In the

United States Court of Appeals

For the Seventh Circuit

No. 17-3493

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SCOTT BOOKS,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.
No. 1:16-cr-10037 — **Michael M. Mihm**, *Judge*.

ARGUED NOVEMBER 9, 2018 — DECIDED JANUARY 29, 2019

Before BAUER, BRENNAN, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. On trial for bank robbery, Scott Books chose not to testify in his own defense and was found guilty and sentenced to 180 months' imprisonment. He now challenges two pretrial decisions by the district court. The first allowed eyewitness testimony at trial from the two bank tellers that Books alleged based their identification of him as the robber not on personal knowledge, but rather on information improperly supplied by a police detective. The sec-

ond ruling would have allowed the government, had Books chosen to testify at trial, to impeach him with physical evidence directly tying him to the robbery—evidence the police learned of (and then recovered) only as a result of a confession the district court separately had determined was unlawfully coerced.

Neither challenge succeeds. The district court did not err in finding the eyewitness identifications reflected the tellers' firsthand knowledge of Books, and thus allowing their testimony at trial was entirely proper. Nor can we conclude that the district court's conditional impeachment ruling, even if wrong on the law, mandates reversal in light of the overwhelming weight of evidence against Books. So we affirm.

I

A

On July 28, 2016 a man robbed the Land of Lincoln Credit Union in Normal, Illinois. Dressed in a black hooded sweatshirt, wearing a mask and neon gloves, the robber approached the counter and, while motioning toward the drawer with what appeared to be a black handgun, demanded "all the money." The robbery lasted all but 20 seconds, with the offender making off with $18,000 and fleeing in a Buick SUV.

Two tellers recognized the robber's voice and mannerisms and immediately identified him as Scott Books—a longtime customer of the credit union. Holly Bateman told her supervisor (and later the police) she was 99% certain Books was the robber because she had interacted with him on at least six prior occasions. The second teller, Susan Phelps,

agreed with Bateman's identification of Books as the offender. A third witness, James Teidman, was driving by the bank when he saw the robber running from the bank with a gun, only then to speed away in a Buick SUV.

The police arrested Books the next day. After waiving his *Miranda* rights and agreeing to an interview, he confessed to the robbery, while also telling the police where they could find the gloves, clothing, and fake gun he used. The police found these items exactly where Books described, and in time a grand jury indicted Books for the robbery.

B

The district court held a series of pretrial hearings to determine the admissibility of evidence contested by Books. Three of those rulings are significant to this appeal.

First, the district court suppressed Books's confession, finding that the police officers overstepped and overcame Books's will by threatening to arrest his wife and take his children into custody if he did not own up to his role in the robbery—rendering the confession involuntary. The court suppressed both the confession and its physical fruits—specifically, the clothing, gloves, and fake gun the police recovered based upon Books telling them where to look.

Second, the district court denied Books's motion to prevent the two bank tellers (Bateman and Phelps) from testifying at trial. Books had sought to exclude their testimony on the basis that the police detective who investigated the robbery improperly tainted their identifications when, a day after the robbery, he allegedly told both witnesses that Books had confessed to the crime. The government disagreed, taking the position that the detective in no way revealed

Books's confession and thus in no way influenced the tellers' clear and definitive identification of Books as the robber. The district court held a hearing, received testimony from the tellers and detective, and found it "clear from th[e] record that [both tellers] have a truly independent source of identification of [Books] other than any suggestion that would have been put in their mind by the officer." Accordingly, the district court permitted the tellers to testify at trial.

Third, the district court considered but reserved definitively ruling until trial on the government's motion for permission to impeach Books with the fruits of his confession in the event he chose to testify. Books opposed the motion and urged the district court to hold that the price for the police unlawfully coercing his confession should be the suppression of all incriminating evidence (his admission and the physical fruits) for *all* purposes, including impeachment. The district court said it was inclined to allow some impeachment but reserved a final ruling unless and until Books chose to testify and the government sought to impeach him on cross-examination with his prior statements describing the whereabouts of the clothing he wore during the robbery. The district court cast its ruling this way: "[I]f and when we get to that point [of the trial], any questions that the government wished to ask the defendant if he testifies, I would have to hear exactly what the questions are outside the presence of the jury so there could be specific objections."

C

In the end, Books chose not to testify at trial, and thus neither his coerced confession nor the resulting physical fruits came into evidence. The government nonetheless presented a strong case, including testimony from these witnesses:

- Bank teller Holly Bateman identified Books as the robber. She testified that she knew Books from her work at the credit union and immediately recognized him as the robber—so much so that she almost said "Scott, can you remove your mask?" Bateman told the jury that she "instantly" recognized Books's voice and likewise knew it was Books from his distinct mannerisms. Asked at trial about her confidence level that Books committed the robbery, Bateman testified that she was 110% sure because the incident had replayed over and over in her mind.
- Susan Phelps, the second bank teller, also identified Books as the robber. While not as fast as Bateman to recognize Books during the robbery, Phelps testified she was confident Books was the offender based on his unique mannerisms, including his walk and jittery disposition.
- Phillip Meyer, a friend and former coworker of Books, testified that he had received a text message from Books on the day of the

robbery or the day before asking, "I wonder what bank I should rob today?"

- Todd Hogan, the bank's vice president, testified that he remembered teller Holly Bateman calling him immediately after the robbery to tell him she was 99% sure the robber was Books. Hogan also explained that Books's business account had been flagged in the bank's system on multiple occasions due to attempts to deposit checks backed by insufficient funds.
- James Teidman testified that he was driving by the credit union when the robbery occurred and saw a Buick SUV, the same model later tracked to Books's residence, flee the scene.

