COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1521-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT K. RYMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Robert K. Rymer has appealed from a judgment convicting him of the first-degree intentional homicide of Justin Zorn and the attempted first-degree intentional homicide of Justin's mother, Gail Rymer. He

has also appealed from an order denying postconviction relief. We affirm both the judgment and the order.

¶2 Rymer's first argument is that the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel without holding an evidentiary hearing. He contends that his trial counsel rendered ineffective assistance when he failed to object to an opinion proffered by Dr. L.T. Johnson, a forensic dentist who testified that a bite mark on Rymer's chest was consistent with having been made by Justin's teeth. Dr. Johnson indicated that based on the orientation of the bite mark, Justin's head would have been upside down when he bit Rymer. Rymer contends that his trial counsel should have objected to the testimony regarding the orientation of the mark because the prosecutor failed to disclose Dr. Johnson's opinion on this subject prior to trial in violation of WIS. STAT. § 971.23(1)(e) (1997-98).[1]

¶3 To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***id.*** "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The case is reviewed from counsel's perspective at the time of trial, and

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms. *See* ***id.***

¶4 Even if counsel's performance is deficient, a judgment of conviction will not be reversed unless the appellant proves that the deficiency prejudiced his or her defense. *See* ***id.*** "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶5 A claim of ineffective assistance presents a mixed question of law and fact. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The trial court is the ultimate arbiter of witness credibility. *See* ***State v. Marty***, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987). This court will not disturb the trial court's findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous. *See* ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See* ***id.***

¶6 A trial court, in the exercise of its discretion, may deny a postconviction motion alleging ineffective assistance without holding an evidentiary hearing if the defendant fails to allege sufficient facts in the motion to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v.***

Bentley, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Whether a postconviction motion alleges facts which, if true, would entitle a defendant to relief is a question of law which we review de novo. *See* ***id.*** at 310.

¶7 Prior to filing his motion for a new trial based on ineffective assistance of counsel, Rymer filed a motion for a new trial based on the prosecutor's alleged failure to disclose material evidence. Like the motion raising ineffective assistance, this motion was based upon the prosecutor's failure to disclose Dr. Johnson's opinion regarding the orientation of the bite mark on Rymer's chest. In the initial postconviction motion, Rymer also alleged that the prosecutor had failed to disclose all of the photographs upon which Dr. Johnson based his opinions. The motion was denied after a lengthy evidentiary hearing.

¶8 Based upon the evidence adduced at that hearing, we conclude that Rymer's claim of ineffective assistance was properly rejected without an additional evidentiary hearing. At the initial postconviction hearing, District Attorney Joseph Paulus, the prosecutor who tried the case, appeared as a witness. He testified that he turned all photographs of the bite mark, along with the police reports, over to Attorney Joseph Hildebrand, the attorney who initially represented Rymer in this case. He testified that he subsequently sent Dr. Johnson's written report to Attorney Hildebrand's successor, Attorney Franklyn Gimbel. Paulus testified that he did not learn of Dr. Johnson's testimony regarding the orientation of the bite mark until shortly before Dr. Johnson testified at trial.

¶9 At the conclusion of the hearing, the trial court found that all of the photographs were turned over to Attorney Hildebrand prior to trial. It found that "[w]ith Dr. Johnson's explanation, with his photographs at the time, the lay witnesses could make the same conclusions for themselves, and logic didn't

require an expert." It further concluded that the orientation of the bite mark was not a critical factor, and that the primary importance of the evidence regarding the bite mark was to establish that Rymer had physical contact with Justin.

¶10 The trial court denied Rymer's motion for a new trial based on ineffective assistance of counsel on largely the same grounds. Rymer's motion was again premised on a claim that the prosecutor failed to timely disclose Dr. Johnson's opinion regarding the orientation of the bite mark. Rymer argued that his counsel was deficient for failing to object to Dr. Johnson's orientation testimony on the ground that the prosecutor had failed to disclose the opinion to defense counsel in violation of WIS. STAT. § 971.23(1)(e). Rymer contends that if his attorney had objected, the trial court would have been required to exclude the opinion testimony or grant a continuance to permit counsel to prepare for cross-examination of Dr. Johnson.

