IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29994

STATE OF SOUTH DAKOTA

Plaintiff and Appellant,

v.

FITSUM GHEBRE,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE BRADLEY G. ZELL
Circuit Court Judge

APPELLANT'S BRIEF

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Order Granting Petition for Allowance of Appeal granted on June 6, 2022

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STATE OF SOUTH DAKOTA,

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PRELIMINARY STATEMENT

The Plaintiff and Appellant, State of South Dakota, is referred to as "the State." The Defendant and Appellee, Fitsum Ghebre, is referred to as "the Defendant." The Honorable Bradley G. Zell presided over the criminal file and is referred to as "the Circuit Court." All other individuals are referred to by name or initials. Relevant documents are referred to as follows:

Minnehaha Criminal File No. 49CRI21-2644 ..... SR

Suppression Hearing Transcript ..... SH

Exhibit 1: Law Enforcement Video ..... LEV

Findings of Fact and Conclusions of Law ..... COL

The appropriate page numbers follow all document designations.

JURISDICTIONAL STATEMENT

On April 28, 2021, the Defendant was indicted by a Minnehaha County Grand Jury on one count of Rape in the Third Degree (SDCL § 22-22-1(4)) and one count of Sexual Contact with Person Incapable of Consenting (SDCL § 22-22-7.2). The

Defendant, through counsel, filed a Motion seeking to suppress statements made to law enforcement. On January 18, 2022, a Suppression Hearing was held.

The Circuit Court filed an Order Suppressing Defendant's Statements as well as its Findings of Fact and Conclusions of Law on May 13, 2022. The State timely filed a Petition for Allowance of Appeal from Intermediate Order on May 17, 2022. On June 6, 2022, the Supreme Court issued an Order Granting Petition for Allowance of Appeal from Intermediate Order and said Order was filed with the Second Judicial Clerk on June 9, 2022. Thus, this Court has jurisdiction to hear this appeal under SDCL 23A-32-12.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ERRED WHEN IT DETERMINED DEFENDANT'S STATEMENTS WERE INVOLUNTARY?

The Circuit Court determined that the Defendant's statements were involuntary under the Due Process Clause of the Fourteenth Amendment.

State v. Morato, 2000 S.D. 149, 619 N.W.2d 655.

State v. Tuttle, 2002 S.D. 94, 650 N.W.2d 20.

State v. Holman, 2006 S.D. 82, 721 N.W.2d 452.

State v. Fisher, 2011 S.D. 74, 805 N.W.2d 571.

STATEMENT OF THE CASE

The Defendant was indicted for one count of Rape in the Third Degree (SDCL § 22-22-1(4)) and one count of Sexual Contact with Person Incapable of Consenting (SDCL § 22-22-7.2). SR:4.

The Defendant filed a Motion to Suppress seeking to suppress all statements made by the Defendant during the execution of the court ordered search warrant for

the Defendant's DNA. SR:17. A Suppression Hearing was held on January 18, 2022. SR:97. The Defendant's briefs in support of his Motion to Suppress asserted that the statements obtained by law enforcement officers violated the Defendant's *Miranda* rights as well as his due process rights. *See* SR:19 & 46.

Following the Suppression Hearing, the Circuit Court filed its Memorandum Decision on April 5, 2022. SR:81. The Circuit Court denied the Defendant's Motion to Suppress with respect to the Defendant's claim that the statements were obtained in violation of *Miranda*. SR:81-83. However, the Circuit Court concluded that the Defendant's statements were involuntary in violation of the Defendant's due process rights and ordered Defendant's statements to be suppressed. SR:83-84. Findings of Fact and Conclusions of Law were filed by the Circuit Court on May 13, 2022. SR:92

The State filed its objections to the Circuit Court's Findings of Fact and Conclusions of Law on May 13, 2022. SR:87. On May 13, 2022, the Circuit Court filed an Order suppressing the Defendant's statements on the issue of voluntariness under the Due Process Clause. SR:91.

STATEMENT OF FACTS

On November 30, 2020, law enforcement was dispatched to 640 N. Dakota Ave., Sioux Falls, South Dakota for a sexual assault report. The alleged victim, S.M. (DOB 8-2-1998), reported that she had been raped during the morning hours of Sunday, November 29, 2020. *See* Affidavit in Support of Search Warrant, ¶ 1-2.

S.M. reported that she woke up in an unfamiliar apartment lying on a bed next to an African male. S.M. stated that she had "never seen the guy before in [her] life." Id, ¶ 3. S.M. informed officers that she was drinking heavily the night before and

thought she may have blacked out. Id, ¶ 4. S.M. reported that when she woke up her pants were down and she was not wearing underwear but the rest of her clothes were still on. Id, ¶ 5. S.M. couldn't find her cellphone or her keys so she requested that the male give her a ride to her friend's house and to let her use his cellphone; and she used the male's phone to call her own phone. Id. Eventually, the male gave S.M. a ride to her friend's house in a "dark or black SUV." Id.

As part of the investigation by law enforcement, S.M. was transported to the Emergency Room at Avera Hospital, where a sexual assault examination was performed. Id, ¶ 7.

On December 7, 2020, Detective Schoepf (hereinafter "Detective"), with the Sioux Falls Police Department, called the phone number provided by S.M. and made contact with a male, later identified as the Defendant. There was a short phone conversation but the call abruptly ended. Id, ¶ 8.

On February 19, 2021, the results from the sexual assault examination were received by the Detective. The results indicated that male DNA was found on S.M.'s mons pubis and cervix and that a sample could be submitted for comparative analysis. Id, ¶ 9-10.

On February 22, 2021, the Detective applied for, and was granted, a search warrant for a sample of Defendant's DNA via buccal cheek swabs. *See* Search Warrant (SWA21-178). On February 24, 2021, the Detective drove to Defendant's apartment building and parked down the street from the complex. SH, pg. 7, line 25 through pg. 8, line 1. Once Defendant left his residence, the Detective radioed for a marked police vehicle to conduct a traffic stop on Defendant to assist the Detective in

executing the search warrant and obtain a sample of Defendant's DNA. SH, pg. 8, lines 2 – 20. Officer Jason Christensen with the Sioux Falls Police responded and stopped Defendant in his vehicle near E. 6th Street and N Sherman Ave., in Sioux Falls, SD. SH, pg. 8, line 24 through pg. 9, line 12.

After initial contact was made with the Defendant, the Detective had the Defendant come back to his unmarked vehicle and sit in the passenger seat while the Detective executed the search warrant. SH, pg. 10, lines 16-18. While the Defendant was seated in the passenger seat, the Defendant was unrestrained and the passenger door was kept open during the encounter. SH, pg. 11, lines 7-8. Officer Christensen stood next to the passenger door, recording the interaction through his body camera. SH, pg. 19, lines 9-13.

The Detective informed the Defendant about the search warrant for his DNA related to a rape allegation. SH, pg. 11, line 16 (*see also* LEV 15:42:40 – 15:43:07). The Detective did not intend nor did he make an arrest when he spoke to the Defendant; rather, the purpose of the contact was to collect the Defendant's DNA sample. SH, pg. 10, lines 3-8. The Detective then extracted a DNA sample from the Defendant. LEV 15:44:45.

After the Detective obtained a DNA sample, the Detective filled out a search warrant inventory sheet and asked the Defendant whether he wanted to sign the inventory sheet. The Defendant declined to sign the inventory sheet. LEV 15:44:30 – 15:45:47. After the Defendant declined to sign the inventory sheet, he stated that he did "not know that girl." LEV 15:45:47 – 15:45:52.

After the Defendant made that statement, the following discussion occurred

between the Detective and the Defendant:

> Detective: "Do you have any questions for me? Do you want to talk about what happened at all? We're not going to talk about it right here, but we can make an arrangement to talk about it. Do you want to talk about what happened? Here's your driver's license. You're free to go. Do you want to talk about what happened though? Here's my thing man, if you had sex with her, that's what you need to explain to me now. Okay? Not right this minute, but call me and we'll talk about it. Okay? Here's my card. If you had sex with her, you had sex with her. The DNA is going to tell us on that kit if that was you that had sex with her."
>
> Defendant: "I have a problem. How I..."
>
> Detective: "What's that?"
>
> Defendant: "Have problem to"
>
> Detective: "You have problems?"
>
> Defendant: "why I sex, says..."
>
> Detective: "I don't understand."
>
> Defendant: "I have problem for sex."
>
> Detective: "Okay?"
>
> Defendant: "I can't go...[inaudible or in Tigrinya]
>
> Detective: "You can't achieve an erection, is that what I'm understanding?"
>
> Defendant: "Yes."
>
> Detective: "Okay. Did you have oral sex with her? Or stick your fingers in her?"
>
> Defendant: "No."
>
> Detective: "No. Okay, so that's not going to be your DNA on the sexual assault kit?"
>
> Defendant: [inaudible]
>
> Detective: "No? Okay."
> Defendant: [inaudible]

Detective: "Okay. Okay. We'll be in contact once that comes back. Okay?" LEV 15:46:03 – 15:47:44.

The Detective stated at the suppression hearing that there were difficulties in communicating with Defendant but the Defendant never gave any indication that he didn't understand the Detective. SH, pg. 15, lines 12-20. The Detective wasn't sure if it was because of the Defendant's thick accent or the fact that the Defendant spoke quietly. SH, pg. 18, lines 14-18. The Detective also stated that he wasn't sure if the Defendant's confusion was because of a language barrier or "why the contact". SH, pg. 15, lines 9-11. The Detective also testified that the Defendant was able to understand directives from law enforcement. SH, pg. 15, lines 14-20.

The total time of the interaction between law enforcement and the Defendant lasted approximately nine minutes and twenty seconds. LEV 15:38:35 – 15:47:50. The Defendant was seated in the Detective's vehicle for approximately five minutes and twenty seconds. LEV 15:42:30 – 15:47:50. Much of the time was spent in the vehicle involved the process of collecting the DNA sample. After the DNA sample was collected, the back and forth between the Detective and the Defendant lasted approximately two minutes. LEV 15:45:50 – 15:47:44.

On April 28, 2021, the Defendant was indicted on one count of Rape in the Third Degree (SDCL § 22-22-1(4)) and one count of Sexual Contact with Person Incapable of Consenting (SDCL § 22-22-7.2). SR:4.

On July 29, 2021, the Defendant filed a Motion to Suppress based upon the claim that the statements obtained by law enforcement were in violation of the

Defendant's *Miranda* rights. SR:17. The Defendant later added the alternative claim that the statements were also in involuntary. SH, pg. 3, lines 8-13.

On January 18, 2022, a Suppression Hearing was held and on April 5, 2022, the Circuit Court filed its Memorandum Decision concluding that no *Miranda* violation occurred based upon the following:

> "Defendant was not "in custody" for purposes of *Miranda* at the time he provided statements to Detective Schoepf. Defendant was told he did not have to talk if he did not want to and that he was free to leave following the execution of the search warrant for his DNA. Further, it is not alone dispositive to the custody analysis that Defendant was the prime suspect in the alleged rape. See *Morato*, 2000 S.D. 149, ¶ 20, 619 N.W.2d at 661 ("[e]ven an unequivocal 'statement from an officer that the [defendant] is a prime suspect is not, in itself dispositive of the custody issue[]...")."
>
> "Detective Schoepf did not intend to make an arrest when he questioned Defendant; rather, the purpose of his contact with Defendant was to collect the DNA sample. Defendant was not handcuffed, the door to the vehicle was left partially open, and Detective Schoepf stated numerous times that Defendant was not under arrest and was free to leave after the swab was completed."

SR: 81. However, the Circuit Court concluded that the Defendant's statements were involuntary under due process based upon the following:

> "Based on the totality of the circumstances surrounding Defendant's interaction with law enforcement, the Court finds that Defendant's admissions to Detective Schoepf were involuntary under due process. "
>
> "Law enforcement disregarded Defendant's unresponsiveness, confusion, and difficulty in speaking and understanding English in a police-dominated atmosphere related to a rape allegation. Rather than call an interpreter or utilize another form of assistance in speaking with Defendant, law enforcement continued on with executing the search warrant on the side of the road and speaking with Defendant about the rape allegation."

SR:81.

ARGUMENT

THE CIRCUIT COURT ERRED WHEN IT SUPPRESSED DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT[1].

A. Standard of review.

"Although there are often subsidiary factual questions deserving deference, the voluntariness of a confession is ultimately a legal question." *State v. Holman*, 2006 S.D. 82, ¶ 13 (quoting *State v. Tuttle*, 2002 S.D. 94, ¶ 20 (additional citations omitted)). "This Court reviews the entire record and makes an independent determination of voluntariness." *Id* (citing *Tuttle*, 2002 S.D. at ¶ 20, 650 N.W.2d at 30 (additional citations omitted). The State must establish the voluntariness of a confession or statement by a preponderance of the evidence. *State v. Fisher*, 2011 S.D. 74, ¶ 18 (citing *State v. Tuttle*, 2002 S.D. 94, ¶ 21 (additional citations omitted)).

B. Voluntariness under Due Process.

In deciding whether the State has met this burden, the Court reviews "the effect [that] the totality of the circumstances had upon the will of the defendant and whether the defendant's will was overborne." *State v. Morato*, 2000 S.D. 149, ¶ 12 (quoting *State v. Smith*, 1998, S.D. 6, ¶ 7). Specifically, "[t]he factual inquiry centers on (1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure. *State v. Tuttle*, 2002 S.D. 94, ¶ 22, (citing *Mincey v. Arizona*, 437 U.S. 385, 399-401, 98 S.Ct. 2408, 2417-18, 57 L.Ed.2d 290, 304-306 (1978)).

1. Police conduct did not create pressure.

---

[1] In the present matter, the circuit court concluded that the objective conditions surrounding the encounter remained noncustodial and no *Miranda* violation occurred. COL, ¶ 8 (See also *Morato*, 2000 S.D. at ¶ 20)

As to the first element, "[a] defendant's will is overborne, making the statement involuntary, when interrogation tactics and statements are so manipulative or coercive as to deprive the defendant of the 'ability to make an unconstrained, autonomous decision to confess.'" *State v. Fisher*, 2011 S.D. 74, ¶19 (quoting *Morato*, 2000 S.D. at ¶ 12 (quoting *State v. Gesinger*, 1997 S.D. 6, ¶ 12 (additional citations omitted)).

