STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP457-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL L. SCHMIDT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR OCONTO COUNTY, THE HONORABLE MICHAEL T. JUDGE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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ISSUES PRESENTED

1. Was the evidence sufficient for a rational jury to find Schmidt guilty beyond a reasonable doubt of the first-degree intentional homicide of Leonard Marsh?

The trial court denied Schmidt's motion to dismiss for insufficient evidence at the close of the state's case. A jury found Schmidt guilty beyond a reasonable doubt of the first-degree intentional homicides of Kimberly Rose and Leonard Marsh.

2. Did the trial court properly exercise its discretion when it excluded as irrelevant the proffered defense expert testimony regarding suggestive child interviewing techniques?

The trial court rejected the expert testimony of Dr. David Thompson regarding factors that may affect a child's answers during an interview. The court held that the probative value of the expert opinion testimony was outweighed by its potential to unfairly prejudice and confuse the jury.

3. Did the trial court err in holding that Schmidt waived the application of the marital privilege that would have excluded from evidence a statement by his wife that Schmidt told her four days before the murders that he contemplated killing both Kimberly Rose and himself?

Schmidt admitted to police that he told his wife he contemplated killing himself over the affair with Kimberly Rose, but denied that he also told her he contemplated killing Rose. The court held that Schmidt waived the marital privilege at Wis. Stat. § 905.05, that would have excluded his wife's statement that he contemplated killing Rose, because he voluntarily disclosed to police a "significant part" of their marital communications, as provided at Wis. Stat. § 905.11.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument. The briefs of the parties should adequately address the legal and factual issues presented.

The state does not request publication. This case involves the application of established principles of law to the facts presented.

STATEMENT OF THE CASE

Daniel Schmidt appeals (180) from a judgment of conviction (145; 151), and from an order denying direct postconviction relief, entered in the circuit court for Oconto County, the Honorable Michael T. Judge, presiding (179). An Oconto County jury found Schmidt guilty as charged of two counts of first-degree intentional homicide after a trial held October 11-17, 2013 (137; 154:163-64).

ARGUMENT

I. WHEN IT IS VIEWED MOST FAVORABLY TO THE STATE AND THE CONVICTION, THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL JURY TO FIND SCHMIDT GUILTY BEYOND A REASONABLE DOUBT OF THE FIRST-DEGREE INTENTIONAL HOMICIDE OF LEONARD MARSH.

Schmidt concedes, by not arguing the point, that the evidence was sufficient to convict him of murdering Kimberly Rose. Schmidt insists, however, that no rational jury could have found him guilty beyond a reasonable doubt of the first-degree intentional homicide of her brother, Leonard Marsh, at the same time and in the same house a few feet away.

Schmidt can only prevail if this court does what he has done; ignore the deferential standard for review and view the evidence in the light most favorable to him rather than, as the law requires, in the light most favorable to the state and the conviction. Schmidt's brief at 13.[1]

A. The standard for review of a challenge to the sufficiency of the evidence to convict.

The highly deferential standard for appellate review of a challenge to the sufficiency of the evidence to convict is firmly established. *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citation omitted).

Stated another way: "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990) (citation omitted). Additionally, the trier of fact is the sole arbiter of the credibility of witnesses and

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[1] Although Schmidt presents this argument last in his brief, the state chooses to lead with it because it puts his remaining arguments in proper perspective.

alone is charged with the duty of weighing the evidence. *See Poellinger*, 153 Wis. 2d at 506. *Also see State v. Hahn*, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998).

When more than one inference can reasonably be drawn from the evidence, the inference which supports the jury's verdict must be the one followed on review. *See State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989). It is exclusively within the jury's province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence. *State v. Wyss*, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985) (citation omitted).

The standard for review is the same whether the verdict is based on direct or circumstantial evidence. *Poellinger*, 153 Wis. 2d at 503.

This court may overturn the jury's verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.

> It is vitally important to maintain this standard of review. An appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial. *Poellinger*, 153 Wis. 2d at 505-06. "It is not the role of an appellate court to do that." *Id.* at 506.

Id. ¶ 77. *See State v. Steffes,* 2013 WI 53, ¶ 23, 347 Wis. 2d 683, 832 N.W.2d 101 (citing *Poellinger* for the proposition that an appellate court will uphold the verdict "if any reasonable inferences support it").

B. The circumstantial evidence was sufficient for a rational jury to find Schmidt guilty of the intentional homicide of Leonard Marsh.

The state was required to prove beyond a reasonable doubt that Schmidt caused Leonard Marsh's death with the specific intent to kill him. Wis. Stat. § 940.01(1).

Someone intentionally murdered Kimberly Rose and Leonard Marsh on the morning of May 19, 2009, in the rural Oconto County home the two siblings shared. Rose was executed in her bedroom with a blast from a 20-gauge shotgun at close range into her arm (a defensive wound), face and neck. Leonard Marsh was executed as he lay sleeping in his bedroom with three shots into his back, also from a 20-gauge shotgun. There were no signs of a struggle or forced entry into the unlocked house. Police eliminated all other suspects who had possible motives to kill Rose or Marsh (157:75-77, 81-84, 88, 96-97, 105-13; 155:110-11, 160-63, 230-32; 158:10-33).

Schmidt had an extra-marital affair with Kimberly Rose that began when they met in the late summer of 2008, and included sexual relations for much of the time. Rose's brother, Leonard Marsh, strongly disapproved of this affair, to the great consternation of both Rose and Schmidt. Schmidt complained to a friend that Rose's "gay brother" (Leonard) was meddling in their affair. Schmidt consistently lied to his wife, Stephanie, about the affair. When Schmidt finally admitted the affair to Stephanie in late April 2009, she was devastated and angry. Despite his transgression, Schmidt did not want his marriage to Stephanie to end (157:165-66, 195-98, 212-13; 155:84-86, 158-59, 192-96; 158:82-84, 142-43, 147-49).

Schmidt borrowed $3,000 from Rose to purchase a motorcycle. He still owed her $1,000 in early May, 2009. On Schmidt's behalf, Stephanie delivered what was purported to be $100 worth of marijuana from Schmidt's grow operation on his property as an initial partial payment of the debt.