While Books chose not to testify, his counsel vigorously cross-examined the government's witnesses. When it came to tellers Bateman and Phelps, defense counsel challenged their recollection of the robbery, probed the reliability of their identifications of Books and the getaway car, and examined their memory of the robber's dress, voice, and mannerisms—all in an effort to question their overall confidence that Books was the offender. At no point during the trial did Books's counsel or the government refer to Books's confession or to the police detective's (allegedly impermissible) interaction with the two tellers. The jury returned a guilty verdict.

II

A

Books challenges the district court's pretrial ruling denying his motion to preclude the two tellers from testifying at trial on the basis that the police detective allegedly tainted their eyewitness identifications by telling them that he had confessed to the robbery. This misconduct, Books contends, violated his Fifth Amendment right against self-incrimination. He further argues that the district court's pretrial ruling too circumscribed his Sixth Amendment right to cross-examine the tellers at trial. The facts belie both contentions.

While all agree that our review of legal issues is *de novo*, the parties dispute the legal standard that governs the admission at trial of the bank tellers' identification testimony. Books invites us to follow *Kastigar v. United States*, and thereby place the burden on the government to show that the tellers' testimony was "derived from legitimate independent sources" and, as a result, not unduly influenced by the police detective. See 406 U.S. 441, 461–62 (1972). The government, on the other hand, urges us to read *Kastigar* as more narrowly applying to, and not beyond, the setting that gave rise to its holding—circumstances in which a witness testifies pursuant to a grant of immunity. See *id*. The government instead asks us to employ the less onerous, due-process based standard found in cases like *Neil v. Biggers*, 409 U.S. 188 (1972), where the focus is more simply on the reliability of in-court identification testimony with the defendant (not the government) bearing the initial burden of showing that the government did something to taint the identification. See also, *e.g.*, *United States v. L'Allier*, 838 F.2d

234, 239 (7th Cir. 1988) (explaining that the defendant bears the burden of showing that the challenged identification was unduly suggestive).

The proper reach and application of the *Kastigar* rule has not gone unnoticed by other courts. See, *e.g.*, *United States v. Allen*, 864 F.3d 63, 90 n.121 (2d Cir. 2017) ("[I]t is not clear whether all involuntary statements or all compelled statements should be subjected to the strong medicine prescribed in *Kastigar*, or whether some other doctrine should govern in certain circumstances."); *United States v. Jones*, 542 F.2d 186, 199 n.24 (4th Cir. 1976) (discussing uncertainty over *Kastigar*'s application to coerced confessions).

We have not had a case requiring us to choose sides, and this appeal does not either. We can comfortably resolve the case on narrower grounds, because under either *Kastigar* or *Biggers* (or hybrids of either standard), the evidence was more than sufficient to show that the two tellers, Bateman and Phelps, identified Books based on their prior dealings and first-hand familiarity with him, without regard to any information supplied by the police detective. At no point did the tellers, and most especially Holly Bateman, ever waiver in their confidence that Books was the robber. So, whether assessed under *Kastigar* or a lesser standard, Books's challenge to the district court's admission of the tellers' testimony cannot succeed.

Books fares no better when contending that the district court's ruling on the tellers' testimony also violated the Sixth Amendment by limiting his ability to confront and cross-examine these witnesses. A fulsome cross-examination, Books posits, would have entailed questioning how the wit-

nesses arrived at their identification testimony—a line of questioning, as Books sees it, that necessarily would have exposed that the police improperly told both tellers that he had confessed to the robbery. We cannot agree, as Books's position misfires on the law and facts.

A defendant's Sixth Amendment right to confront witnesses is not absolute, but instead subject to reasonable limitations imposed by the district court. See *United States v. Saunders*, 166 F.3d 907, 918 (7th Cir. 1999) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). The limitation Books challenges came from the district court's pretrial ruling suppressing his coerced confession. This ruling favored Books and, beyond precluding the government from using the confession as evidence, naturally limited how he would approach cross-examining government witnesses, for he rightly wanted to avoid the jury learning that he had confessed to the robbery. But accepting a necessary and proper limitation on cross-examination does not, without more, run afoul of the Confrontation Clause, especially where, as here, Books was able as a practical matter to adequately, and indeed vigorously, cross-examine both bank tellers. See *United States v. Sasson*, 62 F.3d 874, 882 (7th Cir. 1995) (explaining that the Confrontation Clause "guarantees only an opportunity for a thorough and effective cross-examination, 'not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'") (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). And Books was able to do so without ever insinuating, much less revealing, that he had confessed to the robbery. The Confrontation Clause required no more.

B

This brings us to Books's Fifth Amendment challenge to the district court's pretrial impeachment ruling. Books argues that the ruling—allowing the government, if he chose to testify, to cross-examine him with the fruits of his coerced confession—created an unconstitutional predicament and catch-22: he was forced to either forfeit his right to testify in his own defense, or, if he did take the stand, face a surefire conviction once the government impeached him with the fruits of his confession.

Books may be right in his contention that the district court, even though reserving a final ruling until after seeing whether he chose to testify and what questions the government wanted to ask on cross-examination, committed legal error in concluding, however conditionally, that some impeachment with the physical fruits of a coerced confession may be permissible. While that proposition is not settled in the law, Books's position is not without some support. See, *e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 769 (2003) (plurality opinion) (emphasizing, albeit in dicta, that "those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial").

The government urges us to avoid answering this question. Pointing to *Luce v. United States*, 469 U.S. 38 (1984), the government says that Books waived any challenge to the district court's ruling by not testifying at trial. The government's position finds substantial, if not dispositive, support in our decision in *United States v. Wilson*, 307 F.3d 596, 600–01 (7th Cir. 2002), where the defendant chose not to testify at

trial and, as a result, we declined to review the merits of his claim that a pretrial ruling on the admissibility of particular impeachment testimony violated his Fifth Amendment right to remain silent.