A confession or statement is "involuntary if police overreaching is the actual moving cause" for the confession or statement. *Tuttle*, 2002 S.D. at ¶ 23, (quoting *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 203, 50 L.Ed.2d 194, 197 (1976))(see also *U.S. v. LeBrun*, 363 F.3d 715, 724 (8th Cir. 2004)(en banc)(citations omitted) ("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.")). The actions of law enforcement "must be more than a 'but for' type causation, for 'causation in that sense has never been the test of voluntariness.'" *Tuttle*, 2002 S.D. at ¶ 23 (quoting *Hutto*, 429 U.S. at 30, 97 S.Ct. at 203). "Put from another perspective, even with police coercion, a confession cannot be held to have been obtained by the exertion of such improper influence, unless it is the direct cause for the confession." *Id.*

In the present matter, the Detective came into contact with the Defendant by initiating a traffic stop in order to execute a search warrant. SH, pg. 8-9. The passenger door remained open with Officer Christensen standing outside the passenger door. SH, pg. 19, lines 9-13. The Detective explained why the Defendant was stopped and

explained why the Detective was executing the search warrant. SH, pg. 11, line 16 (see also LEV 15:42:40 – 15:43:07).

After completing the search warrant, the Detective filled out the search warrant inventory sheet and asked if the Defendant wanted to sign the sheet but the Defendant declined to sign the inventory sheet. LEV 15:44:30 – 15:45:47. Spontaneously, the Defendant stated that he did "not know that girl." LEV 15:45:47 – 15:45:52.

The Detective asked the Defendant, "Do you want to talk about what happened though?" The Detective then stated, "Here's my thing man, if you had sex with her, that's what you need to explain to me now. Okay? Not right this minute, but call me and we'll talk about it. Okay? Here's my card. If you had sex with her, you had sex with her." LEV, at 15:46:34-50. The Detective stated, "the DNA is going to going to tell us, on that kit, if that was you that had sex with her." The Defendant then stated, "I have a problem. How I". LEV, at 15:46:50. A back and forth between the Detective and the Defendant occurred where the Defendant confirmed with the Detective that he couldn't achieve an erection. The only direct questions asked by the Detective were whether the Defendant had oral sex with the alleged victim or if the Defendant digitally penetrated the alleged victim. To which the Defendant responded, "No." LEV, at 15:46:15-27.

The first statement by the Defendant, that he did not know the girl, was not prompted by any question or statement from the Detective. The additional statements from the Defendant came after the Detective handed the Defendant his card, told the Defendant he was free to go, asked the Defendant if he wanted to talk about what

happened, and told him to give him a call later to discuss whether the Defendant had sex with the alleged victim.

No threats of adverse consequences, if the Defendant was not willing to cooperate, were made by the Detective. See *State v. Tuttle*, 2002 S.D. 94. No deception or misrepresentations were made by the Detective. See *State v. Darby,* 1996 SD 127, ¶ 31. No promises of leniency for cooperation were promised by the Detective. See *State v. Holman*, 2006 S.D. 82.

The Circuit Court's conclusion centered upon the perception that law enforcement ignored the perceived language barrier. *See* COL, ¶ 15. However, the Circuit Court erred due to the fact that that overreach must be the actual moving cause for the confession or statement. *Tuttle*, 2002 S.D. at ¶ 23 (citation omitted). There "must be more than a 'but for' type causation, for 'causation in that sense has never been the test of voluntariness.'" *Id.* "Put from another perspective, even with police coercion, a confession cannot be held to have been obtained by the exertion of such improper influence, unless it is the direct cause for the confession." *Id.*

The analysis provided by the Circuit Court erroneously rests on a "but for" causation analysis instead of the "direct cause" analysis required by the test of voluntariness. See *Id* (see also *Thatsaphone v. Weber*, 137 F.3d 1041, 1046 (8th Cir. 1998)("Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment.")). The record lacks any form of any deception, coercion, manipulation, promises (express or implied), or improper influence by the Detective. While the Defendant may not have made the statements but for the interaction with

law enforcement, nothing in the record supports the conclusion that the Defendant's statements were directly caused by police overreach.

2. The Defendant demonstrated the capacity to resist pressure.

In analyzing the second factual inquiry, the court looks at the suspect's capacity to resist the pressure of police. *Tuttle*, 2002 S.D. at ¶ 22. This Court stated in *Tuttle*:

> we examine such concerns as the defendant's age; level of education and intelligence; the presence or absence of any advice to the defendant on constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; the use of psychological pressure or physical punishment, such as deprivation of food or sleep; and the defendant's prior experience with law enforcement officers and the courts. Finally, deception or misrepresentation by the officer receiving the statement may also be factors for the trial court to consider; however, the police may use some psychological tactics in interrogating a suspect.

Id (citing *State v. Darby,* 1996 SD 127, ¶ 31). "The presence or absence of any one of these factors is not dispositive as we review voluntariness in the totality, considering all the circumstances surrounding the defendant's encounter with law enforcement." *Morato*, 2000 S.D. at ¶ 13 (citing *State v. Smith*, 1998 S.D. 6).

The *Morato* case cited by the Defendant and the Circuit Court is analogous to the present case. In *Morato*, the Court analyzed the defendant's age, employment, the length of the questioning, and the fact that English was the defendant's second language. The aforementioned factors were juxtaposed against the defendant's previous experience with law enforcement. *Morato*, at ¶ 14 (citing *Smith*, 1998 S.D. 6, ¶ 9)(see also *State v. Darby*, 1996 S.D. 127, ¶ 30). This Court found that the interview that took place in *Morato* did not have any trickery or deception, and it was not prolonged (less than 15 minutes). *Id,* at ¶ *15-16.* The defendant was twenty-one with

little education but gainfully employed. This Court also cited to the fact that defendant also had two previous encounters with law enforcement. *Id*, at ¶ 14. When all of these factors were put together, the totality of the circumstances led this Court to hold that the defendant's statements were voluntary. *Id.*

Much like *Morato*, the interaction between law enforcement and the Defendant in the present case did not involve prolonged questioning. The video shows that the total interaction between law enforcement and the Defendant lasted approximately twelve minutes. The interaction between the Detective and the Defendant, while seated in the Detective's vehicle, lasted approximately five minutes and fifteen seconds. Much of the time was spent in the vehicle involved the process of collecting the DNA sample. After the DNA sample was collected, the back and forth between the Detective and the Defendant lasted approximately two minutes.

The Defendant in the present matter was forty years old at the time he made the statements. The Defendant in the present matter also has previous experience with law enforcement. In 2016, the Defendant was arrested for DWI. See *State v. Ghebre*, 49CRI16-1361. In 2020, the Defendant was again arrested for DWI. See *State v. Ghebre*[2], 49CRI20-7887. In the 2020 case, the Defendant even represented himself *pro se* and received a suspended imposition of sentence.

Much like *Morato*, the encounter was straightforward, with no trickery or deceit. *Morato*, 2000 S.D. ¶ 16. No rule of law prohibits law enforcement from

[2] Appellant requests that this Court take judicial notice of these proceedings under SDCL 19-19-201 as well as the records found therein. These are public records filed in criminal proceedings and their accuracy "cannot reasonably be questioned." SDCL 19-19-201(b)(2); *Nauman v. Nauman*, 336 N.W.2d 662, 664-65 (S.D. 1983)(court may take judicial notice of public or official records).

informing suspects about why the DNA sample is being collected. If anything, the officer's statements about the DNA sample only served to better inform the Defendant about the procedures of the case. See *Id.*

Much like *Morato*, the Defendant was not deprived of food or sleep, as the entire length of encounter lasted approximately nine minutes, and the statements made by the Defendant occurred during a brief back and forth that lasted approximately two minutes. The defendant was free of any physical restrain, his car door was left open, and he was advised that he was free to leave.

In *Tuttle*, *State v. Holman*, 2006 S.D. 82, and *State v. Fisher*, 2011 S.D. 74, this Court noted the same factors such as defendants' experience with law enforcement, lack of deprivation of food and water, or abuse in any fashion, and the briefness of the interrogations. In *Holman* and *Tuttle*, the interrogations lasted less than an hour. In *Fisher*, the defendant was interviewed for six hours but this Court held the defendant's statements to be voluntary.

In the case of *State v. Gesinger*, 1997 S.D. 6, ¶ 14, the defendant was not read his *Miranda* rights; however, this Court held that they could not find, "under the totality of the circumstances which must be considered that Gesinger's statements were the product of police coercion or that his will was overborne." *Id* (citing *State v. Corder*, 460 N.W.2d 733, 737 (S.D. 1990). The court noted that at all times the defendant understood what was being asked of him. *Id.* This Court found it important to note that the length of the questioning was not long and limited to one question. Again, the back and forth between the Detective and the Defendant in this case lasted

approximately two minutes. The Detective's questions were in response to the Defendant's statements and the amount of questions asked was minimal.

The Detective testified that the confusion shown by the Defendant appeared to center on why law enforcement was contacting him. SH, pg. 15, lines 7-11. The video tape shows that Defendant responded appropriately to prompts from law enforcement. The Defendant made no confession and denied knowing the alleged victim. Thus, understanding the allegation being made against him. The Defendant even declined to sign the acknowledgment form when asked by the Detective. Further demonstrating that the Defendant's will was not overborne when he voluntarily made statements to the Detective. When reviewing the facts under the totality of the circumstances, which must be considered, the Defendant's will was not overborne.

Notwithstanding the Circuit Court's erroneous "but for" analysis above, the Circuit Court also erroneously blurs its analysis of the Defendant's capacity to resist pressure with a *Miranda* waiver analysis. The Circuit Court concluded that it was "not persuaded...that Defendant understood his rights at the time [of the stop]." COL, at ¶ 16. The Circuit Court intertwines a valid *Miranda* waiver analysis into its analysis of whether the Defendant's non-custodial statements were voluntary. (See *Tuttle*, 2002 S.D. at ¶ 9 ("(2) the defendant was fully aware that those rights were being waived and of the consequences of waiving them.")(citation omitted)). Even though the validity of a *Miranda* waiver and the voluntariness of an admission or statement are parallel inquires, they are two separate inquires. *Tuttle*, 2002 S.D. at ¶ 20.

This Court has held that *Miranda* warnings are only required when a person is subjected to a custodial interrogation. See *State v. Wright,* 2009 S.D. 51, ¶ 19

(citations omitted). The Circuit Court concluded that the "Defendant was not in custody for purposes of *Miranda* at the time he provided statements to [the Detective]." COL, ¶ 8.[3] Therefore, the Detective was not required to advise the Defendant of his *Miranda* rights nor was the Detective, or the Circuit Court, required to confirm that the Defendant understood his rights when he provided the statements to the detective.[4]

For the purposes of voluntariness under due process, the Circuit Court only needed to analyze whether the statements were voluntary by analyzing (1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure. *Tuttle*, 2002 S.D. at ¶ 22. Not whether the Defendant fully understood his rights. As stated above, there was no coercion or improper influence by law enforcement and the Defendant demonstrated the capacity to resist pressure. The analysis provided by the Circuit Court would require law enforcement to utilize an interpreter for every traffic stop or non-custodial interrogation if it appeared that an

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[3] The United State Supreme Court has recognized "that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of...law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.'" *Beckwith v. U.S.*, 425 U.S. 341, 347-48, 96 S.Ct. 1612, 1617 (1976)(citation omitted). However, the present case does not present special circumstances that warrant a finding that the Defendant's will was overborn.

[4] The District of Columbia has provided more protections for those who require an interpreter yet the Court of Appeals held that the right to an interpreter has the same standard as *Miranda* warnings. (*See* D.C. Code § 2-1902 (see also *Morales v. U.S.*, 866 A.2d 67, 71 (D.C. 2005) ("the protections of the Interpreter Act similarly apply only when an individual is in custody within the meaning of Miranda)(citing *Castellon v. United States*, 864 A.2d 141, 152 (D.C. 2004) ("[T]he definition of custody for *Miranda* purposes is the appropriate standard for determining whether the circumstances are such that an individual's right to a qualified interpreter arises under the [Interpreter] Act.")).

interpreter may be needed. Under the Circuit Court's analysis, every DWI investigation would have to immediately cease and no further questions could be asked if it appeared that an interpreter may be needed. Such analysis goes beyond the due process analysis required to determine whether a statement or confession was voluntary.

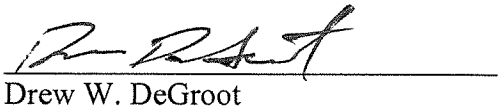
For the reasons stated above, the Circuit Court erroneously determined that the Defendant's statements were involuntary and its Order suppressing the Defendant's statements must be reversed.

CONCLUSION

The State requests that this Court reverse the Circuit Court's determination that the Defendant's statements were involuntary under the Due Process Clause of the Fourteenth Amendment. Respondent also requests that this Court remand this matter with specific instructions to deny the Defendant's request to suppress his statements made to law enforcement.

Respectfully submitted,

DANIEL HAGGAR
STATE'S ATTORNEY
MINNEHAHA COUNTY



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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains 5,219 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2019.

Dated this 22nd day of July, 2022.

Drew W. DeGroot
Deputy State's Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of July, 2022, a true and correct copy of Appellant's Brief in the matter of *State v. Ghebre*, #29994, was served via electronic mail upon Beau Blouin, bblouin@minnehahacounty.org.

Drew W. DeGroot
Deputy State's Attorney

APPENDIX

1. Search Warrant and Affidavit in Support of Search Warrant.
2. Memorandum Decision (CRI. File No. 21-2644)
3. Findings of Fact and Conclusions of Law (CRI. File No. 21-2644)
4. Order Suppressing Defendant's Statements (CRI. File No. 21-2644)

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MAGISTRATE DIVISION

STATE OF SOUTH DAKOTA,

vs.

GHEBRE, FITSUM K
DOB 04/16/1980

Defendant

SEARCH WARRANT

SWA21-178

TO ANY LAW ENFORCEMENT OFFICER IN THE COUNTY OF MINNEHAHA:

Proof by Affidavit has been made before me by DETECTIVE CHRIS SCHOEPF that there is probable cause to believe that the property described herein may be found at the location set forth herein and the property is:

- [x] Evidence of the commission of a criminal offense, to-wit: ***Rape***
- [x] Contraband, the fruits of crime, or thing otherwise criminally possessed,
- [x] Designed or intended for use in, or which is or has been used as a means of, committing a criminal offense.

YOU ARE THEREFORE COMMANDED TO SEARCH

The Defendant

For the following property:

A sample of the defendant's DNA. The DNA sample would be collected via buccal cheek swabs. The buccal swabs would be used to compare DNA profiles found on the sexual assault kit.

It is further ORDERED that this Search Warrant shall be executed within ten days and may be executed in accordance with my initials placed below:

- [x] You may serve this Warrant only during the daytime. Night is that period from 8 p.m. to 8 a.m. local time.
- [ ] You may serve this Warrant at any time of day or night because reasonable cause has been shown to authorize night time execution pursuant to SDCL 23A-35-4.
- [ ] You may execute this Warrant without notice of execution required by SDCL 23A-25-4 in that probable cause exists to demonstrate that if notice were given prior to execution (that the property sought may be easily and quickly

destroyed or disposed of) (that danger to life of limb or the officer or another may result).

☐ You may serve this Warrant on Sunday.