Rose believed she had been short-changed; the amount of marijuana she received from Stephanie was not worth $100. Rose complained and demanded full payment of the remainder of the debt. She was angry at Schmidt. Rose was also angry because Schmidt admitted the affair to his wife and, in the end, chose his wife over her. Rose gave Schmidt until Tuesday, May 19, 2009, to pay off his remaining debt. She sent an e-mail to Stephanie letting her know that "payback is a bitch." Rose knew about Schmidt's marijuana grow operation on his land and, implicitly at least, threatened to tell police about it if Schmidt did not pay off his debt by May 19. For his part, Schmidt wanted this all to end (157:173-79, 191-92, 230-31, 261; 155:17-19, 92-93, 194, 208, 213; 158:122-23, 132-33).

Rose's 11½-year-old son, Donavan, testified that Schmidt would come to the house and argue with his mother about marijuana, about their relationship and his wife's having found out about the affair. Donavan said Schmidt owed his mother $1,000 that she loaned him for his purchase of a motorcycle. Schmidt paid off the first month's portion with a bag of marijuana and, according to Donavan, his mother was not pleased with the amount he gave her as partial payment and threatened to go to the police. Donavan said he saw Schmidt slap his mother on one occasion. Two days before the murders, on May 17, Donavan said that Stephanie Schmidt came to the house and started yelling at his mother about the affair, demanding to see her journals. This greatly upset his mother (155:12-13, 18-21, 32, 41).

On the evening of May 18, 2009, Donavan went to bed while his mother and uncle Leonard were drinking and arguing. Donavan later awoke to overhear and, when he went to the bathroom, to partially see from behind, a man and a woman arguing with his mother over money and drugs. Donavan looked out the window and saw what he believed to be a green and silver pickup truck with an open bed parked outside. Donavan said it resembled Schmidt's truck (155:21-23, 25-27).

Leonard Marsh called a friend, Tia Hale, after 11:00 p.m. May 18 and tearfully asked her to come pick him up because a man and a woman he did not like were in the house. Hale overheard a woman's voice on the phone telling Rose to "shut up" and she heard someone talking about money. Hale also heard young Donavan's voice. Hale did not come to pick up Marsh because it was too late at night (155:46-51). Rose called Marsh's twin brother, Larry Marsh, that night, also asking him to come and pick up Leonard Marsh who was fighting with her. Larry said it was too late, but he would come in the morning. Leonard Marsh telephoned Larry later that night and cursed at him (158:155-57).

Rose would feed details of the affair to Stephanie whenever they met. On May 17, 2009, Rose revealed to Stephanie that she kept a journal about their affair and that she and Schmidt had sex in Stephanie's car. This infuriated Stephanie to the point that she showed up at Schmidt's place of work later that day and threw her wedding ring at him. Stephanie also told Schmidt on May 17 about Rose's "payback is a bitch" text threat. Stephanie then went home, packed the car with her and their children's belongings, and drove off early May 18. Schmidt knew that Rose had kept a written notebook journal chronicling the details of her affair with him. At Stephanie's request, Rose agreed on May 17 to let her see that journal on May 21, 2009 (157:170-71, 192-98, 231-32, 261; 155:209-10; 158:122-23).

Stephanie testified that Schmidt returned from his work on a farm between 9:15 and 9:30 a.m. on May 19, 2009. Schmidt was in a bad mood because he and Stephanie had been fighting. Schmidt drove off around 9:30 a.m. to an unknown destination, he told Stephanie, to "clear his mind." Schmidt said he was going to pick up their daughter from preschool, but Stephanie reminded him that she did not need to be picked up until 11:00 a.m. Schmidt nonetheless drove off in Stephanie's Dodge sedan to an unknown destination. Upon his return, Schmidt told Stephanie that he had driven toward a friend's house in Clintonville to

either pick up or drop off a bull castration device (a "denutter"), but turned around halfway there because he realized there would not be enough time to complete the journey and pick up his daughter by 11:00 a.m..

Schmidt returned from his aborted journey to Clintonville by his own admission around 10:40 a.m. According to Stephanie, he was in a much better mood. Schmidt parked her Dodge in the garage. This, according to Stephanie, was unusual because there was little room in the cluttered garage for the car at that time. Schmidt explained to her that he parked the car in the garage because he did not want to leave the car out in the sun. Schmidt then drove off in his green and silver open bed truck to pick up his daughter from preschool. Stephanie told police she was suspicious about where Schmidt had gone that morning and was hurt that he would not give her straight answers (157:121-22, 201-10; 158:87-89, 108, 150, 153).

Robert Koeller, Schmidt's friend in Clintonville, told police that he had not seen Schmidt in months before being interviewed June 11, 2009, and that Schmidt asked him about borrowing the "denutter" only 1½-2 weeks before the June 11 interview (whereas May 19 was more than three weeks before the interview). Schmidt never spoke to Koeller about the "denutter" until 1½ weeks before the June 11 interview (158:130; 154:25-27).

Police learned in late June, 2009, that the murder weapon was a 20-gauge shotgun. Schmidt initially told police when interviewed in late May that he did not own a shotgun. He then told police the only shotgun he had was a .410 shotgun that he borrowed from his friend, Orlin Sanapaw, to shoot varmints on his property. Schmidt in fact owned a 20-gauge break-open shotgun that was a gift from his uncle when he was a teenager. Schmidt then told police that he sold the 20-gauge shotgun along with his boat in 2005. That also was not true. The purchaser of the boat said no shotgun was included in the 2005 sale. Stephanie confirmed that she saw the 20-gauge shotgun in their garage a few days before

the murders. Schmidt unsuccessfully tried to convince Stephanie that another gun he borrowed from his friend Orlin Sanapaw was the gun his uncle had given him. Although it was old, Schmidt's 20-gauge shotgun was operable and could be easily reloaded. Although the gun had to be reloaded before each shot, the murders of Rose and Marsh could have been carried out in one or two minutes (157:120, 137-38, 179-84; 155:73, 82-83, 105, 122-23, 151-53, 166-69, 175-76, 190-91).

Stephanie pleaded with Schmidt that if he was not guilty, he should turn the shotgun over to the police right away. Instead, Schmidt turned over another shotgun, a .410, that was loaned to him by his close friend Orlin Sanapaw. On May 20, the day after the murders, Schmidt gave his 20-gauge shotgun to Sanapaw, who would "do anything" for his friend. According to Stephanie, she and Schmidt discussed what to do with the gun on May 19, and it was his idea to give the gun to Sanapaw even though she strongly urged Schmidt to turn it over to the police to show that it was not the murder weapon. Sanapaw was supposed to get rid of the gun, but instead, he put it up (with another gun) as collateral for a loan. During a party at the Schmidts' house, when the subject of the murders came up, Schmidt told Holly Nagle that police would never find the gun because it was "in pieces on the res [reservation]." The 20-gauge shotgun was never found. Schmidt also burned unspecified evidence in a burn pit on his property shortly after the murders (157:187-89, 245, 248-49, 264-65; 155:186-87, 190-91, 212, 226; 158:142, 153).