The whole point of the rule announced in *Luce*, which we extended to the domain of a Fifth Amendment claim in *Wilson*, is that courts should refrain from reviewing claims that a particular line of cross-examination would have violated a defendant's right against self-incrimination when the defendant in fact never testified at trial and thus never underwent cross-examination. Any other course, the reasoning runs, would require too much speculation on how the testimony and related questioning would have played out at trial. See *Wilson*, 307 F.3d at 600–01.

Even if we agreed with Books that *Wilson* should be read more narrowly, our ensuing reasoning would not travel a path that resulted in an award of relief. Both parties agree that the ultimate merits of Books's Fifth Amendment claim is subject to harmless error review. Indeed, the doctrine of harmless error finds straightforward application on the evidence presented at Books's trial.

Not every constitutional error automatically requires the reversal of a defendant's conviction. Instead, as the Supreme Court has explained, "if the government can show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' … then the error is deemed harmless and the defendant is not entitled to reversal." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). This precise standard would apply if Books had testified and was subjected to certain impermissible impeachment. See *Arizona v.*

Fulminante, 499 U.S. 279, 306 (1991) (holding that the doctrine of harmless error applies to the violation of the defendant's Fifth Amendment right against self-incrimination through the admission at trial of an involuntary confession). And the same analysis would apply if we accept Books's contention that the district court's ruling constructively foreclosed his decision to take the stand. See *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir. 1988) (applying harmless error analysis to the denial of the right to testify); *Alicea v. Ganon*, 675 F.2d 913, 925 (7th Cir. 1982) (reaching the same conclusion).

In reviewing the trial record, our obligation is to determine whether any error was harmless beyond a reasonable doubt, and we do so in no small part by evaluating the overall strength of the prosecution's case. See *Jones v. Basinger*, 635 F.3d 1030, 1052 (7th Cir. 2011). On this front, Books faces an insurmountable burden because the evidence against him at trial was overwhelming: the eyewitness testimony of the two bank tellers, the text message to a friend indicating his desire to rob a bank, the identification of his car as the getaway vehicle, and the testimony of over a dozen other witnesses—all in the broader context of his financial difficulties and prior disputes with the Land of Lincoln Credit Union. On this record, any error in the district court's pretrial ruling on the scope of permissible impeachment was harmless beyond a reasonable doubt.

III

Two other matters warrant attention. First, relying on *Brooks v. Tennessee*, 406 U.S. 605 (1972), Books argues that the district court's impeachment ruling deprived him of the "guiding hand of counsel" by undermining his attorney's

ability to make informed and independent decisions about the best trial strategy, including whether Books should take the stand in his own defense. *Id.* at 612. But *Brooks* provides no refuge, for there the Supreme Court considered a state statute that required a defendant, if he chose to put on a defense at trial, to be the first defense witness to testify, forcing a preemptive decision to take the stand absent "a full survey of all the case." *Id.* at 608. Books, in contrast, faced only the uncertainty that often accompanies an unfavorable (and perhaps even incorrect) pretrial ruling on the scope of impeachment. Whatever limitations this may have imposed on the strategic choices of Books's defense, they were far afield from the extreme circumstances defense counsel confronted in *Brooks.*

Finally, we reject Books's invitation to overturn his conviction on the basis of cumulative error. We have reviewed the record carefully and cannot get anywhere near concluding that there are "multiple errors [that] so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial." *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001). The bottom line is that Books's cumulative error argument cannot overcome the overwhelming evidence presented against him at trial.

For these reasons, we AFFIRM.

E-FILED
Monday, 01 May, 2017 12:17:58 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 16-10037**
	)	
SCOTT E. BOOKS,	)	
	)	
Defendant.	)	

ORDER

This matter is now before the Court on Defendant Scott E. Books' ("Defendant") Motion to Suppress Statements and Evidence. (ECF No. 14). For the reasons stated herein and during the hearing held on April 18, 2017, the Motion (ECF No. 14) is GRANTED. Defendant's confession made during the interrogation held on June 29, 2016, will not be allowed at trial nor will any evidence resulting from his confession be allowed.

OVERVIEW

On August 24, 2016, Defendant was indicted for bank robbery in violation of Title 18, United States Code, Section 2113(a) in connection with a July 28, 2016, robbery at the Land of Lincoln Credit Union in Normal, Illinois. (ECF No. 1). At approximately 4:51 PM, the Normal Police Department was alerted there had been a robbery at the Land of Lincoln Credit Union. The suspect was described as a white male roughly 6 feet tall wearing a black hoodie and a black ski mask or black bandana. The suspect entered the credit union, displayed what appeared to be a gun, and demanded money. The suspect left the credit union in a Buick SUV. One of the tellers believed the suspect could be the Defendant based on the suspect's mannerisms and her previous interactions with him.

During the early hours of July 29, 2016, officers with the Normal Police Department executed a search warrant at the home of Defendant. Defendant was taken into custody and driven to the Normal Police Department. Upon arriving at the police station, Defendant was placed in an interview room wherein Normal Police Department Detective Bradley Park ("Detective Park") and Federal Bureau of Investigation Agent Larry Savill ("Agent Savill") conducted an interrogation. Toward the end of the interrogation, Defendant made incriminating statements and further identified the location of incriminating evidence.

