

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAMON SIMPSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit*

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

RAMON SIMPSON, Petitioner

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 21-2463

United States of America,

Plaintiff - Appellee,

v.

Ramon Simpson,

Defendant - Appellant.

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: May 11, 2022
Filed: August 15, 2022

Before COLLOTON, WOLLMAN, and SHEPHERD, Circuit Judges.

COLLOTON, Circuit Judge.

Ramon Simpson was convicted of kidnapping resulting in death and conspiracy to commit kidnapping. On appeal, Simpson challenges several rulings of the district court* and the sufficiency of the evidence in support of the convictions. We affirm.

*The Honorable Brian C. Buescher, United States District Judge for the District of Nebraska.

APPENDIX A1

I.

The brutal crime at issue occurred on November 4, 2018. On that date, Simpson and Joseph James traveled with a friend to a bar in Yankton, South Dakota. The men then decided to drive to a strip club in Lesterville, South Dakota. On the way to Lesterville, they stopped near a farm, where Simpson and James got out of the car.

The farm was owned by Phyllis Hunhoff's mother. Simpson and James encountered Phyllis Hunhoff as she was driving home from the farm. The prosecution's theory at trial was that the two men kidnapped Ms. Hunhoff and drove with her toward Simpson's house in Norfolk, Nebraska. The prosecution alleged that the perpetrators then physically and sexually assaulted, strangled, and disemboweled Ms. Hunhoff. James purchased gasoline, drove to a remote dirt access road, and attempted to burn Ms. Hunhoff's body and car. After an investigation, James pleaded guilty to first-degree murder and was sentenced to life imprisonment.

A grand jury charged Simpson with kidnapping resulting in death (as well as aiding and abetting that offense), 18 U.S.C. §§ 2, 1201(a)(1), and conspiracy to commit kidnapping, *id.* § 1201(c). Before trial, Simpson moved to suppress statements made during conversations with an FBI agent on November 8 and 21, 2018. The district court denied the motion after concluding that Simpson was not in custody during the conversations, did not invoke his right to remain silent in any event, and made the statements voluntarily. Simpson also moved to exclude photographs and a video of Ms. Hunhoff's body at the crime scene and during her autopsy on the ground that they were unfairly prejudicial. The court granted the motion in part, but allowed the prosecution to introduce some of the photographs and the video.

A jury convicted Simpson of both offenses. The district court imposed concurrent sentences of life imprisonment on each count.

II.

A.

Simpson's first argument on appeal is that the district court erred by denying his motion to suppress statements from the interviews on November 8 and 21, 2018. He contends that investigators subjected him to custodial interrogations without advising him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

According to the district court's findings, Agent Howard visited Simpson at his residence on November 8, four days after the kidnapping. Howard had attempted to contact Simpson earlier that day. Simpson returned the call and invited Howard to meet at the home. Simpson admitted Howard into the residence, and they spoke at the dining room table, with Simpson's wife seated on a couch nearby. Howard was dressed in plain clothes with no weapon visible. Simpson was not handcuffed or otherwise restrained during the interview. Howard never said that Simpson would be arrested, and when the twelve-minute interview concluded, Howard departed.

In determining whether a defendant was in custody, the critical inquiry is "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *United States v. Williams*, 760 F.3d 811, 814 (8th Cir. 2014) (internal quotations omitted); *see California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). We consider "the circumstances surrounding the questioning and whether, given those circumstances, a reasonable person would have felt free to terminate the questioning and leave." *United States v. Ferguson*, 970 F.3d 895, 901 (8th Cir. 2020).

We conclude that there was no custodial interrogation of Simpson on November 8. Simpson responded to the FBI agent's request for a conversation and agreed to let the agent come to his house for the meeting. The agent did not display a weapon or restrain Simpson in any way. The agent was dressed in plain clothes and allowed Simpson's wife to sit nearby for the interview. The questioning was conducted in Simpson's living room, on his "own turf." *See United States v. Helmel*, 769 F.2d 1306, 1320 (8th Cir. 1985). Under these circumstances, a reasonable person would have felt free to terminate the interview and have the agent depart if he did not wish to speak further. It was not necessary for the agent to state affirmatively that the questioning was voluntary and that Simpson was free to leave. *Miranda* warnings were not required.

Regarding November 21, 2018, the district court found that Simpson agreed to meet the FBI agent at a police station and drove there voluntarily. At the outset, the agent and Simpson spoke for about twenty-five minutes. Although this interview took place on law enforcement's "home turf," the plain-clothed agent informed Simpson that he was not under arrest and that he was free to leave at any time. The provision of this guidance is a strong objective indicium that a reasonable person would feel free to leave. *Williams*, 760 F.3d at 814-15.

Simpson was not restrained, the agent did not block the exit, and Simpson was offered a bathroom break during the short meeting. The agent did not raise his voice, threaten Simpson, or display a weapon. Simpson complains that the room was small and the door was closed, but these factors are not sufficient to place Simpson in custody. The agent told Simpson that he was free to leave, so he could have risen, opened the door, and departed as he wished. The district court correctly determined that Simpson was not in custody when meeting with the agent, and no *Miranda* warnings were required.

After the initial questioning on November 21, a polygraph examiner advised Simpson of his *Miranda* rights and obtained his consent to conduct a polygraph examination. The polygraph examiner spoke with Simpson for approximately five hours, during which time he was offered breaks to smoke and use the restroom. At that point, however, Simpson had been warned under *Miranda*, so it is immaterial whether he was in custody, and we need not consider the point further.

After the polygraph examiner was finished, the FBI agent resumed questioning Simpson for about fifty minutes. During this period, Simpson answered questions but stated repeatedly that he wanted to go home. Simpson maintains that his repeated requests to go home constituted an invocation of his right to remain silent, and that the agent was required under the *Miranda* rule to cease questioning. *See Miranda*, 384 U.S. at 473-74. Even assuming for the sake of analysis that Simpson was in custody, however, a suspect's invocation of his right to remain silent must be clear and unequivocal. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010); *United States v. Adams*, 820 F.3d 317, 323 (8th Cir. 2016).

Simpson's repeated statements that he wished to go home were not unambiguous invocations of his right to remain silent. “[T]he prospect of going home would naturally be of great interest to any suspect undergoing interrogation,” but like the Eleventh Circuit, we are not persuaded that a statement about wanting to go home “evidences a refusal to talk further.” *Moore v. Duggar*, 856 F.2d 129, 134 & n.1 (11th Cir. 1988). That Simpson reiterated the wish many times does not transform his expression of a desire to be elsewhere into an unambiguous assertion of the right to remain silent. Simpson was informed in the *Miranda* warnings that he had a right to remain silent, but he never asserted that right, and he continued to answer questions for more than fifty minutes after first stating that he wanted to go home. The district court did not err in concluding that the questioning complied with the *Miranda* rule.

Simpson also claims that his statements on both dates were involuntary and should be suppressed based on the Due Process Clause. “A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant’s will and critically impair his capacity for self-determination.” *Simmons v. Bowersox*, 235 F.3d 1124, 1132 (8th Cir. 2001). Simpson has not made that showing here. There were no threats or promises that might have overborne Simpson’s will. There is no indication that Simpson is particularly susceptible to undue influence: he is an adult of average intelligence who has earned an associate’s degree and is familiar with the protections afforded by the legal system due to an extensive criminal history. *See Yarborough v. Alvarado*, 541 U.S. 652, 667-68 (2004); *United States v. LeBrun*, 363 F.3d 715, 726 (8th Cir. 2004) (en banc). The court properly denied the motion to suppress.

B.

Simpson next argues that the district court erred at trial by admitting photographs and a video that depicted the crime scene, the interior of Ms. Hunhoff’s vehicle, and Ms. Hunhoff’s autopsy. He contends that images of Ms. Hunhoff’s body are so gruesome and inflammatory as to be inadmissible. Under Rule 403, a trial court “may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.” Fed. R. Evid. 403. We review the district court’s evidentiary rulings for abuse of discretion. *United States v. Ruiz*, 412 F.3d 871, 880-81 (8th Cir. 2005).

The photographs and video had probative value. They corroborated testimony by officers about the location and state of Ms. Hunhoff’s body when it was discovered, and they tended to show the cause of death. By showing the extensive nature of Ms. Hunhoff’s wounds and the absence of some clothing, the images made it more probable that she was not a willing passenger in the car. The autopsy photographs aided the medical examiner’s testimony concerning the timing of Ms.