According to telephone records, Rose was on the phone with her mother, Donna Marsh, from 10:12 a.m. until 10:19 a.m. on May 19, 2009. There was no answer when her mother called back at 10:45 a.m. (155:56-60, 67). When Stephanie was questioned by police on June 3, 2009, she claimed to have learned that Rose was talking to her mother

on the phone shortly before being shot. Stephanie was in no position to know unless she was there that the phone conversation took place, or unless she had learned of it from someone who was there (154:32-33, 36, 42, 69-70).

When interviewed by police on May 28, Schmidt asked whether police had found Rose's diary, and added that he believed it had not been found. Police had released no information about the existence of Rose's journals at that point (158:80). While some of Rose's daily journals were found at her house, the ones chronicling her affair with Schmidt – and the ones she promised to show Stephanie on May 21 – were never found (155:16, 20, 63-65, 68; 158:62).

When he discussed the affair with Stephanie on May 15 (four days before the murders), Schmidt told Stephanie that, to prove he still cared for her, he should just shoot Rose and then himself. This comment scared Stephanie (157:199, 255). Schmidt's mother, Mary Weisnicht, tearfully told a co-worker on May 21, two days after the murders, that her son told her he had an affair with Rose, was angry with the meddling in it by her "gay brother," and he had done "the worst of the worst." Weisnicht said she told her daughter-in-law to get their children out of the house immediately. Weisnicht also told the co-worker that her son has a "nasty temper" (155:71-74, 154-60).

According to his uncle, Keith Schmidt, Daniel Schmidt told him about the affair in early May, said he was trying to repair his marriage, but was "angry" because Rose kept a diary about the affair and Stephanie went to Rose's house demanding to see it. Keith Schmidt also testified that his sister, Mary Weisnicht, told him that Schmidt told her he had given away the shotgun that Keith had given Schmidt as a teenager, and had burned some items in the burn pit behind his house (155:84-85, 89-90). Schmidt got rid of the marijuana grow operation behind his house before September 2009 (155:217-22).

Stephanie testified that she was "shocked" when she learned of the murders on May 19, but when she told Schmidt, he had no emotional reaction (157:190). Stephanie told a fellow Huber inmate in the Shawano County Jail in October 2010 that, when she told Schmidt about the murders, he reacted unusually and would not answer her questions about what he knew. Stephanie told the fellow inmate that Schmidt wanted to get the debt paid off and over with (155:211-13).

The state's theory was that Schmidt drove the 20 minutes or so from his house to Rose's and Marsh's house around 9:30 a.m. on May 19, 2009, to confront Rose about the affair, about the money he owed her, about her threat of "payback" if he did not pay off the $1,000 motorcycle debt by that day, and to find and destroy her journal chronicling the sordid details of their affair before Rose could show it to Stephanie on May 21. Those efforts failed. Schmidt then walked outside to retrieve his 20-gauge shotgun from Stephanie's Dodge during the seven minutes that Rose was on the phone with her mother. When their conversation ended, Schmidt walked into Leonard Marsh's bedroom and fired one shot into the sleeping man's upper back, reloaded and then shot Rose in the face in her bedroom, before returning to Marsh's bedroom to finish him off with two more shots to his back. This scenario could all have been accomplished in less than two minutes because the gun was easy to reload. This left Schmidt with just enough time to return home, as he claimed, by 10:40 a.m. (assuming he did not exceed the speed limit and obeyed all traffic laws) (154:59-110, 151-56).

The state proved beyond a reasonable doubt that Schmidt had powerful motives, the specific intent, the means and the opportunity to commit these heinous crimes with his 20-gauge shotgun – a cherished gift from his uncle that Schmidt got rid of the day after the murders and about which he repeatedly lied when questioned by his wife and police.

In contrast, Schmidt's argument makes no sense and ignores the standard for review. Schmidt concedes that the evidence was sufficient for the jury to find him guilty of shooting Rose, yet insists that no rational jury could also have found him guilty of shooting Leonard Marsh at the same time in the next bedroom. Schmidt's brief at 13. Although it was not the theory he presented to the jury (154:111-51), Schmidt wants this court to now believe that, while he killed Rose, someone else killed Leonard Marsh. That flies in the face of logic, common sense and all of the evidence. As demonstrated above, Schmidt had the same motive, intent, opportunity and means to kill Leonard Marsh as he did Rose. If Schmidt wanted to kill Rose, he would also have had to kill Leonard Marsh to prevent his resistance and to eliminate the only eyewitness to Rose's murder. There was ample, credible, circumstantial evidence upon which a rational jury could and did rely to find Schmidt guilty beyond a reasonable doubt of the first-degree intentional homicides of Kimberly Rose and Leonard Marsh on May 19, 2009.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE THE EXPERT TESTIMONY OF DR. DAVID THOMPSON BECAUSE IT WAS IRRELEVANT, INVITED SPECULATION, AND ITS LIMITED PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE AND CONFUSION OF THE ISSUES.

Schmidt argues that the trial court erroneously exercised its discretion when it granted the state's pretrial motion to exclude the testimony of defense expert Dr. David Thompson to explain inconsistencies in the various statements and trial testimony of Rose's son, Donavan, regarding what he observed on the night of May 18, 2009. Schmidt's brief at 6-10.

A. The relevant facts.

As discussed above, Rose's 11½-year-old son, Donavan, testified about his mother's relationship with Schmidt, and about what he heard and observed during the night of May 18, 2009.

The state filed a motion in limine to exclude the expert testimony of child psychologist Dr. David Thompson regarding child interview techniques because it was irrelevant and had little or no probative value regarding the issue of Donavan's credibility (100:2, ¶ 7; 101:7-10).

At a pretrial hearing on the state's motion held September 25, 2013, the prosecutor explained that the state was not challenging Dr. Thompson's qualifications or the reliability of his opinion testimony. Rather, his testimony was irrelevant because there was no evidence that anyone, be it a family member or law enforcement officer, employed any inappropriate interview techniques when speaking to Donavan (108:16). In response, the trial court queried defense counsel as to what Dr. Thompson could add to what would be drawn out at trial on cross-examination of Donavan and of those who interviewed him. After all, Donavan was not a susceptible five-year-old (108:19). The court then ordered that the parties voir dire Dr. Thompson at another pretrial hearing (108:21).

