No. _____

In The
Supreme Court of the United States

ASHLEY KENNETH HUNTER,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NORTH DAKOTA STATE SUPREME COURT

APPENDIX TO PETITIONER'S
PETITION FOR A WRIT OF CERTIORARI

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Corrected Opinion Pages Filed 9/6/18 by Clerk of Supreme Court

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2018 ND 173

State of North Dakota, Plaintiff and Appellee

v.

Ashley Kenneth Hunter, Defendant and Appellant

No. 20170345

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Norman G. Anderson, Judge.

AFFIRMED.

Opinion of the Court by Tufte, Justice.

Birch P. Burdick, State's Attorney, Fargo, North Dakota, for plaintiff and appellee.

Samuel A. Gereszek (argued), East Grand Forks, Minnesota, and Anna Dearth (appeared), third-year law student, under the Rule on Limited Practice of Law by Law Students, for defendant and appellant.

State v. Hunter

No. 20170345

Tufte, Justice.

[¶1] Ashley Hunter appealed from a criminal judgment entered after a jury found him guilty of two counts of murder and one count of arson. Hunter argues the district court erred by denying his motion to suppress, the court erred in allowing testimony about his statements to a medical professional, and the judge should have recused himself. We affirm.

I

[¶2] On the afternoon of June 22, 2015, Fargo police officers responded to a call about a death at a north Fargo location and found the body of Clarence Flowers. Flowers had been stabbed numerous times. Later that day, firefighters responded to a call about a fire at another north Fargo location and found the body of Samuel Traut. Traut had been killed by blunt force trauma to the head.

[¶3] The next morning Fargo police officers were dispatched to an address near the Traut murder scene in response to a call about a suspicious male. When officers arrived at the address, Hunter approached them and was arrested. Hunter was considered a person of interest in the Traut death, but the officers arrested him on a bench warrant for unrelated charges. Hunter was taken to the police station, where he was questioned by Fargo police detectives Matthew Ysteboe and Nick Kjonaas. Hunter made several incriminating statements related to the Flowers and Traut murders. After the interview was complete, Hunter attempted suicide and was taken to the hospital. Hunter was charged with two counts of murder and one count of arson.

[¶4] On April 10, 2017, Hunter filed a demand for change of judge under N.D.C.C. § 29-15-21. The court denied the demand for failing to comply with statutory requirements.

[¶5] On April 10, 2017, Hunter moved to suppress statements he made to law enforcement after his arrest, arguing the statements were coerced and were not voluntary. He also argued that information obtained from Andrea Wallace, an emergency room nurse, about statements he made to her should be suppressed because Wallace violated the Health Insurance Portability and Accountability Act ("HIPAA") by informing police about statements he had made while he was receiving medical care. After a hearing on Hunter's motion, Hunter filed a supplement to his motion to suppress. He argued his statements to police should be suppressed because he was not given the warning required by *Miranda v. Arizona*, 384 U.S. 436 (1966), before he made the statements and he did not knowingly and intelligently waive his Fifth and Sixth Amendment rights. He also argued that any statements he made to medical professionals should be suppressed on the basis of physician-patient privilege.

[¶6] On April 21, 2017, the district court entered an order authorizing disclosure of medical information and denying Hunter's motion to suppress his statements made to Wallace based on his HIPAA arguments. The court later entered a second order denying Hunter's motion to suppress the statements made to Wallace based on his physician-patient privilege argument.

[¶7] On May 10, 2017, the district court denied the remaining issues raised in Hunter's motion to suppress. The court found Kjonaas gave Hunter the *Miranda* warning before Hunter was transported to the police station for questioning, Hunter understood the warning, Hunter never invoked his right to remain silent, and Hunter voluntarily spoke to police about the murders. The court concluded Hunter voluntarily waived his right to remain silent.

[¶8] On May 12, 2017, Hunter moved the court to reconsider its order denying his motion to suppress the statements he made to police. He argued the statements had been involuntary. The court denied his motion. A nine-day jury trial began on May 22. The jury found Hunter guilty of both counts of murder and one count of arson.

II

[¶9] Hunter argues the district court erred in denying his motion to suppress because the State failed to meet its burden to establish he was given a *Miranda* warning and he did not knowingly and voluntarily waive his constitutional rights.

[¶10] We have explained our standard of review for reviewing a district court's decision on a motion to suppress:

> When reviewing a district court's ruling on a motion to suppress, we defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance. We recognize that the district court is in a superior position to assess the credibility of witnesses and weigh the evidence. Generally, a district court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the district court's findings, and if its decision is not contrary to the manifest weight of the evidence. Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law.

State v. Rogers, 2014 ND 134, ¶ 17, 848 N.W.2d 257 (quoting *State v. Goebel*, 2007 ND 4, ¶ 11, 725 N.W.2d 578).

A

[¶11] Hunter argues the district court erred by finding he was given a *Miranda* warning before he was subject to custodial interrogation. He claims the court's finding was based on Kjonaas' testimony that he gave Hunter the *Miranda* warning at the scene of the arrest, but other evidence indicated Kjonaas was never at the scene of the arrest and there was no other indication from the record that Hunter was ever given the *Miranda* warning.

[¶12] The Fifth Amendment of the United States Constitution provides that no person shall "be compelled in any criminal case to be a witness against himself." In *Miranda*, 384 U.S. at 444, the Supreme Court held as a matter of federal constitutional law that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." A law

enforcement officer is required to give a person subject to custodial interrogation a *Miranda* warning and inform him of certain rights, including that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has a right to an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning. *Id.*; *see also Rogers*, 2014 ND 134, ¶ 18, 848 N.W.2d 257. The parties do not dispute that Hunter was in custody and subject to custodial interrogation when he made the statements at issue, and therefore law enforcement was required to give Hunter a *Miranda* warning before questioning him.

[¶13] The district court found Hunter was given a *Miranda* warning after he was arrested and before he was interviewed. The court found that Hunter was arrested on a warrant unrelated to the murder investigations and that officers handcuffed him and placed him in the back of Officer Wes Libner's squad car. The court found Kjonaas walked around the block from the Traut murder scene to the scene of the arrest, spoke to other officers and confirmed Hunter was the person in the back of Libner's squad car, and then gave Hunter the *Miranda* warning. The court found Detective Matthew Ysteboe testified Kjonaas went to the scene of the arrest and then returned to the Traut murder scene after speaking to Hunter, Ysteboe asked Kjonaas if Hunter had been given *Miranda* warnings, and Kjonaas said he had. The court found Kjonaas' testimony about giving *Miranda* warnings to Hunter was consistent with the timeline. The court found Hunter's testimony was credible and was corroborated by Ysteboe's testimony. The court found Hunter was given a *Miranda* warning.

[¶14] Hunter claims the evidence does not support the district court's finding that Kjonaas gave him the *Miranda* warning while he was sitting in the squad car. Hunter argues the evidence shows he was arrested at 6:34 a.m., the squad car camera video began recording him in the back of Libner's squad car at 6:53 a.m., and the video does not show he was given the *Miranda* warning. He contends Kjonaas is not listed on the crime scene roster for the scene of the arrest, the squad car recording started

immediately after he was seated in the vehicle, and Libner's testimony confirmed Kjonaas was not at the scene of the arrest and so could not have issued the warning.

[¶15] Evidence in the record supports the court's findings. Hunter was arrested at 6:34 a.m. on June 23, 2015. Libner testified Officer Cody Gease placed Hunter in the squad car after he was arrested, the video recording in the squad car was started manually, and he could not recall who started the video recording or when it was started. Libner testified he was bagging up Hunter's property while Hunter was placed in the vehicle, he placed the bags containing Hunter's property in the vehicle's trunk, and other officers began arriving at the scene around that time, including officers from the Traut murder scene. There was also evidence that Libner and other officers conducted a security sweep of the surrounding property after Hunter was placed in the squad car. Libner testified he went into the apartment building located near the scene of the arrest so he could speak to the person who called police about Hunter, he spoke with the caller, and he searched a vehicle behind the apartment building before returning to his squad car to drive Hunter to the police station. Kjonaas testified he was at the Traut murder scene around 6:30 a.m. when he heard a dispatch on the police radio to a location that was around the block from the Traut murder scene. He testified he walked around the block and met with other officers at the scene of Hunter's arrest, he confirmed Hunter was in the back of the squad car, and he gave Hunter the *Miranda* warning. Ysteboe testified he was with Kjonaas at the Traut murder scene, Kjonaas left to go to the Hunter arrest scene, Kjonaas returned to the Traut scene, and Kjonaas told him while they were driving to the police station to interview Hunter that he had given Hunter a *Miranda* warning.

[¶16] The evidence in the record shows there was time for Kjonaas to have given Hunter a *Miranda* warning after Hunter was arrested and before the squad car video recording was started. Kjonaas' testimony is consistent with the timeline evidence. Although Hunter claims Libner testified that Kjonaas was never at the scene of the arrest and therefore could not have read the *Miranda* warning, Libner testified at trial

that he did not recall having seen Kjonaas at the scene but that it was possible Kjonaas had approached the car when he was away from the vehicle. Kjonaas is not listed on the crime scene roster, but there was evidence the roster did not accurately reflect each time a person entered or left the crime scene. Libner was listed as the "securing officer" on the roster, but he testified the roster was not his and he did not know who had filled it out. Kjonaas testified he did not believe he had entered the crime scene because the squad car was parked on the street, outside what he considered to be the crime scene. The evidence supports the district court's finding that Hunter was given a *Miranda* warning, and we conclude there is sufficient competent evidence to support the finding and it is not contrary to the manifest weight of the evidence.

B

[¶17] Hunter contends, even if Kjonaas read him a *Miranda* warning while he was sitting in the squad car, officers were required to issue *Miranda* warnings again at the outset of the interrogation. He contends a warning at the time of the interrogation is indispensable to insure the individual knows he is free to exercise the privilege at that time.

[¶18] Hunter does not cite any case law requiring re-administration of the *Miranda* warning at the beginning of an interrogation if the defendant has previously been given the warning. In *Wyrick v. Fields*, 459 U.S. 42, 48-49 (1982), the Supreme Court rejected a per se rule that a defendant must be re-advised of his *Miranda* rights after taking a polygraph exam and before he can be questioned about the results. The Court indicated courts should consider the totality of the circumstances in each case to determine whether the defendant has waived his rights. *Id.*

[¶19] Other courts have generally rejected a per se rule about when a defendant must be re-advised of his rights after the passage of time and have held the lapse of time between administration of the *Miranda* warning and the custodial interrogation or defendant's statement is only one of the factors to consider in determining the validity of a waiver of *Miranda* rights. *See Treesh v. Bagley*, 612 F.3d 424, 431 (6th Cir.

2010); *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995); *United States v. Thieret*, 791 F.2d 543, 547-48 (7th Cir. 1986). Courts have held a lapse of time and a change in conditions similar to those at issue in this case did not require *Miranda* warnings to be re-administered. *See, e.g.*, *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1129 (9th Cir. 2005) (re-administration of *Miranda* warning not required when defendant's statements were made 16 hours after the initial warning was given, a different interrogator was questioning him, and there was a change in the location of the interrogation); *Andaverde*, at 1312-13 (re-administration of *Miranda* warning not required when warning was given by police two hours before statement to probation officer, there was a ten-minute interval between the police and probation interviews, and the defendant had been moved to a different room); *Thieret*, at 548 (re-administration of *Miranda* warning not required before interrogation when defendant had been placed in a holding cell for 40 minutes after he was arrested and the warning was initially given); *Stumes v. Solem*, 752 F.2d 317, 320 (8th Cir. 1985) (re-administration of *Miranda* warning was not required when there was more than six hours between warning and waiver). *See also Jarrell v. Balkcom*, 735 F.2d 1242, 1254 (11th Cir. 1984) (confession was admissible when *Miranda* warning was given before defendant's arrest, the warning was not given again at the time of arrest, and defendant confessed more than three hours after initial *Miranda* warning and after the arrest).