If the above-described property be seized, it should be returned to me at the Courthouse of this court along with the duplicate original Warrant.

This Warrant is issued at 3:30 o'clock P.m. this 2nd day of February, 2021, at Sioux Falls, Minnehaha County, South Dakota.

Magistrate/Circuit Judge

FILED
MAR 02 2021
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
:SS		SECOND JUDICIAL CIRCUIT
COUNTY OF MINNEHAHA)		
STATE OF SOUTH DAKOTA	*	
	*	AFFIDAVIT IN SUPPORT
vs.	*	OF SEARCH WARRANT
	*	
GHEBRE, FITSUM K	*	
DOB 04/16/1980	*	
	*	SWA21-178
Defendant	*	

I, Chris Schoepf, being first duly sworn on oath, deposes and states that I am a Detective with the Sioux Falls Police Department presently assigned to the Crimes Against Persons Section. I have been a law enforcement officer for 13 years.

1. On 11/30/2020 approximately 1820 hours Officer B. Fiegen #978 with the Sioux Falls Police Department was dispatched to 640 N Dakota Ave, Sioux Falls, Minnehaha County, South Dakota for a sexual assault report. A Sioux Falls police report was generated under incident number PD20-024943.

2 Upon arrival, Officer Fiegen made contact with the Victim, Sadie Rheseriya Murtha DOB: 08/02/1998. The Victim was seated on the front steps of the residence and Officer Fiegen noted that she was trembling and had tears rolling down her face. The Victim advised that she was raped in the early morning hours of 11/29/2020.

3. The Victim said she did not know who the suspect was and had never seen the suspect in her life. The Victim described the suspect as a "real African" who was in his middle 40s, with some shorter gray hair and a neatly trimmed beard. The Victim advised that she went to PAve (11/28/2020) and she drank "a lot of alcohol". The Victim advised that she had been drinking mixed drinks with Hennessey all night at the bar. The Victim stated that she ended her night at PAve with drinking six "shooters" of liquor within 30 seconds. The Victim stated "I was very drunk".

4. The Victim advised that she got into a vehicle with her friends and went to the Super 8 located at 2616 E 10th St, Sioux Falls, Minnehaha County, South Dakota. The Victim explained that she never went inside due to having an argument with a friend. The

Victim did not remember leaving the Super 8 and thought she may have blacked out due to the alcohol.

5. The Victim advised that the next thing she remembered was she woke up next to the African male. The Victim advised that her pants were down around her ankles, but the rest of her clothes were on. The Victim explained that she was not wearing underwear that night. The Victim did not have her phone with her and used the male's cell phone to call her phone number. The male gave the Victim a ride in his dark or black SUV to her friend's house. The Victim did not have any further vehicle information. The Victim provided the phone number that was on her call log and advised it was the male's number.

6. The Victim explained that she did not remember anything that occurred, but stated that she did have pain in her vagina. The Victim advised that she was in her menstrual cycle and her tampon was missing.

7. The Victim was shown a map on Google and she pointed out the address of 304 S Lowell Ave; which is located in Sioux Falls and Minnehaha County, South Dakota. The Victim informed that it was apartment number 10 that she woke up at. The Victim had a sexual assault kit completed at Avera Hospital.

8. Your Affiant called the phone number that was provided by the Victim. A male answered and identified himself as the defendant. The defendant had a 1999 black Subaru Forester registered to him at that time. Your Affiant explained that the phone call was reference a girl that was at his house the other night. The defendant did not want to meet with me at the Law Enforcement Center, but wanted to meet at his house. The phone call abruptly ended and contact was not achieved again.

9. The sexual assault kit was sent to the South Dakota Forensic Lab. On 02/19/2021 Your Affiant received a forensics report. The report advised that male DNA was found on the cervical swabs and fossa navicularis swabs, however, due to insufficient male DNA, autosomal DNA profiling was not performed.

10. The report further advised that male DNA was found on the mons pubis swabs. The report informed that Y-chromosome DNA profiling, using PCR, was performed on the cervical swabs and Y-chromosome DNA profiling can be performed on the fossa navicularis swabs. The report advised that the Y-STR DNA profile obtained from the sperm cell fraction of the cervical swabs and the partial Y-STR DNA profile obtained

from the non-sperm cell fraction of the cervical swabs are consistent with originating from a common, single male source. The report explained that comparisons can be made to the Y-STR DNA profile if a known sample from the defendant is obtained and submitted.

11. Your Affiant swears that the above information is true and correct to the best of his knowledge. At this time, Your Affiant is requesting an order from the court that would authorize him to search the defendant for a sample of his DNA.

12. The DNA sample would be collected via buccal cheek swabs and would be used to compare with any male DNA profiles found on the sexual assault kit swabs.

13. The above described events occurred in the City of Sioux Falls, County of Minnehaha, and State of South Dakota.

825

Affiant Chris Schoepf 825

Subscribed and ~~sworn~~ before me this 22 day of February, 2021.

JUDGE

FILED
MAR 02 2021
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA

vs.

GHEBRE, FITSUM K
DOB 04/16/1980

Defendant.

RETURN OF SEARCH WARRANT AND INVENTORY

SWA21-178

* *

I, Detective Schoepf, received the within court ordered search warrant on 02/22/2021 and duly executed the search warrant on 02/24/2021 by searching the premises described in the warrant for the property described in the warrant, and leaving a copy of the search warrant together with a receipt and inventory of the premises.

The following is an inventory of the property taken pursuant to the search warrant:

A1 DNA via buccal swabs

The above inventory is a true and accurate account of all property taken pursuant to search warrant, or otherwise, and was made by the undersigned in the presence of Detective C. Schoepf.

[signature] 835

Detective Schoepf

Subscribed and sworn to before me this 2 day of Mar, 2021.

[signature]
Judge

FILED
MAR 02 2021
Minnehaha County, S.D.
Clerk Circuit Court

J:\CAP\Schoepf\Affidavits\Search Warrant Return\2021\Fistum Ghebre Buccal Swab SW Return.doc

CIRCUIT COURT OF SOUTH DAKOTA
Second Judicial Circuit
Lincoln and Minnehaha Counties
425 North Dakota Avenue
Sioux Falls, South Dakota 57104-2471

Telephone (605) 367-5920
Facsimile (605) 367-5979

CIRCUIT JUDGE
Bradley G. Zell

April 4, 2022

Ms. Lori Ehlers
Deputy State's Attorney
415 N. Dakota Ave.
Sioux Falls, SD 57104

Mr. Beau Blouin
Deputy Public Defender
413 N. Main Ave.
Sioux Falls, SD 57104

Re: State v. Fitsum Ghebre, 49CRI21-2644

Dear Counsel:

On July 29, 2021, Defendant Fitsum Ghebre filed a Motion to Suppress statements made during the execution of a warrant to obtain Defendant's DNA under *Miranda v. Arizona.* A suppression hearing was held on January 18, 2022. Shortly before that hearing, defense counsel indicated its intent to raise the additional issue of whether Defendant's statements were voluntary under the Due Process Clause. Following the hearing, the parties submitted additional briefing on the issue of voluntariness under due process. The Court received the final submission on this issue on February 4, 2022.

The Court, having reviewed the parties' briefs and considered the arguments and testimony presented at the hearing, issues the following decision.

1. Voluntariness under *Miranda v. Arizona*

There are two constitutional safeguards against involuntary confessions: the Due Process Clause of the Fourteenth Amendment which prohibits involuntary confessions, and the Fifth Amendment right against self-incrimination which requires *Miranda* warnings for custodial interrogations. *State v. Morato*, 2000 S.D. 149, ¶ 11, 619 N.W.2d 655, 659

(citing *Dickerson v. United States*, 530 U.S. 428 (2000)). "The Fifth Amendment right against self-incrimination is implicated whenever an individual is subject to custodial interrogation by law enforcement." *State v. Walth*, 2011 S.D. 77, ¶ 10, 806 N.W.2d 623, 625 (citation omitted). "An individual is subject to custodial interrogation if he is 'deprived of his freedom of action in any significant way.'" *State v. Spaniol*, 2017 S.D. 20, ¶ 35, 895 N.W.2d 329, 342 (quoting *Walth*, 2011 S.D. 77, ¶ 10, 806 N.W.2d at 625). A two-part test is utilized to determine whether an individual is "in custody":

First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Walth, 2011 S.D. 77, ¶ 12, 806 N.W.2d at 626 (quoting *State v. Wright*, 2009 S.D. 51, ¶ 19, 768 N.W.2d 512, 520). "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

The South Dakota Supreme Court has iterated that, although interviews with law enforcement have naturally coercive pressures, *Miranda* warnings are only required when a suspect is "in custody." *State v. Johnson*, 2015 S.D. 7, ¶ 15, 860 N.W.2d 235, 242.

Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. Or is the requirement of warning to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'

Id. (quoting *State v. Johnson*, 2007 S.D. 86, ¶ 22, 739 N.W.2d 1, 9 (emphasis added). "Whether an individual is in custody is determined by 'how a reasonable man in the suspect's position would have understood his situation." *State v. Hoadley*, 2002 S.D. 109, ¶ 24, 6512 N.W.2d 249, 256.

Here, Defendant was not "in custody" for purposes of *Miranda* at the time he provided statements to Detective Schoepf. Defendant was told he did not have to talk if he did not want to and that he was free to leave following the execution of the search warrant for his DNA. Further, it is not alone dispositive to the custody analysis that Defendant was the prime suspect in the alleged rape. See *Morato*, 2000 S.D. 149, ¶ 20, 619 N.W.2d at 661 ("[e]ven an unequivocal 'statement from an officer that the [defendant] is a prime suspect is not, in itself dispositive of the custody issue[]…"). Detective Schoepf did not intend to

make an arrest when he questioned Defendant; rather, the purpose of his contact with Defendant was to collect the DNA sample. Defendant was not handcuffed, the door to the vehicle was left partially open, and Detective Schoepf stated numerous times that Defendant was not under arrest and was free to leave after the swab was completed.

Accordingly, the Court finds that no *Miranda* violation occurred. Defendant's Motion to Suppress Defendant's statements under *Miranda* is therefore denied.

2. Voluntariness under Due Process

The State bears the burden of proving by a preponderance of the evidence that a defendant's admissions were voluntary. *State v. Fisher*, 2011 S.D. 74, ¶ 18, 805 N.W.2d 571, 575 (citing *State v. Tuttle*, 2002 S.D. 94, ¶ 21, 650 N.W.2d 20, 30). In evaluating voluntariness under this analysis, the Court looks to "the effect [that] the totality of the circumstances had upon the will of the defendant and whether the defendant's will was overborne." *Morato*, 2000 S.D. 149, ¶ 12, 619 N.W.2d at 659 (citing *Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d at 517). "A defendant's will is overborne, making a statement involuntary, when interrogation tactics and statements are so manipulative or coercive as to deprive a defendant of the 'ability to make an unconstrained, autonomous decision to confess.'" *State v. Gesinger*, 1997 S.D. 6, ¶ 12, 559 N.W.2d 549, 551.

The Court may consider the following factors to discern whether a defendant's will was overborne or police tactics deprived a defendant of the ability to choose: "the duration of detention; the defendant's age, educational background, and prior experience with law enforcement; whether the defendant received advice on constitutional rights; and whether the interrogators used repeated or prolonged questioning, or physical deprivation of such things as food or sleep." *State v. Darby*, 1996 S.D. 127, ¶ 28, 556 N.W.2d 311, 319. "The presence or absence of any one of these factors alone is not dispositive," as voluntariness is reviewed under totality, "considering all the circumstances surrounding the defendant's encounter with law enforcement." *Morato*, 2000 S.D. 149, ¶ 13, 619 N.W.2d at 660. The inquiry centers on "(1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *State v. Holman*, 2006 S.D. 82, ¶ 15, 721 N.W.2d 452, 456 (citing *Tuttle*, 2002 S.D. 94, ¶ 22, 650 N.W.2d at 31).

Based on the totality of the circumstances surrounding Defendant's interaction with law enforcement, the Court finds that Defendant's admissions to Detective Schoepf were involuntary under due process. First, Detective Schoepf ignored the obvious language barrier between himself and Defendant. Bodycam video footage demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter. Detective Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood. Detective Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused.". Defendant was in the passenger's seat of Schoepf's patrol vehicle on the side of the road. Officer Christensen kept the passenger door ajar but stood directly outside the door so Defendant could not

exit. The officers informed Defendant they had a search warrant for his DNA related to a rape allegation. Although Detective Schoepf tells Defendant he is not under arrest and did not have to talk at that time, the Court is not persuaded, based on Defendant's clear difficulty in understanding the officers, that Defendant fully understood his rights at that time.

The State has not met its burden in establishing voluntariness of Defendant's confession. Law enforcement disregarded Defendant's unresponsiveness, confusion, and difficulty in speaking and understanding English in a police-dominated atmosphere related to a rape allegation. Rather than call an interpreter or utilize another form of assistance in speaking with Defendant, law enforcement continued on with executing the search warrant on the side of the road and speaking with Defendant about the rape allegation.

Accordingly, the Court finds that Defendant's admissions to Detective Schoepf were involuntarily given under the Due Process Clause of the Fourteenth Amendment. Defendant's Motion to Suppress under the Due Process Clause is therefore granted.

The Court is serving this memorandum decision upon counsel via email and filing an original of the same. Defense counsel is to prepare Findings of Fact and Conclusions of Law and an Order consistent with the Court's ruling herein.

Sincerely,

Bradley G. Zell
Circuit Judge

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

FITSUM GHEBRE,

Defendant.

CR. 21-2644

FINDINGS OF FACT AND CONCLUSIONS OF LAW

****

The above-entitled matter came on for hearing on January 18, 2022, before the Honorable Judge Brad Zell. Deputy State's Attorney Lori Ehlers representing the State of South Dakota, and Defendant Fitsum Ghebre was personally present at the hearing with his attorney, Beau Blouin, of the Minnehaha County Public Defender's Office. The Court having received the video exhibit, heard testimony, and reviewed the arguments of counsel, now makes the following:

FINDINGS OF FACT

1. On April 9, 2021, Defendant was charged by complaint with the offenses of felony rape in third degree and sexual contact with person incapable of consenting, stemming from an alleged incident that occurred on November 29, 2020.

2. As part of the investigation by law enforcement, a rape kit was collected and sent to the South Dakota Forensic Lab.

3. On February 19, 2021, the results from the rape kit were received by Detective Christopher Schoepf that indicated male DNA was found and that a sample could be submitted for comparative analysis.

4. On February 20, 2021, Detective Schoepf applied for and was granted a search warrant for a sample of Defendant's DNA.

5. On February 24, 2021, Detective Schoepf drove to Defendant's apartment building and parked down the street from the complex.