Hunhoff's injuries. The court limited the number of images that were introduced, but it was not required to exclude this evidence entirely. The evidence was probative and did not serve merely to inflame the passions of the jurors. *See United States v. Ingle*, 157 F.3d 1147, 1153 (8th Cir. 1998). The district court did not abuse its discretion by concluding that the probative value of the evidence was not substantially outweighed by a danger of unfair prejudice.

C.

Simpson next contends that the district court erred in instructing the jury on liability for aiding and abetting a kidnapping resulting in death. The court instructed that a defendant who aided and abetted that offense must have had enough advance knowledge of the kidnapping that he was able to walk away before the kidnapping was completed. Simpson argues, however, that the court also should have instructed that an aider and abetter must have advance knowledge that a death would result from the kidnapping. The district court rejected that position, concluding that because the government is not required to prove that the principal actor intended to kill or knew that death would result, the government also need not prove that an aider and abetter had advance knowledge that death would result.

Simpson contends that his proposed instruction is required by *Rosemond v. United States*, 572 U.S. 65 (2014). There, the Court considered a defendant charged with aiding and abetting the offense of using or carrying a firearm during and in relation to a drug trafficking offense under 18 U.S.C. § 924(c). The Court held that an aider and abetter in that situation must have advance knowledge that one of his confederates is carrying a gun. *Id.* at 77-78. Simpson points to statements in *Rosemond* that an aider and abetter must have "a state of mind extending to the entire crime," and that his "intent must go to the specific and entire crime charged." *Id.* at 76.

Rosemond addressed aiding and abetting liability for a “double-barreled crime” that requires proof of both “the use or carriage of a gun” and “the commission of a predicate (violent or drug trafficking) offense.” *Id.* at 71. The Court concluded that an aider and abetter of the § 924(c) offense need only facilitate one of these acts—*e.g.*, a drug transaction—but must intend to aid in the commission of both—*e.g.*, a drug transaction *and* use of a gun. *Id.* at 74-76. So while an aider and abetter’s affirmative act may relate to only part of the § 924(c) crime, his state of mind must extend to the entire offense. *Id.* at 76.

Rosemond does not require, however, that a defendant charged with aiding and abetting a kidnapping resulting in death must have advance knowledge of the death. Under § 924(c), a principal offender must knowingly commit both requisite acts, and it followed in *Rosemond* that the aider and abetter must have advance knowledge of both acts. But under § 1201(a), the government must prove the principal’s knowledge and intent only with respect to the kidnapping. The government also must prove that the kidnapping *caused* the victim’s death, but not that the principal intended or knew that death would result. *United States v. Barraza*, 576 F.3d 798, 807 (8th Cir. 2009). Therefore, the district court properly concluded that the government was required to show that Simpson had advance knowledge of the kidnapping, but not that death would result, to establish an aiding and abetting offense. *See United States v. Bell*, 573 F.2d 1040, 1046 (8th Cir. 1978) (“It would be anomalous to hold that specific intent was a necessary element of aiding and abetting a crime, but not of the crime itself.”).

Simpson counters that the First Circuit recently applied *Rosemond* to require advance knowledge of an element for aiding and abetting liability despite the absence of a *mens rea* requirement for the principal. In *United States v. Encarnación-Ruiz*, 787 F.3d 581 (1st Cir. 2015), a divided panel held that a conviction for aiding and abetting the production of child pornography required proof that an aider and abetter had advance knowledge that the victim was a minor, even though there was no

corresponding *mens rea* requirement for the principal. *Id.* at 588-89. But in reaching that conclusion, the court emphasized that the age of the victim was the only fact that made the principal's conduct a crime. The court deemed it improper to allow a conviction for aiding and abetting where a defendant had only a fleeting connection to the crime and no knowledge that criminal activity was afoot. *Id.* at 590. Even accepting that conclusion for the sake of analysis here, the reasoning does not extend to aiding and abetting a violation of § 1201(a). The jury was required to find that Simpson had advance knowledge that he was aiding and abetting a kidnapping, so there is no danger that he was convicted of committing an offense without fault.

We conclude that there was no error in declining to instruct the jury that the government must prove that Simpson knew in advance that death would result from the kidnapping of Ms. Hunhoff. The jury instruction fairly and adequately submitted the aiding and abetting charge to the jury, and there was no abuse of discretion.

D.

Finally, Simpson challenges the sufficiency of the evidence to support his convictions. We review the sufficiency of the evidence *de novo*, viewing the evidence in the light most favorable to the jury's verdict. We will affirm unless no reasonable jury could have returned a guilty verdict. *United States v. Chastain*, 979 F.3d 586, 591 (8th Cir. 2020).

Simpson was convicted of kidnapping resulting in death and conspiracy to commit kidnapping. He maintains, however, that James acted alone, and that he merely rode home in Ms. Hunhoff's car before James initiated the kidnapping. Simpson made this claim in a recorded interview with investigators that was played to the jury, and he contends that his version established reasonable doubt. We conclude, however, that the jury reasonably could have discounted Simpson's version as a false exculpatory narrative.

The government's evidence was sufficient to support a finding of guilt beyond a reasonable doubt. Simpson gave shifting stories to investigators about the events of November 4, 2018. He eventually admitted that he was in Ms. Hunhoff's car with her and James, although he claimed that Ms. Hunhoff dropped him off at home without incident. According to Simpson's jail bunkmate, Simpson later admitted that he and James kidnapped, raped, and murdered a woman whom they "choked and stabbed." Consistent with these admissions, Ms. Hunhoff's autopsy showed bruising to her torso, limbs, and genitals, and found that her death was caused by strangulation and a stab wound. That Ms. Hunhoff did not answer several telephone calls from her mother while traveling between Yankton and Norfolk tended further to show that a kidnapping was in progress throughout the drive, and that Simpson was not an innocent passenger taking a ride home.

Based on this evidence, a reasonable jury could have concluded that Ms. Hunhoff was seized and held against her will, that Simpson knowingly and actively participated in the kidnapping, that Simpson conspired to participate in a kidnapping, and that the kidnapping resulted in Ms. Hunhoff's death. There was sufficient evidence to support the convictions.

* * *

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiffs,

8:18-CR-333

vs.

RAMON SIMPSON,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court for its review of the Magistrate Judge's Findings and Recommendation ([Filing 197](#)) denying Defendant's Motion to Suppress Statements ([Filing 150](#)). Defendant timely filed a Statement of Objections to Magistrate Judge's Findings and Recommendation. [Filing 203](#). Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a de novo review of the portions of the Magistrate Judge's Findings and Recommendation to which objections have been made. As discussed below, because the Court concurs in the Magistrate Judge's factual findings and legal analysis, the Court overrules Defendant's objections, adopts the Magistrate Judge's conclusions, and denies the motion to suppress.

Phyllis Hunhoff was found dead and burned inside her vehicle on the Santee Indian Reservation on November 7, 2018. [Filing 192 at 7](#). FBI Special Agent Jeff Howard ("Agent Howard") investigated her death, interviewed a suspect, and became aware that Defendant was with the suspect preceding Hunhoff's death. [Filing 192 at 8-9](#). On November 8, 2018, Agent Howard spoke with Defendant at Defendant's home. [Filing 192 at 13](#). Agent Howard later spoke with Defendant at the Norfolk, Nebraska, police department. [Filing 192 at 21](#).

Defendant moved to suppress any statements he made to Agent Howard during the November 8 and November 21 interactions. [Filing 150](#). Defendant argued he (1) was in custody during those interactions, (2) invoked his right to remain silent, and (3) involuntarily made

APPENDIX B1

statements. Filing 150; Filing 151 at 4-8. After an evidentiary hearing on Defendant's motion, the Magistrate Judge found Defendant was not in custody during either interaction, never unequivocally invoked his right to remain silent, and made all statements voluntarily. *See Filing 197 at 12-17*. Defendant then objected to the Magistrate Judge's findings that Defendant was not in custody for either interview and did not invoke his right to remain silent during the November 21, 2018, interview Filing 203; Filing 207 at 4-7.