[¶20] In this case, Hunter was advised of his *Miranda* rights before he was taken to the police station for the interview. Evidence established Hunter's interview with Kjonaas and Ysteboe began approximately forty-five minutes after Kjonaas read Hunter the *Miranda* warning and advised him of his rights. The same officer that gave Hunter the *Miranda* warning also was involved in questioning him. We conclude that under these circumstances the delay after the initial warning and the change in location did not require re-administration of the *Miranda* warning.

C

[¶21] Hunter also argues the statements should have been suppressed because he did not knowingly and voluntarily waive his rights.

[¶22] Whether a defendant voluntarily, knowingly, and intelligently waived his rights depends on the totality of the circumstances. *State v. Newnam*, 409 N.W.2d 79, 83-84 (N.D. 1987). To determine whether statements to law enforcement are voluntary, we consider the totality of the circumstances and focus on two elements:

> (1) the characteristics and conditions of the accused at the time of the confession, including age, sex, race, education level, physical and mental condition, and prior experience with police; and (2) the details of the setting in which the confession was obtained, including the duration and conditions of detention, police attitude toward the defendant, and the diverse pressures that sap the accused's powers of resistance or self-control.

Goebel, 2007 ND 4, ¶ 16, 725 N.W.2d 578. A confession may be involuntary even if police have complied with the *Miranda* requirements. *Newnam*, at 84.

[¶23] The State must show waiver by a preponderance of the evidence. *Newnam*, 409 N.W.2d at 84. The voluntariness of a confession depends on questions of fact, which are resolved by the district court. *Goebel*, 2007 ND 4, ¶ 17, 725 N.W.2d 578. This Court gives deference to the district court's determination of voluntariness and will not reverse the court's decision unless it is contrary to the manifest weight of the evidence. *Newnam*, at 84.

[¶24] The district court found Kjonaas gave Hunter the full *Miranda* warning as required, informing him of all of his rights. The court found Hunter understood the warning, he never invoked his right to remain silent, and he wanted to talk to police about the murders.

[¶25] The district court applied the two-part test for voluntariness and found the statements were voluntary. The court found Hunter is a 35-year-old African-American male, his educational background is unknown but he is intelligent, and he has had extensive contact with the criminal justice system in the past. The court

found Hunter maintained his innocence for the Flowers murder until the end of the interview and confessed only after officers spoke to another person about the murder. The court found Hunter showed he understood the seriousness of the possible charges when he talked about how much jail time he could receive, he understood the consequences of confessing by asking if he was looking at life in prison, and he voluntarily initiated contact with police that morning. The court acknowledged Hunter gave conflicting stories on his lack of sleep and admitted he had ingested drugs four or five hours before the interview, but the court found Hunter was alert, conscious, and coherent while talking to detectives and he never said he was too tired to continue the interview.

[¶26] The court also considered the setting of the interview, its duration and conditions, the attitude of the officers, and whether any coercive tactics were used. The court found Hunter initially approached law enforcement officers to explain that he was innocent, and his long and confusing explanations during the interview showed he wanted the opportunity to present his story to law enforcement. The court found the interview lasted three hours, it was conducted in an interview room at the police station, Hunter was seated close to the door with Kjonaas and Ysteboe across from him, and Hunter was handcuffed and in custody. The court found the officers were calm and spoke to Hunter in a respectful and conversational manner and no physical contact occurred other than the officers responding to Hunter's request to help him rearrange his clothing. The court found the officers employed certain interviewing techniques to question Hunter but none of these tactics went beyond the acceptable range and the tactics would not offend common decency or civilized notions of acceptable practices.

[¶27] The district court found Hunter's statements were voluntary under the totality of the circumstances. The court said Hunter's apparent suicide attempt after the interview did not render his statements before the attempt involuntary when all outward indications showed he was stable and wanted to talk. The court concluded

Hunter waived his right to remain silent. After examining the entire record, we conclude the evidence supports the court's findings.

[¶28] Hunter claims the court erred because it did not properly consider several factors. He contends a valid waiver was impossible because he was not informed of why he was arrested or what he was suspected of and he was not informed of the identities of the interviewing officers.

[¶29] In *Moran v. Burbine*, 475 U.S. 412, 422 (1986), the Supreme Court said the Constitution does not require the police to supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or waive his rights. The Court has also said that "a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might . . . affec[t] his decision to confess.'" *Colorado v. Spring*, 479 U.S. 564, 576 (1987) (quoting *Moran*, at 422). In *Spring*, at 577, the Court rejected the defendant's argument that his waiver was not knowing and voluntary because law enforcement failed to inform him about the potential subject matter of the interrogation. The Court said the defendant's awareness of the possible subjects of questioning was not relevant in determining whether he voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege. *Id.*

[¶30] Although Hunter was arrested on an unrelated warrant, he had voluntarily approached officers, saying without prompting, "I'm the one. I'm unarmed." He explained to the officers he had been framed. After Hunter was placed in the squad car, he began talking about a conspiracy, "the original" and "his woman" who frame people for crimes, and he asked whether officers had talked to a woman inside the building where he was arrested because he claimed she wrote a statement for police. During the interview, Hunter initially raised the subject of the Flowers murder without any prompting from the officers other than their request for Hunter to tell them what had happened the last few days. Evidence established Hunter approached the officers to talk about the murders and to claim he was innocent.

[¶31] The officers did not identify themselves at the beginning of the interview, but one of the officers had his badge hanging around his neck. Hunter asked if the conversation was being recorded, and he said to one of the officers, "You're like an FBI agent, right?" Evidence established Hunter understood he was being questioned by law enforcement officers.

[¶32] Hunter also argues his mental state was a large factor in determining the voluntariness of his statements. He claims he told the officers he had ingested copious amounts of methamphetamine and had not slept in several days, he requested medical attention multiple times, and his requests were ignored until law enforcement sent him to the emergency room after his interrogation to be medically cleared because of suspected meth use.

[¶33] Drug or alcohol use and fatigue are relevant to determining whether a defendant has voluntarily waived his rights, but they do not automatically render a confession involuntary. *See United States v. Gaddy*, 532 F.3d 783, 788 (8th Cir. 2008). At the start of the interview, the officers asked Hunter whether he was tired and when was the last time he used drugs. Hunter responded, stating he was sleeping and woke up and walked outside. He said he last used drugs four or five hours earlier and his drug of choice was marijuana but he was around people who use other drugs. Kjonaas testified Hunter did not appear to be under the influence of any drugs during the interview despite his claim that he had ingested or used narcotics four hours before the interview, he engaged in dialogue with the officers, he gave narrative answers to the questions asked, and he seemed to understand what the officers said to him. Kjonaas testified Hunter was not significantly impaired based on his statements and conduct during the interview. Evidence established Hunter was sent to the hospital after his interview for jail clearance and a behavioral health evaluation after a possible suicide attempt in which he attempted to put a cord around his neck before he was stopped by officers. At the hospital, Hunter reported to medical staff that he had last used methamphetamine a few days before and regularly uses

marijuana three times a day. The medical provider noted Hunter was oriented but agitated, his cognition and memory were normal, and he denied any thoughts of suicide. Hunter was medically cleared for incarceration, but suicide precautions were recommended. The district court found Hunter's exact drug use was difficult to ascertain from the interview, but Hunter was alert, conscious, and coherent throughout the interview. The evidence supports the court's findings.

[¶34] After examining the record, we conclude, under the totality of the circumstances, Hunter voluntarily waived his right to remain silent. The evidence supports the district court's findings, and its decision is not contrary to the manifest weight of the evidence. We conclude the district court did not err in denying Hunter's motion to suppress.

III

[¶35] Hunter argues the district court erred in admitting the testimony of Andrea Wallace about statements he made at the hospital after he was arrested. He claims waiver of physician-patient privilege must be voluntary under N.D.R.Ev. 510 and he did not waive his privilege.

[¶36] The district court has broad discretion in evidentiary matters, and its decision to admit or exclude evidence will not be reversed unless the court abused its discretion. *State v. Teggatz*, 2017 ND 171, ¶ 8, 898 N.W.2d 684. A court abuses its discretion when it misinterprets or misapplies the law, or if it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. *Id.*

[¶37] There was no physician-patient privilege under common law, and therefore its existence and scope depends upon the specific language of the statute or rule authorizing it. *State v. Schroeder*, 524 N.W.2d 837, 839-40 (N.D. 1994). Rule 503, N.D.R.Ev., states a patient has a privilege to refuse to disclose, or prevent others from disclosing, confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition. "[O]nly those

communications made 'for the purpose of diagnosis or treatment' are privileged." N.D.R.Ev. 503, explanatory note; *see also Schroeder*, at 841. The party claiming the privilege and desiring to exclude the evidence has the burden to prove the communications fall within the terms of the statute or rule granting the privilege. *See Trinity Med. Ctr., Inc. v. Holum*, 544 N.W.2d 148, 156 n.3 (N.D. 1996); *Booren v. McWilliams*, 26 N.D. 558, 145 N.W. 410, 414 (1914).

[¶38] The district court denied Hunter's motion to suppress his statement to Wallace. The court found Hunter made the statement while he was being evaluated by a medical professional after an apparent suicide attempt at the police station and his statement was made for purposes of diagnosis or treatment or could be interpreted that way. The court concluded the privilege did apply but had already been waived because Hunter told law enforcement the same information before he told Wallace.

[¶39] "We will not set aside a district court's decision simply because the court applied an incorrect reason, if the result is the same under the correct law and reasoning." *State v. Cook*, 2018 ND 100, ¶ 25, 910 N.W.2d 179. We conclude the court reached the correct result, but for the wrong reason.

[¶40] Physician-patient privilege applies only to communications made for the purpose of diagnosis or treatment. N.D.R.Ev. 503. When the statement or communication provided to the physician does not pertain to the patient's diagnosis or treatment, the privilege is not violated by allowing disclosure. In *State v. Miller*, 530 N.W.2d 652, 656 (N.D. 1995), this Court held a nurse's testimony that the defendant did not consume any alcohol while under her care did not implicate the physician-patient privilege because there was no evidence the nurse's observation was for the purpose of diagnosis or treatment. Other courts have similarly held the privilege did not apply to information that was not provided for purposes of diagnosis or treatment. *See State v. Irish*, 391 N.W.2d 137, 142 (Neb. 1986) (holding doctor's testimony about defendant's statement that he "had been drinking" and "lost control [of his vehicle] and hit the other person headon" was admissible because the

communication was not sought for diagnosis or treatment and it was outside the scope of the physician-patient privilege).

[¶41] Wallace testified she is a registered nurse and was working in the emergency room the day Hunter was brought in, she went into the exam room to start her assessment and triage, she completed her assessment, and she charted her assessment. She testified there was no conversation between herself and Hunter while she was charting her assessment, Hunter "just started talking" like he "could not be quiet," and he said, "I killed a man last night, and it never should have happened." She testified she had never had something like that happen to her before, she did not ask any further questions, she did not know what to say, she told him she was finished with her assessment and the doctor would be in shortly, and she left the room. Hunter did not make the statement in response to questions from Wallace, and she testified she was finished with her assessment when he made the statement. There was no evidence that his statement was made for the purpose of diagnosis or treatment.

[¶42] Hunter failed to establish his statement to Wallace was covered by the physician-patient privilege under N.D.R.Ev. 503. We conclude the district court did not abuse its discretion by denying Hunter's request to exclude the testimony.

IV

[¶43] In Hunter's supplemental brief, he claims the court erred by excluding the expert witness testimony of Alan Hirsch. He argues Hirsch is an expert on false confessions, expertise about false confessions has been recognized as a valid social science and necessary tool to help the jury in assessing a defendant's statements, and many courts have allowed expert testimony about false confessions.