6. Once Defendant left his residence, Schoepf radioed for a marked police vehicle to conduct a traffic stop on Defendant so Schoepf could execute the search warrant and obtain a sample of Defendant's DNA.

7. Officer Jason Christensen with the Sioux Falls Police responded and stopped Defendant in his vehicle near E. 6th Street and N Sherman Ave.

8. Detective Schoepf had Defendant come back to his unmarked vehicle parked on the side of the road and sit in the passenger seat while Schoepf executed the search warrant.

9. The passenger door was kept open during the encounter but Officer Christensen stood directly outside the door so Defendant could not exit.

10. Detective Schoepf informed Defendant they had a search warrant for his DNA related to a rape allegation.

11. Detective Schoepf did not intend to make an arrest when he questioned Defendant; rather, the purpose of his contact with Defendant was to collect the DNA sample.

12. Although Detective Schoepf told Defendant he is not under arrest and that they were not going to talk about it at that time, Schoepf also told Defendant "Here's my thing man, if you had sex with her, that's what you need to explain to me now."

13. Schoepf proceeded to ask Defendant specific questions about the rape allegations while executing the search warrant.

14. Bodycam video footage demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter.

15. Detective Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood.

16. Detective Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused."

17. Law enforcement disregarded Defendant's unresponsiveness, confusion, and difficulty in speaking and understanding English in a police-dominated atmosphere related to a rape allegation.

18. Rather than call an interpreter or utilize another form of assistance in speaking with Defendant, law enforcement continued on with executing the search warrant on the side of the road and speaking with Defendant about the rape allegation.

CONCLUSIONS OF LAW

1. There are two constitutional safeguards against involuntary confessions: the Due Process Clause of the Fourteenth Amendment which prohibits involuntary confessions, and the Fifth Amendment right against self-incrimination which requires *Miranda* warnings for custodial interrogations. *State v. Morato*, 2000 S.D. 149, ¶ 11, 619 N.W.2d 655, 659.

2. "Fifth Amendment right against self-incrimination is implicated whenever an individual is subject to custodial interrogation by law enforcement." *State v. Walth*, 2011 S.D. 77, ¶ 10, 806 N.W.2d 623, 625 (citation omitted).

3. "An individual is subject to custodial interrogation if he is 'deprived of his freedom of action in any significant way.'" *State v. Spaniol*, 2017 S.D. 20, ¶ 35, 895 N.W.2d 329, 342 (quoting *Walth*, 2011 S.D. 77, ¶ 10, 806 N.W.2d at 625).

4. A two-part test is utilized to determine whether an individual is "in custody." "First, what were the circumstances surrounding the interrogation; and second, given those circumstances would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest. *Walth*, 2011 S.D. 77, ¶ 12, 806 N.W.2d at 626 (quoting *State v. Wright*, 2009 S.D. 51, ¶ 19, 768 N.W.2d 512, 520).

5. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

6. The South Dakota Supreme Court has iterated that, although interviews with law enforcement have naturally coercive pressures, Miranda warnings are only required when a suspect is "in custody." *State v. Johnson*, 2015 S.D. 7, ¶ 15, 860 N.W.2d 235, 242.

7. "Whether an individual is in custody is determined by 'how a reasonable man in the suspect's position would have understood his situation.'" *State v. Hoadley*, 2002 S.D. 109, ¶ 24, 651 N.W.2d 249, 256.

8. Defendant was not "in custody" for purposes of *Miranda* at the time he provided statements to Detective Schoepf because Defendant was told he did not have to talk if he did not want to and that he was free to leave following the execution of the search warrant for his DNA; further, the Defendant was not handcuffed, and the door to the vehicle was left partially open.

9. The State bears the burden of proving by a preponderance of the evidence that a defendant's admission were voluntary. *State v. Fisher*, 2011 S.D. 74, ¶ 18, 805 N.W.2d

571, 575 (citing *State v. Tuttle*, 2002 S.D. 94, ¶ 21, 650 N.W.2d 20, 30).

10. In evaluating voluntariness under this analysis, the Court looks to "the effect [that] the totality of the circumstances had upon the will of the defendant and whether the defendant's will was overborne." *Morato*, 2000 S.D. 149, ¶ 12, 619 N.W.2d at 659 (citing *Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d at 517).

11. "A defendant's will is overborne, making a statement involuntary, when interrogation tactics and statements are so manipulative or coercive as to deprive a defendant of the 'ability to make an unconstrained, autonomous decision to confess.'" *State v. Gesinger*, 1997 S.D. 6, ¶ 12, 559 N.W.2d 549, 551.

12. The Court may consider the following factors to discern whether a defendant's will was overborne or police tactics deprived a defendant of the ability to choose: "the duration of detention; the defendant's age, educational background, and prior experience with law enforcement; whether the defendant received advice on constitutional rights; and whether the interrogators used repeated or prolonged questioning, or physical deprivation of such things as food or sleep." *State v. Darby*, 1996 S.D. 127, ¶ 28, 556 N.W.2d 311, 319.

13. "The presence or absence of any one of these factors alone is not dispositive," as voluntariness is reviewed under a totality, "considering all the circumstances surrounding the defendant's encounter with law enforcement." *Morato*, 2000 S.D. 149, ¶ 13, 619 N.W.2d at 660.

14. The inquiry centers on "(1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *State v. Holman*, 2006 S.D. 82, ¶ 15, 721 N.W.2d 452, 456 (citing *Tuttle*, 2002 S.D. 94, ¶ 22, 650 N.W.2d at 31).

15. Based on the totality of the circumstances surrounding Defendant's interaction with law enforcement, the Court finds that Defendant's admissions to Detective Schoepf were involuntary under Due Process based on the following: Detective Schoepf ignored the obvious language barrier between himself and Defendant; bodycam video footage demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter; Detective Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood; Detective Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused;" Officer Christensen kept the passenger door ajar but stood directly outside the door so Defendant could not exit.

16. Based on Defendant's clear difficulty in understanding the officers, the Court is not persuaded that Defendant fully understood his rights at that time.

17. The State has not met its burden in establishing voluntariness of Defendant's confession.

18. Accordingly, the Court finds that Defendant's admissions to Detective Schoepf were

involuntarily given under the Due Process Clause of the Fourteenth Amendment, and Defendant's Motion to Suppress under the Due Process Clause is therefore granted.

BY THE COURT:

5/12/22

BRAD ZELL
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk of Courts

By: _____
Deputy

FILED
MAY 13 2022
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

FITSUM GHEBRE,

Defendant.

CR. 21-2644

ORDER SUPPRESSING DEFENDANT'S STATEMENTS

****

Pursuant to Defendant's Motion to Suppress Statements filed on July 29, 2021; a hearing on the motion being held on January 18, 2022; the State having been represented by Lori Ehlers; the Defendant being present at the hearing and represented by Beau Blouin, and the Court having considered the testimony and evidence submitted at the hearing and issuing a Memorandum Decision on April 4, 2022;

IT IS HEREBY ORDERED that on the issue of voluntariness under Miranda, the Defendant's motion is DENIED; however, on the issue of voluntariness under Due Process, the Defendant's motion is GRANTED, and Defendant's statements at issue shall be suppressed.

ENTERED this 12th day of May, 2022.

The Honorable Brad Zell
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk

By _____

FILED
MAY 13 2022
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 29994

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

vs.

FITSUM KIDANE GHEBRE,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE Bradley Zell
Circuit Court Judge

APPELLEE'S BRIEF

BEAU J. BLOUIN
Minnehaha County Public Defender
413 North Main Avenue
Sioux Falls, SD 57104

Attorney for Defendant/Appellee

DANIEL HAGGAR
MINNEHAHA COUNTY
STATE'S ATTORNEY

DREW W. DEGROOT
Deputy State's Attorney
415 N. Dakota Avenue
Sioux Falls, SD 57104

Attorneys for State/Appellant

Order Granting Petition for Allowance of Appeal granted on June 6, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

No. 29994

vs.

FITSUM KIDANE GHEBRE,

Defendant and Appellee

PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR." The Defendant, Fitsum Ghebre, is referred to as "Ghebre." The transcript of the Suppression Hearing held January 18, 2022, is referred to as SH. The police officer body camera video, Exhibit 1, is referred to as "Ex. 1." The Circuit Court's Findings of Fact and Conclusions of Law are referred to as "FOF" and "COL," respectively, followed by the number designation. All references will be followed by the appropriate page number or, for videos, time designation.

JURISDICTIONAL STATEMENT

The State appeals the Circuit Court's Order Suppressing Defendant's

Statements as well as the Findings of Fact and Conclusions of Law, filed May 13, 2022. On July 29, 2021, Ghebre, through counsel, filed a Motion to Suppress Statements. The Suppression Hearing was held on January 18, 2022. The State filed a Petition for Allowance of Appeal from the Circuit Court's Order Suppressing Defendant's Statements on May 17, 2022. On June 6, 2022, this Court issued an Order Granting Petition for Allowance from Intermediate Order. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-12.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE STATE FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT GHEBRE'S STATEMENTS TO LAW ENFORCEMENT WERE VOLUNTARY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Circuit Court granted Ghebre's Motion to Suppress Statements.

State v. Morato, 2000 S.D. 149, 619 N.W.2d 655

State v. Fernandez-Torres, 50 Kan. App. 2d 1069, 337 P.3d 691 (2014)

State v. Xiong, 178 Wis. 2d 525, 504 N.W.2d 428 (Ct.App. 1993)

STATEMENT OF CASE

The State charged Defendant and Appellee, Ghebre, by Indictment with the following: Count 1 - Rape in the Third Degree, on or about November 29, 2020, in violation of SDCL § 22-22-1(4); and Count 2 - Sexual Contact with Person Incapable of Consenting, on or about November 29, 2020, in violation of SDCL § 22-22-7.2. An Arraignment was held on May 21, 2021. On July 29, 2021, Ghebre filed a Motion to Suppress statements made by Ghebre while being

questioned by law enforcement during the execution of a search warrant for his DNA sample. SR 17. A Suppression Hearing on the motion was held on January 18, 2022. The Circuit Court filed a Memorandum Decision on April 5, 2022, denying Ghebre's Motion to Suppress in part, finding Ghebre was not in custody during his questioning by law enforcement for the purposes of *Miranda*, but granted Ghebre's Motion to Suppress on the basis that Ghebre's statements were given involuntarily under the Due Process Clause. SR 81. The Circuit Court's Order Suppressing Defendant's Statements was filed on May 13, 2022. SR 91.

STATEMENT OF FACTS

On the evening of Monday, November 30, 2020, officers from the Sioux Falls Police Department were dispatched to 640 N. Dakota Ave, Sioux Falls, SD. SR 1. The reporting party advised that her daughter had been raped. *Id.* Sioux Falls Police Officer Benjamin Fiegen met the alleged victim Sadie Murtha, (DOB 8-2-1998), who was sitting on the steps outside the home. *Id.* Murtha told Officer Fiegen that she had been raped in the very early morning hours of Sunday, November 29, 2020. *Id.* Murtha indicated she did not know the male. *Id.* Murtha described the male as a "real African" in his mid-40's, with shorter grey hair and a neatly trimmed beard. *Id.* Murtha went on to state that she had gone to PAVE, a dance club in Sioux Falls, on Saturday night and drank a lot of alcohol.[1] *Id.*

[1] While not mentioned in the Affidavit, Detective Schoepf followed up with Murtha on her activities that night in an attempt to locate a video recording from PAVE on the night in question. During that conversation, according to Det. Schoepf Murtha then denied being at PAVE that night.

Murtha further claimed to have ended her night at PAVE with drinking "six shooters of liquor within 30 seconds." *Id.* Murtha recalled subsequently getting into a vehicle with her friends and going to the Super 8 located at 2616 E. 10th St. in Sioux Falls, South Dakota. SR 2. Sometime thereafter, Murtha and her friend became involved in an argument. *Id.* Murtha indicated she did not go inside the hotel, but stated she did not recall leaving the hotel either and thought she had "blacked out from being so drunk." *Id.*

The next morning, November 30, 2020, Murtha claimed she had awoken in an unknown apartment lying next to an African male. *Id.* Murtha stated that her pants were down, but the rest of her clothes were still on. *Id.* Murtha did not have her phone with her, so she asked Ghebre to use his phone to call her own phone to locate it. *Id.* Eventually, Murtha asked Ghebre if he could give her a ride, to which he agreed. *Id.* Murtha and the African male entered Ghebre's vehicle and drove to Murtha's friend's home. *Id.* Murtha described the address and location of the alleged incident to police as well as provided the phone number of Ghebre. *Id.* That same day, Murtha went to Avera McKennan Hospital to have a rape kit completed. *Id.*

In early December, 2021, Detective Schoepf called Ghebre and asked him for his name, how to spell his name, and asked about the night in question. SH 16-17. During the brief phone call, Det. Schoepf admitted that Mr. Ghebre had a "thick accent" and he was uncertain as to the extent of the language barrier, but

he did not ask Ghebre what language he was fluent in.[2] SH 17. Schoepf repeatedly asked Ghebre to spell his name, but the detective had a difficult time understanding him. SH 17. Schoepf also repeatedly told Ghebre that he wanted him to come to the law enforcement center to speak about the allegations, but Ghebre kept repeating, "come my house." SH 17. Shortly thereafter, Schoepf told Ghebre he was having a hard time understanding him, and the call abruptly ended. SH 18. On February 19, 2021, the results from the rape kit sent to the South Dakota Forensic Lab were received by Schoepf that indicated that male DNA was found and that a sample could be submitted for a comparative analysis. SR 2. The next day, February, 20, 2021, Schoepf applied for and was granted a search warrant for a sample of Ghebre's DNA. SR 3.

On February 24, 2021, Schoepf drove to Ghebre's residence in an unmarked patrol vehicle and waited outside for him to leave. SH 7-8. Once Ghebre left his residence in his vehicle, Schoepf radioed for a marked police vehicle to conduct a traffic stop on the vehicle to execute the warrant and obtain a sample of Ghebre's DNA. SH 8-9, 18. Officer Christensen activated his emergency lights and stopped Ghebre's vehicle along the side of the road in the area of 6th Street and Sherman Ave. SH 9. Officer Christensen approached Ghebre at the driver's side of his vehicle with the window down and told Ghebre multiple times to both turn off his vehicle and step out of his car to talk. Ex. 1,

[2] Schoepf acknowledged that it is the policy of the Sioux Falls Police Department to have an interpreter present if there is a language barrier between him and a suspect in any particular case. SH 17-18.

15:39:37 - 15:39:59. Ghebre looked back and forth multiple times at the front of his dash board and at Officer Christensen and mumbled a few inaudible words, at one point lifting his palms in the air as if to suggest he did not understand the officer before exiting the vehicle and accompanying Officer Christensen and Det. Schoepf to the boulevard next to Ghebre's vehicle. Ex. 1, 15:39:37 - 15-40:09.