On March 8, 2017, Defendant filed his Motion to Suppress Statements and Evidence arguing:

- Detective Park and Agent Savill engaged Defendant in a conversation during the drive from his residence to the police station without advising Defendant of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966);
- When Defendant was placed in the interview room, and advised of his Miranda rights, Defendant responded to the Detective's question of whether he was willing to talk with an "I don't know;"
- Defendant requested the presence of an attorney to assist him during his time with the detective and agent; and
- Defendant's statements were involuntary because of the coercive and misleading statements made by the detective and agent.

(ECF No. 14). On April 17, 2017, the Government filed its Response. (ECF No. 19). The Parties presented witnesses and evidence during the hearing held on April 18, 2017. (Minute Entry dated 4/18/2017). During the hearing the Court indicated its intention to grant the Motion to Suppress finding the coercive nature of detective's and agent's statements regarding Defendant's family resulted in Defendant's confession not being "voluntary" within the meaning of the Due Process Claus. *Colorado v. Connelly*, 479 U.S. 157, 157, 107 S. Ct. 515, 517, 93 L. Ed. 2d 473 (1986). The Court noted that it would enter a written order memorializing its ruling. This is that Order.

DISCUSSION

The Court begins by examining all of the Defendant's non-meritorious claims. First, Defendant essentially argues that the detective and agent failed to give him his *Miranda* warnings prior to engaging in conversation with him during his transport to the police station. The record presented during the hearing, however, was clear that no questioning about the alleged crime occurred during this transport. Detective Park testified there was only brief conversation during the transport, and this conversation amounted to what could only be characterized as small talk. In fact, neither party has presented this Court with any incriminating statements arising out of this conversation. Simply put, the Court is unable to find any custodial questioning occurred during this time. *Missouri v. Seibert*, 542 U.S. 600, 601, 124 S. Ct. 2601, 2603, 159 L. Ed. 2d 643 (2004) (*Miranda* warnings are required before custodial *questioning*.).

Defendant also argues he requested his attorney be contacted at the residence prior to being taken to the police station. The testimony given during the hearing indicated the warrant was executed at the residence at approximately 1:45 A.M. Defendant's wife testified she was awoken when the police entered the residence. Not knowing who was entering the home, she immediately went to barricade herself and her children in a room. Ultimately, she realized it was the police. Police escorted Defendant's wife outside where she was taken to a police vehicle for questioning. Upon exiting the vehicle to return to the house to assist the police in opening a safe, Defendant's wife testified that Defendant stated something akin to "can I call my attorney." Defendant's wife responded with statements such as "don't look at me," and "I don't have my phone." While the Court finds Defendant's wife testified credibly during the hearing, there was no clear indication whether the statement made by Defendant was directed to any officer or otherwise heard by anyone

other than his wife. As the Court noted during the hearing, it appears these statements were simply made "into the wind."

The record is clear that prior to being questioned at the police station, Detective Park rad Defendant was given his *Miranda* warnings. Govt. Ex. 1, 3:41:47-3:42:24. Defendant acknowledged he understood these rights. Govt. Ex. 1[1], 3:42:24-3:42:30. Defendant first argues, however, he expressed a desire to remain silent or otherwise expressed reservation to do so that would require the officers to further inquire about his intention to speak with them. Defendant argues that in response to Detective Park's question if he was willing to speak with him, he stated "I don't know." (ECF No. 14 at 2). The Court has spent considerable time listening to the recording. The Court finds that the Defendant did not state "I don't know," but rather said "[a]s far as I know." This statement can reasonably be interpreted as a willingness to engage in the conversation. While this is arguably an ambiguous response, it was not the kind that required further clarification. Additionally, it should be noted that nowhere during the interrogation did Defendant specifically request the presence of an attorney.

That being said, the Court finds Defendant's argument regarding the coercive nature of the interrogation to have merit. In assessing the voluntariness of statements made during an interrogation, the Court must consider "whether, in light of the totality of the circumstances, the statement was the product of a rational intellect and free will [citation removed], or whether it was obtained by the authorities through coercive means." *United States v. Brooks*, 125 F.3d 484, 492 (7th Cir. 1997) *citing Mincey v. Arizona*, 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978) and *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986). The United States Supreme Court also provided guidance is assessing such a situation by noting:

[1] Government Exhibit 1 is a video/audio recording of the interrogation. The time is reflected on the video.

> We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; *Watts v. Indiana*, 338 U.S. 49, 52, 53, 69 S.Ct. 1347, 1348, 1349, 93 L.Ed. 1801*; Leyra v. Denno*, 347 U.S. 556, 558, 74 S.Ct. 716, 717, 98 L.Ed. 948. If so, the confession cannot be deemed 'the product of a rational intellect and a free will.' *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S.Ct. 274, 280, 4 L.Ed.2d 242.

Lynumn v. Illinois, 372 U.S. 528, 534, 83 S. Ct. 917, 920, 9 L. Ed. 2d 922 (1963).

In this case, the detective and agent specifically questioned Defendant while raising issues about his family. At times, they utilized this tactic simply in an effort to get Defendant "to do the right thing." *See* Govt. Ex. 1, at 4:47:06, (Detective Parks asks Defendant if "do you teach your kids to be truthful?"); *see also*, Govt. Ex. 1, at 5:05:40, (Agent Savill offers notepad and pen to Defendant to write a note to his wife and kids). The tactic, however, ultimately changed to the point where there were implicit, or even explicit, threats to have Defendant's wife arrested and children taken into the custody of the Department of Family and Children Services ("DCFS"). Some of the specific events that occurred during the interrogation include:

> [Govt. Ex. 1, at 5:12:45-5:20:00]: Govt. Ex. 1, at 5:12:45-5:15:10: Detective Park advised Defendant that his supervisor was very concerned about what's going on that he was very seriously considering contacting DCFS, and further sought names of people whom his children could stay with if his wife was in jail; Govt. Ex. 1, at 5:15:45-5:16:00: Kids could be placed in foster care; Govt. Ex. 1, at 5:18:25: Agent Savill advises Defendant when people at State Farm get in trouble, they rarely keep their job (Defendant's wife worked at State Farm); and Govt. Ex. 1, at 5:18:45: Detective Park advised Defendant his wife would have a felony record.
>
> [Govt. Ex. 1, at 5:44:55-5:49:06]; Govt. Ex. 1, at 5:45:32: Detective Park advised Defendant that DCFS would be contacted; Govt. Ex. 1, at 5:46:09: Detective Park advised that the officers would draft their report and present it to the prosecutors for charges against his wife; Govt. Ex. 1, at 5:48:22, Detective Park advised Defendant that if Defendant did not want to keep his wife out of this, "it's on you."