¶11 In denying Rymer's second motion for postconviction relief, the trial court found that the prosecutor was made aware of Dr. Johnson's opinion regarding the orientation of the mark just before he testified. It reiterated its prior findings that all of the evidence upon which Dr. Johnson relied had been turned over to the defense in a timely fashion, and it found that neither side had requested or received a prior opinion from Dr. Johnson regarding the orientation of the bite mark. It also noted that at the earlier hearing, co-counsel for the defense suggested that Attorney Gimbel might have refrained from objecting to the testimony at trial to avoid drawing attention to it. Therefore, the court concluded that a valid strategic reason existed for failing to object. It concluded that if an objection had been made, it would not have been sustained, and that in any event, the testimony regarding orientation was of little importance to the overall case.

¶12 Based upon the record and the trial court's findings, no basis exists to conclude that trial counsel was deficient for failing to object to Dr. Johnson's opinion on the ground that the prosecutor failed to comply with WIS. STAT. § 971.23(1)(e). As determined by the trial court, an objection would not have led to exclusion of the opinion. The photographs upon which the opinion was based had been timely provided to the defense. The defense knew that the photographs were being reviewed by a forensic dentist and could have inquired further into the matter if it so chose, thus obviating any claim that the defense was prejudiced by the prosecutor's failure to disclose the opinion earlier. In addition, the prosecutor himself learned of Dr. Johnson's opinion regarding orientation only shortly before he testified. Moreover, even the attorney who represented Rymer at the first postconviction hearing indicated that trial counsel might not have wanted to object for fear that an objection would draw more attention to the testimony.[2] Because trial counsel was unlikely to have prevailed on an objection, and because his objection would have drawn undue attention to the testimony, no basis exists to conclude that trial counsel performed deficiently by failing to object.

¶13 Most importantly, as determined by the trial court, counsel's failure to object to the opinion did not prejudice Rymer's defense. The evidence regarding the bite mark was important because it showed that Rymer had physical contact with Justin, not because it showed that he carried Justin upside down or slung over his shoulder with his head upside down. Although Rymer testified that Justin nipped him while he was carrying Justin out to the car for Gail, Gail

[2] We recognize that an evidentiary hearing was not held on the ineffective assistance of counsel claim, and that Rymer's trial counsel, Attorney Gimbel, did not testify to his strategy or the reasons he failed to make an objection. However, the attorney who represented Rymer at the first postconviction hearing was a member of Attorney Gimbel's law firm. His statement concerning possible strategy, while not determinative, is informative.

testified that she, not Rymer, carried Justin to the car, and she adamantly denied that Rymer ever handled Justin while she was present. If the jury believed Gail's testimony, evidence that Justin bit Rymer substantiated the State's argument that Rymer handled Justin after beating Gail, and after Gail escaped. It thus also substantiated the State's claim that Rymer killed Justin.

¶14 In contending that the testimony regarding the orientation of the mark was prejudicial, Rymer contends that evidence that Justin was inverted showed an unnatural position, thus supporting the State's claim that he mishandled Justin and ruining his credibility. However, the issue for the jury was whether Rymer handled Justin while Gail was present, as he testified, or whether his only physical contact with Justin occurred after Gail escaped, as indicated by her testimony. The position in which Justin was held or carried had no relevance to that issue. Counsel's failure to object to the testimony regarding orientation therefore cannot be deemed prejudicial. Moreover, an evidentiary hearing was not required to resolve the ineffectiveness of counsel issue because the record, including the record and findings made at the first postconviction hearing, established that Rymer was not denied effective assistance of counsel.

¶15 Rymer's next contention is that the trial court erred when it denied his motion for a change of venue. We review the trial court's order denying Rymer's motion under an erroneous exercise of discretion standard. *See* ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). However, while our review is deferential, we must also independently evaluate the circumstances to assess whether there was a reasonable likelihood of community prejudice. *See* ***id.*** Factors to be considered include: (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury;

(4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned. *See* ***id.***

¶16 The record provides no basis to disturb the trial court's denial of the motion for change of venue. The motion was filed on November 17, 1997, approximately two months after the complaint was filed. It was heard and denied on January 29, 1998, approximately three months before the trial. While acknowledging that the crimes charged were very serious and had an emotional content of their own, the trial court concluded that the newspaper articles submitted by Rymer in support of his motion were largely straightforward and informative and did not reflect an effort to inflame emotions by the media or the State. It noted that the extent of the coverage was no more than in many other cases in the area, and that most of the articles submitted by Rymer occurred in an initial flurry of coverage. It further noted that pretrial publicity was important only to the extent that potential jurors were exposed to it, remembered it and believed it, and that those issues were properly assessed during jury selection. Based upon the record regarding pretrial publicity submitted by Rymer, the trial court was not persuaded that selecting an impartial jury would be difficult, and denied a change of venue.