Det. Schoepf met Ghebre at the boulevard while Ghebre stood on the side of the road and began asking Ghebre multiple times if he remembered talking to him over the phone "about two months ago" about a girl who "was drunk" and slept at Ghebre's house. Ex. 1, 15:40:08 - 15:40:39. Det. Schoepf attempted to elicit a head nod or a head shake in response as Ghebre gave no audible response. *Id.* At one point, Ghebre shook his head no. *Id.* Det. Shoepf then explained that the "girl" had claimed that Ghebre raped her, a rape kit had been completed, and the sexual assault kit came back with male DNA on it. Ex. 1, 15:40:39 - 15:40:54. Schoepf further explained that he had a search warrant to collect Ghebre's DNA, that they were going to "stick some swabs in *Id* [his] mouth," and they were going to compare his DNA to the male DNA found in the rape kit. Ex. 1, 15:40:54 - 15:41:05. Ghebre gave no verbal response nor head gesture to Det. Schoepf during his explanation of the purpose of the stop and Ghebre's detention. *Id.*

Det. Schoepf went back to his unmarked vehicle and subsequently requested Ghebre take a seat in the front passenger seat of the vehicle. Ex. 1, 15-41:13 - 15-42: 38. While seated in the vehicle, and throughout the questioning inside the vehicle, Officer Christensen stood directly outside the passenger door

facing Ghebre while the search warrant was executed and Det. Schoepf questioned Ghebre. Ex. 1, Ex. 1, 15-42: 38 - 15:47:44. Det. Schoepf showed Ghebre the search warrant and continued to explain the reason for taking his DNA, and told Ghebre "she didn't consent to any sex, alright?". Ex. 1, 15-42: 38 - 15:43:06. Det. Schoepf set a copy of the search warrant on Ghebre's lap and began to put rubber gloves on. Ex. 1, 15:43:06 - 15:43:23. Det. Schoepf continued to explain that he was going to put swabs in Ghebre's nose and told him "[he] looked confused" and asked Ghebre if he wanted to "talk about it, do you have questions?" Ex. 1, 15:43:23 - 15:43:35. Ghebre gave no response. *Id.* Schoepf stated to Ghebre, "You look confused. Do you have questions?" Ghebre did not respond. *Id.* Det. Schoepf then swabbed the inside of Ghebre's mouth to obtain the DNA sample. Ex. 1, 15:43:35 - 15:44:07. After taking the DNA sample, Det. Schoepf asked Ghebre multiple times if he had questions for him, with no response. Ex. 1, 15:44:07 - 15:45:32. Det. Schoepf then asked Ghebre to sign a form acknowledging his DNA sample was taken, and Ghebre shook his head and said no. Ex. 1, 15:45:32 - 15:45:48. Det. Schoepf then stated to Ghebre, "You didn't know her?" Ghebre gave an inaudible response. Ex. 1, 15:45:48 - 15:45:58. The following exchange then occurred:

> Schoepf: "Do you have any questions for me? Do you want to talk about what happened at all? We're not going to talk about it right here, but we can make an arrangement to talk about it. Do you want to talk about what happened? Here's your driver's license. You're free to go. Do you want to talk about what happened though? Here's my thing man, if you had sex with her, that's what you need

to explain to me now. Okay? Not right this minute, but call me and we'll talk about it. Okay? Here's my card. If you had sex with her, you had sex with her. The DNA is going to tell us on that kit if that was you that had sex with her."

Ghebre: "I have problem. How I..."

Schoepf: "What's that?"

Ghebre: "Have problem to"

Schoepf: "You have problems?"

Ghebre: "why I sex, says..."

Schoepf: "I don't understand."

Ghebre: "I have problem for sex."

Schoepf: "Okay?"

Ghebre: "I can't go.... [inaudible or in Tigrinya]

Schoepf: "You can't achieve an erection, is that what I'm understanding?"

Ghebre: "Yes."

Schoepf: "Okay?"

Schoepf: "Did you have oral sex with her? Or stick your fingers in her?"

Ghebre: "No."

Schoepf: "So that's not going to be your DNA on the sexual assault kit?"

Ghebre: [inaudible]

Schoepf: "No?"

Schoepf: "Okay?"

Ghebre: [inaudible]

Schoepf: "Okay. We'll be in contact once that comes back. Okay?"

Ex. 1 15:46:03 - 15:47:44.

Ghebre exited the detective's unmarked vehicle and went back to his vehicle. Det. Schoepf then exited his vehicle and spoke briefly with Officer Christensen, saying, "well, I like... I like that," as he pointed back to his vehicle gesturing to where he had questioned Ghebre. Ex. 1, 15:48:02 - 15:48:09.

At the suppression hearing, Detective Schoepf admitted that Ghebre was nonresponsive to several of his questions, and admitted Ghebre appeared confused. SH 19 - 20. Despite the phone call from two months prior during which Det. Schoepf had difficulty communicating with and understanding Ghebre, Ghebre's lack of interaction and look of confusion to his questions during the execution of the search warrant, and his uncertainty as to Ghebre's understanding or proficiency in the English language, Det. Schoepf did not attempt to inquire as to what language Ghebre was fluent in, nor did he request the services of an interpreter. SH 18, 20, 25; Ex. 1, 15:43:23 - 15:43:35. Det. Schoepf indicated that he did not further investigate whether Ghebre had a "complete language barrier" at the time because he was not attempting to elicit information from Ghebre regarding the rape allegations. SH 21-23. He further testified that he otherwise would have requested an interpreter. SH 25. However, Det. Schoepf also admitted that he did at one point tell Ghebre that if he had sex

with Murtha, he needed to tell him "now," and proceeded to ask specific questions as to whether he had penetrated Murtha during the execution of the search warrant. SH 21-23, 25, 27-28.

In the written Finding of Facts, the Circuit Court made the following findings:

> 12. Although Detective Schoepf told Defendant he is not under arrest and that they were not going to talk about it at the time, Schoepf also told Defendant "Here's my thing man, if you had sex with her, that's what you need to explain to me now.
>
> 13. Schoepf proceeded to ask Defendant specific questions about the rape allegations while executing the search warrant.
>
> 14. Bodycam video footage demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter.
>
> 15. Detective Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood.
>
> 16. Detective Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused."
>
> 17. Law enforcement disregarded Defendant's unresponsiveness, confusion, and difficulty in speaking and understanding English in a police-dominated atmosphere related to a rape allegation.
>
> 18. Rather than call an interpreter or utilize another form of assistance in speaking with Defendant, law enforcement continued on with executing the search warrant on the side of the road and speaking with Defendant about the rape allegation.

FOF 12 - 18.

Based upon those findings, the Circuit Court concluded "[t]he State has

not met its burden in establishing voluntariness of Defendant's confession. COL 17.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN FINDING GHEBRE'S STATEMENTS TO LAW ENFORCEMENT INVOLUNTARY UNDER THE DUE PROCESS CLAUSE.

A. Standard of Review

"Fact findings are reviewed for clear error, but ultimately, in reviewing decisions on motions to suppress for asserted constitution violations our standard of review is *de novo*." *State v. Morato*, 2000 S.D. 149, ¶ 10, 619 N.W.2d 655, 659. "In addressing a Due Process voluntariness challenge, the circumstances surrounding an interrogation are factual questions meriting deferential review." *Id.* (citing *State v. Stanga*, 2000 S.D. 129, ¶ 8, 617 N.W.2d 486, 488). "The crucial determination of voluntariness is, on the other hand, 'a legal question, requiring independent judicial review.'" *Id.* The State has the burden to establish the voluntariness of a statement by a preponderance of the evidence. *Morato*, 2000 S.D. 149, ¶ 12.

B. Involuntary Statements under the Due Process Clause

The Due Process Clause of the Fourteenth Amendment prohibits involuntary confessions. *Morato*, 2000 SD 149, ¶ 11. In evaluating the voluntariness of a statement, the Court reviews "the effect [that] the totality of the circumstances had upon the will of the defendant and whether the

defendant's will was overborne." *Morato*, 2000 SD 149, ¶ 12 (quoting *State v. Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d 515, 517). "A defendant's will is overborne, making a statement involuntary, when interrogation tactics and statements are so manipulative or coercive as to deprive a defendant of the 'ability to make an unconstrained, autonomous decision to confess.'" *Id.* (quoting *State v. Gesinger*, 1997 S.D. 6, ¶ 12, 559 N.W.2d 549, 551). The inquiry centers on "(1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *State v. Holman*, 2006 S.D. 82, ¶ 15, 721 N.W.2d 452, 456 (citing Tuttle, 2002 S.D. 94, ¶ 22, 650 N.W.2d 20, 31).

The compelling of involuntary statements from the accused by law enforcement is deeply rooted in our nation's history and jurisprudence. The United States Supreme Court, in *Escobedo v. State of Ill.*, made the following observations regarding law enforcement attempts to compel confessions and the importance of the accused to understand their rights and obtain legal advice:

> There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.
>
> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:
>
> '[A]ny system of administration which permits the prosecution to

> trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. It there is a right to an answer, there soon seems to be a right to the expected answer - that is, to a confession of guilty. Thus, the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' This Court has also recognized that history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence.
>
> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional right. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

378 U.S. 478, 488 (1964) (citations omitted).

On the issue of the voluntariness of a confession, the Court in *Miranda v. Arizona* noted that "[t]he rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary. . . ." 384 U.S. 436, 462 (1966) (quoting *Bram v. United States*, 168 U.S. 532, 542 (1897)). The *Miranda* Court, quoting the unanimous opinion of the Court in *Ziang Sung Wan v.*

United States, also observed the following:

> In federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.

384 U.S. 436, 462 (quoting *Ziang Sung Wan v. United States*, 266 U.S. 1, 14-15 (1924)).

While this Court has not previously addressed the issue of voluntariness of a statement or a confession in the context of statements made to law enforcement by an accused with a language barrier and limited fluency in English, other federal and state courts have addressed similar circumstances that help inform the proper analysis for the Court to consider in this case. These courts have found that the particular characteristics of the defendant, including any vulnerabilities, impediments, mental incapacities or language barriers affect the voluntariness analysis and lowers the quantum of coercion necessary to render a statement involuntary. *See Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) (observing that "[w]hen a suspect suffers from mental incapacity, such as intoxication or retardation, and the incapacity is known to interrogating officers, a 'lesser quantum of coercion' is necessary to call a confession into question."); *State v. Fernandez-Torres*, 50 Kan. App. 2d 1069, 337 P.3d 691, 698-99 (2014) (stating that in performing an analysis of the voluntariness of a statement under

Due Process, a defendant's limited fluency in English "ties into the fairness of the interrogation," and "typically comes into play when a suspect is literate in some other language but is interrogated in English."); *Commonwealth v. Bell*, 365 S.W.3d 216, 224 (Ky Ct. App. 2012) (observing linguistic ability as a factor in determining the voluntariness of a confession or statement).

In *State v. Hoppe*, the Supreme Court of Wisconsin noted:

> The balancing of the personal characteristics against the police pressures reflects a recognition that the amount of police pressure that is constitutional is not the same for each defendant. When the allegedly coercive police conduct includes subtle forms of psychological persuasion, the mental condition of the defendant becomes a more significant factor in the 'voluntariness' calculus.

2003 WI 43, ¶ 40, 261 Wis. 2d 294, 661 N.W.2d 407. On this same issue, the Wisconsin Court of Appeals stated the following:

> Whether coercion exists is determined by looking at the totality of the circumstances. The more vulnerable a person is because of his unique characteristics, the more easily he or she may be coerced by subtle means. The United States Supreme Court wrote: '[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the voluntariness calculus.'

State v. Xiong, 178 Wis. 2d 525, 504 N.W.2d 428 (Ct.App. 1993) (quoting *Colorado v. Connelly*, 479 U.S. 157, 164 (1986)). "Connelly teaches that overt acts are not the sole criterion of coerciveness. If there is evidence that police are taking subtle advantage of a person's personal characteristics, that may be a form of coercion." *Xiong*, 504 N.W.2d at 534.

Likewise, the Court of Appeals of Minnesota has acknowledged that "[a]

suspect who lacks understanding of the legal proceedings surrounding his or her detainment cannot make intelligent choices regarding the exercise or waiver of fundamental rights." *State v. Marin*, 541 N.W.2d 370, 373 (Minn. App. 1996) (citing *Ton v. State*, 110 Nev. 970, 878 P.2d 986, 987 (1994) (holding a language impaired defendant enjoys a due process right to the aid of an interpreter at all crucial stages of the criminal process, which is necessary to a meaningful exercise of the defendant's constitutional rights).

In *State v. Fernandez-Torres*, the defendant was questioned by law enforcement in regard to allegations of aggravated indecent liberties and lewd touching of a minor. 50 Kan. App. 2d 1069, 337 P.3d 691, 698-99 (2014). The questioning occurred both while the defendant voluntarily accompanied law enforcement to the law enforcement center, and while interviewed later at the law enforcement center. 50 Kan. App. 2d at 1070-71. The defendant did not dispute that he was not under arrest or unwilfully detained during the questioning. *Id.* He was not handcuffed during the car ride nor at the law enforcement center. *Id.* The defendant was twenty-three years old and fluent in Spanish. *Id.* at 1071. He could not read English but could speak the language conversationally. *Id.* During the ride to the law enforcement center, the officer and defendant talked in English. *Id.* Once they arrived to the interrogation room, the officer utilized the services of a bilingual probation officer, who was fluent in Spanish but had never been certified as a Spanish-English translator. *Id.*

During the questioning at the law enforcement center, the officer asked

confirming the defendant's wife understood her consent, the wife's signature consenting to the search was obtained. *Id.* at 530.

After being charged with the offense, the defendant brought a motion to suppress, alleging the wife's consent was given involuntarily, claiming the Hmong language did not have words for "constitution" or "warrant." *Id.* at 531. The trial court granted the suppression on the basis that the interpreter's translation of the consent form inaccurately defined "warrant." *Id.*

In reversing the trial courts ruling, the Court of Appeals found that the defendant's wife's consent was voluntary under the totality of the circumstances. *Id.* at 536. The Court reasoned that officers obtained a Hmong interpreter and made "obvious attempts to ensure that [the wife] understood her actions." The Court also noted that no other forms of overt coercion were present during questioning. *Id.*

In the present case, unlike *Fernandez-Torres* and *Xiong*, no attempts were made by law enforcement to ascertain Ghebre's deficiencies in the English language nor obtain the services of an interpreter in the face of an "obvious language barrier between himself and the defendant[.]" COL 15. The present case is more akin to *Fernandez-Torres*, where law enforcement took advantage of the defendant's condition and lack of proficiency in English to elicit inculpatory statements by asking pointed questions related to an allegation of sexual assault. Here, however, no attempts were made to utilize the services of an interpreter in the face of an obvious language barrier.