In *Rogers v. Richmond*, the United States Supreme Court indicated that threats to arrest a members of the suspect's family may cause a confession to be involuntary. *Id.*, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961); *see also United States v. Johnson*, 351 F.3d 254, 262 (6th Cir.

2003) *citing United States v. Finch*, 998 F.2d 349 (6th Cir. 1993) ("Coercion may involve psychological threats as well as physical threats. Specifically, threats to arrest members of a suspect's family may cause a confession to be involuntary."). Nonetheless, the Court must also consider the totality of the circumstances. *United States v. Montgomery*, 555 F.3d 623, 629 (7th Cir. 2009) ("As a fundamental matter, a confession must be voluntary under the totality of the circumstances, and a court evaluating the voluntariness of a confession must consider any promises or representations made by interrogating officers.").

In this case, Defendant was interrogated in the early morning hours of July 29, 2016. Several times during this interrogation, including during breaks, Defendant appeared very tired and uncomfortable with the questions, but always answered coherently and articulately. While in this state, Detective Park and Agent Savill raised the possibility that Defendant's children would be placed with a foster family, as well as the possibility that his wife would be arrested (and lose her job). This was not done by way of passing reference, but rather, the detective and agent outlined specific plans and consequences. The Court finds this type of interrogation coercive and is the type that would cause the confession to be involuntary. Accordingly, the Court finds Defendant's confession should be suppressed and any evidence resulting from his confession will be inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 479-84 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975). The Court noted during the hearing that the Government may seek to introduce other statements made by the Defendant during the interrogation that occurred prior to the interrogation becoming coercive. At this time, the Government has not indicated any desire to do so. Nonetheless, the Court finds that any statements made prior to Govt. Ex. 1, at 5:12:45 (*see supra* p. 4) may be admissible.

Parenthetically, in his Motion, Defendant raises concerns regarding telephone calls that were intercepted and listened to by law enforcement officers during the time he was detained at McLean County Jail. The Parties briefly discussed this matter during the hearing (and the hearing held on April 11, 2017). *See* Minute Entry dated 4/11/2017. At this time there appears to be no specific action requested of this Court.

CONCLUSION

For the reasons stated herein and during the hearing held on April 18, 2017, Defendant Scott E. Books' Motion to Suppress Statements and Evidence (ECF No. 14) is GRANTED. Defendant's confession made during the interrogation held on June 29, 2016, will not be allowed at trial, nor will any evidence resulting from his confession.

ENTERED this 1st day of May 2017.

/s/ Michael M. Mihm
Michael M. Mihm
U.S. District Court Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Criminal No. 16-10037
vs.	)	
	)	
SCOTT BOOKS,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL M. MIHM
EVIDENTIARY HEARING
JULY 28, 2017; 10:59 A.M.
PEORIA, ILLINOIS

APPEARANCES:

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Jennifer E. Johnson, CSR, RMR, CRR
U.S. District Court Reporter
Central District of Illinois

Proceedings recorded by mechanical stenography; transcript produced by computer

wish to make to that?

MR. KORN: Judge, I believe this is within your discretion, and I believe that's a fair ruling.

THE COURT: Okay. Thank you.

Mr. Alvarado?

MR. ALVARADO: Your Honor, we would like to reserve the right to inform the jury of the precise conviction that he had.

THE COURT: That's fine if you want --

MR. ALVARADO: But we would like to consider that --

THE COURT: Sure.

MR. ALVARADO: -- especially in light of the government's theory that he had a motive to rob the bank because he was a drug addict, that he needed money. So, we want to consider that.

THE COURT: That's fine. I need to know your decision about that before the case begins. Okay?

MR. ALVARADO: Right.

THE COURT: The other motion in limine was filed by the defendant (sic) and that has to do with the situation that if the defendant were to testify -- and as I understand it, only if. You're not making any claim to be permitted to present any

of this during your case in chief; is that right?

MR. KORN: You had said "defendant," Judge. Are you referring to the motion that I filed?

THE COURT: I'm sorry, yes.

MR. KORN: Yes, I don't intend to reference the items that were found, so there were -- so Your Honor's aware, and I'm sure you are, there were items that were found during the execution of the search warrant that corroborate the robbery, but the items that I was specifically referring to are a pair of gloves that were found on Veterans Highway that the defendant directed law enforcement to and a plastic bag containing a sweatshirt, pants and a black painted water pistol that the defendant directed law enforcement to.

THE COURT: I guess my question -- I'm not sure how this -- first of all, are you saying that if the defendant takes the stand -- I assume the purpose of it would be to deny the robbery. If he just said that, "I wasn't in the bank at that time," you're saying that that would open the door to you to do what?