¶17 The trial court's findings regarding the extent and nature of the pretrial publicity are supported by the record. Most of the articles were purely informative in nature. Although some of the articles contained information regarding Rymer's prior criminal record and domestic abuse allegations, that fact alone did not compel a change of venue. *See, e.g.,* ***McKissick v. State***, 49 Wis. 2d 537, 546-47, 182 N.W.2d 282 (1971). In addition, while one editorial set forth a

statement by Justin's grandfather concerning the death penalty, the purpose of the editorial was to explain the newspaper's decision to publish a photograph, not to inflame public sentiment. It is also noteworthy that the most recent article in the record was dated more than five months prior to Rymer's trial. "[E]ven where community prejudice is found to exist initially, a delay or cooling-off period contributes to the ability of the state to conduct a fair trial." ***Hoppe v. State***, 74 Wis. 2d 107, 114, 246 N.W.2d 122 (1976).

¶18 Most importantly, the trial court's expectation that an impartial jury could be selected without difficulty proved to be correct. This court has reviewed the entire record of the voir dire and jury selection. The selection process was not difficult. The potential jurors were asked many questions during the voir dire, including whether they had seen or read reports about the case. Without going into detail on the reports, the trial court asked if there were any jury panel members who, because of what they had seen or read, had already made up their minds or could not be fair and impartial. The panel members who raised their hands or stated that they could not be impartial because the victim was a young child were excused.

¶19 While other panel members indicated that they had seen some reports about the case, they also indicated that they could be impartial despite seeing or reading those reports. The record of the voir dire indicates that all jury panel members who indicated that they could not be fair and impartial or decide the case based solely on the evidence at trial, whether because of the media reports or for other reasons, were removed from the panel by the trial court. Ultimately, nothing in the voir dire indicates that there was a reasonable likelihood that the media reports resulted in community prejudice which affected Rymer's right to a fair trial, or rendered the jury unwilling or unable to impartially decide the issues

based upon the evidence.[3] Rymer was entitled to nothing more. *See* ***Albrecht***, 184 Wis. 2d at 307.

¶20 Rymer also objects that the trial court applied the wrong legal standard when it considered the victims' rights when addressing his motion for change of venue. It is true that the trial court asked the prosecutor if the victims had a position on the motion for change of venue. It is also true that nothing in the victims' rights law set forth in WIS. STAT. ch. 950 or elsewhere in the Wisconsin Statutes provides that a trial court should consider a victim's interests in determining whether a defendant is entitled to a change of venue based on pretrial publicity. However, the record reveals that the trial court did not inquire into the victims' position until after it had addressed the factors relevant to a motion for change of venue and denied the request. In addition, in response to the trial court's inquiry, the prosecutor indicated that the victims had not been concerned with the issue and had left the recommendation up to him. Under these circumstances, any error by the trial court in inquiring into the victims' interests was harmless.

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[3] We note that Rymer did not renew his motion for a change of venue during voir dire or upon its completion. Shortly before jury selection began, Rymer's counsel stated that there had been television coverage of the case that morning. Based upon that coverage, he requested permission to question any potential juror outside the presence of the other jurors if voir dire revealed that the potential juror had extensive exposure to the pretrial publicity. The State did not oppose the request and the trial court left the issue open to see how the questioning went. Defense counsel never subsequently claimed that individual voir dire outside the presence of the other jurors was necessary, nor did he renew the motion for a change of venue.

Although Rymer's failure to renew his motion for a change of venue does not prevent him from challenging the trial court's order denying change of venue in this appeal, it limits the venue issues that can be raised as of right on appeal to those raised in his pretrial motion. *See* ***State v. Benoit***, 229 Wis. 2d 630, 647 n.6, 600 N.W.2d 193 (Ct. App.), *review denied*, 230 Wis. 2d 273, 604 N.W.2d 571 (Wis. Sept. 28, 1999) (No. 98-1531-CR). It is also a further indication of the lack of difficulty encountered in selecting an impartial jury.