Dr. Thompson testified at a pretrial hearing held on October 2, 2013 (160). He discussed his qualifications and the bases for his opinions about suggestive child interview techniques (160:5-24). Dr. Thompson insisted that his research would apply to an interview of an 11-year-old as well as of a small child (160:1-19). The state again argued that this testimony was irrelevant because there was no evidence that improper interview techniques were used with Donavan (160:66-71).

The trial court issued a Memorandum Decision excluding Dr. Thompson's expert testimony October 4, 2013

(113; A-Ap. 8-11). The court noted that Dr. Thompson "did not have the opportunity to review, other than the investigative reports and the testimony of the preliminary examination of Donavan Rose-Turner, any type of recorded interview of Donavan." (113:2; A-Ap. 9). Consequently, "there is no evidence [of] . . . external influence or negative stereo-typing [sic]" (113:2; A-Ap. 9). Dr. Thompson admitted that he could not "accurately assess the interviewing techniques used in the interviews with Donavan being that he had no transcripts of those interviews or recordings of them" (113:2; A-Ap. 9). While "interviewer bias" can be a relevant factor, the court found there was no evidence of interviewer bias here especially given that police were still investigating multiple suspects in the homicides when Donavan was interviewed (113:3; A-Ap. 10). The court also gleaned from Dr. Thompson's testimony that repeated interviews of a child may at times be appropriate and at other times inappropriate (113:3; A-Ap. 10).

The state proffered the testimony of Donavan's grandmother, Donna Marsh, that his statements to her were spontaneous and she did not question Donavan about them. In response, Dr. Thompson conceded that repeated questioning of a child who makes spontaneous disclosures may be appropriate. From this testimony the court found that "[t]here is no evidence that the repeated interviewing of Donavan by law enforcement was inappropriate" (113:3; A-Ap. 10). The court next noted that "misattribution" errors, whereby the child inaccurately identifies the source of a memory is, according to Dr. Thompson, more likely to affect preschoolers than an older child such as Donavan. There was no evidence of source misattribution by Donavan (113:3; A-Ap. 10). Finally, the court pointed out that any inconsistencies from one interview of Donavan to the next "can be adequately addressed and covered on cross-examination" (113:3; A-Ap. 10).

Despite its findings, the trial court said it would allow Dr. Thompson to testify should there develop at trial any evidence of inappropriate techniques in the interviews of

Donavan (113:3-4; A-Ap. 10-11). The court concluded that Dr. Thompson's expert testimony did not meet the admissibility standards of Wis. Stat. § 907.02. In the alternative, even if Dr. Thompson's testimony met those standards, its probative value was substantially outweighed by its potential for prejudice (113:4; A-Ap. 11).

Schmidt renewed his challenge to the exclusion of Dr. Thompson's testimony in his motion for postconviction relief. The trial court denied that motion in a Memorandum Decision issued February 16, 2015 (179; A-Ap. 12-13). The court again explained that Schmidt could have introduced Dr. Thompson's expert testimony if there had been any evidence of "inappropriate interview techniques." There was none (179:1; A-Ap. 12).

B. The applicable law and standard for review.

The trial court's decision to exclude Dr. Thompson's expert testimony was a discretionary one that may not be disturbed by this court if there was a reasonable basis for it, and the trial court relied on accepted legal standards and relevant facts of record. *State v. Ringer*, 2010 WI 69, ¶ 24, 326 Wis. 2d 351, 785 N.W.2d 448; *State v. St. George,* 2002 WI 50, ¶ 37, 252 Wis. 2d 499, 643 N.W.2d 777; *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983); *State v. Giese,* 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687; *State v. Dukes*, 2007 WI App 175, ¶ 26, 303 Wis. 2d 208, 736 N.W.2d 515; *State v. Kirschbaum,* 195 Wis. 2d 11, 20-21, 535 N.W.2d 462 (Ct. App. 1995).

This court may independently review the record to determine whether there was a reasonable basis to support the trial court's exercise of discretion. *State v. Hunt*, 2003 WI 81, ¶ 34, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Davidson*, 2000 WI 91, ¶ 53, 236 Wis. 2d 537, 613 N.W.2d 606; *Pharr*, 115 Wis. 2d at 343; *Kirschbaum,* 195 Wis. 2d at 21. *See generally McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

Evidence is not admissible unless it is relevant. Wis. Stat. § 904.02. Relevant evidence is that evidence which has any tendency to make the existence of a material fact more or less probable than it would be without the evidence. Wis. Stat. § 904.01. There are two components to the question of evidentiary relevance: (1) the evidence must relate to a fact of consequence to the determination of the action; and (2) it must have a tendency to make that fact of consequence more or less probable than it would be without the evidence. Wis. Stat. § 904.01; *Davidson*, 236 Wis. 2d 537, ¶ 64. *See State v. Moran*, 2005 WI 115, ¶ 45, 284 Wis. 2d 24, 700 N.W.2d 884; *State v. Hereford*, 195 Wis. 2d 1054, 1066, 537 N.W.2d 62 (Ct. App. 1995).

Even relevant evidence may be excluded in the trial court's discretion if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Wis. Stat. § 904.03. The evidence is *unfairly* prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or causes the jury to base its decision on something other than the established propositions in the case. *Davidson*, 236 Wis. 2d 537, ¶ 73.

The admissibility of expert testimony is governed by Wis. Stat. § 907.02 (2011-12). *Giese,* 356 Wis. 2d 796, ¶ 17. Expert testimony is admissible if the expert is qualified to give it, and the expert testimony would help the jury to understand the evidence or determine a fact in issue. In the words of the statute, the opinion testimony of a qualified expert is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Wis. Stat. § 907.02(1).

After the 2011 amendments to Wis. Stat. § 907.02(1), the expert's proffered testimony must also be "based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." *Giese*, 356 Wis. 2d 796, ¶ 17.

This "gatekeeper function" of the trial court "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Id.* ¶ 18. *See Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589 n.7 (1993).

C. The trial court properly exercised its discretion to exclude Dr. Thompson's testimony.

1. The trial court reasonably held that the expert testimony was not relevant to the issue of Donavan's credibility because it invited the jury to speculate without any basis in fact.