Upon de novo review, the Court agrees with the Magistrate Judge's factual findings and legal analysis. In particular, Defendant was not in custody during either interview and did not invoke his right to remain silent during the November 21 interview. *Miranda* warnings are required when an individual has been subjected to a "custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966). "Custodial interrogation" refers to questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* The Eighth Circuit has enumerated the following six "common indicia of custody":

(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990).

The November 8 interview took place after Defendant returned Agent Howard's call and agreed to meet at Defendant's home. Filing 192 at 10-19. The meeting involved no restraint of movement, no strong-arm or deceptive strategies—only Agent Howard in plain clothes—and

ended without an arrest. Filing 192 at 10-19. Further, the twelve minute interview was “conversational.”¹ Filing 192 at 16. Applying the *Griffin* factors, the Court finds Defendant’s objection to this finding meritless.

The November 21 interview was similarly noncustodial. Defendant agreed to meet Agent Howard at the Norfolk Police Department. Filing 192 at 21-22. The interview took place in a windowless interview room with Agent Howard and another FBI agent. Filing 192 at 24; Ex. 16. At various points, only Agent Howard was with Defendant. Filing 192 at 29. Agent Howard was dressed in plain clothes with no visible firearm, and he informed Defendant that he was not under arrest and could leave at will. Filing 192 at 30; Ex. 11. Agent Howard did not yell, display his firearm, or block the door during the “conversational” interview. Filing 192 at 29-30. The other agent did not threaten, lie to, yell at, display a firearm to, or use physical force on Defendant. Filing 192 at 185. Defendant was not handcuffed or otherwise restrained and was offered restroom and cigarette breaks, snacks and water, and the option to leave at any time. Filing 192 at 33-34, 188; Ex. 3; Ex. 4.

Defendant was advised of his *Miranda* rights and signed a waiver of those rights prior to submitting to a polygraph examination that lasted approximately five hours. Ex. 4; Ex. 5. Following the polygraph examination, Agent Howard again spoke with Defendant. Filing 192 at 25. During this conversation, Defendant repeatedly asked to go home. Ex. 12. Agent Howard noted that Defendant could go home but kept questioning Defendant. Ex. 12. Defendant kept responding to Agent Howard’s questions and never left. Ex. 12.

Because Defendant was informed numerous times that he was free to leave and waived his *Miranda* rights; was not handcuffed or physically restrained and allowed to leave the interview

¹ The audio recording of the November 8th interaction supports Agent Howard’s recollection that his exchange with Defendant was “conversational.” Filing 10.

room for bathroom and cigarette breaks; agreed to meet Agent Howard at the police department; was not deceived or coerced into responding to questions; and was not arrested at the termination of the questioning, he was not in custody. *See Griffin*, 922 F.2d at 1349.

Further, Defendant's numerous statements indicating his desire to go home are not clear or unequivocal invocations of his right to remain silent, particularly when he continued speaking with Agent Howard following such statements. "To adequately invoke [the right to remain silent] and effectively cut off questioning, a suspect must indicate 'a clear, consistent expression of a desire to remain silent.'" *United States v. Adams*, 820 F.3d 317, 323 (8th Cir. 2016) (quoting *United States v. Johnson*, 56 F.3d 947, 955 (8th Cir. 1995)). The Court must "consider the defendant's statements as a whole to determine whether they indicate an unequivocal decision to invoke the right to remain silent." *Id.* Defendant's willingness to answer Agent Howard's questions even after repeatedly requesting to go home does not indicate a clear, consistent expression of a desire to remain silent.

Accordingly, the Court overrules Defendant's objections and adopts the Magistrate Judge's Findings and Recommendation.

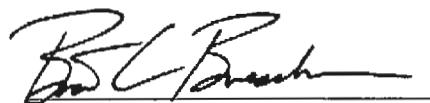
IT IS ORDERED:

1. Defendant's Statement of Objections to Magistrate Judge's Findings and Recommendation (Filing 203) is overruled;
2. The Magistrate Judge's Findings and Recommendation (Filing 197) is adopted; and
3. Defendant's Motion to Suppress (Filing 150) is denied; and
4. The Clerk of Court is ordered to terminate Filing 150, Filing 197, Filing 203, and Filing 208.

Dated this 1st day of October, 2020.

APPENDIX B4

BY THE COURT:



Brian C. Buescher
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiffs,

8:18CR333

vs.

RAMON SIMPSON,

FINDINGS AND RECOMMENDATION

Defendant.

This matter is before the Court on Defendant Ramon Simpson's ("Defendant") Motion to Suppress Statements. (Filing No. 150.) An evidentiary hearing was held on the matter on June 22, 2020 and June 29, 2020. A transcript has been filed and the motion is ready for disposition.

For the reasons explained below, the undersigned will recommend that the Motion to Suppress be denied.

FACTS

FBI Special Agent Jeff Howard ("Agent Howard") was assigned to investigate the murder of Phyllis Hunhoff ("Hunhoff").¹ (TR. 6.) Agent Howard, who works in the FBI's office in Sioux City, Iowa, investigates federal crimes and has been with the FBI since 1999. (TR. 6.) Agent Howard was provided Defendant's name by Joseph James ("James"), who he interviewed earlier in the day on November 8, 2018.² (TR. 10.)

¹ Hunhoff was kidnapped as she was leaving her mother's home on or about November 4, 2018. (TR. 6.) Hunhoff was found stabbed to death and burned in her vehicle in a remote section of the Santee Indian Reservation on November 7, 2018. (TR. 7.)

² On February 5, 2020, James plead guilty to murdering Hunhoff. (Filing No. 152.)

On November 8, 2018, Agent Howard drove to Defendant's residence in Norfolk, Nebraska to speak to Defendant, but Defendant was not home. (TR. 9-10, 16.) Agent Howard left his card at Defendant's residence. (TR. 10.) Approximately fifteen to thirty minutes later, as Agent Howard was traveling back to Sioux City, Iowa, Defendant called and agreed to allow Agent Howard to come to his residence and speak with him. (TR. 10.) Agent Howard did not tell Defendant he had to speak to him or that Defendant had to allow him in his residence. (TR. 12.) When Agent Howard arrived at Defendant's residence, Defendant let him inside, and they spoke at Defendant's dining room table. (TR. 11.) Defendant's wife was seated on the couch nearby. (TR. 12.) Agent Howard did not provide Defendant a *Miranda* advisement. (TR. 18.)

During the interview, Agent Howard was dressed in plain clothes and his weapon was not visible. (TR. 11.) Agent Howard testified that he did not threaten Defendant or use any physical force during the interview. (TR. 16.) Agent Howard stated the interview was conversational in nature. (TR. 16.) Defendant was not handcuffed or otherwise restrained during the interview. (TR. 17.) Defendant was never told he was under arrest and Agent Howard testified Defendant was free to terminate the conversation at any time. (TR. 17-18.) Agent Howard stated Defendant did not appear to be under the influence of alcohol or drugs and seemed to be of normal intelligence. (TR. 19.) Agent Howard testified he did not use any strong-arm tactics or deceptive strategies during the interview. (TR. 19.) Defendant did not ask for an attorney, refuse to answer any questions, or ask Agent Howard to leave at any point. (TR. 20; Ex. 2.) The interview lasted approximately twelve minutes and Defendant was not arrested. (TR. 16-17.) Agent Howard testified Defendant was not a suspect in the murder at the time. (TR. 17.) Agent Howard's interview with Defendant was audio recorded and transcribed. (TR. 13; Exs. 2, 10.)

A few days before November 21, 2018, Agent Howard contacted Defendant by telephone and asked Defendant if he would come to the Norfolk, Nebraska police department to speak with him.³ (TR. 20-21.) Defendant agreed. (TR. 22.) Agent Howard testified he did not tell Defendant that he had to speak to him or that Defendant would be under arrest if he refused to speak to him.

³ Agent Howard also contacted Defendant's probation officer about Defendant coming to the police station. (TR. 124.) This occurred after Agent's Howard's meeting with Defendant on November 8, 2018, but before November 21, 2018. (TR. 124.) Agent Howard could not recall the exact date. (TR. 124.)

(TR. 21.) Defendant came to the Norfolk, Nebraska police department at about 10:00 a.m. on November 21, 2018. (TR. 22.) Agent Howard testified he did not tell Defendant he was under arrest and did not place Defendant in handcuffs. (TR. 24.)