¶21 Rymer's next argument is that the trial court erred when it permitted photographs of the deceased child to be shown to the jury. He contends that the photographs were inflammatory.

¶22 A decision as to whether to admit photographs into evidence lies within the trial court's discretion. *See* ***State v. Lindvig***, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996). An appellate court will not disturb the trial court's decision unless it is wholly unreasonable, or the only purpose of the photographs was to inflame and prejudice the jury. *See* ***id.***

¶23 We have reviewed the photographs and conclude that the trial court properly exercised its discretion in admitting them into evidence and permitting them to be shown to the jury during closing argument. The photographs showed bruising on the front, side and top of Justin's head, and a pattern or markings on the left side of his head. Dr. Michael Chambliss, the forensic pathologist who performed an autopsy on Justin, testified that in his opinion the cause of Justin's death was blunt force injuries to his head. He indicated that such injuries would occur if a child was struck with something or if his or her head struck something. He described the damage to Justin's head as a severe injury requiring severe force, and testified that based on the degree of bruising, it was clear that he had received more than one blow. He also testified that the marks on Justin's left forehead and the frontal region of his scalp resembled the linear marks on Rymer's shoes, although he declined to render an opinion that Justin's injuries were caused by the bottom of Rymer's shoes.

¶24 Rymer was charged with first-degree intentional homicide in violation of WIS. STAT. § 940.01. Lesser included offenses of second-degree intentional homicide and first- and second-degree reckless homicide were also

submitted to the jury. As noted by the trial court, the degree of the injuries in this case was relevant to the issue of whether Rymer's conduct was intentional or reckless. The photographs, which showed the extent of the bruising, could assist the jury in deciding whether Rymer's conduct was merely reckless, or whether he had the mental purpose to take Justin's life or was aware that his conduct was practically certain to cause the death of Justin, as required to convict him of first-degree intentional homicide. *See* WIS JI—CRIMINAL 1010.

¶25 Two of the photographs also corroborated the testimony of Dr. Chambliss and Detective Cheryl Eischen, indicating that there were distinct markings on Justin's forehead which resembled markings on the bottoms of Rymer's shoes. Because photographs of the bottoms of Rymer's shoes were also admitted into evidence, showing the photographs of Justin to the jury permitted them to compare the marks. The photographs depicting the marks on Justin's head were thus relevant to the jury's decision as to whether Rymer caused Justin's injuries and, if so, to his state of mind when doing so. Because the trial court also properly determined that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice, it acted within the scope of its discretion in publishing the photographs to the jury. *See* WIS. STAT. § 904.03.[4]

[4] In permitting the photographs to be shown to the jury, the trial court also stated that it was required to consider the rights of the victims. This comment reflects a misunderstanding on the part of the trial court. Nothing in the victims' rights law set forth in WIS. STAT. ch. 950 or elsewhere in the Wisconsin Statutes requires a trial court to consider a victim's interests in determining evidentiary issues. However, any error by the trial court in making this comment was harmless. A review of the trial court's decision indicates that it clearly considered the probative value of the photographs and whether they were unduly prejudicial, and made its decision based upon those factors.

¶26 Rymer's next argument is that statements made by him to Detective Eischen were taken in violation of his Sixth Amendment right to counsel and his Fifth Amendment right to remain silent. He contends that the trial court erred in denying his motion to suppress his statements.

¶27 The record indicates that Rymer was arrested on September 20, 1997, based upon the physical assault of Gail.[5] At the hearing on Rymer's motion to suppress his statements, Detective Robert Hughes testified that he read Rymer his ***Miranda***[6] rights at the time of his arrest, informing him of his right to counsel and his right to remain silent. Hughes testified that Rymer indicated that he understood his rights and would answer questions without an attorney being present. Hughes testified that he then transported Rymer to the sheriff's department and told Eischen that Rymer had been informed of his ***Miranda*** rights.