Ghebre was forty years old at the time he was questioned in this case. He is fluent in the Tigrinya language and has limited capabilities in speaking and understanding the English language. See Ex. 1; SH. Further, Ghebre had limited prior contact with law enforcement prior to questioning in this case. SH 20. The State highlights Ghebre's prior limited experience with law enforcement, including both 49CRI16-1361 and 49CRI20-7887.[3] It should be noted that in 49CRI16-1361, in the scheduling order filed on May 20, 2016, the Magistrate Judge John Schlimgen noted that "Defendant needs Interp."

Bodycam video footage from February 24, 2021 demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter. FOF 14. Det. Schoepf had a difficult time understanding and communicating with Ghebre in a phone call related to the allegations two months prior to the execution of the search warrant. SH 17. Further, Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood. FOF 15. While questioning Ghebre in his vehicle, Det. Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused." FOF 16. Law enforcement disregarded Defendant's unresponsiveness, confusion, and difficulty in speaking and understanding

[3] Defense counsel does not have access to Ghebre's record in 49CRI20-7887 on the eCourts database because Ghebre was granted a suspended imposition of sentence.

English in a police-dominated atmosphere related to a rape allegation. FOF 17. During the questioning, Officer Christensen kept the passenger door ajar but stood directly outside the door so Ghebre could not exit. COL 15. Rather than call an interpreter or utilize another form of assistance in speaking with Defendant, law enforcement continued on with executing the search warrant on the side of the road and speaking with Defendant about the rape allegation. FOF 18.

The cases cited by the State in its brief fail to adequately address the particular issue in this case. None of the cases cited by the State involve circumstances similar to those presented here. In arguing that no threats, promises or other overt coercion was present in the instant case, the State avoids the core issue: whether law enforcement took advantage of Ghebre's lack of understanding of the English language to elicit inculpatory statements.

While the coercive aspects of police conduct in this case were subtle, they were no less effective. Without notice or warning, Ghebre was stopped by a marked patrol vehicle by the road roughly fifteen months after the allegations arose in this case. SH 7-9. Confused and unresponsive, he was approached by a uniformed and armed police officer and ushered to the boulevard. See Ex. 1. He was then accompanied into Det. Schoepf's vehicle with another officer standing directly outside the vehicle and facing his person while he was asked probing questions about the rape allegations. *Id.* Det. Schoepf gave him mixed messages in the English language, telling him they were not going to talk about it at that time, but telling Ghebre that if he had sex with her, he needed to explain it

"now," and proceed to ask specific questions about penetrating the alleged victim. FOF 12-13. The questioning occurred in the face of an obvious language barrier between law enforcement and Ghebre with no attempts to secure an interpreter. FOF 16-17. Under the totality of the circumstances, including the method of questioning by law enforcement and his lack of proficiency in English, Ghebre's capacity for self-determination was substantially impaired and vitiated his knowing intelligent, free and voluntary will.

CONCLUSION

The Circuit Court carefully observed the testimony provided at the suppression hearing and reviewed the officer's bodycam in making its findings, and made no clear error in rendering those findings. The record demonstrates that the circumstances surrounding the questioning by law enforcement combined with Ghebre's vulnerability warrant the conclusion that Ghebre's statements were something less than freely given. Under the totality of the circumstances, the State failed to show by a preponderance of the evidence that Ghebre's statements to law enforcement were voluntary as a matter of law, and this Court should uphold the Circuit Court's Order Suppressing Defendant's Statements.

Respectfully submitted this 21st day of September.

/s/ Beau J. Blouin
Beau J. Blouin
Minnehaha County Public Defender

ATTORNEY for APPELEE

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 5,191 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 21st day of September, 2022.

/s/ Beau J. Blouin
Beau J. Blouin
Attorney for Appellant

APPENDIX

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA, Plaintiff, vs. **FITSUM GHEBRE,** Defendant.	**CR. 21-2644** **ORDER SUPPRESSING DEFENDANT'S STATEMENTS**

****

Pursuant to Defendant's Motion to Suppress Statements filed on July 29, 2021; a hearing on the motion being held on January 18, 2022; the State having been represented by Lori Ehlers; the Defendant being present at the hearing and represented by Beau Blouin, and the Court having considered the testimony and evidence submitted at the hearing and issuing a Memorandum Decision on April 4, 2022;

IT IS HEREBY ORDERED that on the issue of voluntariness under Miranda, the Defendant's motion is DENIED; however, on the issue of voluntariness under Due Process, the Defendant's motion is GRANTED, and Defendant's statements at issue shall be suppressed.

ENTERED this 12th day of May, 2022.

The Honorable Brad Zell
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk

By _____

FILED
MAY 13 2022
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA, Plaintiff, vs. **FITSUM GHEBRE,** Defendant.	**CR. 21-2644** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

****

The above-entitled matter came on for hearing on January 18, 2022, before the Honorable Judge Brad Zell. Deputy State's Attorney Lori Ehlers representing the State of South Dakota, and Defendant Fitsum Ghebre was personally present at the hearing with his attorney, Beau Blouin, of the Minnehaha County Public Defender's Office. The Court having received the video exhibit, heard testimony, and reviewed the arguments of counsel, now makes the following:

FINDINGS OF FACT

1. On April 9, 2021, Defendant was charged by complaint with the offenses of felony rape in third degree and sexual contact with person incapable of consenting, stemming from an alleged incident that occurred on November 29, 2020.

2. As part of the investigation by law enforcement, a rape kit was collected and sent to the South Dakota Forensic Lab.

3. On February 19, 2021, the results from the rape kit were received by Detective Christopher Schoepf that indicated male DNA was found and that a sample could be submitted for comparative analysis.

4. On February 20, 2021, Detective Schoepf applied for and was granted a search warrant for a sample of Defendant's DNA.

5. On February 24, 2021, Detective Schoepf drove to Defendant's apartment building and parked down the street from the complex.

6. Once Defendant left his residence, Schoepf radioed for a marked police vehicle to conduct a traffic stop on Defendant so Schoepf could execute the search warrant and obtain a sample of Defendant's DNA.

7. Officer Jason Christensen with the Sioux Falls Police responded and stopped Defendant in his vehicle near E. 6th Street and N Sherman Ave.

8. Detective Schoepf had Defendant come back to his unmarked vehicle parked on the side of the road and sit in the passenger seat while Schoepf executed the search warrant.

9. The passenger door was kept open during the encounter but Officer Christensen stood directly outside the door so Defendant could not exit.

10. Detective Schoepf informed Defendant they had a search warrant for his DNA related to a rape allegation.

11. Detective Schoepf did not intend to make an arrest when he questioned Defendant; rather, the purpose of his contact with Defendant was to collect the DNA sample.

12. Although Detective Schoepf told Defendant he is not under arrest and that they were not going to talk about it at that time, Schoepf also told Defendant "Here's my thing man, if you had sex with her, that's what you need to explain to me now."

13. Schoepf proceeded to ask Defendant specific questions about the rape allegations while executing the search warrant.

14. Bodycam video footage demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter.

15. Detective Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood.

16. Detective Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused."

17. Law enforcement disregarded Defendant's unresponsiveness, confusion, and difficulty in speaking and understanding English in a police-dominated atmosphere related to a rape allegation.

18. Rather than call an interpreter or utilize another form of assistance in speaking with Defendant, law enforcement continued on with executing the search warrant on the side of the road and speaking with Defendant about the rape allegation.

CONCLUSIONS OF LAW

1. There are two constitutional safeguards against involuntary confessions: the Due Process Clause of the Fourteenth Amendment which prohibits involuntary confessions, and the Fifth Amendment right against self-incrimination which requires *Miranda* warnings for custodial interrogations. *State v. Morato*, 2000 S.D. 149, ¶ 11, 619 N.W.2d 655, 659.

2. "Fifth Amendment right against self-incrimination is implicated whenever an individual is subject to custodial interrogation by law enforcement." *State v. Walth*, 2011 S.D. 77, ¶ 10, 806 N.W.2d 623, 625 (citation omitted).

3. "An individual is subject to custodial interrogation if he is 'deprived of his freedom of action in any significant way.'" *State v. Spaniol*, 2017 S.D. 20, ¶ 35, 895 N.W.2d 329, 342 (quoting *Walth*, 2011 S.D. 77, ¶ 10, 806 N.W.2d at 625).

4. A two-part test is utilized to determine whether an individual is "in custody." "First, what were the circumstances surrounding the interrogation; and second, given those circumstances would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest. *Walth*, 2011 S.D. 77, ¶ 12, 806 N.W.2d at 626 (quoting *State v. Wright*, 2009 S.D. 51, ¶ 19, 768 N.W.2d 512, 520).

5. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

6. The South Dakota Supreme Court has iterated that, although interviews with law enforcement have naturally coercive pressures, Miranda warnings are only required when a suspect is "in custody." *State v. Johnson*, 2015 S.D. 7, ¶ 15, 860 N.W.2d 235, 242.

7. "Whether an individual is in custody is determined by 'how a reasonable man in the suspect's position would have understood his situation.'" *State v. Hoadley*, 2002 S.D. 109, ¶ 24, 651 N.W.2d 249, 256.

8. Defendant was not "in custody" for purposes of *Miranda* at the time he provided statements to Detective Schoepf because Defendant was told he did not have to talk if he did not want to and that he was free to leave following the execution of the search warrant for his DNA; further, the Defendant was not handcuffed, and the door to the vehicle was left partially open.

9. The State bears the burden of proving by a preponderance of the evidence that a defendant's admission were voluntary. *State v. Fisher*, 2011 S.D. 74, ¶ 18, 805 N.W.2d

571, 575 (citing *State v. Tuttle*, 2002 S.D. 94, ¶ 21, 650 N.W.2d 20, 30).

10. In evaluating voluntariness under this analysis, the Court looks to "the effect [that] the totality of the circumstances had upon the will of the defendant and whether the defendant's will was overborne." *Morato*, 2000 S.D. 149, ¶ 12, 619 N.W.2d at 659 (citing *Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d at 517).

11. "A defendant's will is overborne, making a statement involuntary, when interrogation tactics and statements are so manipulative or coercive as to deprive a defendant of the 'ability to make an unconstrained, autonomous decision to confess.'" *State v. Gesinger*, 1997 S.D. 6, ¶ 12, 559 N.W.2d 549, 551.

12. The Court may consider the following factors to discern whether a defendant's will was overborne or police tactics deprived a defendant of the ability to choose: "the duration of detention; the defendant's age, educational background, and prior experience with law enforcement; whether the defendant received advice on constitutional rights; and whether the interrogators used repeated or prolonged questioning, or physical deprivation of such things as food or sleep." *State v. Darby*, 1996 S.D. 127, ¶ 28, 556 N.W.2d 311, 319.

13. "The presence or absence of any one of these factors alone is not dispositive," as voluntariness is reviewed under a totality, "considering all the circumstances surrounding the defendant's encounter with law enforcement." *Morato*, 2000 S.D. 149, ¶ 13, 619 N.W.2d at 660.

14. The inquiry centers on "(1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *State v. Holman*, 2006 S.D. 82, ¶ 15, 721 N.W.2d 452, 456 (citing *Tuttle*, 2002 S.D. 94, ¶ 22, 650 N.W.2d at 31).

15. Based on the totality of the circumstances surrounding Defendant's interaction with law enforcement, the Court finds that Defendant's admissions to Detective Schoepf were involuntary under Due Process based on the following: Detective Schoepf ignored the obvious language barrier between himself and Defendant; bodycam video footage demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter; Detective Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood; Detective Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused;" Officer Christensen kept the passenger door ajar but stood directly outside the door so Defendant could not exit.

16. Based on Defendant's clear difficulty in understanding the officers, the Court is not persuaded that Defendant fully understood his rights at that time.

17. The State has not met its burden in establishing voluntariness of Defendant's confession.

18. Accordingly, the Court finds that Defendant's admissions to Detective Schoepf were

involuntarily given under the Due Process Clause of the Fourteenth Amendment, and Defendant's Motion to Suppress under the Due Process Clause is therefore granted.

BY THE COURT:

5/12/22

BRAD ZELL
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk of Courts

By: _____
Deputy

FILED
MAY 13 2022
Minnehaha County, S.D.
Clerk Circuit Court

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Second Judicial Circuit
Lincoln and Minnehaha Counties
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CIRCUIT JUDGE
Bradley G. Zell

April 4, 2022

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Re: State v. Fitsum Ghebre, 49CRI21-2644

Dear Counsel:

On July 29, 2021, Defendant Fitsum Ghebre filed a Motion to Suppress statements made during the execution of a warrant to obtain Defendant's DNA under *Miranda v. Arizona*. A suppression hearing was held on January 18, 2022. Shortly before that hearing, defense counsel indicated its intent to raise the additional issue of whether Defendant's statements were voluntary under the Due Process Clause. Following the hearing, the parties submitted additional briefing on the issue of voluntariness under due process. The Court received the final submission on this issue on February 4, 2022.

The Court, having reviewed the parties' briefs and considered the arguments and testimony presented at the hearing, issues the following decision.

1. Voluntariness under *Miranda v. Arizona*

There are two constitutional safeguards against involuntary confessions: the Due Process Clause of the Fourteenth Amendment which prohibits involuntary confessions, and the Fifth Amendment right against self-incrimination which requires *Miranda* warnings for custodial interrogations. *State v. Morato*, 2000 S.D. 149, ¶ 11, 619 N.W.2d 655, 659

(citing *Dickerson v. United States*, 530 U.S. 428 (2000)). "The Fifth Amendment right against self-incrimination is implicated whenever an individual is subject to custodial interrogation by law enforcement." *State v. Walth*, 2011 S.D. 77, ¶ 10, 806 N.W.2d 623, 625 (citation omitted). "An individual is subject to custodial interrogation if he is 'deprived of his freedom of action in any significant way.'" *State v. Spaniol*, 2017 S.D. 20, ¶ 35, 895 N.W.2d 329, 342 (quoting *Walth*, 2011 S.D. 77, ¶ 10, 806 N.W.2d at 625). A two-part test is utilized to determine whether an individual is "in custody":

First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Walth, 2011 S.D. 77, ¶ 12, 806 N.W.2d at 626 (quoting *State v. Wright*, 2009 S.D. 51, ¶ 19, 768 N.W.2d 512, 520). "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

The South Dakota Supreme Court has iterated that, although interviews with law enforcement have naturally coercive pressures, *Miranda* warnings are only required when a suspect is "in custody." *State v. Johnson*, 2015 S.D. 7, ¶ 15, 860 N.W.2d 235, 242.

Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. Or is the requirement of warning to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'

Id. (quoting *State v. Johnson*, 2007 S.D. 86, ¶ 22, 739 N.W.2d 1, 9 (emphasis added). "Whether an individual is in custody is determined by 'how a reasonable man in the suspect's position would have understood his situation." *State v. Hoadley*, 2002 S.D. 109, ¶ 24, 6512 N.W.2d 249, 256.