When he arrived at the police department, Defendant followed Agent Howard into an interview room. (TR. 24.) The interview room is about ten by seven feet and contains a desk and chairs. (TR. 54-55; Ex. 16-17.) There is one door to the room and no windows. (Exs. 16-17.) Agent Howard was dressed in plain clothes and his firearm was not visible. (TR. 27.) When they first started speaking, Agent Howard did not tell Defendant he had to talk to him or that he could not leave. (TR. 26-27.) Agent Howard told Defendant that he appreciated Defendant coming to the police station. (Exs. 3, 11.) Agent Howard told Defendant he was not under arrest and could walk out whenever he wanted. (Exs. 3, 11.) Agent Howard recognized that Defendant needed to be at work by 4:00 p.m. and stated: "As far as I'm concerned you're . . . going to work." (Exs. 3, 11.) Agent Howard testified he did not threaten Defendant, yell, or display his firearm during the interview. (TR. 29.) Agent Howard testified that the interview was conversational in nature. (TR. 29.) Agent Howard stated he did not block the door to the interview room or indicate to Defendant that he could not leave. (TR. 29-30.) Defendant was not handcuffed and was able to move around. (TR. 33-34.) Agent Howard testified that Defendant did not appear to be intoxicated, under the influence of drugs, or sleep deprived. (TR. 30.)

Agent Howard asked Defendant to tell him again who he was with on November 4, 2018 and what they did. (Exs. 3, 11.) Agent Howard did not give Defendant a *Miranda* advisement before speaking to him. (TR. 136.) During the interview, Agent Howard asked Defendant to take a polygraph examination and Defendant agreed. (TR. 34-35; Ex. 11.) Agent Howard testified he did not tell Defendant that he had to take a polygraph, lie to him, or threaten him to agree to the polygraph. (TR. 35-36; Ex. 11.) Agent Howard offered Defendant the opportunity to use the restroom before the polygraph. (Exs. 3, 11.) Agent Howard and Defendant spoke for approximately twenty-five minutes before the polygraph examination. (Ex. 11; TR. 28-29.) The interview was audio recorded and transcribed. (Exs. 3, 11.)

The polygraph examination was administered by FBI Special Agent Lara Zeisler ("Agent Zeisler"). Agent Zeisler is a polygraph examiner and works out of the FBI's office in Omaha,

Nebraska. (TR. 23.) Agent Howard testified Agent Zeilser was present at the Norfolk police department that day because he planned to ask Defendant to take a polygraph examination. (TR. 23.) Agent Zeisler testified that, per polygraph policy, she is not allowed to conduct polygraph examinations in someone's home. (TR. 179, 216.) Part of the reason for this is the need for a controlled environment, such as a police station, for officer safety. (TR. 179, 216.) Agent Zeisler started her contact with Defendant at approximately 11:30 a.m. (TR. 36-37; Ex. 4.)

Before the polygraph examination, Agent Zeisler read Defendant an FD-395 Advise of Rights Form (FBI's *Miranda* Waiver Form). (TR. 37; Ex. 5.) Defendant signed the *Miranda* Waiver Form in front of Agent Zeisler and Agent Howard. Both agents then signed the form as witnesses. (TR. 95, 139, 162-163, 182; Ex. 5.) Agent Zeisler also read Defendant an FD-328, Consent to Interview with Polygraph Form. (TR. 37; Ex. 6.) The Polygraph Consent Form advised Defendant that he was taking the polygraph examination in connection with a "homicide" investigation. (Ex. 6.) The Polygraph Consent Form also advised Defendant that (1) he had the right to refuse to take the polygraph test; (2) had the right to stop the test at any time; and (3) had the right to refuse to answer any individual question. (Ex. 6.) Defendant signed the Polygraph Consent Form.⁴ (TR. 37, 5-6.)

Agent Zeisler testified that Defendant indicated he understood his rights when he signed both the *Miranda* Waiver Form and Polygraph Consent Form. (TR. 184, 186; Ex. 4.) Agent Zeisler stated she did not threaten or lie to Defendant to get him to sign the forms and that her firearm was not visible. (TR. 185.) Agent Zeisler testified that it did not appear to her that Defendant was of low intelligence or that he was intoxicated or under the influence of drugs when he signed the forms. (TR. 208.) Agent Zeisler testified that Defendant was not told he had to engage in the polygraph examination. (TR. 185.) At no time did Agent Zeisler yell, swear or use any physical force on Defendant. (TR. 185.)

After the Defendant signed the *Miranda* Waiver Form and the Polygraph Consent Form, but before the polygraph examination, Agent Zeisler conducted a pretest interview. Agent

⁴ During Agent Zeisler's interview with Defendant, prior to taking the polygraph examination, Defendant, agreed to have his phone searched and signed a form consenting to the search. (TR. 208; Exs. 4, 18.)

Zeisler asked Defendant to tell her his whereabouts on Sunday, November 4, 2018. (TR. 190; Ex.4.) Defendant indicated he was with James and James Kyriss (“Kyriss”) and that they went to Yankton, South Dakota and eventually James and Kyriss drove him back to his house in Norfolk. (TR. 190-195; Ex. 4.) Defendant indicated he got home around 11:00 p.m. and went to bed about midnight. (TR. 195; Ex. 4.) Defendant also indicated he never saw Hunhoff on November 4, 2018. (TR. 195-196; Ex. 4.) Defendant had a significant burn on his hand that Agent Zeisler asked him about as did Agent Howard. (Exs. 3, 4.) Defendant indicated he burned it on the radiator of his car on November 13, 2018. (Ex. 4.)

Prior to the polygraph exam being conducted, Agent Zeisler also reviewed with Defendant all of the test questions she was going to ask him. (TR. 175; Ex. 4.) Defendant was asked if he understood all definitions and questions that had been presented to him, and he indicated he did. (Ex. 4.) Defendant understood he was being interviewed regarding the death of Hunhoff. (TR. 190; Ex. 4.)

During the polygraph, Defendant was offered water, soda, food, cigarette breaks, restroom breaks and was reminded that he was free to leave at any time. (TR. 188, 205; Ex. 4.) Defendant was never deprived of food or water during the polygraph examination. (TR. 207.) Agent Howard testified that Defendant was not under arrest and not restrained during the polygraph. (TR. 40.) The polygraph examination was not recorded. (TR. 25-26.) However, Agent Howard was able to watch and listen to the examination using a closed-circuit television from another area in the police department. (TR. 26.)

After the polygraph examination, Agent Zeisler conducted the post-test phase of the examination, where she went over the results with Defendant and asked any follow-up questions. (TR. 178, 198-199.) Defendant was told he failed the polygraph examination and deception was indicated. (TR. 198-199). After Defendant was told he failed the polygraph examination, he changed his story. (TR. 198; Ex. 4.) Defendant told Agent Zeisler that he hitched a ride from a guy in Ford truck. (TR. 199; Ex. 4.) Defendant went on to describe what the driver of the truck looked like, what he was wearing, what the inside of the truck looked like, and what he and the driver talked about. (TR. 199-200; Ex. 4.) Defendant made Agent Zeisler a handwritten map of

the area he walked from and where he got picked up by the individual in the truck. (TR. 200; Ex. 4.) He also wrote out a physical description of the male that picked him up. (TR. 200; Ex. 4.)

Agent Zeisler's interview with Defendant ended at approximately 4:30 p.m. (TR. 203; Ex. 4.) Agent Zeisler testified it is not uncommon for polygraph examinations to take three to six hours. (TR. 204.) Following the polygraph, Defendant told Agent Zeisler that he wanted to go home. (TR. 205.) Agent Zeisler testified that she informed Defendant he was free to leave at any time. (TR. 206.)

Agent Howard spoke to Defendant again after the polygraph examination in the same interview room.⁵ (TR. 25.) Agent Howard testified that Defendant was not under arrest and was not provided another *Miranda* advisement because Agent Zeisler had previously given Defendant a *Miranda* advisement, which Agent Howard witnessed. (TR. 41, 44.) Agent Howard stated he was not blocking the door to the interview room and Defendant was not restrained or handcuffed. (TR. 43.) During this period, Defendant was allowed to smoke cigarettes in his car, given bathroom breaks, and provided water. (TR. 45.) The following colloquy occurred between Defendant and Agent Howard after the polygraph examination:⁶

JH: Ramon, here's the problem, okay? You know, when you came in here the story was um, "James drove us all home." And I already knew that wasn't true. And you already knew that wasn't true, but it took you how many hours to finally admit that that wasn't true?