¶28 Eischen testified that she first met with Rymer in a conference room at approximately 8:30 p.m. on September 20, 1997, and that prior to the interview she had been informed by Hughes that Rymer had been read his ***Miranda*** rights. She testified that Rymer asked her if she was an attorney, and that her response was, "No, I'm not. I'm not an attorney. If that's what you want." She testified that she showed Rymer her badge and told him that she was a detective with the sheriff's department. She testified that she also gave him a business card which included her name, badge number and rank. She testified that she then told Rymer that he did not have to talk to her if he did not want to, and that he could stop

[5] In a complaint filed on September 22, 1997, Rymer was initially charged with the substantial battery of Gail. That charge was subsequently amended to attempted first-degree intentional homicide of Gail.

[6] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

talking to her at any time. She testified that Rymer acknowledged that he understood, and that she then commented, "I understand you had a pretty bad time last night." She testified that Rymer replied that he did not want to talk "about that." She testified that she then asked if he would be willing to talk about Justin, who was still missing, and Rymer stated that he would be willing to talk to her "about the missing baby."

¶29 Eischen's testimony indicated that this interview continued until 10:55 p.m., and that Rymer never stated that he wanted an attorney or that he did not want to talk to her. She testified that she interviewed Rymer again at 11:30 p.m. that night, and that, as with the earlier interview, he did not state that he wanted an attorney or that he wished to stop talking. After Justin's body was discovered in Lake Winnebago the next day, Eischen conducted a third interview with Rymer. She testified that she told Rymer that the same conditions applied as in their past conversations, that he did not have to talk to her, that he could have an attorney present, that he could stop the interview at any time, and that anything he said could be used against him in court. She testified that Rymer agreed to talk to her. She testified that later in that conversation Rymer requested an attorney and the interview ceased.

¶30 In his testimony at the suppression hearing, Rymer acknowledged that he was informed of his ***Miranda*** rights by Hughes. However, he also testified that when Eischen introduced herself, he asked her if he could have an attorney present and she ignored his request. He contends that his Sixth Amendment right to counsel was violated when his request for counsel was ignored. He further contends that his Fifth Amendment right to remain silent was violated when Eischen questioned him after he stated that he did not want to discuss the events of the previous night.

¶31 The resolution of Rymer's claims requires the application of constitutional principles to evidentiary or historical facts. *See* ***State v. Dagnall***, 2000 WI 82, ¶26, 236 N.W.2d 339, 612 N.W.2d 680. In reviewing an order denying a motion to suppress statements, we apply a deferential, or clearly erroneous, standard to the trial court's findings of evidentiary or historical facts. *See* ***id.*** at ¶27. We independently review the court's application of constitutional principles to the historical facts. *See* ***id.***

¶32 The Sixth Amendment right to counsel arises upon the initiation of adversary judicial proceedings, which occurs in Wisconsin when a criminal complaint is filed or an arrest warrant is issued. *See* ***id.*** at ¶30. The Sixth Amendment right to counsel applies to pretrial interrogations, *see* ***id.***, and attaches for the specific charges which are the subject of the complaint or arrest warrant, *see* ***id.*** at ¶52. If a defendant has been informed of his or her right to counsel and the right to remain silent, but has not yet retained counsel or had counsel appointed for the specific charges, he or she must invoke his or her right to counsel in order to terminate questioning. *See* ***id.***

¶33 Counsel had not been retained or appointed to represent Rymer in this criminal case at the time of the interviews with Eischen. Consequently, he was required to invoke his right to counsel if he wished to refrain from answering questions without the presence of an attorney.

¶34 The Wisconsin Supreme Court has not decided whether the test for invoking the Sixth Amendment right to counsel is identical to the Fifth Amendment test in situations where an unrepresented defendant must invoke the

right.[7] *See* ***id.*** at ¶60. However, regardless of the precise scope of the test, the trial court properly determined that Rymer's right to counsel was not invoked here.

¶35 In denying Rymer's motion to suppress, the trial court found that when Rymer specifically asked for an attorney, the questioning stopped and he was allowed to seek an attorney. This finding is supported by the testimony of Eischen and is not clearly erroneous. It therefore cannot be disturbed by this court.[8]

¶36 Rymer contends on appeal that his Sixth Amendment right to counsel was invoked by the question, "Are you an attorney?" However, this question cannot reasonably be construed as either a demand or a request for counsel. It constituted nothing more than a question as to whether Eischen was an attorney and was honestly answered by Eischen. Because neither the testimony nor the trial court's findings supports a determination that Rymer asked for an attorney after hearing Eischen's reply, or in any manner invoked his right to

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[7] Under the Fifth Amendment, a defendant "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." ***Davis v. United States***, 512 U.S. 452, 459 (1994).

