litigants a virtually absolute Confrontation Clause right to ask witnesses such questions to show residence-based pro-State bias for impeachment purposes. *See Alford v. United States*, 282 U.S. 687 (1931); *see also Smith v. Illinois*, 390 U.S. 129 (1968). He also argues that he may properly raise such arguments by a collateral attack postconviction motion, despite his failure to raise the issue in his direct appeal from his conviction. *See State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). We assume *arguendo* that the trial court erroneously barred Buhse's residence-based cross-examination for bias. We nonetheless conclude that any trial court error was harmless. We therefore affirm the trial court postconviction order and do not decide whether Buhse's postconviction motion met the *Escalona* standards.

We conclude that Buhse suffered no prejudice from his inability to cross-examine Kaseno for residence-based bias. In prior years, the United States Supreme Court has held that trial court restrictions of such cross-examination were *per se* erroneous and *per se* prejudicial. *See Alford*, 282 U.S. at 692-94 (“substantial right and essential safeguard to fair trial”); *see also Smith*, 390 U.S. at 131-33 (“constitutional error of the first magnitude”). The Supreme Court based these holdings on accuseds' fundamental Confrontation Clause rights to cross-examine witnesses for bias, ruling that juries were entitled to know whether prosecution witnesses who resided in the county jail had residence-based bias. In recent years, however, the Supreme Court has abandoned its *per se* Confrontation Clause analysis in favor of a harmless error analysis. *See Delaware v. Van Arsdall*, 475 U.S. 673, 682-83 (1986) (relevant factors include the importance of the witness's testimony, the existence of cumulative, corroborative and

contradictory evidence, the use of other impeachment evidence, and the overall strength of the prosecution's case). We believe that *Van Arsdall* overrules the *Alford-Smith* rule *sub silentio*. We now apply the *Van Arsdall* analysis, with the qualification that Buhse has the burden of proof on his collateral attack to show prejudice by clear and convincing evidence. See *State v. Walberg*, 109 Wis.2d 96, 103-04, 325 N.W.2d 687, 691-92 (1982).

Here, the trial court's evidentiary ruling did not affect the jury's verdict or Buhse's attempt to impeach Kaseno on cross-examination. Buhse was able to use several other means to impeach Kaseno's truthfulness that offset his inability to question Kaseno about potential residence-based bias. First, Buhse examined Kaseno about his drunkenness at the time of the crime and its adverse effect on his capacity to observe. Second, Buhse impeached Kaseno with his four prior convictions. Third, Buhse was able to identify prior inconsistent statements Kaseno had made in the case. Fourth, Buhse was able to impeach Kaseno with other facts that contradicted several of Kaseno's statements. In addition, the trial court permitted Buhse a wide ranging cross-examination into the substantive facts and factual background of the crime, and the prosecution presented another witness who corroborated much of Kaseno's testimony. Under these circumstances, Buhse has not shown that the trial court's erroneous limitation of Kaseno's residence-based cross-examination ultimately had any effect on the verdict. Buhse's full use of other cross-examination means, along with the strength of the prosecution's evidence, met Buhse's basic Confrontation Clause rights. In short, Buhse's trial satisfied the Supreme Court's *Van Arsdall* Confrontation Clause standards.

Finally, we do not read the *Alford-Smith* rule as expansively as Buhse. Since *Smith*, commentators have questioned its scope. See MCCORMICK

ON EVIDENCE § 29, at 58 n.8 (2d ed. 1972), citing *United States v. Teller*, 412 F.2d 374 (7th Cir. 1969); *United States v. Lawler*, 413 F.2d 622 (7th Cir. 1969); *United States v. Lee*, 413 F.2d 910 (7th Cir. 1969); *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969). We therefore question whether it is absolute. For example, courts would not require undercover drug agents to give their addresses due to the risk of danger. Moreover, the rule exists to help defendants identify the witness and thereby to discover information about him. Here, Buhse had other sources of information about Kaseno.

*By the Court.*—Order affirmed.

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