RS: I just wanna go home, Jeff.

JH: Okay. Listen to me for a few minutes, okay? Because we got a problem (Clinking noise) You, you, you lied in a serious way. Remember what you asked me yesterday? You said, "Jeff, is this serious?" You asked me that three times if this is serious because you already knew that it was serious. This is serious business, all right?

RS: (UI) go home.

JH: Okay. And you can go home. But let me talk to you for a few minutes, okay?...

Agent Howard continued to speak to Defendant about the results of the polygraph and whether Hunhoff was alive when Defendant was in Hunhoff's vehicle with her and James. The following exchange took place:

⁵ This portion of the interview was also audio recorded and transcribed. (Exs. 3,12-14.)

⁶ "RO" refers to Defendant. "JH" refers to Agent Howard. "UI" means unintelligible and not clear. "VO" is indicated where the Defendant and Agent Howard began speaking over one another.

JH: Y-now listen to me because, I mean you came all the way down here and I know this is bothering you when you told me you only got a couple hours of sleep. We both know the real reason you can't sleep, okay? It's because this is eating you up. This is bothering you (VO)

RS: Can I go home?

JH: okay? Yeah, you can go home. But the thing is, you know,...

Agent Howard then proceeded to talk about Defendant's knowledge of the events that transpired on the night of Hunhoff's abduction. Agent Howard also mentioned what the other individuals in the car said, what cell phone information indicated and the videos he had of James on the night in question. Then, the following colloquy occurred:

RS: I gotta go home.

JH: Are you gonna go home? What do you got to tell me? Did you kill that woman?

RS: No.

JH: Okay. Good. Tell me what happened. How did you get into that car? What was going on (VO)

RS: I wanna go home, Jeff.

JH: Are, R-Ramon, I, I really want you to explain this, okay? I don't want you to k-'cause if you leave it's not resolved. It's not resolved. Right? It's not resolved. I want it to be resolved. If you can tell me you were in that car and she was alive when you got out, then we'll go with that. Can you tell me that? If you can tell me that (VO)

RS: Am I gonna go home?

JH: I need to hear the truth.

RS: I need to go home.

JH: I need to hear the truth. Can I hear the truth, please? (Pause) Joseph, I need you to tell, or yeah, Joseph. I know Joseph was involved, okay? 'Cause some of the stuff that you heard is true. All right? But if you didn't kill her (VO)

RS: Hell no.

JH: then you should be going, (Whooshing noise) "Dodged that bullet," right? When was the last time you were, have you ever been to Santee other than the casino?

RS: No.

JH: Do you even know how to get there?

RS: No.

JH: Okay. That tells me you weren't driving because I know the route that was taken to the, to the casino, okay? And I got video of who was driving, Ramon. If you got out at 11 o'clock, I know when that woman left the house, okay? I got two people telling me what time she must have had people get into her car and I'm just going by time. Because if you got to where your car was at 10:45, you had to have left between 9:30 and, and 9:45. And that's 9:30 more if you were driving the speed limit down, okay? If you guys got into that car I need to know what happened. I

need to know if she was alive when you got out of the car. That's what I need to know, okay?

RS: I (UI) to go home.

JH: I know you wanna go home. I wanna go home, too. I got a 2 hour drive.

RS: I thought you said I could go whenever I want (VO)

JH: You can go whenever you want. I'm not blocking the door. But I know you wanna explain this. And you know as well as I do that if you say, "I killed her," you're not going home.

RS: I didn't kill her.

JH: Okay. Was she still alive when you got out of the car in Norfolk? When the, when the, when her phone is pinging down in Norfolk, okay, was she still alive when you got out of the car?

RS: I wasn't in her car.

JH: You were in her car, Ramon.

RS: Can I go home?

JH: It ma-yeah, you can go home. But don't (VO)

RS: (UI)

JH: I know you, I can't give you your phone back because you, you deleted stuff. That's the other thing we haven't talked about is the stuff you deleted from that night. You deleted stuff. I can't give you your phone back now because now you've lied about that. You're, you're, you're hiding, you're hiding a crime.

RS: I'm not hiding anything.

JH: Ramon, have a seat. Let's talk about this a little more, okay (VO)

RS: I wanna go home, Jeff.

JH: You can go home. But let's, you, you're, you're almost there, Ramon. I know you wanna tell me what really happened. I know you wanna tell me, okay? I got Joseph's version. I got Joseph's version. Tell me, tell me your version. Tell me the sober version, please. Can you tell me the sober version?

RS: I just wanna go home.

JH: And I wanna hear the sober version.

Agent Howard continued to talk to Defendant about being in the car with Hunhoff on the night she was kidnapped and what was occurring in Hunhoff's vehicle that evening. Defendant admitted being in Hunhoff's vehicle and then the following exchange occurred:

RS: Can I go home now?

JH: Can you tell me how you got in the car? How did you guys get in that car?

RS: They picked me up walking.

JH: Um him and the lady? Okay. So he's already in the driver's seat? Okay. And what's going on?

RS: I just wanted to come home.

JH: You just wanted to go home. And I heard you a thousand times, "I just wanted to go home." In fact, one of the very first things you said to me when we first talked about this last week, or on the 8th. It was actually 2 weeks ago now (VO)

RS: Can I go home now?

JH: You're in the car with the lady. I wanna know what she said. I wanna know what was going on in that car (VO)
RS: Nothing. Her and Joseph were talking. I was just sitting (VO)
JH: Okay.
RS: in the back (VO)
JH: What were they talking about?
RS: I don't know.
JH: Well wh- (VO)
RS: I was sitting in the backseat (VO)
JH: Okay.
RS: wanting to go home (VO)
JH: Was there music on?
RS: I think so.
JH: What kind of music?
RS: Country?
JH: Country music? Okay. And where did they pick you up?
RS: Walking down the road.
JH: All right. Um whereabouts?
RS: I don't know. Like I said, I don't know that place.
JH: Okay. So you're out in the middle of nowhere when you got out of the car (VO)

Defendant then backtracked, and denied that he was in the vehicle with Hunhoff and James that evening:

RS: Can I go home now, Jeff?
JH: Can, can I ask you a few more questions, Ramon (VO)
RS: No. I wanna go home.
JH: Ramon (VO)
RS: (UI) I'm gonna be in fricking.
JH: R-Ramon, just, just, let's, we're almost there, okay?
RS: No. I wanna go home (VO)
JH: Ramon, we're almost there, please (VO)
RS: Jeff, I wanna go.
JH: Ramon uh R-Ramon, I don't know that I can let you go now. You're telling me that you've helped kidnap that woman.
RS: I didn't kidnap nobody (VO)
JH: You were in the car with her (VO)
RS: No I wasn't (VO)
JH: Okay? You need to explain to me what was going on.
RS: I wasn't in the car (VO)
JH: Okay.
RS: This is what you guys wanna hear. You said I could go home. I want to go home (VO)
JH: I said, I said you could go home if I was convinced you didn't kill her.
RS: I didn't kill her.

JH: Okay. Great. Tell me about the, the, we've got an hour worth of you sitting in the car driving home. Tell me what was going on, okay? You're listening to country music. You're in the backseat. What's in the backseat, by the way?

RS: Nothing.

JH: Well, there's stuff on the floor or stuff on the seat?

RS: I really didn't pay attention. I wasn't, I wanna go home.

JH: Okay. I heard you. But let me listen to you (VO)

RS: You can't let me go home now?

JH: I wanna hear what happened. You told me you were in her car. We should have this conversation now, okay? You were in her car wh-where you got picked up, where were you? I know you don't know exactly where you are but what is the closest thing there?

RS: Walmart.

JH: You got all the way down to Walmart? Okay. How far is that from where you got out of the car?

RS: I don't know. It was a ways. JH: Uh miles?

RS: It seemed like it.

JH: Okay. And do you know what time it was when she picked you up?

RS: Ssh, that could be around 9 o'clock, 9:30.

JH: 9:30, 9 o'clock? Somewhere in there? Before 10? Okay. And were they getting along?

RS: I guess.