[8] In denying Rymer's motion to suppress, the trial court also stated: "Even if I would accept [Rymer's] version that he asked Detective Eischen early on if he could have an attorney present, and as he put it she ignored him and continued to question, he also knew of his rights that he didn't have to answer and that the questioning would stop any time he wanted to stop."

As conceded by the State, to the extent that the trial court's decision suggests that a defendant who has invoked his or her Sixth Amendment right to counsel waives that right by continuing to answer questions, the decision is incorrect. *See* ***State v. Dagnall***, 2000 WI 82, ¶¶ 64-65, 236 Wis. 2d 339, 612 N.W.2d 680 (the police may not initiate or continue questioning of a defendant who invokes his or her Sixth Amendment right to counsel; further contact may be initiated only by the defendant). However, regardless of whether the trial court erred in this portion of its analysis, it continued its decision by stating: "And further I find that when [Rymer] specifically asked for an attorney the questioning stopped, and he was allowed to seek an attorney." As previously noted, this finding is not clearly erroneous. Based upon it, suppression was properly denied.

counsel prior to the third interview on September 21, 1997, Eischen was not required to cease the questioning of Rymer.

¶37 We also uphold the trial court's determination that Rymer's Fifth Amendment right to remain silent was not violated. A suspect's right to remain silent includes both the right to remain silent prior to questioning and the right to terminate questioning. *See* ***State v. Ross***, 203 Wis. 2d 66, 73-74, 552 N.W.2d 428 (Ct. App. 1996). The key question is whether, after being informed of his or her ***Miranda*** rights, the suspect invokes any of those rights during police questioning. *See* ***Ross***, 203 Wis. 2d at 74. A suspect must clearly and unambiguously articulate and invoke his or her right to remain silent before questioning must cease. *See* ***id.*** at 74-75. "A suspect must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police as such, inform the police that he or she wishes to remain silent." ***Id.*** at 78. The suspect's desire to remain silent or cut off questioning must be articulated "'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be' an invocation of the right to remain silent." ***Id.*** (quoting ***Davis v. United States***, 512 U.S. 452, 459 (1994)).

¶38 If a suspect makes an equivocal or ambiguous request to remain silent, the police need not ask the suspect clarifying questions on that request. *See* ***Ross***, 203 Wis. 2d at 78. Moreover, a suspect may selectively waive his or her ***Miranda*** rights, deciding to respond to some questions but not to others. *See* ***State v. Wright***, 196 Wis. 2d 149, 157, 537 N.W.2d 134 (Ct. App. 1995).

¶39 The trial court found that Rymer was properly advised of his ***Miranda*** rights, understood them, and chose to answer Eischen's questions. These findings are supported by the testimony of both Hughes and Eischen and cannot be

disturbed by this court. Moreover, Rymer's statement that he did not want to talk "about that" in response to Eischen's comment that she heard he had a pretty bad time the preceding night cannot be construed as a clear and unambiguous invocation of his right to remain silent, nor would a reasonable police officer have perceived it as such. Rymer's statement indicated only that he did not want to talk about the bad time he had. Eischen was entitled to clarify his response and ask him whether he would be willing to talk about Justin. Because Rymer responded that he would be willing to talk to her "about the missing baby," no basis exists to conclude that his right to silence was not respected by Eischen.

¶40 Rymer's final argument is that the evidence was insufficient to permit his conviction for first-degree intentional homicide. The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence are for the jury. *See* ***id.*** We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***id.*** "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

¶41 Although there was no direct evidence that Rymer killed Justin and that he did so intentionally, the circumstantial evidence of his guilt was strong. As noted above, the forensic pathologist who performed an autopsy on Justin testified

that he died from blunt force injuries requiring severe force. Based on the degree of bruising encircling Justin's head, the pathologist also testified that it was obvious that Justin had received more than one blow, and that he would have died within a matter of seconds of receiving the injuries. In addition, although he did not render an opinion that the marks on Justin's head were caused by Rymer's shoes, he testified that the linear marks on Justin's left forehead and frontal scalp resembled the linear marks on Rymer's shoes.