[¶44] The decision whether to allow expert witness testimony is within the district court's sound discretion, and the court's decision will not be reversed on appeal unless it abused its discretion. *State v. Campbell*, 2017 ND 246, ¶ 6, 903 N.W.2d 97. The court has broad discretion to determine whether a witness is qualified as an expert

and whether the testimony will assist the trier of fact. *In re J.M.*, 2013 ND 11, ¶ 11, 826 N.W.2d 315.

[¶45] Testimony from expert witnesses is allowed under N.D.R.Ev. 702, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

The Rule envisions generous allowance of the use of expert testimony if the witness has some degree of expertise in the field in which the witness is to testify. *J.M.*, 2013 ND 11, ¶ 11, 826 N.W.2d 315. The expert does not need to be a specialist in a highly particularized field if the expert's knowledge, training, education, and experience will assist the trier of fact. *Id.*

[¶46] Hunter argued the false confession expert testimony was necessary to aid the jury in accurately assessing the reliability of his statement to law enforcement. He claimed the evidence in the trial had been inconsistent, there was no DNA evidence conclusively linking him to the murders, and the State's case was largely based on his statement to law enforcement. Hunter claimed his expert witness, Alan Hirsch, had specialized knowledge acquired through 30 years' experience in various fields of interrogations and confessions that would be helpful to the jury in understanding his statement to law enforcement.

[¶47] The district court allowed Hunter to make an offer of proof and then denied Hunter's request to introduce the testimony. The court explained Hirsch was not a psychiatrist or psychologist or researcher and there was no evidence Hunter had been diagnosed with a personality disorder which might make him more amenable to suggestion. The court found Hunter was offering only general testimony about false confessions, Hunter said the only purpose for calling Hirsch was to put to the jury the notion that false confessions exist, and Hirsch was not going to testify about Hunter or his confession. The district court concluded the existence of false confessions was

common knowledge and the evidence would not aid the jury. The jury was instructed that false confessions exist. Hunter failed to present sufficient evidence to establish that Hirsch is an expert and that the testimony would help the jury to understand the evidence or to determine a fact in issue. The district court did not abuse its discretion when it excluded Hirsch's testimony.

V

[¶48] Hunter argues his due process rights were violated because the district court judge failed to recuse himself. He claims the judge was biased and it affected his rulings, including his rulings on the *Miranda* issues and the decisions to exclude expert witness testimony and allow Wallace's testimony.

[¶49] On April 10, 2017, Hunter filed a demand for change of judge under N.D.C.C. § 29-15-21, stating he "does not assume any impropriety on the part of any of the preceding Judge just that preconceived notions may be formed regarding the Defendant." On April 12, 2017, the Presiding Judge of the East Central Judicial District denied the demand, stating it did not comply with the North Dakota Century Code.

[¶50] Hunter's demand states his motion is in accordance with N.D.C.C. § 29-15-21. Section 29-15-21, N.D.C.C., allows a party in a criminal action to demand a change of judge, but the demand is invalid unless it is filed no more than 10 days after the date of notice of assignment of a judge, the date of notice that a trial has been scheduled, or the date of service of any ex parte order. A peremptory demand for a change of judge may not be made after the judge has ruled upon any matter pertaining to the action. N.D.C.C. § 29-15-21(3). The demand must certify that the judge has not ruled upon any matter pertaining to the action or proceeding in which the moving party was heard. N.D.C.C. § 29-15-21(4). A demand for a change of judge based on bias is different from a peremptory demand under N.D.C.C. § 29-15-21. *Gray v. Berg*, 2015 ND 203, ¶ 9, 868 N.W.2d 378. A demand for a change of judge based on bias is not subject to the same time constraints as a peremptory demand. *Id.*

[¶51] Hunter's demand cited only N.D.C.C. § 29-15-21, under which the demand was untimely and did not comply with other requirements. If Hunter's demand intended to rely on bias, his allegations in the motion were too vague. He claimed "preconceived notions may be formed regarding the Defendant." That allegation was not sufficient. Knowledge obtained during a judicial proceeding is ordinarily not a basis for disqualification. *Rath v. Rath*, 2018 ND 138, ¶ 25, 911 N.W.2d 919. On appeal he argues the court's rulings on the *Miranda* issues, the court's decision to allow Wallace's testimony, and other evidentiary rulings support his claim about bias. His allegations amount to nothing more than dissatisfaction with unfavorable rulings, which is insufficient to demonstrate bias. *See Evenstad v. Buchholz*, 1997 ND 141, ¶ 11, 567 N.W.2d 194. A ruling adverse to a party does not render a judge biased. *Grasser v. Grasser*, 2018 ND 85, ¶ 9, 909 N.W.2d 99. Furthermore, the decisions Hunter alleges show bias all occurred after the demand for change of judge. Hunter did not make any further demands for change of judge or motions for recusal related to the alleged bias. Hunter's allegations are insufficient to demonstrate bias. We conclude the court did not err in denying Hunter's demand for a change of judge.

VI

[¶52] We have considered Hunter's remaining issues and arguments and conclude that they are either unnecessary to address or are without merit. We affirm the judgment.

[¶53] Jerod E. Tufte
Daniel J. Crothers
Lisa Fair McEvers
Jon J. Jensen
Gerald W. VandeWalle, C.J.

STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF CASS | EAST CENTRAL JUDICIAL DISTRICT

State of North Dakota, Plaintiff, vs. Ashley Kenneth Hunter, Defendant.	File No.: 09-2015-CR-02085 **MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS**

[¶1] The above-captioned case came before the Court on Defendant's Motion to Suppress Statements, filed April 10, 2017. On April 13, 2017, the State of North Dakota (State) filed a Response. On April 26, 2017, the Court heard testimony and argument on the admissibility of the Defendant's statements to law enforcement. Birch Burdick, Tristan Van de Streek, and Leah Viste appeared on behalf of the State. The Defendant appeared personally, along with counsel, Samuel Gereszek. Based on the record and applicable law, the Defendant's motion is denied.

BACKGROUND

[¶2] On June 24, 2015, the State of North Dakota charged Defendant Ashley Kenneth Hunter (Hunter) with two counts of Murder and one count of Arson. On June 23, 2015, as part of the investigation before an Information was filed, Fargo Police Department Detectives Matthew Ysteboe and Nick Kjonaas questioned Hunter at the Fargo Police Department. The Defendant was under arrest for an active bench warrant in case FA-2013-CR-04643, an unrelated shoplifting matter, but not for the murders or arson.

[¶3] Hunter made a number of incriminating statements during the recorded interview. The State intends to introduce Hunter's statements during the upcoming trial. The Defendant in his

motion to suppress and supplemental briefing has argued: (1) no Miranda warning was given to Hunter or, conversely, there was not a valid waiver of his Miranda rights; (2) the statements were taken while Hunter was in custody for another, unrelated warrant; and (3) the statements obtained from Hunter were involuntary and, therefore, inadmissible under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

LAW AND ANALYSIS

Miranda Warning Arguments

I.

[¶4] Fargo Police Officer Teressa Durr testified at the suppression hearing she was working the night shift on June 22-23, 2015. At approximately 6:00 a.m. she was in the parking lot of the Newman Center on North University Drive, assisting with the unattended death of Samuel Traut, when she heard dispatch say officers were being sent to check on a suspicious male at 1119 North University Drive. Dispatch described the person as a black male wearing a vest, carrying a bunch of papers, and making comments about being framed. At the time dispatch was describing the suspicious male, Officer Durr already knew Hunter had been identified as a person of interest in the death of Traut.

[¶5] The address dispatch gave was only three houses south of the Newman Center where Officer Durr was so she positioned herself behind the first house south of the Newman Center and kept a watch for the black male. She immediately saw a black male walking north on her side of the street, but he did not match the description. When Officer Durr looked south again she saw Hunter walking towards her, slowly raising his hands and saying "I'm the one. I'm unarmed." He held a bunch of papers in his right hand. Officer Durr drew her gun and ordered Hunter down to the ground. Within seconds, Fargo Police Officer Libner pulled up next to them

in his patrol car and got out to assist Officer Durr. Officer Libner ordered Hunter to put his hands behind his back, and he was handcuffed. The papers Hunter held in his hand were placed on the ground and later put in a bag given to Officer Libner. While on the ground Hunter made comments about wanting the officers to look at the paperwork. Hunter was then placed in the back seat of Officer Libner's patrol car.

II.

[¶6] According to the Arrest Report offered as Exhibit 1 to Hunter's Motion to Suppress, he was arrested on June 23, 2015, at 6:34 a.m. on a warrant unconnected to the murder investigation. Two DVDs were submitted to the Court for its consideration in deciding the motion to suppress. The first DVD began at approximately 7:01 a.m. and showed Hunter in the back seat of the patrol car with his hands handcuffed behind his back. The second DVD showed the interview with Hunter at the Fargo Police Department.

[¶7] Within the first minute of the squad car video, Hunter asked the officer in the patrol car about another "cop" who went by "Austin" on the street, and Hunter swears he was with him the day before. Hunter then asked if anyone had questioned the "chick" in the apartment. At approximately 7:03 Hunter again asked the officer if they had questioned the chick on the main level of the apartment, and the officer first said "no" and then "I'm not sure, I guess." The officer asked Hunter who this person was they should talk to. Hunter did not give a name; instead he referred to a bunch of "paperwork" he had grabbed to show the police what was going on. At that point Hunter on his own began talking about someone called "the Original" and his woman who go around framing people for "shit" and making it look perfect. Hunter told the officer that the Original said he'd be back at 7:00.

[¶8] At approximately 7:04 the officer began driving, and Hunter asked if he could get checked out at the hospital because he was not feeling well. The officer said "you'll get checked out as soon as we get there Ashley," and Hunter responded "Okay." Hunter said it was going to be a long waiting process at the jail though. At approximately 7:07 Hunter asked where the officer was going, and then said "police station?" to which the officer answered "yes."

[¶9] Just as they were arriving at the police station, Hunter once more asked the officer if the police had talked to "the girl in the main level yet that was with me?" The officer said "Ashley, I'm not sure who they've spoken to," and Hunter said "Okay, I'm sorry, I don't mean to bug you, I'm just asking." Hunter then added "Because she wrote out a statement for you. Signed it." Hunter was taken out of the patrol car at approximately 7:09 a.m.

III.

[¶10] Fargo Police Detective Kjonaas testified at the suppression hearing that on June 22, 2015, he was sent to the scene of the Clarence Flowers murder between 1:00 and 2:00 p.m. He worked the entire day on the Flowers murder until approximately midnight when he was called to the scene of the Samuel Traut murder. Detective Kjonaas said he worked all night going between the Traut murder scene and the main police department. At approximately 6:30 a.m. on June 23, 2015, Detective Kjonaas was at the Traut murder scene and heard dispatch sending officers to the 1100 block of North University Drive regarding a suspicious male. He walked the short distance to the area where he talked to officers on scene who had taken Hunter into custody. He confirmed with the officers that Hunter was the person in the back of Officer Libner's patrol car.

[¶11] Detective Kjonaas testified he went to the car, opened the back door, and gave Hunter a Miranda warning, which was his standard procedure. He said Hunter was the only person in the patrol car at the time of the Miranda warning, and he did not believe Hunter specifically

responded to the warning. Detective Kjonaas closed the car door and went back to talk to the officers on scene about what the plan would be for Hunter. It was decided Hunter would be taken in the patrol car to the police station and interviewed there by Detective Ysteboe and Detective Kjonaas.

[¶12] Detective Kjonaas said it was approximately 30 minutes from the time he gave Hunter his Miranda warnings in the patrol car until he next saw Hunter at the police station for the interview. When asked on cross-examination how long Hunter had been in the patrol car before he was Mirandized, Detective Kjonaas said he assumed it was not long. It was also brought out on cross-examination that according to the arrest report Hunter was arrested at 6:34 a.m.