Dr. Thompson, though qualified, could not provide testimony, "based upon sufficient facts or data" and that applied the principles and methods he described "reliably to the facts of the case," to render an opinion as to whether Donavan's credibility was tainted by improper interview techniques. Wis. Stat. § 907.02(1); *Giese,* 356 Wis. 2d 796, ¶ 17. To date, Schmidt offers no proof whatsoever that anyone employed inappropriate techniques when speaking to Donavan. Dr. Thompson's expert testimony would not, therefore, have assisted the jury in understanding the evidence or, more specifically, in assessing Donavan's credibility. Wis. Stat. § 907.02(1). It would only have invited rank speculation that Donavan's credibility was tainted by such techniques.

In his August 28, 2013 report, Dr. Thompson openly acknowledged the lack of any connection between his general opinions and the specific facts of this case (110). On the issue of possible external influences on Donavan that might cause "negative stereotyping," Dr. Thompson could only provide vague references to "overhearing other people [who] talk in a negative manner about an individual," or to "family pressure [that] can influence a child's statement in a variety of ways . . . where doing so may cause disruption or financial hardship for the family." The child may feel pressured to make negative statements about someone if "the family is angry with or hostile toward the person in question" (110:2). Dr. Thompson opined that negative stereotyping was possible here because of the relationship between Donavan's mother and Schmidt, their "significant conflict" and their drug use in the home. Dr. Thompson maintained that his opinion was important because these were "potential sources of external pressure on Donavan as well as the effects such pressure might have had on his reports" (110:2).

A few questions on cross-examination of Donavan exploring his reasons for disliking and being angry at Schmidt would have accomplished the same purpose. Counsel could have established Donavan's bias against Schmidt without the unnecessary confusion and speculation invited by Thompson's nebulous opinion testimony about "negative stereotyping." Donavan's alleged motives for falsely testifying that Schmidt and Stephanie might have been at the house on the night of May 18 arguing with his mother — the unpaid drug debt, the breakup of their affair, Schmidt's hostility toward both Donavan and his mother – could be easily established by defense counsel and understood by the ordinary juror. This, the trial court properly held, did not require expert testimony.

Furthermore, such biases are not unique to children. Had Rose lived and testified that Schmidt killed her brother, Schmidt would no doubt have accused her of having the

same incentives to falsely accuse him as Donavan supposedly did: the drug debt, the breakup of their relationship, maltreatment, etc.

On the issue of inappropriate child interviewing techniques, Dr. Thompson had no proof that any such techniques were employed by anyone who spoke with Donavan. "I was unable to accurately assess the interviewing techniques used in the various interviews with Donavan" (110:2). Moreover, Dr. Thompson had to concede that his review of the reports prepared by the Wisconsin Department of Justice, Division of Criminal Investigation (DCI) Agent Kust, revealed that "Investigator Kust was very much aware of proper child interviewing techniques" when he interviewed Donavan (110:3). Schmidt does not explain why he could not have discussed proper child interviewing techniques at trial with Investigator Kust, who interviewed Donavan, even though he was not allowed to discuss those techniques with Dr. Thompson, who did not interview Donavan.

On the issue of interviewer bias, Schmidt offered no proof that anyone who interviewed Donavan did so with a "preconceived notion" that Schmidt killed his mother and uncle. Dr. Thompson also acknowledged, rather obtusely, that he had no such proof: "In the current case a transcript of the interview [which interview was not specified] was not available, so the extent to which interviewer bias may have influenced Donavan's reports was unable to be determined" (110:3). Nonetheless, Dr. Thompson insisted that the jury should consider the "possibility" of interviewer bias. This, then, was yet another invitation by Dr. Thompson for the jury to speculate without facts about a truly remote "possibility."

On the issue of repeated interviews of Donavan, Dr. Thompson conceded that "under certain circumstances, it can be a useful tool and can result in additional accurate information from the interviewee[] . . . [and] can be useful in retrieving additional information, particularly given the

reconstructive nature of memory" (110:3). Dr. Thompson nonetheless speculated that, because of factual inconsistencies in Donavan's various accounts over time, improper techniques and biases may have tainted his repeated interviews ("subtle or obvious pressure placed on Donavan by family members and others") (110:4). Once again, this is nothing more than an invitation to speculate based on the baseless assumption that inappropriate interview techniques were employed by people who had a bias against Schmidt.

In any event, Schmidt could have easily established on cross-examination of Donavan and of those who spoke with him over time, the inconsistencies in his accounts and their possible motives to influence him to falsely accuse Schmidt of arguing with his mother in their house on the night of May 18.

On the issue of source misattribution, where an adult or a child supposedly incorrectly identifies the source of a memory, this again assumes bias by the interviewer or interviewee, improper interview techniques and negative stereotyping by Donavan. Once again, Thompson invited the jury to speculate without facts about the "possibility" that Donavan misattributed the source of his memory of what happened when he was awakened by the argument on the night of May 18.

Schmidt did not at trial question Donavan's grandmother or any law enforcement officer about the circumstances of their conversations or interviews with Donavan. Schmidt did not explore with any of these witnesses how the interviews went, what questions were asked, or whether they believed that Schmidt was guilty when they spoke with Donavan. In short, Schmidt did not take advantage of the opportunity the trial court gave him to establish through those witnesses, and through Donavan himself, that inappropriate techniques may have been used or that biases against Schmidt were imported into the interviews consciously or subconsciously. Only if Schmidt

established through their testimony that interviewer bias and improper techniques were more than a mere "possibility" would Dr. Thompson's testimony have moved from the realm of speculation to evidentiary relevance.

Inviting the jury to speculate without any proof that there may have been interviewer bias, external influences, negative stereotyping, or inappropriate repeated interviews, especially given that much of what Donavan told his grandmother was spontaneous, would not have assisted the jury. Rather, it would have sidetracked the jury on purely academic issues divorced from the facts proven at trial. It would have misled the jury to evaluate Donavan's credibility based on unsubstantiated, speculative factors rather than on what Donavan told others before trial and what he testified to at trial.

Schmidt drew out on cross-examination of Donavan the various inconsistencies between Donavan's trial testimony and his pretrial statements and preliminary hearing testimony (155:24-40). Indeed, Schmidt acknowledges at page 6 of his brief that he was able to challenge these inconsistencies on cross-examination of Donavan ("Donavan's trial testimony as to these key details was different from his statements to police in 2009 and different than his preliminary hearing testimony a year before. (155:24-27, 31-33, 37-40)."). So, if it was "crucial to the defense to help the jury understand how [Donavan's] memory and testimony had changed over time," Schmidt's brief at 9, Schmidt did just that on cross-examination of Donavan establishing "how his memory and testimony had changed over time." That is what was relevant with respect to Donavan's credibility. That is not what Dr. Thompson's testimony would have addressed.