¶42 The jury also heard extensive testimony from Gail, which established that Rymer had both a motive and the opportunity to harm Justin. Gail testified that although she gave birth to Justin while married to Rymer, Rymer was not Justin's father. She testified that at the time of Justin's death, she and Rymer were in the process of a divorce, and that Rymer was very uncooperative. She testified that on September 19, 1997, a few weeks after Justin's first birthday, Rymer telephoned and asked her to come to his house to pick up some items and to bring Justin with her. She testified that prior to that date Rymer had seen Justin for only five minutes and did not interact with him.

¶43 Gail testified that she went to Rymer's house on September 19, 1997. She testified that she carried Justin into Rymer's house, and that Rymer never touched Justin while they were in the house. She testified that when a dispute arose, she carried Justin out to the car and locked him in his car seat. She testified that she then returned to the house with Rymer but without Justin. She testified that as she subsequently returned to the car, Rymer struck her with a rock, initiating a violent altercation in which Rymer beat her multiple times with a rock and attempted to drown her in both a barrel and a tray of water. She testified that Rymer told her that she had hurt him and that he was going to kill her. She

testified that she attempted to get into the car but that Rymer pulled her out. She testified that she was drenched in blood.

¶44 Gail testified that while these events were unfolding, Justin, who was still locked in his car seat in the backseat of the car, commenced crying. She testified that at one point she lay beaten on the ground and said to Rymer, "If you're going to kill me, can I hold my son one more time?" She testified that Rymer responded, "No, you're not going to get near Justin again." Gail testified that she asked Rymer what he was going to do with Justin and he responded that he "didn't know yet."

¶45 Gail testified that Rymer cut his hands on the screen door during the fight, and that at one point he grabbed a brick and struck her, knocking her into the grass. She testified that when she regained her alertness she realized that Rymer was not near her, and she ran to a neighbor's house where she made a 911 emergency call. She testified that the last time she saw Justin alive was just before the final blow. He was buckled in his car seat. She testified that during the entire time she was at Rymer's residence, Rymer had not taken Justin from the car seat or put him in it. She also testified that Justin was not strong enough to unlock the car seat himself, and that he could barely walk.

¶46 Gail's testimony was corroborated by the testimony of police officers who described the scene of the fight and the blood found at the places where Gail indicated she had been beaten. In addition, the neighbor to whose house Gail ran testified that Gail's "whole head was opened up" and that "the meat was hanging out of her head." She testified that Gail told her that her baby was in the car. The neighbor testified that she looked out after the 911 call was made and

observed a car moving out of the strip of grass between her house and Rymer's residence.

¶47 Based upon Gail's testimony, the jury could conclude that Rymer was the last person to be seen with Justin. Based upon Rymer's horrific beating of Gail and his statement that she would never see Justin again, the jury could determine that Rymer chose to kill Justin in order to hurt Gail. In addition, Gail unequivocally testified that Rymer never touched Justin in her presence. However, based on the remaining evidence, it was clear that Rymer did handle Justin. Evidence of Rymer's handling of Justin included the bite mark on Rymer's chest, and the presence of Rymer's blood on the locking mechanism of Justin's car seat. Based upon this evidence, the jury could reasonably find that Rymer handled Justin after Gail escaped from him.

¶48 Additional evidence indicated that Rymer's blood was found on the dock in front of his house, close to where Justin was found in the water. The jury also heard Eischen's testimony that after telling Rymer that Justin had been found, Rymer stated, "Well, he probably hit his head on some rocks down by the water," and that "he could have been hit by a boat prop when he was found in the water." Because Eischen had not informed Rymer that Justin had been found in the water, Rymer's statements indicated that he had personal knowledge of how Justin had died and were thus indicative of his guilt.

¶49 The jury was also entitled to find that Rymer was an incredible witness, particularly in light of his description of his beating of Gail as essentially an evenly matched fight, a description which was contradicted by the evidence regarding the degree of the injuries suffered by Gail. Additionally, the jury heard contradictory statements from Rymer to police detectives concerning how he cut

his hands and when he last saw Justin. Based upon Rymer's lack of credibility and the remaining strong evidence that he intentionally caused the death of Justin, the jury was entitled to find him guilty of first-degree intentional homicide.

By the Court.—Judgment and order affirmed.

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