[¶13] Detective Kjonaas admitted he did not include in his written report that Hunter had been Mirandized in the patrol car, and acknowledged it should have been included in his report. He also admitted the Miranda warning did not appear on the patrol car video. Detective Kjonaas pointed out the Miranda warning given to Hunter was documented in the charging summary report prepared by Detective Ysteboe.

IV.

[¶14] Detective Ysteboe testified at the suppression hearing that on June 22, 2015, he and other law enforcement were wrapping up work at the Flower's murder scene when they were called to the Traut murder scene. The crime scene bus he was on moved to the scene of the Traut murder where he and the others would be available to assist if needed.

[¶15] Sometime later he heard dispatch report the detention of a male on University Drive. Detective Ysteboe testified Detective Kjonaas went to that location and then returned to the bus after speaking to Hunter. Detective Kjonaas told Detective Ysteboe the two of them had been assigned to interview Hunter at the police station. On the way to the police station for the

interview, Detective Ysteboe asked Detective Kjonaas if Hunter had been Mirandized, and Detective Kjonaas said he had been.

[¶16] Detective Ysteboe said he typed a charging summary report right after the interview on June 23, 2015, in which he reported that Hunter was found at 1119 University Drive North, arrested on an open warrant, and Mirandized.

V.

[¶17] There have been two motions to suppress filed in this case. The first one was filed by Hunter's second court appointed lawyer, and later withdrawn when he was excused from further representation of Hunter because of a conflict of interest. The first motion sought to suppress Hunter's statements in the interview on June 23, 2015, but did not mention any violation of Miranda. The second motion to suppress included the alleged Miranda violation, but did not include an alleged invalid waiver of Miranda. The issue of waiver was indirectly raised for the first time at the suppression motion hearing when the defense asked Detective Kjonaas whether he had asked Hunter if he understood the Miranda warning, to which Detective Kjonaas answered he did not recall.

[¶18] The first thing the Court must decide is whether Detective Kjonaas gave Hunter a Miranda warning while he was seated in the back of the patrol car. The timing of events the morning Hunter was arrested is consistent with Detective Kjonaas' testimony. Hunter was arrested at 6:34 a.m., right around the time Detective Kjonaas said he arrived at the scene of the arrest. After briefly talking to the arresting officers and confirming Hunter was seated in the back of Officer Libner's patrol car, Detective Kjonaas went to the car and Mirandized Hunter, which was in line with his standard procedure. Detective Kjonaas believed Hunter had not been in the car long when he Mirandized him. If Detective Kjonaas Mirandized Hunter just a short

while after he was arrested at 6:34 a.m.—and there is no evidence to the contrary—then his Miranda warning to Hunter would not be on the patrol car video because the patrol car video only started at 6:53:55 a.m., twenty minutes after the arrest. Detective Kjonaas' testimony that it was approximately 30 minutes from the time he gave Hunter his Miranda warnings in the patrol car until he next saw Hunter at the police station for the interview is also consistent with the time the interview of Hunter began. The beginning of Hunter's videotaped interview is timestamped 7:09:55 a.m. Going back 30 minutes from the timestamp would put it at roughly 6:40, not long after Hunter was arrested at 6:34. Detective Kjonaas' testimony about when he Mirandized Hunter fits the known time of Hunter's arrest and the beginning of the interview.

[¶19] Under all the circumstances, Detective Kjonaas' testimony that he gave Hunter a Miranda warning when Hunter was seated in the back of the patrol car is entirely plausible and credible. First, Detective Kjonaas did not exhibit any signs of being untruthful while he testified about giving Hunter a Miranda warning. Nor was it shown that at an earlier time Detective Kjonaas had said something different from what his testimony was at the suppression hearing. Second, his testimony was consistent with the known facts leading up to Hunter's arrest and interview. Third, Detective Kjonaas' testimony was corroborated by Detective Ysteboe's testimony. Detective Ysteboe testified Detective Kjonaas left the Traut murder scene to walk over to the scene of Hunter's arrest and returned to the crime scene bus to tell him they would be interviewing Hunter at the police station. He also testified Detective Kjonaas told him he had already Mirandized Hunter. Finally, the failure of Detective Kjonaas to include in his post-interview report the fact he Mirandized Hunter is largely cured by its inclusion in the charging summary report prepared by Detective Ysteboe right after the interview of Hunter on June 23, 2015.

VI.

[¶20] Having found Hunter was given a Miranda warning, the Court must next decide whether Hunter waived his Miranda rights. The Fifth Amendment protects an individual from compelled self-incrimination. The Supreme Court of the United States in Miranda v. Arizona established warnings as a safeguard against the coercion inherent in custodial interrogations. 384 U.S. 436 (1966); Dickerson v. United States, 530 U.S. 428, 435 (2000). Once Miranda warnings are given, an individual may choose to waive his rights, including the privilege against self-incrimination.[1] A waiver is valid if it is made voluntarily, knowingly, and intelligently. Miranda 384 U.S. at 444. "A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." United States v. Harper, 466 F.3d 634, 643 (8th Cir. 2006), cert. denied, 549 U.S. 1273 (2007). A suspect is not required to make "an explicit statement of waiver" for a court to later find the suspect did, in fact, voluntarily waive his Constitutional rights. North Carolina v. Butler, 441 U.S. 369 (1979); Berguis v. Thompkins, 560 U.S. 370, 385 (2010) ("As a general proposition the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.").

[¶21] The Supreme Court's decision in Berghuis addresses the question of what may constitute a valid waiver of Miranda. After noting that some of the language in Miranda could be read to indicate a waiver of Miranda is difficult to prove in the absence of an explicit written waiver or an express oral statement, the Court in Berghuis explicitly stated that is not the case:

[1] If a defendant has been given Miranda warnings before police interrogation, such fact weighs in favor of finding a confession voluntary. United States v. Mendoza, 85 F.3d 1347, 1350 (8th Cir. 1996) (citing Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 268 (1985)). "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that law enforcement authorities adhered to the dictates of Miranda are rare." Berkemer v. McCarty, 468 U.S. 420, 433 (1984).

> One of the first cases to decide the meaning and import of Miranda with respect to the question of waiver was North Carolina v. Butler. The Butler Court, after discussing some of the problems created by the language in Miranda, established certain important propositions. Butler interpreted the Miranda language concerning the "heavy burden" to show waiver, 384 U.S., at 475, in accord with usual principles of determining waiver, which can include waiver implied from all the circumstances. See Butler, supra, at 373, 376. And in a later case, the Court stated that this "heavy burden" is not more than the burden to establish waiver by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).
>
> The prosecution therefore does not need to show that a waiver of Miranda rights was express. An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. Butler, supra, at 376. Butler made clear that a waiver of Miranda rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." 441 U.S., at 373. The Court in Butler therefore "retreated" from the "language and tenor of the Miranda opinion," which "suggested that the Court would require that a waiver ... be 'specifically made.' " Connecticut v. Barrett, 479 U.S. 523, 531–532 (1987) (Brennan, J., concurring in judgment).

Berghuis, 560 U.S. at 383-84 (internal citations included).

[¶22] The Supreme Court concluded that if the prosecution shows a Miranda warning was given to a suspect and he understood it, then any uncoerced statement will establish an implied waiver of the right to remain silent. Id. at 384.

VII.

[¶23] As a preliminary matter, Detective Kjonaas stated he gave Hunter his Miranda warning from memory. A Miranda warning essentially consists of advising a person in custody that he has the right to remain silent, that anything he says can be used against him, and that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed to represent him prior to questioning if he wants an attorney. The Miranda warning is so ingrained in our society that it has a firmly established meaning even for lay people. The Court finds Detective Kjonaas would have given the essential Miranda warning as stated above when he testified he recited it to Hunter from memory. See Duckworth v. Eagan, 492 U.S. 195,

202-03 (holding a Miranda warning need not be verbatim, but must touch all the bases required by Miranda).

[¶24] No evidence was offered at the suppression hearing to suggest Hunter did not receive a full Miranda warning. Furthermore, there is no contention, let alone evidence, that Hunter did not understand the warning. It would be difficult for Hunter to make such a claim in any event given his extensive contacts with the criminal justice system as a defendant. Hunter has been a defendant in over 25 state cases in North Dakota. In some cases he pleaded guilty to charges ranging from B misdemeanors to C felonies, and in others he was found guilty following a jury trial. Furthermore, courts are required to advise a defendant at his initial appearance of the rights included in a Miranda warning as well as other rights. N.D.R.Crim.P. 5(b). Therefore, it is easy to conclude Hunter had been advised of the rights included in a Miranda warning numerous times before he heard the warning given by Detective Kjonaas after his arrest on June 23, 2015. In the complete absence of any evidence to the contrary, and in view of all the circumstances, the Court concludes Hunter understood the warning.

[¶25] Hunter never invoked his right to remain silent, and it is abundantly clear from the undisputed facts that he wanted to talk to the police and explain why he was not the person they should be looking for in connection with the murders of Flowers and Traut. Hunter knew the police wanted to talk to him about the murders. When he approached Officer Durr, Hunter said in effect he was the one they were looking for. Hunter initiated contact with the police and had a bunch of papers in his hand he wanted them to see. Hunter was ordered to the ground, and he immediately asked the police to look at his paperwork. One of the first things Hunter said on the video in the patrol car was about a "chick" the police needed to talk to. And when the officer asked who it was Hunter wanted the police to talk to, Hunter said the paperwork would show

them what was going on, and then he began talking about the Original and his woman who go around framing people for "shit," making it look perfect.

[¶26] Hunter unquestionably wanted to talk to talk to the police, and to specifically talk about the murder investigations. He voluntarily went to the police, with his paperwork and talk of being framed, in an obvious effort to explain himself out of the murder picture. The last thing Hunter asked before he got out of the car at the police station was whether the police had talked to the girl who was with him in the apartment because she wrote out a statement for the police and signed it. Hunter wanted the police to hear how he was framed.

[¶27] In the interview at the police station, Hunter said it seemed like someone had shot him up with some kind of drug while he was sleeping. Detective Ysteboe asked him what he had been up to the last couple of days, and Hunter immediately brought up Megan, the person he had told the police about on the main level of the apartment at North University Drive, apparently the same person who wrote the statement for the police and signed it. Hunter said Megan called him to come over because something bad had happened, and when he got there he saw "him" (Clay/Flowers) lying dead on the floor. Megan had blood on her chest and said something about the dead man owing Mexicans for something. Hunter told the detectives he had her write a statement, suggesting Megan wrote it to explain what happened to the dead man when Hunter was not there. He next brought up "the Original," also called "Apache," who "fucks people over" and has a bad reputation. For the next twenty minutes or so Hunter talks in general and vague terms, almost without interruption, about the events leading up to Flower's murder.

[¶28] The drift of Hunter's statements for the first half-hour of the interview was that the Original was somehow responsible for Flower's death. At no time did Hunter implicate himself, and at no time did he invoke his right to remain silent or to have an attorney present. Hunter

simply wanted to give his own exculpatory version of what happened to Flowers. The inescapable conclusion to be drawn from Hunter's course of conduct is that he voluntarily made contact with the police and voluntarily talked to them at the police station. He initiated contact with the police that morning knowing he would have the chance to tell his exculpatory version of the events surrounding the murders, which would be buttressed by the paperwork he wanted to show them. Hunter had thought about this in advance, before he approached Officer Durr. He definitely had a plan on how to present this to the police.

Statements Unrelated to the Reason for Arrest

[¶29] Hunter argues "the interrogation covered issues for which the Defendant was not under arrest for, nor did any law enforcement have probable cause to even obtain an arrest warrant for a custodial interrogation." Hunter concedes he was under arrest on a bench warrant from a prior Shoplifting case. See FA-2013-CR-04643 (Bench Warrant). Hunter seems to be arguing that it was illegal for detectives to ask him questions about the murder and arson investigations when he was under arrest for something else.