Schmidt contends that "Dr. Thompson's testimony would have helped the jury understand the reasons for the changes in [Donavan's] testimony over time." Schmidt's brief at 8. Establishing through Dr. Thompson *why* Donavan's statements were inconsistent was not nearly as important as

establishing, as Schmidt did, that those statements *were* inconsistent. Schmidt was fully able to challenge Donavan's credibility based on those established inconsistencies and not on rank speculation about why Donavan was inconsistent. The inconsistencies alone gave Schmidt sufficient ammunition with which to challenge Donavan's credibility. Speculation about what interview techniques his grandmother or law enforcement may have used, or any biases they might have had, would have added nothing to that challenge.

Schmidt was able to attack Donavan's credibility with the inconsistencies discussed above, as well as with the vagueness of precisely what Donavan claimed to have heard and seen when he was awakened by his mother's argument in the next room with unidentified people late on May 18, 2009. The following applies well here with regard to the need for Dr. Thompson to explain Donavan's inconsistencies:

> We also conclude that the trial court's decision with respect to the issue of "Amanda [H's] inconsistent statements" was within the scope of its discretion. It is well established that the credibility of witnesses, including child witnesses, and the weight assigned to their testimony are matters for the jury's judgment. *Shawver v. Roberts Corp.,* 90 Wis. 2d 672, 681, 280 N.W.2d 226, 230 (1979). The trial court could reasonably conclude that the jury could draw its own conclusions on Amanda H.'s allegedly inconsistent statements and that this was something the jury could knowledgeably determine without the help of expert testimony. *See State v. Haseltine,* 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984).

Kirschbaum, 195 Wis. 2d at 23.

With regard to Dr. Thompson's testimony about interviewer bias and improper interview techniques, Schmidt "failed to point to a single specific example of an improper interview technique that [his] expert would discuss

such that the court could invoke its decisional process." *Id.* at 26 (footnote omitted).

Finally, Donavan was neither a victim nor an eyewitness to the charged crimes. His credibility, while significant, was just not as important as that of a recanting five-year-old sexual assault victim. *See St. George,* 252 Wis. 2d 499, ¶¶ 7-9. The need for expert testimony to explain inconsistencies in Donavan's testimony regarding what he observed the night before the murders was not as great as the need for an expert to rebut the expert opinion testimony presented by the state at trial (a) explaining why a child sexual assault victim would recant, and (b) bolstering the credibility of the child's allegations of being sexually assaulted by the defendant. *Id.* ¶¶ 31-35, 59-72.

Here, the trial court properly exercised its discretion to exclude Dr. Thompson's irrelevant expert testimony. What little probative value it had was substantially outweighed by the risk of misleading and confusing the jury, inviting it to speculate on academic theory rather than on what Donavan actually said before and at trial. Wis. Stat. § 904.03.

2. The exclusion of Dr. Thompson's expert opinion did not deny Schmidt his right to present a defense.

The trial court's discretionary ruling did not violate Schmidt's right to present a defense. The constitution does not give Schmidt the right to present irrelevant evidence, or evidence whose probative value is substantially outweighed by the risk of unfair prejudice and confusion of the issues. "Simply put, an accused has no right, constitutional or otherwise, to present irrelevant evidence." *State v. Scheidell,* 227 Wis. 2d 285, 294, 595 N.W.2d 661 (1999) (citation omitted).

Schmidt's confrontation right is not absolute and may in appropriate cases bow to accommodate other legitimate interests in the criminal trial process. *Chambers v.*

Mississippi, 410 U.S. 284, 295 (1973); *State v. Rhodes,* 2011 WI 73, ¶¶ 34-36, 68, 336 Wis. 2d 64, 799 N.W.2d 850. The Supreme Court has given trial judges broad latitude to exclude relevant evidence after engaging in precisely the sort of balancing of probative value against the potential for prejudice, confusion of issues and the like that occurred here. *Holmes v. South Carolina,* 547 U.S. 319, 324-26 (2006); *Montana v. Egelhoff,* 518 U.S. 37, 42-43 (1996). The Sixth Amendment only guarantees that the defendant may present relevant evidence whose probative value is not substantially outweighed by its prejudicial impact. *State v. Jackson,* 216 Wis. 2d 646, 656-57, 575 N.W.2d 475 (1998); *State v. Pulizzano*, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). *See State v. Evans*, 187 Wis. 2d 66, 84, 522 N.W.2d 554 (Ct. App. 1994). *See also Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (no Sixth Amendment right to present evidence that has little or no probative value and is prejudicial); *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (right to present a defense is not a constitutional straitjacket on ordinary state trial court evidentiary rulings); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (the confrontation/cross-examination right is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation").

Dr. Thompson's expert opinion testimony concerned a state's witness (Donavan) who was neither a victim nor an eyewitness and was not needed to rebut any testimony by expert witnesses for the state. *Compare St. George,* 252 Wis. 2d 499, ¶¶ 30-35, 59-73 (In a child sexual assault case, the five-year-old victim recanted at trial. The defense expert on child interview techniques was not allowed to testify. The expert would have: (a) rebutted trial testimony by one expert for the state that 92 percent of child sexual assault victims who recant later reaffirm their accusations; and (b) rebutted trial testimony by another expert for the state who obtained the child's accusation using the "cognitive graphic interview" technique which, the state's expert claimed, was an accepted means of obtaining accurate information from children. The court held that exclusion of

the defense expert's testimony directly rebutting the testimony of the state's two experts and that bolstered the child/victim's credibility violated the right to present a defense).

Here, there was no state expert witness testimony to be rebutted by Dr. Thompson as there was in *St. George.* Here, Dr. Thompson's opinion testimony did not rebut the testimony of a child/victim as was the case in *St. George*. The exclusion of Dr. Thompson's testimony did not prevent the defense from challenging Donavan's credibility on cross-examination by pointing out the inconsistencies in his accounts over time, his alleged bias against Schmidt and his ability to observe on the night of May 18; or from challenging the credibility of those who interviewed Donavan by again pointing out the inconsistencies in his accounts from one interview to the next or their possible biases against Schmdit. These were all matters within the common knowledge of the average juror. Schmidt was not denied his right to present a defense because he was not denied his right to effectively challenge Donavan's credibility.