JH: Well did they seem, I mean you would know, right?

RS: They seemed fine to me, like I said.

JH: They seemed fine to you, okay. Were they talking about anything?

RS: No, just giggling. And (VO)

JH: Oh? They were giggling? Okay (VO)

RS: Yeah.

JH: Did you guys stop anywhere?

RS: No.

JH: All right. So you crossed the bridge um from Yankton into Nebraska headed to Norfolk? What, where, where el-what else do you remember seeing as you're driving home?

RS: Nothing really.

JH: Did you stop (VO)

RS: Just cars.

JH: Did you stop at the EZ Stop?

RS: Nope.

JH: Did you see the EZ Stop? Joseph said she bought him a pop. Were you there for that?

RS: No.

JH: That was before you got in the car?

RS: It was probably before or after.

JH: Okay. Well did you see (VO)

RS: Can I go now, Jeff?

JH: Can, just as, Ramon, these are seriously important questions, okay? Did he

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already have a pop? Was he drinking a pop when you got in the car?

RS: No.

JH: He was not. Okay. But he was in the front seat. She was driving? Is that a yes? Okay. You're nodding your head yes. And when you got in the car where were you?

RS: Behind Joseph.

JH: Behind Joseph. Okay. Um did he tell her to pull over and pick you up? Is that what happened?

RS: Probably.

JH: Probably? Okay. Um so you get down, you're just, like how fast was she driving?

RS: Normal. Speed limit.

JH: Speed limit? Okay. What is the speed limit on 81?

RS: 75.

Agent Howard and Defendant then spoke for an extended period about what occurred in Hunhoff's vehicle. Then, the following exchange occurred:

RS: What do you want me say, Jeff? I don't know (VO)

JH: I want you to say the truth, Ramon, because (VO)

RS: I am saying the truth.

JH: You, you lied up until about 5 minutes ago, right? Right?

RS: I had nothing to do with her death.

JH: Okay. But you lied to me up until about 5 minutes ago.

RS: Can I go home?

JH: Right? Did you lie to me up till (VO)

RS: Yes.

JH: about 5 minutes ago? Okay (VO)

RS: 'Cause I didn't want nobody getting in trouble.

JH: Well, Ramon, somebody's dead.

RS: I know.

(Exs. 3, 12.)

Following this exchange, Agent Howard continued to talk to Defendant for another twenty-six minutes. (Exs. 13,14). Defendant never asked to go home or if he could leave. (Exs. 3,13,14.) Agent Howard talked to Defendant about James and if he killed Hunhoff. (Exs. 3, 13.) Agent Howard and Defendant talked about what was going on in car with Hunhoff on the drive to Norfolk and what Defendant touched in Hunhoff's vehicle. (Exs. 3, 4, 13.) Defendant indicated at the end of the interview that if he wanted to get rid of a body, he knows how to do it. (Ex. 14.) If he was the one that did it, he would have gotten rid of the body. (Ex. 14.) During the interview, Defendant offered to give Agent Howard the clothes he was wearing the night Hunhoff went missing. (Exs.

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3,14.) Agent Howard ended the interview by allowing Defendant to go out and smoke before he would meet him outside to take him home.⁷ (TR. 115; Ex. 14.)

In total, Agent Howard spoke with Defendant for about fifty-one minutes after the polygraph examination. (Ex. 12-14.) At no point during the interview did Defendant request an attorney or tell Agent Howard that he wished to remain silent. (TR. 46.) At the end of the interview, Agent Howard did not arrest Defendant and drove Defendant home. (TR. 103.)

DISCUSSION

1. November 8, 2018 Statements

Defendant claims the statements he made to Agent Howard on November 8, 2018 should be suppressed because he was not advised of his *Miranda* rights.⁸ *Miranda* warnings are required when an individual has been subjected to a “custodial interrogation.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A person is in custody for purposes of *Miranda* “either upon formal arrest or under any other circumstances where the suspect is deprived of his freedom of action in any significant way.” *United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990).

In determining whether an individual was in custody, “the critical inquiry is not whether the interview took place in a coercive or police dominated environment, but rather whether the defendant’s freedom to depart was restricted in any way.” *United States v. LeBrun*, 363 F.3d 715, 720 (8th Cir. 2004) (internal quotation omitted). The Court must “consider the circumstances surrounding the questioning and whether, given those circumstances, a reasonable person would have felt free to terminate the questioning and leave.” *United States v. Ferguson*, No. 19-1725, 2020 WL 4280956 (8th Cir. July 27, 2020).

The Eighth Circuit has set out six “common indicia of custody,” commonly referred to as the “*Griffin* factors,” to provide guidance for the custody determination: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was

⁷ Agent Howard had to drive Defendant home because at some point during the interview Defendant’s wife came and got the vehicle Defendant drove to the police station because his wife needed the car. (TR. 103.)

⁸ The government argues suppression is not warranted because Defendant made false statements which are not protected by the Fifth Amendment. Because resolution of this issue is not necessary to the undersigned’s decision, it will not be addressed in this Findings and Recommendation.

free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was placed under arrest at the conclusion of questioning. Griffin, 922 F.2d at 1349.

Having reviewed the record, it is clear to the undersigned that Defendant was not in custody at the time he made statements to Agent Howard on November 8, 2018. Defendant spoke to Agent Howard at his residence. This meeting took place only after Defendant returned Agent Howard's telephone call and agreed that Agent Howard could come to his residence. The interview was short in duration, lasting approximately twelve minutes and was entirely conversational in nature. Defendant was not in handcuffs or physically restrained and Defendant's wife was on the couch nearby. Agent Howard was dressed in plain clothes and did not make any threats, raise his voice, or brandish a weapon. Although Defendant was not informed that he was free to terminate the conversation, he voluntarily replied to questions and there is no evidence that his responses were coerced. Defendant did not refuse to answer questions, request an attorney, or ask Agent Howard to leave the residence. Agent Howard did not indicate to Defendant that he was going to be arrested, nor was Defendant arrested at the end of the conversation. Because Defendant was not in custody when he made the statements, *Miranda* warnings were not required.

Moreover, to the extent Defendant asserts his statements on November 8, 2018 were involuntary, such argument is unpersuasive. "Statements to law enforcement authorities are voluntary if they are the product of an essentially free and unconstrained choice by [their] maker. A statement is not considered involuntary unless the police extorted it from the accused by means of coercive activity." United States v. Vinton, 631 F.3d 476, 482 (8th Cir. 2011) (internal quotations and citations omitted). "The appropriate test for determining whether a statement or confession is voluntary is whether the alleged statement or confession was extracted by threats, violence, or direct or indirect promises, such that [an individual's] will is overborne and his . . . capacity for self-determination critically impaired." United States v. Gipp, 147 F.3d 680, 683 (8th Cir. 1998) (internal quotation omitted).

In making the voluntariness determination, courts consider “the totality of the circumstances in assessing the conduct of law enforcement officials and the suspect’s capacity to resist any pressure.” United States v. Kilgore, 58 F.3d 350, 353 (8th Cir. 1995). Factors taken into consideration in performing this assessment include: (1) the suspect’s age; (2) the suspect’s intelligence and education; (3) whether the suspect was intoxicated or under the influence of drugs; (4) whether the suspect consented after being informed of his right to withhold consent or his *Miranda* rights; and (5) whether the suspect, because of having been previously arrested, was familiar with the protections afforded by the legal system. United States v. Bradley, 234 F.3d 363, 366 (8th Cir. 1990).

The record shows Defendant’s statements to Agent Howard were voluntary. Defendant returned Agent Howard’s telephone call and agreed to allow Agent Howard to come speak to him at his residence. Defendant’s statements were not extracted by threats, violence, or direct or indirect promises. At no time did Agent Howard threaten, restrain, or otherwise coerce Defendant into speaking. There is no indication that Defendant lacked the capacity to terminate the encounter. Defendant was 48 years old at the time of the interview, employed, had an associate degree, and seemed to be of average intelligence. (TR. 187.) There is no evidence that Defendant was intoxicated or under the influence of drugs. Moreover, Defendant is familiar with the protections afforded by the legal system as he has an extensive criminal history which includes an Escape conviction in Colorado. (Ex. 19.) The record shows Defendant’s will was not overborne and his capacity for self-determination was not impaired. Defendant’s statements were voluntary as they were the product of Defendant’s free and unconstrained choice. Therefore, Defendant’s request that the November 8, 2018 statements be suppressed will be denied.