[¶30] Law enforcement may freely question a suspect in custody regarding a separate offense. McNeil v. Wisconsin, 501 U.S 171, 175 (1991) (citing Maine v. Moulton, 474 U.S. 159, 179-80 (1985)); see also United States v. Scott, 831 F.3d 1027, 1033 (8th Cir. 2016) (holding the Sixth Amendment did not prohibit law enforcement from questioning a suspect who had been both indicted and appointed counsel for a separate offense). "[A] suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." Colorado v. Spring, 479 U.S. 564, 577 (1987). Accordingly, law enforcement may question a suspect about offenses he has not been arrested for.

[¶31] Hunter was under arrest on an active and valid bench warrant. Thus, questioning Hunter on the separate homicides and arson was permissible. To suppress Hunter's statements regarding the murders simply because he was under arrest for a separate and unrelated charge would "unnecessarily frustrate the public's interest in the investigation of criminal activities," as stated by the Moulton Court.

Due Process and Voluntariness

I.

[¶32] Hunter seeks to suppress his statements to the detectives alleging a violation of the Due Process Clause of the Fourteenth Amendment. He argues the statements were involuntary and coerced, and therefore must be suppressed. The Court has already found the statements were voluntary. The remaining issue is whether the statements were coerced.

II.

[¶33] The interview with Hunter began just after Detectives Ysteboe and Kjonaas entered the room at approximately 7:09 a.m. Hunter appeared to be sleeping in his chair. Later Hunter claimed he had been awake for "like, about four days, four-and-a-half days, no sleep, no food." Hunter stated he slept at some point in the last 72 hours after snorting some drug. Hunter admitted the last time he ingested drugs "was, like, four or five hours" prior to the interview. The exact drug used is difficult to ascertain from the interview.

[¶34] Hunter discussed the last couple of days of his life. Detective Ysteboe stated, "I'm glad you're okay. Maybe we can help you out." Hunter responded, "I'm hoping you can." Hunter asked the detectives if they had spoken to Megan yet, emphasizing that her written statement needed to be reviewed. Hunter did almost all of the talking in the early part of the interview and gives his story about how he was not responsible for the Flowers murder or the Traut murder.

[¶35] Eventually Hunter described the scene of the Flowers murder. He made it clear he did not participate in the murder, but was called there after the fact by Megan. Hunter implicated both Megan and the Original. Hunter acknowledged recently he had differences with Flowers, but insisted he did not stab Flowers. Shortly thereafter Hunter changed course and described being present when the stabbing occurred, but again claimed he was not the one who murdered Flowers. Hunter's story continued to evolve when he said Megan was present at the Flowers murder but "she didn't do anything. She was just like, along for the ride, type of deal, you know."

[¶36] In another part of the interview, Hunter described being in a garage close to his own residence with an unknown individual. Hunter admitted he was "under the influence" and "drinking that shit" with an unknown white male as well as the Original. Hunter described seeing the Original go to a nearby home and strike someone with a hammer. Again, Hunter's version is that he was present but did not himself strike the person. Hunter specifically stated, "No, I never whacked him with anything." When the detectives asked Hunter about a rosary he was wearing that could tie him to the Traut home, Hunter said it was a gift from Apache's wife. Hunter later said he stole the rosary while walking through the Traut murder scene.

[¶37] Detective Ysteboe stated, "You know, I think your story would make a lot more sense if you didn't talk about it from somebody else doing it but you doing it." Detective Ysteboe told Hunter he was responsible for more than he had admitted to. Hunter's story again changed. Slowly he admitted more facts potentially implicating him in each murder, including helping to set the fire at the Traut home and stealing a shotgun from the scene of the Flowers murder.

[¶38] As the interview went on, Detective Ysteboe told Hunter he could lift the burden he was feeling by speaking honestly and that "it's like you'll be free . . . [of] the stories and the lies that

you have to, you know, keep making up and keeping it straight." Detective Ysteboe offered Hunter an excuse, saying, "[i]t's the drugs man. It's the drugs. It's not you." Detective Kjonaas added that Hunter's role could have been an "out-of-body experience," comparing it to Jekyll and Hyde. Detective Kjonaas told Hunter the respectable thing to do was to admit the truth. After that, the following exchange took place:

DETECTIVE KJONAAS:	You know that. That's what people respect.
ASHLEY HUNTER:	What? To just tell you the truth and say, look, that I'm the one that hit him, that it was me beating him up with the hammer the whole time?
DETECTIVE YSTEBOE:	Yeah.
ASHLEY HUNTER:	Okay. That's what I'll say then. I was the one -- I was the one that was beating him up with the hammer the whole time.
DETECTIVE YSTEBOE:	Why'd you do it?
ASHLEY HUNTER:	Well, he went back inside the house an Original was kind of -- was kind of weird, like, "Is he coming back or not?" And when he finally came back, he just, like, made a weird gesture like he was about to pull out his pistol, or something. And, you know, then we started just, like, fighting each other a little bit. And I fucking hit him with the hammer, and I fucking -- I never saw nothing like that ever before, you know, like hitting somebody with a hammer and seeing their head, like would do that, you know, and then --

Hunter went on to describe the "pop" noise made when the hammer struck Traut's head. Hunter stated he was paranoid and worried Traut had contacted the police while getting Hunter a glass of water.

[¶39] The detectives asked Hunter again about the circumstances of the Flowers murder. Hunter claimed the Original stabbed Flowers while Hunter and Megan were present. Detective Kjonaas asked Hunter to be honest and said, "I don't know why you'd want to hang onto one and, you know, not open up, be honest, man up, about the other. You're an honest guy." Hunter

showed concern the detectives had not yet talked to Megan, and wanted to be sure they would both talk to her and read her statement.

[¶40] The detectives talked to Hunter for some time about the relationship he had with Flowers. Detective Ysteboe asked Hunter if Flowers "wanted you to be his bitch?" Hunter responded, "[e]xactly." Hunter described confrontations between himself and Flowers where he asked for a deal on drugs, and Flowers did not give him a deal.

[¶41] Detective Ysteboe stated, "So where did you get the knife for Clay [Flowers]?" Hunter denied seeing it, but asked "which knife?" Detective Ysteboe stated, "The knife that you had stabbed him." Hunter responded, "Where is it? Do you have it? Let me see it. I don't know what it looks like." After some discussion about drug use, Detective Ysteboe asked, "So how many times did you stab him?" Hunter at first said he did not remember, but then said "maybe like -- maybe seven or eight times." Moments later, however, Hunter claimed not to have stabbed Flowers at all, but again said he just came upon the scene after the fact. Both detectives expressed skepticism about Hunter's constantly changing story.

[¶42] Near the end of the interview, the detectives told Hunter that Megan was at the police station. Detective Ysteboe stated:

> If she tells us that you did it, what are we supposed to do? Think that you were lying to us this whole time and that you weren't being honest with us? That would -- that would -- you know, that would, like, kinda ruin what I thought we had going here. And don't do that, you know. Because I know she's gonna tell us the truth.

Hunter continued to say he did not stab Flowers, and the detectives told Hunter to think about it while they went to interview Megan. After approximately 30 minutes, the detectives returned to the interview room and asked him what he had decided. Hunter remained silent, and Detective Ysteboe said, "How do you think that went with her [Megan]?" Hunter said, "Pretty sure just as

you guys said it would, probably. Right? Just as you said it would. Or just as I said it would or whatever." Detective Ysteboe told Hunter, "Well, this is your chance." After a brief pause, Hunter said, "On the Clay deal, you know, yeah, I did it. I did it." Hunter went on to describe in uninterrupted detail how he stabbed and killed Flowers.

[¶43] At the end of the interview, Detective Ysteboe informed Hunter he would be charged with both murders. Hunter again changed his story, saying "I didn't hit him with the hammer. I told you that was the Original doing that." The detectives did not directly respond and left Hunter in the interview room. At this point on the DVD, Hunter got down on the floor and tried to wrap the phone cord around his neck. An officer saw Hunter doing this and stopped him with help from others.

III.

[¶44] When a confession or incriminating statement is challenged on due process grounds, the "ultimate inquiry is whether the confession was voluntary." State v. Rogers, 2014 ND 134, ¶ 27, 848 N.W.2d 257. Voluntariness, measured under the totality of the circumstances, focuses on two factors: "(1) the characteristics and condition of the accused at the time of the confession and (2) the details of the setting in which the confession was obtained." State v. Crabtree, 2008 ND 174, ¶ 12, 756 N.W.2d 189.

[¶45] "Coercion in and of itself does not invalidate a confession, however, a confession is the product of coercion if the defendant's will is overborne at the time the confession is given." Id. Virtually all custodial interrogations have an element of coercion present because they naturally involve some pressure on the suspect to confess. See United States v. Astello, 241 F.3d 965, 967 (8th Cir. 2001) (holding coercive tactics, including law enforcement implications of leniency, harsher consequences for not confessing, and use of a "family dishonor" tactic did not overbear a

suspect's will or make the subsequent confession involuntary); see also Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973) ("very few people give incriminating statements in the absence of official [police] actions of some kind."). As a baseline standard, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167 (1986). The issue is not whether coercion was used in an interrogation, but rather whether the defendant's will was overborne by any police coercion.

[¶46] Under the first factor, the characteristics of the accused include the age, sex and race of the suspect, his or her educational level, physical or mental condition and prior experience with the police." State v. Pickar, 453 N.W.2d 783, 785 (N.D. 1990). Under the second factor, a district court will look to "the details of the setting in which the confessions was obtained . . . includ[ing] the duration and conditions of detention, the attitude of the police . . . and the diverse pressures which sap the accused's powers of resistance or self-control." Id. at 785-86. The North Dakota Supreme Court has uniformly applied these factors when analyzing the voluntariness of a confession.[2] In Syverston, the Court considered law enforcement promises of

[2] State v. Goebel, 2007 ND 4, ¶¶ 19-20, 725 N.W.2d 578 (upholding a trial court's finding a confession was voluntary despite minimal evidence the defendant was of low intelligence, and where "[t]here is no evidence that the officers used improper questioning tactics or in any way coerced [the defendant] into confessing"); State v. Norrid, 2000 ND 112, ¶¶ 19-21, 611 N.W.2d 866 (upholding a trial court's finding that being tired, alone, is not enough to make a confession involuntary); State v. Helmenstein, 2000 ND 223, ¶¶ 19-21, 620 N.W.2d 581 (upholding a trial court's finding the confession was voluntary based on the defendant's "average intelligence," lack of "identifiable physical or mental handicaps," and voluntary participation in the interview); State v. Syverston, 1999 ND 134, ¶¶ 25-27, 597 N.W.2d 652 (upholding the trial court's finding that the defendant's statements were voluntary despite police "trickery" and promises of leniency in the course of obtainment); State v. Bjornson, 531 N.W.2d 315, 318-19 (N.D. 1995) (reversing a trial court's finding a confession was involuntarily obtained because "[t]here was no finding [the defendant] was suffering from a physical or mental condition," no evidence the defendant was overborne by the police questioning, and "[n]one of the traditional indicia of coercive police conduct are apparent."); State v. VanNatta, 506 N.W.2d 63, 68-9 (N.D. 1993) (upholding a trial court's determination that a confession was voluntary when the defendant was coherent, knew the gravity of the situation, and no police coercion was used); State v. Taillon, 470 N.W.2d 226, 229-30 (N.D. 1991) (upholding a trial court's suppression of an involuntary confession based on both the defendant's suspect mental and educational level, as well as investigator coercion, by means of assurances, showings of "extreme sympathy," and continuing the interview after the defendant made attempts to remain silent and/or secure an attorney); Pickar, 453 N.W.2d at 785-87 (upholding a trial court's suppression of a confession based on law enforcement's coercive techniques, including playing on the

help or leniency in deciding whether it met the high bar of conduct "so offensive to a civilized system of justice that [the coercive tactics] must be condemned":

> [The defendant's] main claim throughout has been he was tricked into believing [the Sergeant's] assurances he was only interested in helping him, and not prosecuting him. While promises implying leniency or threats of prosecution are part of the totality of the circumstances to be weighed by the trial court, without more, they are insufficiently coercive to render a confession involuntary.