MR. KORN: I believe that if he were to essentially perjure himself, that all the cases -- the due-process cases which touch on fairness and

exclusionary rule shouldn't be used as a gateway to suborn perjury, essentially; that although -- although the cases are clear that a coerced confession cannot be used to impeach, there is no non-dicta --

THE COURT: So, you're not asking -- on that scenario, you're not asking that you be allowed to present the suppressed evidence that he -- his confession was coerced?

MR. KORN: Correct. I, I --

THE COURT: Or that he confessed?

MR. KORN: While I think that is unfair and it's almost interesting that we're going down the same rabbit hole that we went down with Detective Park earlier, what I'm seeking to do is something to the effect of, "If you didn't commit the robbery, how are you aware" -- "how were you aware of the gloves that were used on Veterans Parkway? How were you aware of the bag of clothes and the fake firearm that was" -- "that you directed law enforcement to at CVS?" which, I believe --

THE COURT: Doesn't that take you to the confession?

MR. KORN: I think that those --

THE COURT: The only way that they knew where

those items were located was because during a portion of the interrogation that I have suppressed he came out with that information.

MR. KORN: Judge, I, I believe that the -- and I don't think Your Honor detailed which parts are -- and I don't know if it's possible to draw a fine line between what parts of a statement are the coerced parts of a statement and which parts are the fruits of a coerced statement, but I color the physical evidence --

THE COURT: Well, I thought I made it clear in my ruling that once we reached a certain point in the video that everything he said after that, in my opinion, was coerced. Every admission that he made after that was coerced. I would assume that that would apply not only to the, "I did rob the bank," but also, "Here's where the fruits of the robbery are."

MR. KORN: I don't think that that line -- it would be Your Honor's ruling. I don't think that that line has been -- I don't think that that line has ever been drawn, and for no other reason than there's no case on point about this. The Supreme Court hasn't decided -- hasn't -- in some dicta statements the Supreme Court has stated that fruits

of a coerced confession should not be used to impeach.

This is different for a couple of reasons -- the overlap in differing goals of the due-process clause and the self-incrimination clause and the purposes here. Under due process, which is the -- which is the theory that Defense Counsel successfully had the confession suppressed, under due process, the underlying -- the underlying motivation and the underlying goal of due process is essential fairness. And it is patently clear to me that if he were to perjure himself on the stand, that it would be patently unfair for the government not to be able to cross-examine with physical fruits which, as the court in *Patane*, P-a-t-a-n-e, stated were reliable and shouldn't be -- shouldn't be suppressed after a *Miranda* violation, which I agree is different.

THE COURT: Well, let me ask you this question: You agree that the state of the law is that a coerced confession cannot be used to cross-examine?

MR. KORN: So, the court in *Portash* dealt with a -- I think they dealt with compelled grand jury testimony.

THE COURT: Yes.

MR. KORN: And then in *Ventris* -- this wasn't the issue again in *Ventris*. There wasn't a coerced statement. But they -- I think -- I think Rehnquist or Scalia wrote the opinion, and he essentially analogized compelled testimony at grand jury to a coerced statement.

But again, *Ventris* wasn't about -- wasn't about a coerced statement being used to impeach. That didn't happen. So, the court has decided this in dicta also, that a coerced confession should not be used to impeach.

But the court also has gone back and forth about self-incrimination and due process, and I think that's important because under the self-incrimination clause, the exclusionary rule is written right into the self-incrimination clause: It shall not be used against you, right?

Under due process, due process has a similar exclusionary rule that is not written in the amendment itself similar to the Fourth Amendment, similar to Fifth Amendment due process, similar to Sixth Amendment right to counsel and violations of right to counsel. The court and the judges have read in an exclusionary rule where one had not

existed.

And I admit that this is all -- I believe this is not treaded territory that we're in, but I see a different purpose for due-process exclusion and a different weight of the exclusionary rule in the due-process clause from the self-incrimination clause where the founders wrote that into the self-incrimination clause that that testimony should be excluded.

THE COURT: All right. Thank you.

What's the response?

MR. ALVARADO: Well, Your Honor, when you ruled that the confession was involuntary because it was coerced, that cannot be used for any purpose whatsoever because it is --

THE COURT: Which case says that?

MR. ALVARADO: -- an unreliable statement.

THE COURT: Well, which case says that? Because my recollection is there's one case where Justice Kennedy said that physical evidence might be considered somewhat differently.

MR. ALVARADO: Well, yes, in some circumstances. But in *Dassey*, *Dassey* would be the first case that comes to mind where the court would say that an involuntary confession, a coerced

confession is not reliable for any purpose.

But in this case what we have are the fruits of that confession tied directly to the confession so that when the government tries to bring in the gloves or the mask or the gun, it infers that Scott Books must have made that confession; otherwise, how would they have recovered those things?

THE COURT: Right.

MR. ALVARADO: So, it is directly traced to the confession that is not reliable.

THE COURT: The other side of the issue is if your client takes the stand and testifies under oath that he did not commit that robbery, then arguably he's directly committing perjury.

MR. ALVARADO: We're talking about a theoretical possibility.

THE COURT: We're talking about theoretical. I understand.

MR. ALVARADO: And the only way this was triggered was because of the motion in limine regarding the prior convictions which we had to do --

THE COURT: No, I understand that.

MR. ALVARADO: -- in order to --

THE COURT: I'm not -- I'm not faulting you in

any way.

MR. ALVARADO: No, no, what I'm saying is --

THE COURT: I understand your argument. At the same time, when we're balancing policies here, it seems that to say that a defendant -- that someone can take the stand -- that any witness can take the stand, but certainly even a defendant can take the stand and, under oath, say things that are false, knowing that they're false and material to the issue at hand, that's a pretty major attack on the criminal justice system.

MR. ALVARADO: I think that's exactly what Detective Park did, and I believe in that principle very well, too.