2. November 21, 2018 Statements

Defendant argues the statements he made to Agent Howard and Agent Zeisler on November 21, 2018 should be suppressed because he was not advised of his *Miranda* rights at the commencement of questioning. He further maintains that after the *Miranda* advisement, he invoked his right to remain silent, which officers ignored. He also claims his statements to Agent Howard and Agent Zeisler were involuntary. The undersigned finds Defendant’s arguments unpersuasive.

Having considered the evidence, the undersigned finds a *Miranda* violation did not occur because Defendant was not in custody prior to, during, or following the polygraph. Defendant voluntarily went to the police station to speak with officers. When he arrived, and at several other points while he was at the department, he was informed that the questioning was voluntary and that he was free to leave and not under arrest. Defendant responded to questions and his discussions with the agents were entirely conversational in nature. Agent Howard and Agent Zeisler did not raise their voices, make threats, or brandish weapons at any point.

Contrary to his suggestion, Defendant possessed unrestrained freedom of movement during questioning. Defendant was not handcuffed or physically restrained at any time. Although the questioning took place in a small interview room, this does not mean Defendant was restrained, threatened, or in a police-dominated environment. Defendant was able to move around the room during the interview. Agent Howard did not block the exit to the room to prevent Defendant from leaving. Defendant was provided several breaks to smoke cigarettes and use the restroom. Also, Agent Howard and Agent Zeisler were the only agents involved in the interviews. See United States v. Young, No. 8:12CR24, 2012 WL 2577493, at *5 (D. Neb. July 3, 2012) (finding the defendant was not in a police-dominated environment when he was interviewed by one police officer in a small room); United States v. Galceran, 301 F.3d 927, 930-31 (8th Cir. 2002) (finding ninety-minute interview in a windowless conference room by two officers was not police dominated).

Moreover, Defendant's participation in the polygraph examination did not render him in custody. Defendant was fully aware that he had the right to terminate the polygraph and could leave at any time. Nevertheless, Defendant agreed to the examination and signed a waiver of *Miranda* rights form, as well as a polygraph consent form, which advised him that he had the right to refuse to take the polygraph, could stop the test at any time, and could refuse to answer any individual question. There is no evidence that Defendant was threatened, tricked, or coerced into signing the forms. The Eighth Circuit has recently concluded in a case presenting similar facts that a defendant was not in custody for *Miranda* purposes during or following a polygraph examination. In United States v. Ferguson, No. 19-1725, 2020 WL 4280956 (8th Cir. July 27, 2020), the Eighth Circuit affirmed the district court's denial of a motion to suppress statements made during questioning after a polygraph examination. The Eighth Circuit, applying the *Griffin*

factors, found the defendant was not in custody because he went to the police station voluntarily; was informed that his participation in the polygraph was voluntary and that he could end it at any time; was read and signed a polygraph authorization form; and was not restrained and allowed to take breaks.

When the polygraph examination concluded, Defendant was again advised on multiple occasions that he was free to leave. At the conclusion of the interview, Defendant was not arrested and allowed to leave the police station.⁹ *See United States v. Merrick*, 8:17CR154, 2017 WL 6014263, at *3 (D. Neb. Nov. 15, 2017) (finding the defendant was not in custody “when she voluntarily appeared at the police station for an interview and left when it concluded”).

Even assuming Defendant was in custody at some point, his statements that he wanted to go home were not a clear and unequivocal invocation of his right to remain silent. “During an interrogation, if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” *United States v. Adams*, 820 F.3d 317, 322-23 (8th Cir. 2016) (internal quotation omitted). However, an invocation of the right to remain silent cannot be ambiguous or equivocal. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010). “To adequately invoke this right and effectively cut off questioning, a suspect must indicate a clear, consistent expression of a desire to remain silent.” *United States v. Johnson*, 56 F.3d 947, 955 (8th Cir. 1995) (internal quotation omitted). “A defendant must articulate a desire to remain silent ‘sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request’ to exercise his right to remain silent and terminate the interrogation.” *United States v. Wolfe*, 8:16CR88, 2016 WL 2992911, *3 (D. Neb. May 4, 2016) (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). The defendant’s statements must be considered as a whole when evaluating whether they “indicate an unequivocal decision to invoke the right to remain silent.” *Wolfe*, 2016 WL 2992911, at *3.

After Defendant agreed to take a polygraph examination, Defendant voluntarily signed a *Miranda* waiver, acknowledging that he understood his rights and that he was knowingly waiving them. During the polygraph, Defendant did not request an attorney or refuse to answer questions.

⁹ After the November 21, interview Defendant voluntarily met with Agent Howard two more times. On one of these meetings, Defendant drove around with Agent Howard and showed him the places they went the night Hunhoff was kidnapped.

Following the polygraph, Defendant also did not request an attorney, and resumed speaking to Agent Howard and answered his questions.

During his subsequent interview with Agent Howard, Defendant did state multiple times that he wanted to go home, asked whether he could go home and asked if he was going to be allowed to go home. However, these statements were not an unambiguous expression of his desire to remain silent. *See Reay v. Henry*, No. CIV S-05-0356 GEB DAD P, 2009 WL 1451712, at *20 (E.D. Cal. May 22, 2019) (holding that the petitioner's statements to officers that "I . . . want to go home. I mean, am I gonna go to jail tonight?" and "I don't want to go through it again. I don't know," did not "rise to the level of a clear and unequivocal invocation of the right to remain silent"); *Moore v. Dugger*, 856 F.2d 129, 134 n.1 (11th Cir. 1988) (finding that the defendant's statement: "[w]hen will you all let me go home?" did not constitute invocation of the right to remain silent). After making these statements, Defendant immediately answered questions. At certain points, Defendant even rose from his chair to leave, but then sat down again to continue his conversation with Agent Howard. Agent Howard did not threaten Defendant or force him to stay. Looking at Defendant's words in context, combined with his actions, Defendant did not articulate a desire to remain silent in such a way that a reasonable police officer would understand he wished to exercise his right to remain silent. *See United States v. Adams*, 820 F.3d 317, 321 (8th Cir. 2016) (finding that the defendant's statement that he did not "want to talk" was not an unambiguous invocation of right to remain silent). Defendant's statements, considered as a whole, did not indicate an unequivocal decision to invoke the right to remain silent.

The record also shows Defendant's statements were voluntary. Defendant voluntarily went to the police station to speak with officers. Defendant's statements were not extracted by threats, violence, or direct or indirect promises. At no time did the agents threaten, restrain, or otherwise coerce Defendant into speaking or taking the polygraph examination. Further, there is no indication that Defendant lacked the capacity to terminate the interviews or polygraph examination. Defendant was 48 years old at the time and employed. He was also educated, as he had an associate degree. Defendant was not intoxicated or under the influence of drugs. Due to his extensive criminal history, Defendant was familiar with the protections afforded by the legal system. Defendant's will was not overborne and his capacity for self-determination was not

impaired. Thus, Defendant's request that the November 21, 2018 statements be suppressed will be denied.

Accordingly,

IT IS HEREBY RECOMMENDED to United States District Court Judge Brian Buescher that Defendant's Motion to Suppress Statements (Filing No. 150) be denied.

Dated this 27th day of August, 2020.

BY THE COURT:

s/ Susan M. Bazis
United States Magistrate Judge

ADMONITION

Pursuant to NECrimR 59.2, any objection to this Findings and Recommendation shall be filed within fourteen (14) days after being served with a copy of this Findings and Recommendation. Failure to timely object may constitute a waiver of any such objection. The brief in support of any objection shall be filed at the time of filing such objection. Failure to file a brief in support of any objection may be deemed an abandonment of the objection.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2463

United States of America

Appellee

v.

Ramon Simpson

Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:18-cr-00333-BCB-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 19, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C1

APPENDIX D

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 55. Kidnapping (Refs & Annos)

18 U.S.C.A. § 1201

§ 1201. Kidnapping

Effective: July 27, 2006

Currentness

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when--

(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or

(5) the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties.