Syverston, 1999 ND 134, ¶ 25, 597 N.W.2d 652. The Court found support in United States v. Byram, 145 F.3d 405 (1st Cir. 1998), which held "trickery is not automatically coercion," and "[g]iven the narrowed definition of coercion in Connelly, it would be very hard to treat as coercion a false assurance to a suspect that he was not in danger of prosecution." Id. at 408 (emphasis original).

[¶47] In State v. Murray, the Court stated "We have never held that interviewers are required to 'show their entire hand' during questioning such that the interviewee can make an 'informed' decision of whether to speak to the interviewer." 510 N.W.2d 107, 112 (N.D. 1994). Confession tactics are a necessary practice in "the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948).

IV.

[¶48] Applying the first factor, Ashley Hunter is a thirty-five (35) year-old African American male. His educational background is unknown, but he is obviously intelligent and more than once corrected the detectives during the interview when he disagreed with them on critical matters. Hunter has had numerous run-ins with law enforcement and has had extensive contact with the state judicial system as a defendant. Hunter has been involved as a defendant in over twenty-five misdemeanor and felony criminal cases in North Dakota, some of which resulted in

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defendant's guilt and emotion state, his duty to family, and "police promised . . . benefit[s] in exchange for the confession.").

plea agreements and others in jury trials. In short, Hunter has seen the criminal justice system play out countless times as a Defendant. Hunter is no novice to the criminal justice system and surely has a full understanding of how it operates at every level, including being interviewed by law enforcement. Hunter is not one of those people who might be particularly susceptible to police pressure because of a lack of experience with the criminal justice system. To the contrary, Hunter maintained his innocence in the Flowers' murder until nearly the end of the interview, and only confessed after the detectives spoke to Megan and Hunter obviously believed Megan had told the truth and named him as the one who killed Flowers. See United States v. Mendoza, 85 F.3d 1347, 1350 (8th Cir. 1996); see also United States v. Astello, 241 F.3d 965 (8th Cir. 2001) (upholding a district court's determination that a recently-turned eighteen-year-old had the capacity to understand and voluntarily made statements to law enforcement).

[¶49] Hunter showed he understood the seriousness of the potential homicide charges when on his own he started talking about how much jail time he was looking at. At first, Hunter seemed to be admitting he committed some crimes for which he would have to do some time, but not the murder. Hunter knew what it would mean if the case went forward on a murder charge, stating "So am I looking at life in prison, or what?" Hunter fully understood the consequences of confessing to the murders. He voluntarily initiated contact with the police that morning knowing he would have the chance to tell his exculpatory version of the events surrounding the murders, which would be buttressed by the paperwork he wanted to show them. Hunter had thought about this in advance, before he approached Officer Durr. He had a plan to get himself off the hook.

[¶50] With regard to his physical and mental condition at the time of the interview, Hunter gave conflicting stories on his lack of sleep. A suspect claiming to be fatigued, even when true and known to officers, does not render a confession involuntary without some other extenuating

circumstances relating to the fatigue. See United States v. Mshihiri, 201 WL 348571, *12-13 (D. Minn. Jan. 31, 2014). Even a combination of drug use and fatigue will not "automatically render a confession involuntary." United States v. Gaddy, 532 F.3d 783 (8th Cir. 2008) (citing United States v. Casal, 915 F.2d 1225, 1229 (8th Cir. 1990)).

[¶51] Hunter admitted the last time he ingested drugs "was, like, four or five hours" prior to the interview. The exact drug used is difficult to ascertain. However, throughout the interview Hunter is alert, conscious, and coherent when talking to the detectives. He never said he was too tired or too hungry to continue the interview; in fact, Hunter stated he was seeking help from the detectives. Hunter only asks for a moment to think on one occasion in the interview, but does not say he wishes to stop the interview, remain silent, or speak with an attorney. Also, Hunter continues to speak with the detectives moments after this. Hunter never asked for the interview to end. Hunter never said he did not want to talk to the detectives anymore because he was tired or exhausted. Except to ask that his vitals be checked, Hunter did not appear to be in any physical pain or in immediate need of medical help at anytime during the interview.

[¶52] Under the totality of circumstances, Hunter voluntarily initiated contact with the police and voluntarily chose to talk to law enforcement about the murders. His statements were his own or else direct responses to the detectives' questions. Hunter was lucid, coherent, and calm during the full interview, clearly indicating he was not significantly impaired by lack of sleep or earlier use of drugs. The effects of drug use on the issue of voluntariness have been analyzed on a number of occasions by the Eighth Circuit, applying the same tests as this Court. See United States v. Casal, 915 F.2d 1225, 1229 (8th Cir. 2008) (holding confession voluntary despite a suspect's recent use of methamphetamine and lack of sleep for five days when law enforcement had no knowledge of the use or its effects); United States v. Contreras, 372 F.3d 974, 977 (8th

Cir. 2004) (holding a suspect provided a voluntary statement, despite using methamphetamine and marijuana, when law enforcement testified he appeared "sober an in control of his facilities."), as cited by United States v. Gaddy, 532 F.3d 783, 788 (8th Cir. 2008).

V.

[¶53] Applying the second factor, the Court looks at the setting of the interview, its duration and conditions, as well as the attitude of the police and the use of any coercive tactics. Under Connely and North Dakota Supreme Court cases, police coercion is a necessary predicate for finding a Due Process violation and involuntariness.

[¶54] It is important once again to note how Hunter came into contact with law enforcement on June 23, 2015. He freely approached Officer Durr on a city street. Hunter chose to come forward to law enforcement so he could explain how he was innocent. Hunter brought paperwork with him in an attempt to show he was being "framed." Hunter's long and sometimes confusing explanations during the interview further show he wanted the opportunity to present his story to law enforcement.

[¶55] Hunter's interview took three (3) hours and was conducted in a small, nondescript interview room at the Fargo Police Department. Hunter was seated close to the door, while Detectives Ysteboe and Kjonaas were seated across from Hunter, but not blocking the door. Hunter was handcuffed but still in street clothes. Hunter was clearly in custody and not free to leave. Before beginning the interview, the detectives introduced themselves.[3] Both detectives were calm and spoke to Hunter in a respectful and conversational manner throughout the

[3] It is important to note that the same individual who gave Hunter the Miranda warning earlier took part in the interview: Detective Kjonaas.

interview. No physical contact occurred outside of normal exchanges, like when Hunter asked for help rearranging his clothes while handcuffed.

[¶56] During the interview, Detectives Ysteboe and Kjonaas employed certain techniques in questioning Huner, none of which would have overborne Hunter's will.[4] The detectives offered Hunter help with his current issues and drug problem. They offered him mitigating reasons for his alleged involvement in the murders. The detectives commented about the honorable and decent thing to do. At times, the detectives expressed outright disbelief in Hunter's changing story. And near the end of the interview, Hunter was left alone in the interview room while the detectives left to interview Megan. When they returned, Hunter gave a detailed statement on the Flowers murder, without knowing exactly what Megan said. None of these tactics went beyond the acceptable range, and are mild in comparison with other law enforcement tactics upheld by the courts when considering the voluntariness of a confession. Hunter's will was not overborne. The detectives made no promises or threats as to what would happen either with or without a confession. At no point did either detective use tactics that would offend common decency or civilized notions of acceptable practices.

[¶57] Based on the totality of the circumstances, the statements made by Hunter to Detectives Ysteboe and Kjonaas on the morning of June 23, 2015, were voluntary. Hunter was not physically or mentally impaired to any significant degree. Hunter appeared alert, coherent, and able to understand the gravity of his situation. Further, based on Hunter's criminal history, he undoubtedly had extensive experience with and knowledge of law enforcement tactics and

[4] "[W]e note that officers elicit confessions through a variety of tactics, including claiming not to believe a suspect's explanations, making false promises, playing on a suspects emotions, using his respect for his family against him, deceiving the suspect, conveying sympathy, and even using raised voices." United States v. Braveheart, 397 F.3d 1035, 1041 (8th Cir. 2005). These are factors to consider, along with the suspect's overall understanding of the police questioning, including the suspect's experience with the criminal justice system. Id.; see also United States v. LeBrun, 363 F.3d 715 (8th Cir. 2004) (upholding a district court finding a confession was voluntary when only psychological pressure was used but no physical threats, harm, or even shouting was present).

procedures. The apparent suicide attempt by Hunter after the conclusion of the interview does not render his statements *before* the attempt somehow involuntary when all outward indications showed Hunter was stable and wanted to talk.

[¶58] After review of the entire record in this case, the Court finds an implied waiver of the right to remain silent.

Questioning as to the Circumstances of the Interview

[¶59] The Court's holding does not preclude Hunter from questioning Detectives Ysteboe and/or Kjonaas on the circumstances and manner in which the interview was conducted. Whether Hunter's statements are credible, and what weight to give them, are matters for the jury. In Crane v. Kentucky, 476 U.S. 683 (1986), the Court succinctly stated:

> [Prior Court decisions] while not framed in the language of constitutional command, reflect the common-sense understanding that the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise ... unworthy of belief." Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Id. at 688-89; see also United States v. Martin, 369 F.3d 1046, 1059 (8th Cir. 2004) (stating it was difficult to square the trial court allowing evidence of the "circumstances, context, and milieu surrounding" the confession, but not allowing evidence relating to coercion or

voluntariness; however, the Court found this to be harmless error); United States v. Barnes, 798 F.2d 283, 289 (8th Cir. 1986) (applying Crane and vacating a judgment where the trial Court prohibited testimony on whether the Defendant's confession was worthy of belief and whether the Defendant offered credible statements during the confession).

[¶60] Hunter will be afforded the opportunity to present a full defense. This may include questioning witnesses regarding the circumstances of the confession and the methods employed by the detectives in questioning Hunter.

CONCLUSION

[¶61] Based on the forgoing, IT IS HEREBY ORDERED that Hunter's Motion to Suppress is **Denied.**

Dated this 10th day of May, 2017.

BY THE COURT:

Honorable Norman G. Anderson
District Judge
East Central Judicial District

STATE OF NORTH DAKOTA

COUNTY OF CASS

IN DISTRICT COURT

EAST CENTRAL JUDICIAL DISTRICT

State of North Dakota, Plaintiff, vs. Ashley Kenneth Hunter, Defendant.	File No.: 09-2015-CR-02085 **ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER**

[¶1] The above-captioned case is before the Court on Defendant's Motion to Reconsider Order Denying Defendant's Motion to Suppress Involuntary Statements, as well as a brief in support, dated May 12, 2017. The Court has reviewed the Defendant's motion and the Court's Opinion and Order, dated May 11, 2017. Based on this review, the Defendant's motion is **Denied.**

Dated this 12th day of May, 2017.

BY THE COURT:

Honorable Norman G. Anderson
District Judge
East Central Judicial District

Exhibit

1

09-2015-CR-02085

EXHIBIT B

Your Affiant Matthew B. Ysteboe is a Detective with the Fargo Police Department Investigations Division and has been employed as a police officer with the Fargo Police Department since December of 2001. Your Affiant's education includes a Bachelor's degree from Concordia College, Moorhead in Sociology and has taken graduate classes in Criminal Justice at North Dakota State University. Your Affiant completed the 14 week North Dakota Basic Academy through Lake Region State College and the Fargo Police Department 13 week field training program. Your Affiant has over 500 hours of post-certified law enforcement training. Your Affiant was trained as a crime scene investigator in 2003.