Here, Defendant was not "in custody" for purposes of *Miranda* at the time he provided statements to Detective Schoepf. Defendant was told he did not have to talk if he did not want to and that he was free to leave following the execution of the search warrant for his DNA. Further, it is not alone dispositive to the custody analysis that Defendant was the prime suspect in the alleged rape. See *Morato*, 2000 S.D. 149, ¶ 20, 619 N.W.2d at 661 ("[e]ven an unequivocal 'statement from an officer that the [defendant] is a prime suspect is not, in itself dispositive of the custody issue[]…"). Detective Schoepf did not intend to

make an arrest when he questioned Defendant; rather, the purpose of his contact with Defendant was to collect the DNA sample. Defendant was not handcuffed, the door to the vehicle was left partially open, and Detective Schoepf stated numerous times that Defendant was not under arrest and was free to leave after the swab was completed.

Accordingly, the Court finds that no *Miranda* violation occurred. Defendant's Motion to Suppress Defendant's statements under *Miranda* is therefore denied.

2. Voluntariness under Due Process

The State bears the burden of proving by a preponderance of the evidence that a defendant's admissions were voluntary. *State v. Fisher*, 2011 S.D. 74, ¶ 18, 805 N.W.2d 571, 575 (citing *State v. Tuttle*, 2002 S.D. 94, ¶ 21, 650 N.W.2d 20, 30). In evaluating voluntariness under this analysis, the Court looks to "the effect [that] the totality of the circumstances had upon the will of the defendant and whether the defendant's will was overborne." *Morato*, 2000 S.D. 149, ¶ 12, 619 N.W.2d at 659 (citing *Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d at 517). "A defendant's will is overborne, making a statement involuntary, when interrogation tactics and statements are so manipulative or coercive as to deprive a defendant of the 'ability to make an unconstrained, autonomous decision to confess.'" *State v. Gesinger*, 1997 S.D. 6, ¶ 12, 559 N.W.2d 549, 551.

The Court may consider the following factors to discern whether a defendant's will was overborne or police tactics deprived a defendant of the ability to choose: "the duration of detention; the defendant's age, educational background, and prior experience with law enforcement; whether the defendant received advice on constitutional rights; and whether the interrogators used repeated or prolonged questioning, or physical deprivation of such things as food or sleep." *State v. Darby*, 1996 S.D. 127, ¶ 28, 556 N.W.2d 311, 319. "The presence or absence of any one of these factors alone is not dispositive," as voluntariness is reviewed under totality, "considering all the circumstances surrounding the defendant's encounter with law enforcement." *Morato*, 2000 S.D. 149, ¶ 13, 619 N.W.2d at 660. The inquiry centers on "(1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *State v. Holman*, 2006 S.D. 82, ¶ 15, 721 N.W.2d 452, 456 (citing *Tuttle*, 2002 S.D. 94, ¶ 22, 650 N.W.2d at 31).

Based on the totality of the circumstances surrounding Defendant's interaction with law enforcement, the Court finds that Defendant's admissions to Detective Schoepf were involuntary under due process. First, Detective Schoepf ignored the obvious language barrier between himself and Defendant. Bodycam video footage demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter. Detective Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood. Detective Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused.". Defendant was in the passenger's seat of Schoepf's patrol vehicle on the side of the road. Officer Christensen kept the passenger door ajar but stood directly outside the door so Defendant could not

exit. The officers informed Defendant they had a search warrant for his DNA related to a rape allegation. Although Detective Schoepf tells Defendant he is not under arrest and did not have to talk at that time, the Court is not persuaded, based on Defendant's clear difficulty in understanding the officers, that Defendant fully understood his rights at that time.

The State has not met its burden in establishing voluntariness of Defendant's confession. Law enforcement disregarded Defendant's unresponsiveness, confusion, and difficulty in speaking and understanding English in a police-dominated atmosphere related to a rape allegation. Rather than call an interpreter or utilize another form of assistance in speaking with Defendant, law enforcement continued on with executing the search warrant on the side of the road and speaking with Defendant about the rape allegation.

Accordingly, the Court finds that Defendant's admissions to Detective Schoepf were involuntarily given under the Due Process Clause of the Fourteenth Amendment. Defendant's Motion to Suppress under the Due Process Clause is therefore granted.

The Court is serving this memorandum decision upon counsel via email and filing an original of the same. Defense counsel is to prepare Findings of Fact and Conclusions of Law and an Order consistent with the Court's ruling herein.

Sincerely,

Bradley G. Zell
Circuit Judge

FILED
APR 05 2022
Minnehaha County, S.D.
Clerk Circuit Court

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellee's Brief were electronically served upon:

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Dated this 21st day of September, 2022.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29994

STATE OF SOUTH DAKOTA

Plaintiff and Appellant,

v.

FITSUM GHEBRE,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE BRADLEY G. ZELL
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Order Granting Petition for Allowance of Appeal granted on June 6, 2022

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29994

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

FITSUM GHEBRE,

Defendant and Appellee.

PRELIMINARY STATEMENT

To comply with SDCL 15-26A-62 and to avoid repetitive arguments, the State limits its response to the issues addressed in Defendant's Appellee's Brief. The State does not intend to waive any issues raised in its Appellant's Brief. The State also relies on, without restating, its Jurisdictional Statement, Statement of Legal Issue and Authorities, Statement of the Case, Statement of Facts, and Appendix presented in its Appellant's Brief.

The State uses all document, transcript, and exhibit designations identified in the Preliminary Statement of its Appellant's Brief. On top of those designations, this reply brief refers to Defendant's Appellee's Brief as "AP." This reply brief also refers to the State's Appellant's Brief as "AB." These brief designations are followed by the appropriate page numbers when appropriate.

ARGUMENT

THE CIRCUIT COURT ERRED WHEN IT SUPPRESSED DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT

First and foremost, the Defendant does not contest the statement made to the Detective that "he did not know the girl or did not know who I was talking about." See SH, pg. 13, lines 18-19. The Defendant only argues that the statements made by the Defendant in the later exchange were involuntary.

Second, the Defendant's conclusion states that the Circuit Court "made no clear error in rendering its findings" and that the Circuit Court's Order should be upheld. *See* AP, pg. 21. "Although there are often subsidiary factual questions deserving deference, the voluntariness of a confession is ultimately a legal question." *State v. Holman,* 2006 S.D. 82, ¶ 13 (quoting *State v. Tuttle,* 2002 SD 94, ¶ 20, (additional citation omitted) "This Court reviews the entire record and makes an independent determination of voluntariness." *Id.* This Court does not need to make a clearly erroneous finding in order to reverse the Circuit Court's conclusion of involuntariness.

In its Conclusions of Law, the Circuit Court held that the Defendant's statements were involuntary based on the following:

> Based on the totality of the circumstances surrounding Defendant's interaction with law enforcement, the Court finds that Defendant's admissions to Detective Schoepf were involuntary under Due Process based on the following: Detective Schoepf ignored the obvious language barrier between himself and Defendant; bodycam video footage demonstrates that Defendant was confused and largely unresponsive throughout the entirety of the encounter; Detective Schoepf admitted at the suppression hearing that there were difficulties in communicating with Defendant and that he was not sure how much Defendant understood; Detective Schoepf did not attempt to call an interpreter to assist Defendant, even after telling Defendant he "looked confused;" Officer

> Christensen kept the passenger door ajar but stood directly outside the door so Defendant could not exit.
>
> Based on Defendant's clear difficulty in understanding the officers, the Court is not persuaded that Defendant fully understood his rights at that time.

COL, ¶ 15-16. Other than officer's presence outside the door and the Detective's communication efforts, the Circuit Court's conclusions fail to cite to any overt or implied pressure and the Circuit Court fails to cite to any subtle psychological tactics used by the Detective. The Circuit Court's Conclusions of Law and the Defendant's arguments "conflate the voluntariness question with custody arguments." See *United States. v. Singh*, 2017 WL 4355048, 12 (E.D. Cal. 2017).

The Defendant's AP cites to various cases to assert the proposition that the "quantum of coercion necessary to render a statement involuntary" is lowered. AP, p. 14 (citing *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002). The State does not contest the assertion that personal characteristics must be factored by a court and weighed against law enforcement conduct. This Court stated as such in *Tuttle* when it held that factors such as age, level of education, and intelligence must be weighed against law enforcement conduct. See *Tuttle*, 2002 S.D. at ¶ 22.

However, "Involuntariness requires coercive state action, such as trickery, psychological pressure, or mistreatment." *Withrow v. Williams*, 507 U.S. 680, 708, 1113 S.Ct. 1745, 1762 (1993) (Justice O'Connor Concurrence) (citations omitted). The conclusions must be "more than a 'but for' type causation, for 'causation in that sense has never been the test of voluntariness.'" *Tuttle*, 2002 S.D. at ¶ 23 (quoting

Hutto v. Ross, 429 U.S. 28, 30, 97 S.Ct. 202, 203 (1976))[1]. The Circuit Court's Conclusions of Law failed to factor the coercion aspect of a voluntariness review. Without authority, the Defendant argues that the lack of an interpreter essentially creates a presumption of coercion. A language barrier may be a factor when considering voluntariness but it does not create a presumption of coercion as the Defendant argues. See *State v. Preito-Hernandez*, 329 P.3d 577(Table) (Kan.App.2014)[2].

Notwithstanding the fact that an interpreter was not used, the Defendant cites to three "coercive" measures: the fact that he was stopped without warning, the presence of an armed officer standing by the passenger door, and that the Detective told "Ghebre that if he had sex with her, he needed to explain it "'now,'" and proceed to ask specific questions about penetrating the alleged victim." See AP, pg. 20-21.[3]

First, the Defendant argues, and the Circuit Court's Finding of Fact ¶ 17 states, that there was a police-dominated atmosphere. Yet, the circumstances surrounding the other officer's presence in this case is akin to a routine traffic stop. "[T]raffic stops are

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[1] "If the test was whether a statement would have been made *but for* the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action." *Tuttle*, at n. 6 (citing *U.S. v. Leon Guerrero,* 847 F.2d 1363, 1366, n.1 (9th Cir.1988).

[2] Even in an in-custody situation the lack of an interpreter does not automatically make a statement involuntary. In *Preito-Hernandez* the Kansas Appellate Court found that the defendant had a lack of proficiency with the English language. Ultimately, the Court found that it was the officer's misleading tactics that amounted to coercion. The officers said it was not a "big deal" if the defendant sexually assaulted the victim with only his fingers as long as he promised he wouldn't do it again. Further, the defendant did not volunteer facts but adopted the officer's version. No facts in the present case rise to the level of the in-custody issue presented in *Preito-Hernandez*.

[3] The Defendant takes issue with the Detective's "I like that" comment to the other officer after the Detective exits the vehicle. The Defendant asserts that the Detective was pointing to the vehicle even though no testimony establishes this assertion. Based upon the video, it appears that the Detective was pointing to the body camera. This is further evidenced by the fact that the officer immediately responded that he would upload "it" immediately after the Detective pointed to the camera. Nevertheless, the Detective's comment does not prove any type of coercive conduct by the Detective.

presumptively temporary and brief; and 2) that traffic stops involve circumstances such that the motorist does not feel completely at the mercy of the police, *i.e.,* they are conducted in public view, usually only one or two officers are involved, and the atmosphere is substantially less "police dominated" than in the cases applying *Miranda". State v. Gesinger*, 1997 S.D. 6, ¶ 22, 559 N.W.2d 549, 553, (citing *Berkemer v. McCarty*, 468 U.S. 420, 437–38, 104 S.Ct. 3138, 3149, 82 L.Ed.2d at 333 (quoting *Miranda v. Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966)).

The stop in this matter was temporary and brief, conducted in public view, and two officers were involved. By objective standards, the Defendant and Circuit Court "gave too much weight to [the presence of law enforcement]: 'Any warrant search is inherently police dominated; there is nothing untoward about that circumstance.'" *U.S. v. Williams*, 760 F.3d 811, 815 (8th Cir.2014) (citing *U.S. v. Perrin*, 659 F.3d 718, 721 (8th Cir.2011)). Further, the type of stop fell within the standards set forth by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 29, 88 S.Ct. 1868 (1968) (permissible to conduct a brief stop and inquiry that is "reasonably related in scope to the justification for their initiation.").

Next, the Circuit Court, as well as the Defendant, highlights that the Detective said, "that's what you need to explain to me now." FOF, ¶ 12. Voluntariness must be viewed in the totality of the circumstances. The Circuit Court and the Defendant isolate that statement. It should be noted that through his own arguments, the Defendant concedes that he understood that statement. However, the Circuit Court and the Defendant ignore that prior to that statement the Detective stated, "[y]ou're free to

go", but the Defendant did not leave and they both continued to sit silently in the vehicle. LEV 15:46:14 – 15:46:33. The Circuit Court and the Defendant also ignore the fact that right after saying, "that's what you need to explain to me now", the Detective did not immediately proceed to ask the Defendant questions. Detective corrected himself by stating, "Not right this minute, but call me and we'll talk about it. Okay?" LEV 15:46:34-50. The Detective then handed him his contact card and said that the DNA is going to tell the Detective whether the Defendant had sex with the victim. See *State v. Morato*, 2000 S.D. 149, ¶ 16 ("No rule of law prohibits officers from informing suspects what will be done with their property."). Unprompted by any question, the Defendant then voluntarily stated that he couldn't achieve an erection. The Detective's "specific questions", to the Defendant's unsolicited statement, lasted approximately 45 seconds. LEV 15:46:55-15:47:41 "The [detective] used no deceptive strategies or threats." *Williams*, 760 F.3d at 815.

The Defendant provides citations to support the argument that personal characteristics or vulnerabilities must be taken into consideration. However, he noticeably fails to address the coercive techniques utilized by law enforcement in those cases. See *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515, 520 (1986) ("Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.") In fact, the State would argue that the cases cited by the Defendant further bolsters the State's position.

In *Hill v. Anderson*, the defendant suffered from a form of mental incapacity. During the investigation of the defendant's involvement in the homicide, the

defendant's uncle was assigned to the case. The court noted that "twice before, when Hill was in police custody, his uncle struck him when he refused to talk." *Hill*, 300 F.3d at 682. While being investigated for a third time, the defendant's uncle was left alone in a room for a few minutes and their interaction was not recorded. *Id*, at 681. The defendant's uncle testified, that during the third investigation, he only told the defendant that he believed his nephew had something to do with the murder of the victim. *Id.* The Court stated, "Even accepting his uncle's version of events, in which Detective Hill simply told Danny Hill he believed he was involved in the killing, this episode raises a serious question of coercion. That any officer had struck a suspect is troubling; of special concern here is that Danny Hill was struck by an officer who was also a close family member." *Id*, at 682-83.