D. Any error was harmless.

If the trial court erred in excluding Dr. Thompson's opinion testimony, any error was harmless. Beyond a reasonable doubt, the jury would still have found Schmidt guilty based on the powerful and properly received circumstantial evidence, and all reasonable inferences to be drawn from it. *State v. Harvey,* 2002 WI 93, ¶ 44, 254 Wis. 2d 442, 647 N.W.2d 189.

For many of the same reasons the state believes Dr. Thompson's testimony was properly excluded, its impact on the outcome would have been minimal. Its probative value would have been low. The state would have pointed out on cross-examination that his opinions could not be tied to any facts. Dr. Thompson did not observe any of the interviews and had no idea what transpired in any of them. He would have to concede that DCI Investigator Kust likely used

proper interview techniques with Donavan. His opinion would have been challenged with the fact that Donavan was not a toddler who would more likely be misled by improper interview techniques. Dr. Thompson would have to concede that concerns about interviewer bias, negative stereotyping and memory attribution could also occur in interviews of adults. Finally, Dr. Thompson would have to admit that repeated interviews of a child are often a good thing. The state would point out that these problems were less likely to occur here because multiple suspects, not just Schmidt, were being investigated at the time. The state would also have established through Donavan's grandmother that his statements to her were spontaneous and she did not question him. And, as discussed above, defense counsel was fully able to draw out on cross-examination of Donavan the various inconsistencies in his accounts over time (155:24-40).

Beyond a reasonable doubt, the jury would still have found Schmidt guilty even if Dr. Thompson were allowed to testify in the face of the following devastating evidence: Schmidt's admission to his mother that he had an affair with Rose and had done "the worst of the worst"; Schmidt's admission to his mother that he had gotten rid of the gun his uncle gave him as a teenager and burned some evidence in a burn pit on the day of the murders; Schmidt's admission to his uncle Keith in early May that he had an affair with Rose but wanted to save his marriage, was "angry" that Rose kept a diary about the affair and that his wife went to Rose's house to see it; Stephanie's testimony that two days before the murder, she confronted Schmidt at his place of work about Rose's claim that they had sex in Stephanie's car, threw her wedding ring at him, and packed her and their children's things to leave; Schmidt's complaints to others that Rose's brother, Leonard Marsh, was meddling in their affair; Stephanie's testimony detailing their discussions about what to do with his 20-gauge shotgun when she told Schmidt of the murders on May 19; and Schmidt's decision to get rid of the gun the next day despite Stephanie's pleas that he turn the gun over to police if he was innocent; Schmidt's initial lies to police about whether he owned a 20-

gauge shotgun and about his supposed sale of the 20-gauge shotgun along with his boat in 2005; and Schmidt's bragging to a friend at a party that police would never find the gun because it was "in pieces on the res."

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE STEPHANIE'S TESTIMONY THAT HER HUSBAND DISCUSSED KILLING ROSE AND HIMSELF FOUR DAYS BEFORE THE MURDERS.

A. The relevant facts.

The state moved before trial to admit a number of statements by Stephanie to police recounting conversations she and Schmidt had about various topics including the existence of his affair with Rose, his activities on the morning of May 19, 2009, and the disposal of his shotgun shortly after the murders (35; 42). When questioned by police, Schmidt discussed all of these conversations with his wife in detail. Schmidt opposed the state's motion, arguing that his statements to Stephanie were protected by the marital privilege at Wis. Stat. § 905.05. Schmidt's brief at 10-12.

In a pretrial letter dated September 26, 2013, defense counsel significantly narrowed the issue to be decided (107). Schmidt now only challenged the admissibility of one statement that his wife made to police: shortly before the murders, Schmidt told Stephanie he should kill Rose and then himself. Schmidt later admitted to police he may have told Stephanie he should kill himself, but denied also telling her he should kill Rose. Schmidt argued his mere confirmation that he told Stephanie he contemplated killing

only himself did not waive the marital privilege because it was not "a significant part" of his marital communications to allow for the admissibility of Stephanie's statement that he told her he also considered killing Rose (107:1-2).

The parties addressed the issue at a pretrial hearing held April 16, 2013 (82:77-83). The trial court issued a Memorandum Decision on October 2, 2013, allowing the statement into evidence (111; A-Ap. 14-15). The court noted at the outset of its decision that there was no longer any dispute regarding the admissibility of Stephanie's statements and testimony recounting her conversations with Schmidt about his affair with Rose, his desire to rebuild their marriage and his whereabouts on the day of the murders (111:1; A-Ap. 14).[2] Schmidt also conceded the admissibility of the portion of his statement to Stephanie four days before the murders that he should kill himself, but denied making the statement to her that he should also kill Rose (111:2; A-Ap. 15). The court held that Schmidt waived the protection of the marital privilege under Wis. Stat. § 905.05, when he voluntarily disclosed a significant part of his conversation with his wife to police, as provided in Wis. Stat. § 905.11. The trial court held that by discussing the substance of their private conversation with police, admitting part and denying part, Schmidt disclosed a significant part of it to a third party and thereby waived the marital privilege (111:2; A-Ap. 15).

Accordingly, the state introduced into evidence at trial Stephanie's testimony that four days before the murders, Schmidt told her he should kill Rose and himself to prove that he still cared for Stephanie (157:199).

[2] There was also no dispute about the admissibility of Stephanie's statements and testimony regarding what Schmidt told her he did with his shotgun after the murders (42).

B. The applicable law and standard for review.

Schmidt had the privilege to prevent his wife from testifying about "any private communication by one to the other made during their marriage." Wis. Stat. § 905.05(1). The privilege is waived, however, if the person claiming the privilege, "voluntarily discloses or consents to disclosure of any significant part of the . . . communication." Wis. Stat. § 905.11.

Statutory privileges, including the marital privilege, "are to be strictly and narrowly construed." *State v. Denis L.R.,* 2005 WI 110, ¶ 38, 283 Wis. 2d 358, 699 N.W.2d 154. This narrow construction is appropriate because "statutory privileges interfere with the trial court's search for the truth." *State v. Denis L.R.,* 2004 WI App 51, ¶ 12, 270 Wis. 2d 663, 678 N.W.2d 326. *See State v. Richard G.B.,* 2003 WI App 13, ¶ 13, 259 Wis. 2d 730, 656 N.W.2d 469. *See also United States v. Nixon,* 418 U.S. 683, 710 (1974) ("exceptions to the demand for every man's evidence are not lightly created or expansively construed, for they are in derogation of the search for truth").