On 6/23/2015 approximately 1:30 AM, your affiant learned from Fargo Police officers that a male was found deceased at 1122 12th Street North. On 6/23/2015 at approximately 12:49 AM Fargo Police Dispatch received a 911 call from a female at 1118 12th Street saying she could hear alarms going off at the house to the north of her house. That house is 1122 12th Street North. The female said she could see something flickering in the kitchen. The female believed five males may live in the house and thought two of them may be home. Fargo Fire Department responded to the scene. They requested Police Department to respond emergent to their location as they had found someone down on the ground that was bloody. Fargo police officers responded to the scene and located a male face down in the rear porch of the residence. There was blood on the floor around the male. The male was deceased. His identity was not known at the time. Officer Moser told Detective Gunther that he and other officers conducted a sweep of the residence to verify there was no one else injured in the residence. No one else was located. Officer Moser saw a hammer on a ledge near the front of the house directly across from the opening to the living room. Officer Moser said the hammer was covered in blood. Officers exited the house and secured it so evidence could be maintained.

As officers were maintaining a perimeter on the residence, a male approached on a motorcycle and stated that he was a resident of 1122 12th Street North. The male was identified as Daniel Aubol. Aubol willingly went to the police station to speak with officers. Aubol said the house is owned by the Catholic Diocese. Aubol said he and Samuel Traut are the only ones currently living at the house. They had previous roommates who have left for the summer. Aubol said he was last at the house on 06/22/15 around 2220 hours. He said he spoke with Traut for a few minutes. He said Traut was making a pizza. Aubol said he changed clothes and then left to meet friends.

When a search warrant was signed for the residence, officers were able to identify the body as the other resident of the house, Samuel Traut. Upon completing the search warrant of the residence, Detectives gathered many items of as evidence to include biological material.

Exhibit

1

09-2015-CR-02085

There was also an ongoing investigation for a murder that happened a few blocks away at 319 12th Ave North around 2:00 PM 6/22/2015, approximately 10-11 hours prior the murder at 1122 12th ST North.

Ashley Kenneth Hunter was identified as a person of interest for the murder at 319 12th Ave North. Hunter was located and arrested for an outstanding unrelated warrant at approximately 7:00 AM on 6/23/2015, a block away from the second murder location of 1122 12 St North. Hunter was given his Miranda warning and he agreed to speak with your affiant and Detective Kjonaas. During the interview, Hunter admitted to killing a white male, identified as Samuel Traut, with a hammer near the back door of the residence which is 1122 12th St North. Hunter was arrested then for murder and transported to the Cass County Jail. Hunter's clothes were taken as evidence and there was blood on some of the clothes taken.

Your affiant is asking for a DNA profile to be obtained from Ashley Kenneth Hunter for comparisons of biological material found at the murder scene and Hunter's clothing.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

7/1/15
Date

Magistrate

SOP 88-15

CRIME SCENE ENTRY ROSTER

DATE: 06/23/15 TIME: 0626 LOCATION: 1119 University N INCIDENT #: 15-42510

1. SECURING OFFICER: Wes Libner SQUAD # 81 TIME 0634

2. SECURING OFFICER: _____ SQUAD # _____ TIME _____

3. SECURING OFFICER: _____ SQUAD # _____ TIME _____

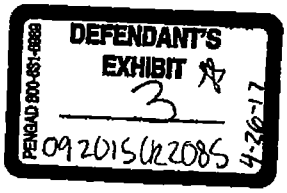
SENIOR OR LEAD INVESTIGATOR IN CHARGE OF SCENE A Getz. P. Swan

SCENE OPEN TIME 0634 SCENE CLOSE TIME [illegible] 15:41

SIGNATURE OF SENIOR OR LEAD INVESTIGATOR IN CHARGE _____

NAME	AFFILIATION	TIME IN	REASON FOR ENTRY	Check Out time
1. Wes Libner	FPD	0634	Detaining male	
2. T. Durr	FPD	0634	Detaining male	
3. S. Fugere	FPD	0634	Detaining male	
4. K. Seehusen	FPD	0635	Detaining male	0912
5. C. Gease	FPD	0635	Detaining male	[illegible]
6. J. Helm	FPD	0636	Detaining Male	
7. T. Morris	FPD	0636	Detaining male	0912
8. A. Getz	FPD	0815	Investigations	0911
9. P. Swan	FPD	0816	Investigations	0911
10. ~~R Cichos FPD~~ KJS			Never Made Entry	
~~11. T. Hannig FPD~~ KJS			Never Made Entry	
~~12. E. Nicholson FPD~~		~~0855~~	KJS	~~0855~~
13. Jason Abel	FPD	0912	Scene Security	1049
14. P. Sievers	FPD	0956	Investigations	0957

MEMO:



SOP 88-15

CRIME SCENE ENTRY ROSTER

DATE: 6-23-15 TIME: 0626 LOCATION: 1119 NUD INCIDENT #: 15-42510

1. SECURING OFFICER: Wes Lisnek SQUAD # 81 TIME 0634

2. SECURING OFFICER: _____ SQUAD # _____ TIME _____

3. SECURING OFFICER: _____ SQUAD # _____ TIME _____

SENIOR OR LEAD INVESTIGATOR IN CHARGE OF SCENE A. Getz P. SWAN

SCENE OPEN TIME 0634 SCENE CLOSE TIME _____

SIGNATURE OF SENIOR OR LEAD INVESTIGATOR IN CHARGE _____

	NAME	AFFILIATION	TIME IN	REASON FOR ENTRY	Time out
*	1. Paul Hollie	FPD	1035	Scene Security	1541
	2. PAUL CICHOS	FPD	1408	Warrant	1541
	3. MIKE ERBES	FPD	"	"	1541
	4. TROY HANNIG	FPD	"	"	1541
	5. COLLIN GRABOWSKY	FPD	"	"	1541
	6.				
	7.				
	8.				
	9.				
	10.				
	11.				
	12.				
	13.				
	14.				

MEMO:

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

State of North Dakota,

Plaintiff,

vs.

Ashley Kenneth Hunter,

Defendant.

Case No.: 09-2015-CR-02085

MOTION HEARING

TRANSCRIPT

OF

PROCEEDINGS

Taken At
Cass County Courthouse
Fargo, North Dakota
April 26, 2017

BEFORE THE HONORABLE NORMAN G. ANDERSON
DISTRICT JUDGE

I N D E X

WITNESSES

activity around the residence.

Q. Would it have been the kind of thing that would draw the attention of neighbors, or did it draw the attention of neighbors?

A. Yes, there was neighbors sitting outside watching us work.

Q. Okay. So let's talk, then, about when you become involved with Mr. Hunter.

A. Okay.

Q. What information do you get that causes you to go over to where Mr. Hunter is arrested?

A. I'd returned to the Traut scene. It was around -- it was around approximately 6:30. I don't remember how long I'd been at the Traut scene, but we had a police radio on in the command vehicle that I was in. On that radio, I heard a dispatch to the 1100 block of North University Drive. I went on foot around initially to the north and then west on 12th Avenue and then south down University Drive where I met up with other officers on scene that had taken Mr. Hunter into custody.

Q. So where was Mr. Hunter when you got there?

A. I don't remember specifically where in the 1100 block of North University Drive, but he was in the back of Officer Libner's squad car.

Q. He was in the squad car when you first observed him?

A. Yes.

Q. So what do you do then in relation to Mr. Hunter once you see him?

A. I conferred with the officers on the scene and determined that, in fact, it was Mr. Hunter. I then went to the squad car that Mr. Hunter was seated in and read him his Miranda warning. I then shut the door and went back and continued to converse with the officers on scene as to, I guess, what the plan would be from there and the circumstances surrounding taking him into custody.

Q. Have you had the opportunity to watch Officer Libner's squad car video?

A. I have.

MR. VAN DE STREEK: At this point, Your Honor -- it's already been filed as part of the State's brief -- but at this point, I would offer that squad car video. It's an attached exhibit to the State's brief. I don't know if the Court has already reviewed it.

THE COURT: I have.

MR. VAN DE STREEK: But we'd like it to be part of this record specifically.

THE COURT: I have reviewed it. And does it have -- is it designated as a certain exhibit? I don't recall.

MR. VAN DE STREEK: Yeah, it's an exhibit to the brief. I believe it's -- to my brief. I believe it's Exhibit A. If you look in Odyssey, it says it's in the north vault somewhere.

THE COURT: Okay. You're talking about the short video in Officer Libner's squad car with Mr. Hunter in the back seat; is that correct?

MR. VAN DE STREEK: Yeah.

THE COURT: Okay. And that's on the morning of June 23rd?

MR. VAN DE STREEK: Yes, Your Honor.

THE COURT: Okay. So I think everybody knows what we're referring to; but, for the record, that's the video that you're offering.

And, Mr. Gereszek, any objection?

MR. GERESZEK: No objection, Your Honor.

THE COURT: Okay. That will be received in evidence. If you can, give a more exact reference to it, if you have something in your brief and you refer to it as exhibit whatever.

MR. VAN DE STREEK: Yeah, I'll refer to it as the squad car video.

THE COURT: Okay.

Q. (Mr. Van de Streek, continuing) And you've had an opportunity to watch the squad car video?

A. I have.

Q. Now, I want to talk to you about Mirandizing Mr. Hunter.

A. Okay.

Q. That was documented initially in the charging summary, as I recall?

A. That was correct.

Q. And it wasn't documented in the specific report?

A. No, it was not.

Q. Would you agree with me that you probably should have done that at the time?

A. Absolutely.

Q. And you did, though, however, Mirandize Mr. Hunter when he was in the back of that squad car?

A. Yes, I did.

Q. Okay. And then do you have any further conversation with Mr. Hunter at that point, or what takes place?

A. I have no further conversation with Mr. Hunter at that point on that scene. The next time I have conversation with Mr. Hunter is when Detective

Ysteboe -- or, Sergeant Ysteboe and I go into the interview room with Mr. Hunter.

Q. Okay. So the plan was to interview Mr. Hunter at the police department?

A. That's correct.

Q. So what do you do -- you and then Detective Ysteboe do to coordinate that? Do you tell Libner to take him to the station?

A. Yeah, I believe -- I don't know if we directed him to, but it was known or implied that that's where the interview would take place.

Q. Okay.

A. And that we would meet him there.

Q. This isn't like New York City where we have 20 different precincts?

A. That's correct.

Q. So everybody pretty much knows to go to the station?

A. Yep.

Q. And between the time that Mr. Hunter leaves and the time that the interview starts, do you remember just approximately how much time that was?

A. Maybe approximately 30 minutes.

Q. So describe the interview room, then, to the Court, please.

MR. GERESZEK: It's what I offered in as part of the brief. I don't know if you want to re-enter it, Your Honor.

THE COURT: What's our next number?

THE CLERK: The next one will be 4.

THE COURT: Pardon me?

THE CLERK: 4.

THE COURT: Yeah, why don't you mark it as 4 so the record is clear in this hearing.

MR. VAN DE STREEK: And there's no objection from the State, Your Honor.

THE COURT: Okay. What will be marked as Exhibit 4 will be received in evidence without objection.

(WHEREUPON, Exhibit 4 was marked for identification.)

MR. GERESZEK: Thank you, Your Honor.

THE COURT: Thank you.

Q. (Mr. Gereszek, continuing) Moving forward to the interrogation of Mr. Hunter at the police station, was there any Miranda warning done after what you said you did at the crime scene?

A. He was not Mirandized again by me after he was Mirandized in the 1100 block of North University Drive.

Q. At the -- during the interrogation, do you

recall Mr. Hunter's demeanor?

A. Yes.

Q. How would you describe his demeanor?

A. In reviewing the video, I would describe his demeanor as sitting back in the chair, for the most part, or seated in the chair, engaged in dialogue with Detective Ysteboe and I.

Q. Did he ever ask who you guys are?

A. I don't recall specifically if he asked or if we introduced ourselves.

Q. Did he ever ask to take a break?

A. I don't recall him asking to take a break, no.

Q. Did he ever say he was tired?

A. He was asked if he was tired, and I think he responded "no" or "not anymore" or something to that effect.

Q. Did he ever ask you to take his vitals?

A. I could review the transcript and answer your question more accurately. I don't recall him asking us to take his vitals.