THE COURT: I understand that's your position, and I'm not -- I've already suppressed the evidence so you won that argument.

But I'm just saying this is -- it almost seems like we're at the point here of balancing the circumstances in terms of if he testifies and denies the robbery, and I'm sitting here theoretically saying, "He just committed perjury." That's pretty serious.

MR. ALVARADO: Oh, I know it very well, Judge. But as a theoretical proposition, the fruits -- the

physical fruits of an involuntary confession which could be traced directly back to that involuntary confession should not be admitted for any reason.

THE COURT: Let me ask you this, and again we're speaking theoretically: If your client took the stand and you asked him, "Were you in this bank on such and such a date at such and such a time and take money from them at that time?"

"No."

"No further questions."

In your opinion, would that open the door otherwise to cross-examining him concerning the items that they recovered?

MR. ALVARADO: No. No, it would not.

THE COURT: And your reasoning for that is what?

MR. ALVARADO: The reason is that the involuntary confession, which was unreliable for any reason, is tied directly to the physical evidence and, therefore, cannot be -- the physical evidence could not be used for any reason in a criminal case because it would lead back to an involuntary confession.

THE COURT: And dealing with that same hypothetical, your response would be by denying the

crime, that opens the door to this evidence?

MR. KORN: Yes, Judge, I think that was what --

THE COURT: Even if he says no more.

MR. KORN: Yes, I think that was what Your Honor was actually asking, not about the -- about the scope of cross-examination.

THE COURT: Right.

MR. KORN: And the fact that he knew where the gloves were that are clear in the video, he knew where the clothes --

THE COURT: So, you would say if you couldn't ask him that, your ability to effectively cross-examine the witness for his credibility would be impacted?

MR. KORN: And, and the impeachment rule states that if there is a question that is material in any manner and it is not explicitly brought up on direct examination, a cross-examiner can still question about a different matter as long as they do so as if on direct examination; so, non-leading questions is what the cross-examination rule says.

And, Judge, might I add, I'm willing to defer -- if Your Honor wishes, I'm willing for Your Honor to defer ruling until that time that the defendant

seeks to -- seeks to exercise his right either to remain silent or to testify in his own defense.

THE COURT: Well, I'd be happy to defer it, but my guess is that Defense Counsel needs to know the answer to this question before the trial starts. Am I correct?

MR. ALVARADO: Absolutely, Judge. We would like to know the answer.

THE COURT: Okay. If I rule in favor of the government, as I understand it, you're not asking -- you would not ask him if he confessed to the robbery; is that right?

MR. KORN: That's correct.

THE COURT: You would ask him if he told the police where the items were?

MR. KORN: That's correct.

THE COURT: Correct?

MR. KORN: Yes. Which I believe to be the fruit, not the -- not the actual nucleus of the confession, "I did commit that robbery. I robbed the Land of Lincoln Credit Union."

THE COURT: Well, this is about in the same category as the earlier ruling. It's a very difficult decision.

My ruling is that I'm going to -- I would

allow that. But having said that, I think if and when we get to that point, any questions that the government wished to ask the defendant if he testifies, I would have to hear exactly what the questions are outside the presence of the jury so there could be specific objections.

I did rule that this confession was coerced. I don't believe that -- under all of the circumstances here, I don't believe in this case that the reliability of the information given as affected by the coercion is not really the issue from my point of view. And when I -- while understanding that defense argument when confronted with the possibility of a defendant or witness taking the stand and committing perjury in open court, I think that that effectively trumps the other consideration. So, there's, I think, a lot of uncharted territory here. That's my best effort.

I want to thank counsel for both sides for the quality of your briefs and your argument. Certainly haven't made the decisions easy, but they are made at this point.

So, this is set for trial on August 7th; is that right?

E-FILED
Tuesday, 18 July, 2017 11:57:15 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT PEORIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 16-10037
	)	
SCOTT E. BOOKS,	)	
	)	
Defendant.	)	

MOTION IN LIMINE

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and pursuant to Fed. R. Evid. 104(c) respectfully moves this Honorable Court for an Order In Limine, authorizing the use of certain physical evidence to impeach the Defendant, should he elect to testify in his defense. In support of this request, the United States of America avers:

Statement of Facts

1. On July 28, 2016, a man wearing a black sweatshirt and pants, yellow gloves, and a partial face covering robbed the Land of Lincoln Credit Union holding what appeared to be a firearm.

2. Upon entering the bank, the robber walked over to a teller, H.B., and asked her for "all the money." The teller, H.B., immediately believed the robber to be the Defendant due to his voice and mannerisms. The Defendant was a customer at the

bank and H.B. had personally waited on the defendant on multiple occasions. Additionally, the Defendant was memorable to both H.B. and another employee, S.P., as the Defendant had been involved in potential check kiting at the credit union.

3. H.B. noticed on each occasion during which she assisted the Defendant that the Defendant appeared high on drugs as he was "shifty" and unable to stand still. S.P., had had prior contact with the Defendant, but was unsure of the identity of the robber until H.B. stated her belief that it was the Defendant. S.P. concurred due to the Defendant's mannerisms, but noted that she had less prior contact with the Defendant than H.B.

4. H.B. and another witness both observed the robber flee in a brown or grey Buick SUV.

5. When police officers arrived at the credit union, H.B. informed them that she believed the robber to be the Defendant. S.P. concurred in that belief, but to a lesser degree of certainty than H.B.

6. At this point, the investigators only lead was H.B.'s belief that the Defendant was the culprit. The described vehicle was later observed at the Defendant's home and the Defendant was arrested.