The marital privilege is waived, and no longer "private," if the holder of the privilege later reveals a significant part of the marital communications to third parties. Wis. Stat. § 905.11. *State v. Dalton,* 98 Wis. 2d 725, 732-33, 298 N.W.2d 398 (Ct. App. 1980). The inference the finder of fact might draw from the disclosed marital communication "is irrelevant to the question of waiver." *Id.* at 733.

Also irrelevant is the privilege-holder's claimed lack of intent to waive the privilege. The issue is not whether the privilege-holder intended to waive the statutory privilege. It is simply whether he voluntarily disclosed a significant part of that communication to a third party. *See Denis L.R.,* 270 Wis. 2d 663, ¶¶ 14-16; *State v. Solberg,* 211 Wis. 2d 372, 383-84, 564 N.W.2d 775 (1997). *See also State v. Eison,*

2011 WI App 52, 332 Wis. 2d 331, ¶ 33, 797 N.W.2d 890 (holding that the marital privilege was waived for statements made by the defendant to his wife during telephone conversations while he was in jail because all outgoing calls by jail inmates were recorded; a policy that was disclosed to all inmates).

> A waiver occurs under Wis. Stat. § 905.11 only where the disclosure was voluntary, that is, free from compulsion. Thus, the disclosure need not be done with knowledge of its consequences (the surrender of a privilege) or represent an intelligent exercise of one's rights; it need only be free from coercion or improper inducements. More to the point, a strategically catastrophic disclosure may be made in total ignorance of a privilege, yet it is deemed a valid waiver as long as it was voluntary.

7 Daniel D. Blinka, *Wisconsin Evidence,* § 511.1 at 386 (3d ed. 2008) (footnotes omitted).

C. Schmidt voluntarily disclosed a "significant part" of his communications with his wife to police.

When interviewed by police, Schmidt openly admitted that he and Stephanie, discussed his affair with Rose, its impact on their marriage and his whereabouts on the morning of the murder (35:11-22; 111:1). Schmidt also confirmed that he and his wife discussed the whereabouts of his shotgun after the murders (35:23; 42). Schmidt concedes that their conversations about these subjects were not protected. Finally, Schmidt concedes that his admission to police that he told Stephanie four days before the murders that he should kill himself over his affair with Rose was not protected. Schmidt does not claim that any of these statements were coerced out of him by police. Schmidt had another privilege that he chose not to exercise: his Fifth

Amendment privilege against self-incrimination allowing him to refuse to answer some or all of the questions by police. *See generally Miranda v. Arizona,* 384 U.S. 436 (1966).[3]

This puts into proper context Schmidt's claim that the portion of Stephanie's statement to police that he also contemplated killing Rose was still protected by the marital privilege. Although Schmidt denies ever having made the statement, he insists that if he said it, the statement was protected by the marital privilege. By waiving the marital privilege with respect to everything else they discussed in the days before and after the murders, however, Schmidt revealed "a significant part" of their private marital

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[3] *See also People v. Simpson,* 369 N.E.2d 1248 (Ill. 1977). The court upheld the admission of a statement by Simpson's wife when they were being jointly interviewed by police that he admitted the murder to her, and Simpson's response to his wife in the presence of police: "Yes, but I told you later I was lying." *Id.* at 1250. The court held that Simpson waived the marital privilege with that voluntary response to his wife's statement in the presence of police:

> Rather, it is the defendant's own public reply to his wife's statement which rendered admissible Kasten's account of the police station confrontation, for, by his reply, defendant admitted making the prior statement. The defendant did not have to make such an acknowledgment. There is no suggestion that he was coerced. When confronted by his prior, privileged statement in the trailer he could have remained silent or denied having made such a statement. Under those circumstances, the privilege of the communication in the trailer would, no doubt, have been preserved, despite his wife's revelation of that conversation to the police. Irrespective, however, of the facts that he was in the midst of a lengthy custodial interrogation regarding the murder and in the known presence of three officers of the State, he acknowledged having said he shot Gwen. His statement cannot under these circumstances be deemed to have been a confidential communication.

Id. at 1252.

communications about this investigation, rendering admissible his statement to Stephanie that he also contemplated killing Rose. *See Denis L.R.,* 270 Wis. 2d 663, ¶¶ 17-19.

Schmidt denied making the statement about killing Rose. His denial was received into evidence at trial. Schmidt could have, had he so chosen, also taken the stand to deny making that statement to his wife. Schmidt decided not to testify. His disclosure of "a significant part" of their marital communications to a third party – the police – was voluntary and his claimed intent not to waive the marital privilege as to one clause in one sentence is irrelevant. *Id.* ¶¶ 14-16.

D. Any error was harmless.

It is clear beyond a reasonable doubt that, if Schmidt's statement to Stephanie four days before the murders about killing Rose should have been excluded under the husband-wife privilege, the error was harmless. Beyond a reasonable doubt, the jury would still have found Schmidt guilty based on the powerful and properly received circumstantial evidence, and all reasonable inferences to be drawn from it. *Harvey,* 254 Wis. 2d 442, ¶ 44. *See* sections "I." and "II. D.," above.

Stephanie denied at trial that she took Schmidt's comment about killing Rose and himself seriously, even though she told police that it "scared" her (157:255). Schmidt did not object to testimony that he and Stephanie discussed in general what to do about Rose and, in the course of that discussion, Schmidt told Stephanie he considered killing himself to prove his love for her.

In truth, both Schmidt and his wife were busy disclosing their marital confidences to just about anyone who would listen both before and after the murders: Schmidt's mother, Schmidt's uncle, Stephanie's sister, Stephanie's jail inmate, family friends, and finally the police. Their disclosures of such significant parts of their marital

communications about significant facts directly relevant to the homicides render insignificant the disclosure by Stephanie to police that Schmidt mused about killing both Rose and himself four days before the murders.

It is clear beyond a reasonable doubt that, in light of the properly admitted overwhelming evidence of his guilt, discussed at "I.," and "II. D.," above, the verdicts would have been the same had Stephanie been allowed to testify that Schmidt admitted he considered killing himself, but not allowed to testify that he also considered killing Rose. Any violation of Wis. Stat. § 905.05 was, therefore, harmless beyond a reasonable doubt. *See Eison,* 332 Wis. 2d 331, ¶¶ 10-11, 29, 34.

CONCLUSION

Therefore, the state of Wisconsin respectfully requests that the judgment of conviction and order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin this 19th day of August, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,764 words.

Dated this 19th day of August, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of August, 2015.

_____

Daniel J. O'Brien
Assistant Attorney General