Q. Do you recall him ever asking you if he were to go for your gun, would you kill him?

A. No.

Q. Do you recall in the video when Mr. Hunter attempted suicide?

A. I recall Mr. Hunter sitting on the ground and, yeah, doing what we believe was a -- or, attempting what we believe is suicide.

Q. What did you do as a result of that?

A. Uniformed officers went in and managed the situation.

Q. Did Mr. Hunter ever claim to be hearing voices?

A. I don't recall him claiming to hear voices.

Q. Were some of his responses along the lines of, "Is that what you want me to say?"

A. If he told Detective Ysteboe and I, or made the statement, "Is that what you want me to say," I, again, would have to refresh my memory specifically by the transcript. I don't remember specific statements that he made.

Q. Did he ever dance around the interrogation room?

A. In reviewing the video, it appears at one point he stands up, and I don't know that he was dancing or stretching or -- I don't -- I recall him standing. I don't recall him dancing.

Q. Have you ever had experience in dealing with people under the influence of drugs of varying substances?

A. I've dealt with people under the influence of varying substances, yeah.

Q. Do you believe that Mr. Hunter was under the influence of any substances that morning?

A. I didn't perform any tests, I guess, to make a clear-cut judgment on that. I would base my response on the fact that, again, he was engaged in dialogue with us, he gave narrative answers to the questions that we'd asked him, and he seemed to understand our conversation, and we understood each other, I mean, for the most part, with clarification.

Q. I guess I'm asking, in your experience, did Mr. Hunter appear, to you, to be under the influence of anything that morning?

A. No.

Q. To your knowledge, did he ever claim to have been taking drugs?

A. Yes. He was asked if he'd recently ingested or used narcotics, and I believe he responded within like or as recent as four hours.

Q. Did you believe him?

A. Yes.

Q. So would that change your answer if you believed he was under the influence?

A. Again, I'm basing my response that I don't

believe he was under the influence, or he wasn't significantly impaired enough, without performing some type of sobriety tests or blood tests to know for sure. I base my response on the fact that we were able to talk about -- you know, ask questions and he would respond and we seemed to have a dialogue that everybody was on the same track with.

Q. Did Mr. Hunter appear to be afraid that day?

A. No.

Q. Did he ever indicate fear?

A. Let me, I guess, back up a sec, if that's okay. Like, afraid of anything or us or of somebody else? I don't really --

Q. In general, did he appear to be afraid or express fear to you?

A. You know, at times during our interview, he would make statements in regards to The Original or things like that, that maybe somebody caused him fear or that he was worried; but generally afraid like he was trying to get away or, you know, fight or flight or something like that, no. I mean, again, the demeanor in the interview room was very calm.

Q. His reference to The Original, can you explain a little bit of that to the Court?

A. At the time he was arrested, like Officer Durr

THE COURT: Mr. Van de Streek?

MR. VAN DE STREEK: Nothing further.

THE COURT: I've got a couple questions, Detective.

EXAMINATION

BY THE COURT:

Q. What's this charging summary that you referred to earlier?

A. It was a document completed by Detective Ysteboe that was completed after we had done the interview with Mr. Hunter.

Q. And in the charging summary, there's a reference to Mr. Hunter having been Mirandized?

A. Detective Ysteboe and I had discussed that Mr. Hunter was Mirandized because I had done it. Detective Ysteboe included that in his charging summary, that Mr. Hunter was Mirandized.

Q. And Mr. Gereszek says that that's something that you should normally have in your own report?

A. Mr. Van de Streek pointed out that, in hindsight, should I have documented that independently? Absolutely.

Q. Okay. And why didn't you?

A. I don't know. Oversight.

Q. Okay. When you went to the car and you say

you opened the door and you advised Mr. Hunter of Miranda, what happened? Tell me in detail what happened.

A. I opened the door. I read him his Miranda warning.

Q. Off a prepared card or from memory?

A. No, from memory.

Q. Okay.

A. And as soon as I had completed the Miranda warning, I don't believe he gave a response, and I shut the door.

Q. Okay. How long did all of that take?

A. Less than a minute.

Q. Was there anybody else in the patrol car?

A. There was nobody else in the patrol car at the time I read Miranda.

Q. Just Mr. Hunter?

A. Yes.

Q. Okay. And what's your standard procedure for advising somebody of Miranda? Just what you did there?

A. I would read them Miranda. That's my standard procedure, is just to read Miranda.

Q. Okay. And then on a separate matter, Megan, what's her last name?

A. Wartman.

THE COURT: Okay. Thank you.

And, Mr. Van de Streek, anything based on that?

MR. VAN DE STREEK: By way of clarification, Your Honor, I'd ask the Court to take judicial notice of document I.D. No. 2 in this file, because that's the charging summary that the Court referenced in its questioning which contains the notation that Mr. Hunter was Mirandized.

THE COURT: Mr. Gereszek, any objection?

MR. GERESZEK: No objection, Your Honor. It's part of the docket.

THE COURT: Okay. It will be received in evidence and made a part of the record in this case.

And then, Mr. Gereszek, any questions based on what I asked?

MR. GERESZEK: Yes, Your Honor. Just a couple, if I may?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. GERESZEK:

Q. When you read the Miranda warning to him and you said he didn't have any response, did you ask him if he understood?

A. I don't recall asking him if he understood.

Q. Do you recall if you explained why he was under arrest?

A. No, I don't think I explained to him why he was under arrest.

MR. GERESZEK: No questions, Your Honor.

THE COURT: Okay. Thank you. You may step down, Detective.

MR. VAN DE STREEK: The State calls Detective Ysteboe.

DETECTIVE MATT YSTEBOE, being first duly sworn, was examined and testified under oath as follows:

THE COURT: Mr. Van de Streek.

MR. VAN DE STREEK: Thank you.

DIRECT EXAMINATION

BY MR. VAN DE STREEK:

Q. Please state your name, Detective -- or, Sergeant. I'm sorry.

A. Matt Ysteboe.

Q. And where are you employed?

A. The Fargo Police Department.

Q. And now you're a Sergeant?

A. Correct.

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

State of North Dakota,

Plaintiff,

vs.

Ashley Kenneth Hunter,

Defendant.

Case No.: 09-2015-CR-02085

JURY TRIAL

VOLUME 3 OF 9

TRANSCRIPT

OF

PROCEEDINGS

Taken At
Cass County Courthouse
Fargo, North Dakota
May 24, 2017

BEFORE THE HONORABLE NORMAN G. ANDERSON
DISTRICT JUDGE

I N D E X

WITNESSES

and you left to go to 1119?

A. Yes.

Q. So the recording was on when you left?

A. Yes.

Q. Before you left, you were in the proximity of the car that whole time?

A. Yes.

Q. So you would have seen Detective Kjonaas approach the car while you were there?

A. Other than when I was dealing -- or, putting the evidence into bags that we had taken off of his person and out of his pockets.

Q. How far away from the car were you?

A. You had pointed to it on that item, so it would probably be anywhere from 20 to 40 feet, I suppose, away from the car.

Q. So you could see the car, though?

A. Correct. I would be in proximity of it, yes.

Q. And you could see it?

A. Yes.

Q. And you don't recall Detective Kjonaas ever approaching the car?

A. I do not.

Q. Do you recall Detective Kjonaas ever being there?

A. I do not.
Q. Do you know Detective Kjonaas?
A. I do.
Q. Are you familiar with him?
A. I am.
Q. Do you know what he looks like?
A. I do.
Q. You worked with him for a long time?
A. Well, not directly, because, I mean, we had separate assignments, but for the same department, yes.
Q. Okay. Would you have noticed him if he was there?
A. If I had seen him, I would have recognized him.
Q. And you didn't see him?
A. I don't recall seeing him.
MR. GERESZEK: Nothing further, Your Honor.
MR. VAN DE STREEK: Can I just touch on a little follow-up, Your Honor?
THE COURT: Yes, Mr. Van de Streek.

FURTHER EXAMINATION

BY MR. VAN DE STREEK:

Q. Do you remember any discussion about Miranda -- a Miranda warning about the time when the defendant was in your car?

patted down and searched. Those items were removed. So there was a period of time. I mean, he didn't instantly go into the car. There was a period of time where discussion took place about, you know, where he should be placed and what should happen next.

Q. Okay. And how long would that have taken, roughly, you know, from the time he's placed on the ground, he's searched, patted down, and handcuffed?

A. I don't think that it would be unreasonable to say anywhere from three to seven minutes, at least.

Q. Okay. Three to seven minutes. So say seven minutes. That puts it up to 6:41 that he probably would have been in the patrol car, as far as you're concerned. And the camera doesn't start until 6:53. According to the video that we just saw, it starts at 6:53. Okay?

A. Yes.

Q. Do you have any disagreement with that?

A. No.

Q. And is that accurate, as far as you know, the time clock?

A. As far as I know, Your Honor.

Q. Okay. And then you say that you went inside the 1119 address; is that correct?

A. Yes.

subject to re-call.

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. Anything more, Mr. Gereszek?

MR. GERESZEK: No, Your Honor. That was it.

THE COURT: Mr. Van de Streek?

MR. VAN DE STREEK: I have nothing further to add on that subject, Your Honor.

THE COURT: That's the concern that the Court had all along, Mr. Gereszek and the State. We had a suppression hearing in this case. All of this could have been addressed at that time, not in the middle of a trial. So I don't understand that. It's very frustrating because, as I said before, you could have called every witness you needed to call to try to get this straightened out at the suppression hearing, and that wasn't done. But it's important enough that it needs to be addressed, and it has been addressed.

I told you before in the Court's order that I watched and I was concerned about the time frame myself, Mr. Gereszek. When Detective Kjonaas testified, I'm looking at him and I asked him, Tell me exactly what happened," and I wanted him to look at me so that I could size him up. I didn't see him fidgeting. I didn't see him looking away. I didn't

see him squirming in his seat. I didn't see him sweating. My impression was that he was telling the truth. There's a 12-minute gap here. And that's just an approximation. Mr. Libner is doing the best he can after two years. That's an approximation. But he says, yes, it's possible that Detective Kjonaas came and gave those Miranda warnings at that time. And unless that's absolutely foreclosed, the Court's view of this matter hasn't changed. The Court believes Detective Kjonaas when he said that he gave the Miranda warning. Now Mr. Libner says it could have happened during that time period when he wasn't right at the squad car, when he was off 20 to 40 feet working on the evidence or whatever. In the end, it's up to the Court to make that credibility determination. And as I said before, if there's that time frame where it's open and the Miranda warning could have been given during that period of time, and Detective Kjonaas says that he gave it, the Court believes him.

So the motion to suppress, the renewed motion, is denied.

And, frankly, in some ways, I'm glad that this did get addressed because there were some gray areas at the time, and I think Mr. Libner cleared a lot of that up.

So anything else that we need to take up at this time, Mr. Gereszek?

MR. BURDICK: Nothing further for the State, Your Honor.

MR. GERESZEK: Nothing for the defense, Your Honor.

THE COURT: Okay. Then we're in recess until tomorrow morning at 9:00.

Oh, let me go back on the record for a second.

I'd like to just note for the record that I haven't said every time we've gone back on the record that Mr. Hunter was present in the courtroom. Typically, I don't say that. He's here. The only reason I would say anything is if he's not here.

So does anybody disagree that Mr. Hunter has been in the courtroom this whole time? Mr. Gereszek?

MR. GERESZEK: No, he's been here the whole time, Your Honor.

THE COURT: Okay. And the Court is not going to enter appearances for everybody every single time we go back on the record. So unless the Court says otherwise, Mr. Hunter is present.

Also, what we have up on the TV, can that be expanded so it covers the whole TV to get rid of everything else around it so that the jury has a better