

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2004

Cornelia G. Clark
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. 03-0594-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF000144

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALLACE J. HAMMERLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: EDWARD F. ZAPPEN, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Wallace Hammerle appeals from a judgment convicting him of first-degree reckless homicide, and from an order denying him postconviction relief. He raises several issues concerning the proceedings. We reject his arguments and affirm.

¶2 Hammerle's eight-week-old daughter, Devon Kuehl, died of a fractured skull. Based on the information provided by the child's mother, Dawn Kuehl, and an informant named Edwin Estep, the State charged Hammerle with first-degree reckless homicide. At trial, Dawn testified that the morning after a night when she and Hammerle engaged in heavy drinking, Devon and Hammerle were in a room together, and Devon was crying. The crying then abruptly stopped. The child was dead within several hours. Dawn admitted that she initially provided a completely different version of the events leading to Devon's death, one that completely omitted Hammerle's involvement. However, she explained that she did so to protect him because he was wanted by the police as a probation absconder, but decided to tell the truth after she learned that Devon died a violent death.

¶3 The State's other principal witness was Estep, who met Hammerle in prison several months after Devon's death. (Hammerle was imprisoned after his arrest and probation revocation). According to Estep, Hammerle described in detail how he beat Devon to death.

¶4 Estep had at least thirteen criminal convictions on his record. The State disclosed eight, the number of his Wisconsin convictions, but did not inform defense counsel of five Illinois convictions. When asked at trial about his convictions, Estep admitted to an unspecified number of bad check and retail theft convictions. He also testified that he had absconded from parole to avoid testifying against Hammerle, because of threats to his imprisoned brother from other inmates.

¶5 In his defense, Hammerle testified that Devon's injuries occurred when Dawn accidentally banged Devon's head against a doorway. His mother

testified that he told her the same story on the day of Devon's death. He also emphasized the inconsistencies in Dawn's statements about the death, and testified that he never discussed the matter with Estep.

¶6 After Hammerle's conviction he sought postconviction relief based on newly discovered evidence. The trial court denied relief, resulting in this appeal. The issues are: (1) whether the evidence was sufficient to convict Hammerle; (2) whether the trial court erroneously limited defense counsel's closing argument; (3) whether the prosecutor violated Hammerle's constitutional rights by failing to disclose exculpatory evidence; (4) whether newly discovered evidence mandates a new trial; and (5) whether the trial court demonstrated a bias toward Hammerle.

¶7 We conclude the jury heard sufficient evidence to convict Hammerle. We address this issue first, even though Hammerle contends that errors occurred during the evidentiary portion of the proceeding. In considering the sufficiency of the evidence, this court must consider all of the evidence submitted, including erroneously admitted evidence. *See Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988). Dawn identified Hammerle as the only person present when Devon suffered the fatal blow or blows to her head. Estep provided testimony about Hammerle's detailed admission of guilt. There were reasons to doubt the testimony of either or both of these witnesses. However, the jury clearly chose to believe their version of the fatal events, rather than Hammerle's. That was its prerogative. *See Whitaker v. State*, 83 Wis. 2d 368, 377, 265 N.W.2d 575 (1978). Having chosen to believe the State's witnesses, the jury could reasonably find guilt beyond a reasonable doubt from their testimony. On appeal, we reverse a conviction for insufficient evidence only if that evidence "viewed most favorably to the State and the conviction, is so insufficient in probative value and

force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We cannot say that here.

¶8 Hammerle waived his argument that the trial court improperly limited his counsel’s closing statement. The trial court allowed Hammerle’s mother to testify that Hammerle gave a consistent, exculpatory version of events shortly after they occurred, to rebut an implication that he recently fabricated his defense. *See* WIS. STAT. § 908.01(4). However, the trial court instructed counsel that he could not argue that what Hammerle said to his mother proved that what he said occurred. Counsel did not object to this limitation on his use of the evidence, and instead agreed that the statement was offered to prove its making rather than the truth of the matter asserted. Consequently, the argument is waived on appeal. *See State v. Nielsen*, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325. In any event, Hammerle suffered no prejudice from the court’s limitation. There was no limiting instruction. The jury heard the testimony and, as the trial court observed, was able to draw whatever inference it chose.

¶9 Hammerle has not shown that the prosecutor suppressed exculpatory evidence. A defendant is constitutionally entitled to material exculpatory evidence from the prosecutor. *Brady v. Maryland*, 373 U.S. 83, 86 (1963). In this case, the undisclosed exculpatory information was Estep’s five Illinois convictions. However, the court found that the State was never aware of those convictions, despite a diligent, good faith investigation. Hammerle does not challenge that ruling, and that resolves the issue. He concedes in his brief that the duty to disclose only extends to information that the State actually possesses or controls.

¶10 Hammerle has not satisfied the newly discovered evidence test. His new evidence consisted of: (1) testimony from Estep's brother denying that other inmates had threatened him over Estep's testimony against Hammerle, and (2) the full extent of Estep's criminal history. His burden required a showing that this evidence would make a different result on retrial reasonably probable. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The trial court's determination on that question is discretionary. *State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). Here, Estep's motive for absconding, and his willingness or unwillingness to testify against Hammerle, were peripheral issues. Estep had no apparent motive to lie. The trial court reasonably concluded that an attempt to impeach Estep on these matters would not measurably affect the outcome of a retrial. Additionally, the same is true of the evidence of Estep's five Illinois convictions. It is only speculation that the difference between eight convictions and thirteen convictions would change a jury's credibility determination. In any event, the jury never learned that Estep had even eight convictions. He admitted to an unspecified number.

¶11 Hammerle's claim of the judge's bias is unsupported by the record. Hammerle had a constitutional right to an impartial judge. *State v. Hollingsworth*, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991). The judge violates that right by actually treating the defendant unfairly. *Id.* at 894. Merely the appearance of partiality, or of circumstances allowing speculation as to impartiality, is not sufficient. *Id.* In this case, Hammerle points to an instance where the judge allegedly signaled the prosecutor to object to a question. The judge admitted an observable reaction to the question, which he considered plainly objectionable, but adamantly denied signaling the prosecutor. This court has no basis to review the trial court's description of its subjective state of mind.

¶12 Additionally, Hammerle points to other comments the judge made concerning the weakness of Hammerle’s case and the performance of his attorney. Even if these comments about the case suggested bias, which is a conclusion we do not share, the judge made them outside the jury’s presence. They did not amount to, nor indicate, unfair treatment in fact.

¶13 Finally, Hammerle complains that the judge referred to his decision to impose the maximum sentence as “a no brainer.” The judge made the comment after sentencing, and we construe it as a comment on the numerous very aggravating factors present in this case, and not as an indication of prejudgment or other bias.

By the Court.—Judgment and order affirmed.

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