7. The Defendant was transported to the Normal Police Department Headquarters and interviewed by Normal PD Detective Brad Park and FBI Special

Agent Larry Savill. During the interview, the Defendant admitted to robbing the credit union and the reasons for doing so. The Defendant also stated that the weapon was a water gun—not a functioning firearm. He stated that he threw the yellow gloves out on Veteran's Parkway and discarded the sweatshirt he was wearing, the water gun, and the money at a CVS located on S. Veteran's Parkway.

8. Normal PD officers subsequently located both gloves on Veteran's Parkway and recovered the black sweatshirt and water gun at the CVS.

9. On April 18, 2017, after an evidentiary hearing, the Court ruled that it intended to grant Defendant's Motion to Suppress Statements and Evidence (ECF No. 14) and subsequently entered an Order (ECF No. 21) memorializing its findings. The Court ruled that the "type of interrogation" utilized was coercive and "is the type that would cause the confession to be involuntary." (ECF No. 21 at 6.) The Court made no ruling as to the reliability of the statement or the physical evidence recovered.

10. On July 7, 2017, the Defendant moved for an order in limine excluding the use of his prior convictions as impeachment should he wish to testify. Due to the implication of this motion that the Defendant may wish to testify in his own defense, in almost certain contradiction with his confession and direction to law enforcement of the locations of the instrumentalities of the robbery which were subsequently recovered.

Argument

In *Kansas v. Ventris*, the Supreme Court recognized that exclusionary rules derived from different constitutional guarantees serve different primary purposes. 556 U.S. 586, 590 (2009). For example, while the Fifth Amendment's guarantee that "no person shall be compelled to give evidence against himself" requires exclusion by its letter, exclusionary rules in the context of prophylaxis serve the primary function of deterring "certain pretrial police conduct." *Id.*

The Supreme Court went on to hold that fruits of a Sixth Amendment violation may be admitted for impeachment because "the interests safeguarded by such exclusion are outweighed by the need to prevent perjury and to assure the integrity of the trial process." *Id.* at 593.

In *United States v. Patane*, the Supreme Court held that physical fruits of a statement taken in violation of *Miranda* may be admitted in the government's case-in-chief. Justice Kennedy, whose concurrence garnered the fourth and fifth votes for the majority decision, wrote that "[i]n light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation." *United States v. Patane*, 542 U.S. 630, 645 (2004) (Kennedy, J., concurring).

With this foundation and upon the implication that the Defendant may testify in his own defense, the United States of America seeks to offer against the Defendant physical evidence amounting to instrumentalities of the robbery, to impeach the Defendant, should he testify. Any relevant testimony that the Defendant could provide would implicate Defendant's independent and specific knowledge of the location of instrumentalities of the robbery. While the Defendant is undoubtedly "privileged to testify… that privilege cannot be construed to include the right to commit perjury." *See Harris v. New York*, 401 U.S. 222, 225 (1971).

The Supreme Court has held that compelled grand jury testimony may not be used to impeach a witness. *New Jersey v. Portash*, 440 U.S. 450, 459 (1979). In dicta, the Supreme Court extended this holding to the context of "truly coerced confessions." *Kansas v. Ventris*, 556 U.S. 586, 590 (2009). Outside of dicta, no Supreme Court case has resolved the issue of whether fruits of a coerced confession may be admitted to impeach a witness. *See* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 928 (1995) ("In fact, we are aware of no U.S. Supreme Court case -- before or after 1960 -- that actually excludes physical fruits of a coerced confession that occurred outside formal proceedings."). Following *Portash*, the Supreme Court in *Patane* held that the "fruits of actually compelled testimony" cannot be

used to impeach a defendant's testimony at trial; however the issue resolved in *Patane* was whether physical fruits of a statement taken in violation of *Miranda* could be offered against a defendant in the government's case-in-chief.

The Supreme Court has also distinguished statements taken in violation of the Due Process clause and statements taken in violation of the Fifth Amendment's Self-Incrimination Clause. *Dickerson v. United States*, 530 U.S. 428, 434 (2000). Specifically, the Supreme Court noted that it has never abandoned its "due process jurisprudence," which focuses on "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession, [while considering] the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.*

Under this due process analysis, and not under self-incrimination jurisprudence, the Defendant sought and secured the suppression of his confession. (ECF No. 14 ("Threats to a suspect's family or children, even if implicit, certainly may render confessions involuntary for due process.")).

This is legally relevant for two reasons: (1) the Government is aware of no jurisprudence holding that inarguably reliable fruits of a confession secured in violation of due process may not be used to impeach a witness's trial testimony; and (2) while the Fifth Amendment Self-Incrimination Clause, by its substance,

excludes evidence taken in violation of the clause, due process exclusion relies on notions of fairness. *See generally Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

Conclusion

The touchstone of due process analyses is whether a given proceeding was fair. *United States v. Andreas*, 216 F.3d 645, 659 (7th Cir. 2000).

Additionally, Courts have long recognized the difficulty in drawing lines between permissible and impermissible police interrogation. *Haynes v. State of Wash.*, 373 U.S. 503, 515 (1963) ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused."); *Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("[T]he totality-of-the-circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.").

And, in upholding the *Miranda* regime parallel with the due process voluntariness inquire, the Supreme Court has held that "cases in which a defendant can make a colorable argument that a self-incriminating statement was

'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984).

Law enforcement complied with the dictates of *Miranda* and the confession was thoroughly corroborated and manifestly true. Should the Defendant take the stand, any relevant testimony would necessarily be perjured, amounting to "a corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976). Excluding all evidence which could impeach the perjured testimony compounds the corruption.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2017, I electronically filed the foregoing Response with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to defense counsel.

/s/ Adam C. Korn
Adam C. Korn
Assistant United States Attorney