In *State v. Fernandez-Torres*, the defendant was questioned for approximately 2 hours at the law enforcement center and the court noted that this timeframe was comparatively brief. 50 Kan.App.2d 1069, 1079, 337 P.3d 691, 698 (2014). The detective told the defendant that a doctor found the defendant's skin cells on the alleged victims vagina. *Id*, at 1073, 337 P.3d at 694. The detective then insisted that he knew the defendant inappropriately touched the alleged victim. *Id*, 337 P.3d at 694-95. Further, the Court stated that the translated statements, made by the detectives, led the defendant to reasonably believe that the detective had authority to act on any criminal charges in exchange for an admission of some degree. *Id*, at 1083, 337 P.3d at 700. The Court noted that it was the tactics used by law enforcement that made the statements involuntary. ("[G]iven Brixius' interrogation technique that combined false representations about supposedly incriminating evidence with suggestions that

inaccurately tended to minimize the legal consequences of some unlawful behavior." *Id*, at 1081, 337 P.3d at 699.)

In *Commonwealth v. Bell*, the defendant was a 13-year-old boy. 365 S.W.3d 216, 219 (Ky Ct. App. 2012). Detectives pulled the 13-year-old out of class and conducted a thirty-two-minute interrogation without his parents present. *Id.* The Court of Appeals of Kentucky noted, "Although the thirty-two-minute interrogation may not seem excessive, the repetitive questioning amounted to coercion by importunity. T.C., alone, was ordered by school officials into a room, facing adult authority figures with considerable power, who also feigned superior knowledge ('I know what happened [and your cousin] has not lied to me about anything'), and who repeatedly demanded answers that he, if he was to be an obedient child, would have to provide. How could T.C. not perceive such a situation as subjectively coercive?" *Id*, at 225. The Court also noted that "a school is where compliance with adult authority is required and where such compliance is compelled almost exclusively by the force of authority". *Id.*

In *State v. Hoppe*, the Defendant was in a state of alcohol withdrawal and hallucinating. 2003 WI 43, ¶ 47-48, 261 Wis.2d. 294, 299, 661 N.W.2d 407, 313. The defendant, over the time of the interviews, adopted the scenarios presented by the law enforcement office. *Id.* During the third interview of the defendant, the officer "raised emotional topics such as the death of Hoppe's parents, Hoppe's military service, and the death he saw in Vietnam. He also discussed how Simon's family was feeling and their need for an answer as to what had happened to Simon. He told Hoppe that, although he could not make any promises, he would tell the district attorney if Hoppe cooperated." *Id*, 2003 WI at ¶ 17.

The Wisconsin Supreme Court stated, "Given Hoppe's personal characteristics, we now turn to the pressures and tactics used by the police officers during the interviews. The questioning was for an aggregate period of approximately five hours over a three-day period. The longest of the three interviews was the third interview on March 9, lasting approximately two hours and during which the most significant incriminating statements were made." *Id*, at ¶54. The Wisconsin Supreme Court even hinted that the case was a close call. *Id*, at ¶ 57.

Dicta within the *Hoppe* case further bolsters the State's arguments. Much like the brief conversation in the present matter, the Wisconsin Supreme Court recognized that "merely asking an injured and intoxicated defendant questions for a brief period of time is generally not an impermissible, coercive tactic." *Id*, at ¶ 45 (citation omitted)

The Defendant also cites to *State v. Xiong* for the prospect that a person can be coerced by subtle means. See AP, p. 15-16 ("*Connelly* teaches that overt acts are not the sole criterion of coerciveness. If there is evidence that police are taking subtle advantage of a person's personal characteristics, that may be a form of coercion." *Xiong*, 178 Wis. 2d 525, 534, 504 N.W.2d 428, 431). However, in the present case, the Defendant merely cites to the alleged language barrier and the lack of the interpreter as the only subtle form of coercion. The Court in *Xiong* still recognized that "improper tactics" must be utilized by law enforcement in order to make a finding of involuntariness. *Id* (See also *U.S. v. Preston*, 751 F.3d 1008, 1027-28 (9th Cir. 2014) (en banc) ((1) Use of repetitive questions; (2) pressure to adopt certain responses; (3) use of alternative questions that assumed culpability; (4) multiple deceptions about

how statement would be used; (5) suggestive questioning that provided details of the alleged crime; (6) false promises of leniency)).

Finally, the Defendant cites to *State v. Marin*, 541 N.W.2d 370, 373 (Minn. App. 1996)(citing *Ton v. State*, 110 Nev. 970, 878 P.2d 986, 987 (1994). *Marin* involved a custodial arrest in which the defendant's *Miranda* rights were violated due to the lack of an interpreter. The State would not dispute that, if this case involved a custodial interrogation, that the lack of interpreter would have greater weight when ensuring a waiver of a defendant's Fifth Amendment right was voluntary. See *U.S. v. Conquering Bear*, 2018 WL 4334066 (D. SD. 2018) (See also *Connelly*, 479 U.S. at 172, 107 S.Ct. at 524 (Justice Stevens Concurrence)("The postcustodial statements raise an entirely distinct question."). Further, the *Ton* case stands for the proposition that an interpreter is required during the "criminal proceedings". *Ton* does not contemplate noncustodial interrogations. Once again, the Defendant "conflate[s] the voluntariness question with custody arguments." See *Singh*, 2017 WL 4355048, 12.

The present case is both factually and legally distinguishable from the cases addressed above because of one conspicuous issue - the Defendant's cited cases "contained a substantial element of coercive police conduct." *Connelly*, 479 U.S. at 164, 107 S.Ct. at 520. No physical threat occurred and nothing in the LEV suggests that the Detective took advantage of the perceived language barrier. The questioning in the present matter was not just comparatively brief, it was almost nonexistent. The exchange in question lasted less than 2 minutes and the questions from the Detective lasted approximately 45 seconds. *See* LEV 15:46:15-15:47:41. The Detective never lied or used false information in an attempt to get a confession. The Detective did not

accuse the Defendant of inappropriate conduct. No repetitive or alternative questions, meant to confuse the Defendant, were asked. He explained the process of the warrant, what the results would show, and that he wanted to talk to the Defendant. See *State v. Morato*, 2000 S.D. 149, ¶ 16 ("No rule of law prohibits officers from informing suspects what will be done with their property.").

The Defendant was told that he was free to go but continued to sit in the Detective's vehicle. After the Detective stated he needed the circumstances explained to him "now", he clarified that they wouldn't talk right there but for the Defendant to give him a call later and they would talk about it. The questions asked by the Detective were in response to the Defendant's voluntary statement that he couldn't achieve an erection. The Defendant's statement and responses to questions clearly indicate that he understood the nature of the allegations. It must also be noted that no "confession" was elicited by the Detective. The Defendant simply denied any type of sexual contact with the victim. The present matter is devoid of any coercive police conduct.

Further, the Defendant had prior experience with law enforcement. The Defendant minimizes those interactions on the basis that an interpreter was requested during previous court proceedings. Even if this case involved a consent or waiver issue, the fact that an interpreter was used in court proceedings does not mandate the use of an interpreter. (See *U.S. v. Ibarra*, 2007 WL 1306639, 8 (D.S.D 2007) ("Neither party has presented any authority, however, and the Court has found none that indicates the use of an interpreter for later court proceedings mandates a finding that an earlier consent or waiver of rights without an interpreter was invalid.")

The Defendant analogizes this case to *State v. Fernandez-Torres* and *Xiong* based upon law enforcements use of an interpreter in those cases. AP, p. 18. However, as stated above, *Fernandez-Torres* rested upon substantial elements of coercion that went beyond the officers asking pointed questions.

Xiong reviewed the voluntariness of the Defendant's wife's consent to search their shared home. The Defendant merely cites to law enforcement's use of an interpreter *Xiong*.[4] However, the Defendant's reliance on *Xiong* once again bolsters the State's arguments. The Wisconsin Court of Appeal found that no "improper police practices" were utilized. See *Xiong*, 178 Wis.2d at 535, 504 N.W.2d at 432. Further, the U.S. Supreme Court has previously conducted a review of a number of its own voluntariness cases. After conducting that review in *Schneckloth v. Bustamonte* the court stated, "In none of them did the Court rule that the Due Process Clause require[s] the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, [are] certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they [are] not in and of themselves determinative." 412 U.S. 218, 226-227 (1973)) (citations omitted).

The Defendant asserts that "the State avoids the core issue: whether law enforcement took advantage of the Ghebre's lack of understanding of the English language to elicit inculpatory statements." *See* AP, pg. 20. On the contrary, the

[4] The Defendant cites to no authority that requires an interpreter during noncustodial questioning. See *Chen v. D'Amico*, 2018 WL 1508909, n. 9. ("In any event, although a criminal defendant has a constitutional right to an interpreter in certain circumstances, the Ninth Circuit has not recognized a right to an interpreter during a police interview.")

Defendant "ignores the integral element of police overreaching." See *Connelly*, 479 U.S. at 164, 107 S.Ct. at 520. While an interpreter was not used, that is merely a factor in the analysis and not the silver bullet as Defendant suggests. See. *Connelly*, 479 U.S. at 164, 107 S.Ct. at 520. The Defendant cites to *Xiong* yet he ignores a key excerpt from the *Xiong* case. "*Connelly* further cautions that a personal characteristic, such as a person's mental condition, *cannot by itself and apart from its relation to official coercion*, dispose of the inquiry into constitutional "'voluntariness.'" *See Xiong,* 178 Wis.2d at 534, 504 N.W.2d at 431 (Ct.App.1993) (emphasis added). "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Thatsaphone v. Weber*, 137 F.3d 1041, 1046 (8th Cir. 1998).

A court must still review the "pressures imposed on him or her by the police in order to induce him [or her] to respond to the questioning." *Xiong*, 178 Wis.2d 525, 534-35 (citing *State v. Michels*, 141 Wis.2d 81, 91, 414 N.W.2d 311, 315 (Ct.App.1987)). "While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, *all have contained a substantial element of coercive police conduct*." *Connelly*, 479 U.S. at 164, 107 S.Ct. at 520 (emphasis added). "The flaw in the [Defendant's] constitutional argument is that it would expand [the] previous line of 'voluntariness' cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision." *Connelly*, 479 U.S. at 165-66, 107 S.Ct. at 521.

While the officers could have sought an interpreter, the Circuit Court and the Defendant also ignore the fact that the Defendant does not request an interpreter. This factor must also be considered when reviewing the totality of the circumstances. (See *U.S. v. Ibarra*, 2007 WL 1306639, 8 (D.S.D 2007); *U.S. v. Adem*, 18 Fed.Appx. 512, 513, 2001 WL 1005975 (9th Cir. 2001); *People v. Fickes*, 2014 IL App. (4th) 130736-U, ¶ 29, 2014 WL 4050047, 6; *People v. Fukama-Kabika*, 2022 IL App. (4th) 200371-U, ¶ 21, 2022 WL 2305759). Other than the officers merely being present and the fact that they asked questions without an interpreter, the Circuit Court's Conclusions of Law fail to cite any coercive or improper tactics whatsoever. See COL, ¶ 15-16.

The Defendant argues that "circumstances surroundings the questioning by law enforcement combined with Ghebre's vulnerability warrants the [Circuit Court's] conclusion that Ghebre's statements were something less than freely given." See AP, pg. 21. A Report and Recommendation for Disposition of Motion to Suppress, authored by Judge Moreno in *U.S. v. Conquering Bear,* reviewed the voluntariness of a "vulnerable" suspect's statements without the use of an interpreter. In *Conquering Bear*, Judge Moreno concluded that the defendant's waiver of *Miranda* was not knowing and intelligent due to the defendant's "severely restricted English literacy, lack of an ASL interpreter, and his conduct during the interview." 2018 WL 4334066, 5 (D. SD. 2018).[5]

[5] The Circuit Court in the present matter concluded that there was no *Miranda* violation; therefore, whether the Defendant's statement is admissible, for impeachment purposes, is not applicable. However, the voluntariness analysis used by Judge Moreno is the same one that should have been utilized by the Circuit Court in the present matter.

However, Judge Moreno also reviewed whether the statements were voluntary for impeachment purposes. Judge Moreno concluded that the statements were voluntary despite the vulnerability of the suspect.

> The record lacks any evidence that shows Agents Provost and Tucker physically coerced, orally threatened, or took advantage of Conquering Bear's inability to hear or speak. Conquering Bear's claim seems to be that he was a "vulnerable suspect whose statements were rendered involuntary because the agents' failure to exercise "special care" when they questioned him and to accommodate his disabilities (not being able to hear or speak) and his communication and English literacy impairments. His claim, while creative, is unavailing.
>
> This is because the "crucial element" of police overreaching is lacking. Agents Provost and Tucker extracted no statements from Conquering Bear through overt or even subtle coercion. Nor did the agents manipulate him or capitalize on his shortcomings.

2018 WL 4334066, 7.

Judge Moreno's summarization could easily be applied to this case. "The [Detective] should have furnished [the Defendant] with an [ ] interpreter to ensure there was effective communication." *Id*, at 8. "Failing to supply [the Defendant] with one, however, was not a form of coercion sufficient to make his statements involuntary." *Id*. "He appeared to 'understand' that the [Detective] wanted to ask him questions about have sex with [the victim]" *Id*. "[H]e cooperated with the [Detective], responded to [his] questions." Id. "More importantly, [the Defendant] never asked for an interpreter or a lawyer or to stop the interview." *Id*. "Because [the Detective] took no action that could objectively be considered coercive or overreaching, there is nothing to refute the voluntariness of [the Defendant's] statements." *Id*.

The Circuit Court's conclusion, that it was "not persuaded that Defendant fully understood his rights at that time", does not follow South Dakota's voluntariness

jurisprudence. (Quoting COL, ¶ 16) Nor can the State find any authority that requires the State to prove the Defendant understand his rights when making statements during a noncustodial interview. (See *Schneckloth v. Bustamonte*, 412 U.S. at 223-227 (1973)) (citations omitted). ("[T]he Due Process Clause [does not] require the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put.")

For the reasons stated above, the Circuit Court's Conclusions of Law erroneously found that the Defendant's statements were involuntary and its Order suppressing the Defendant's statements must be reversed.

CONCLUSION

The State requests that this Court reverse the Circuit Court's determination that the Defendant's statements were involuntary under the Due Process Clause of the Fourteenth Amendment. The State also requests that this Court remand this matter with specific instructions to deny the Defendant's request to suppress his statements made to law enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the 16-page limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains 4,971 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2019.

Dated this 21st day of October, 2022.

Drew W. DeGroot
Deputy State's Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of October, 2022, a true and correct copy of Appellant's Reply Brief in the matter of *State v. Ghebre*, #29994, was served via electronic mail upon Beau Blouin, bblouin@minnehahacounty.org.

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