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce. Notwithstanding the preceding sentence, the fact that the presumption under this section has not yet taken effect does not preclude a Federal investigation of a possible violation of this section before the 24-hour period has ended.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

APPENDIX D1

(d) Whoever attempts to violate subsection (a) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 46501(2) of title 49. For purposes of this subsection, the term "national of the United States" has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

(g) Special Rule for Certain Offenses Involving Children.--

(1) To whom applicable.--If--

(A) the victim of an offense under this section has not attained the age of eighteen years; and

(B) the offender--

(i) has attained such age; and

(ii) is not--

(I) a parent;

(II) a grandparent;

(III) a brother;

(IV) a sister;

(V) an aunt;

(VI) an uncle; or

APPENDIX D2

(VII) an individual having legal custody of the victim;

the sentence under this section for such offense shall include imprisonment for not less than 20 years.

[(2) Repealed. Pub.L. 108-21, Title I, § 104(b), Apr. 30, 2003, 117 Stat. 653.]

(h) As used in this section, the term "parent" does not include a person whose parental rights with respect to the victim of an offense under this section have been terminated by a final court order.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 760; Aug. 6, 1956, c. 971, 70 Stat. 1043; Pub.L. 92-539, Title II, § 201, Oct. 24, 1972, 86 Stat. 1072; Pub.L. 94-467, § 4, Oct. 8, 1976, 90 Stat. 1998; Pub.L. 95-163, § 17(b)(1), Nov. 9, 1977, 91 Stat. 1286; Pub.L. 95-504, § 2(b), Oct. 24, 1978, 92 Stat. 1705; Pub.L. 98-473, Title II, § 1007, Oct. 12, 1984, 98 Stat. 2139; Pub.L. 99-646, §§ 36, 37(b), Nov. 10, 1986, 100 Stat. 3599; Pub.L. 101-647, Title IV, § 401, Title XXXV, § 3538, Nov. 29, 1990, 104 Stat. 4819, 4925; Pub.L. 103-272, § 5(e)(2), (8), July 5, 1994, 108 Stat. 1373, 1374; Pub.L. 103-322, Title VI, § 60003(a)(6), Title XXXII, §§ 320903(b), 320924, Title XXXIII, § 330021, Sept. 13, 1994, 108 Stat. 1969, 2124, 2131, 2150; Pub.L. 104-132, Title VII, § 721(f), Apr. 24, 1996, 110 Stat. 1299; Pub.L. 105-314, Title VII, § 702, Oct. 30, 1998, 112 Stat. 2987; Pub.L. 108-21, Title I, § 104(b), Apr. 30, 2003, 117 Stat. 653; Pub.L. 109-248, Title II, § 213, July 27, 2006, 120 Stat. 616.)

18 U.S.C.A. § 1201, 18 USCA § 1201

Current through P.L. 117-214. Some statute sections may be more current, see credits for details.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,) Case No. 8:18CR333
)
Plaintiff,) DEFENDANT'S PROPOSED ELEMENTS
)
) JURY INSTRUCTIONS
vs.) (COUNT III)
)
RAMON SIMPSON,) FILED RESTRICTED
)
Defendant.)

Defendant Simpson, by and through his undersigned counsel, submits the following elements jury instructions pertaining to Count III of the Second Superseding Indictment.

Dated this 19th day of March, 2021.

RAMON SIMPSON, Defendant,

By /s/ Matthew M. Munderloh
Matthew M. Munderloh, No. 22698
JOHNSON & MOCK, PC, LLO
9900 Nicholas Street, Suite 225
Omaha, NE 68114
(402) 346-8856
mmunderloh@johnsonandmock.com

CERTIFICATE OF SERVICE

I, Matthew M. Munderloh, hereby certify that on March 19, 2021, I electronically filed the above document with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all parties of record.

/s/ Matthew M. Munderloh
Matthew M. Munderloh

INSTRUCTION NO. _____

Count III: Kidnapping Resulting in Death

The crime of kidnapping resulting in death, as charged in Count III of the Second Superseding Indictment, has five elements, which are:

One, the defendant, Ramon Simpson, unlawfully and willfully seized, confined, kept, abducted, or detained Phyllis Hunhoff without her consent;

Two, the defendant, Ramon Simpson, held Phyllis Hunhoff for ransom, reward, or otherwise;

Three, the defendant, Ramon Simpson voluntarily and intentionally transported Phyllis Hunhoff while she was seized, confined, kept, abducted, or detained;

Four, the transportation was in interstate commerce; and

Five, death resulted from the kidnapping.

"Interstate commerce" means commerce or travel between one state and another state. The government must prove that the defendant crossed a state line while intentionally transporting Phyllis Hunhoff.

The government does not have to prove that the defendant knew he was crossing a state line.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, Ramon Simpson, then you must find the defendant guilty of the crime charged in Count III; otherwise, you must find the defendant, Ramon Simpson, not guilty of this crime.

Source: 18 U.S.C. § 1201; Eighth Circuit Model Jury Instructions, 6.18.1201.

INSTRUCTION NO. _____

Aiding and Abetting Kidnapping Resulting in Death

A person may also be found guilty of kidnapping resulting in death even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of kidnapping resulting in death.

In order to have aided and abetted the commission of a crime, a person must:

- (1) have known kidnapping resulting in death was being committed or going to be committed;
- (2) have had enough advance knowledge of the extent and character of the kidnapping resulting in death that he was able to make the relevant choice to walk away from the kidnapping resulting in death before all elements of the kidnapping resulting in death were complete;
- (3) have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of kidnapping resulting in death; and
- (4) have intended a kidnapping resulting in death to occur.

For you to find the defendant, Ramon Simpson, guilty of kidnapping resulting in death by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the elements of kidnapping resulting in death were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

You may infer the defendant had the requisite advance knowledge of the kidnapping resulting in death if you find the defendant failed to object or withdraw from

actively participating in the commission of kidnapping resulting in death after the defendant observed another participant complete the kidnapping resulting in death.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

Source: 18 U.S.C. § 1201; Eighth Circuit Model Jury Instructions, 5.01; *Rosemond v. United States*, 572 U.S. 65 (2014) (defendant must have intent to aid and abet the entire crime). That is, in *Rosemond*, it was insufficient for the defendant to have simply had advanced knowledge of, and intended, a drug sale; instead, he must have had advanced knowledge of, and intended, an armed drug sale. The defendant must have "chosen ... to align himself with the illegal scheme in its entirety." *Rosemond*, at 78 (emphasis added). Similarly here, any aiding and abetting instruction must include language that the defendant had advanced knowledge of, and intended, not just a kidnapping—but a kidnapping resulting in death.

APPENDIX F

INSTRUCTION NO. 9

Count III: Kidnapping Resulting in Death

The crime of kidnapping resulting in death, as charged in Count III of the Second Superseding Indictment, has five elements, which are:

One, the defendant, Ramon Simpson, unlawfully seized, confined, kept, or detained Phyllis Hunhoff without her consent;

Two, the defendant held Phyllis Hunhoff for some purpose and benefit;

Three, the defendant voluntarily and intentionally transported Phyllis Hunhoff while she was seized, confined, kept, or detained;

Four, the transportation was in interstate commerce; and

Five, death resulted from the kidnapping.

“Interstate commerce” means commerce or travel between one state and another state. The government must prove that the defendant crossed a state line while intentionally transporting Phyllis Hunhoff.

The government does not have to prove that the defendant knew he was crossing a state line.

The government does not have to prove that Phyllis Hunhoff was alive when she was transported across a state line.

If all of these elements have been proved beyond a reasonable doubt as to the defendant then you must find the defendant guilty of the crime charged under Count III; otherwise you must find the defendant not guilty of this crime under Count III.

INSTRUCTION NO. 10

A person may also be found guilty of kidnapping resulting in death even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of kidnapping.

In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed:

- (1) have known kidnapping was being committed or going to be committed;
- (2) have had enough advance knowledge of the extent and character of the kidnapping that he was able to make the relevant choice to walk away from the kidnapping before all elements of the kidnapping were completed;
- (3) have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of kidnapping; and
- (4) have intended to kidnap Phyllis Hunhoff.

For you to find the defendant guilty of kidnapping resulting in death by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the elements of kidnapping resulting in death were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

You may infer the defendant had the requisite advance knowledge of the kidnapping if you find the defendant failed to object or withdraw from actively participating in the commission of kidnapping after the defendant observed another participant complete the kidnapping.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.