IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0062

STATE OF MONTANA,

Plaintiff and Appellee,

v.

FRANK MACIEL,

Defendant and Appellant.

REDACTED REPLY BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Karen Townsend, Presiding

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I. Frank Maciel's confession was involuntary in violation of due process under the totality of the circumstances.

A. The standard of review for involuntariness is non-deferential.

The State agrees that the voluntariness of a confession is "rooted" in constitutional due process guarantees and that this Court exercises plenary review of constitutional questions. (Appellee's Br. at 18.) But the State also asserts that "'[w]hether a confession is voluntary is a factual issue.'" (Appellee's Br. at 18 (quoting *State v. Eskew*, 2017 MT 36, ¶ 12, 386 Mont. 324, 390 P.3d 129).)

The United States Supreme Court has made clear that whether a challenged confession was voluntary under the totality of the circumstances is ultimately "a legal question" not entitled to the same deference accorded to factual questions. *Miller v. Fenton*, 474 U.S. 104, 110-12 (1985). "[T]he dispositive question of the voluntariness of a confession has always had a uniquely legal dimension." *Miller*, 474 U.S. at 115-16. While voluntariness can involve subsidiary factual determinations, the ultimate determination of whether a confession was voluntary under the totality of the circumstances is a legal question. *Miller*, 474 U.S. at 110-12; *see also*, *Davis v. North Carolina*, 384 U.S.

737, 741-42 (1966) ("It is our duty in this case . . . as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness."). As this Court has explained regarding voluntariness in the context of guilty pleas, this Court will "review the ultimate, mixed question of voluntariness *de novo*, to determine if the district court's interpretation of the law—and application of the law to facts—is correct." *State v. Warclub*, 2005 MT 149, ¶ 23, 327 Mont. 352, 114 P.3d 254.

As such, this Court's conclusion as to the voluntariness of Frank's confession is "in no way foreclosed" by the district court's conclusion on the same question. *Haynes v. Washington*, 373 U.S. 503, 515 (1963) (reversing voluntariness determination made by trial judge or jury). The Court must make an independent evaluation of the record to determine whether Frank's statements were constitutionally voluntary. *See Miller*, 474 U.S. at 110-12; *Haynes*, 373 U.S. at 515 ("[W]e cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated."). That the question is difficult makes it no less constitutional.

See Haynes, 373 U.S. at 515 (noting the voluntariness determination required a "fine judgment[] as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused").

In this case in particular, the dispute pivots upon the ultimate legal question of voluntariness. There is no dispute as to the key facts, such as Frank having at least some level of intellectual disability, the length of the interrogation, the extent of Frank's criminal history, the phrases the officers used while questioning Frank, and how Frank responded. The basic facts of the communication between the parties are documented by an audio recording that this Court is in an equal position to evaluate as the district court. (Appellant's Br. at 19.) There was no hearing with witness credibility to assess here.

The district court was in no "appreciably better position" than this Court to determine the ultimate voluntariness question here under the totality of the circumstances. *Miller*, 474 U.S. at 117. Frank maintains that a review of the record under the appropriate de novo standard shows Frank's confession was "the product of a will overborne." *Davis*, 384 U.S. at 742.

B. The totality of the circumstances shows that Frank's confession was involuntary.

The State's response downplays significant factors to the totality here such as Frank's intellectual disability, his emotional breakdown, and the officers' coercive techniques. (*See* Appellee's Br. at 26, 33-35.) The conclusion to be drawn from the totality remains that the officers overbore the will of an intellectually disabled man.

The State repeats the district court's mistake of divorcing Frank's documented intellectual disability from the totality of the circumstances. (*See* Appellee's Br. at 26.) Even though Frank was determined fit to proceed in a prior criminal case, Frank's intellectual disability left him with [redacted] (D.C. Doc. 22 at 17; Ex. B, Initial Social Assessment at 5.[1]) Frank could not control these deficits in his mental functioning and they necessarily impacted his reactions and his

[1] This brief follows the citations to the exhibits and redactions to information contained in sealed documents made in the opening brief. (Appellant's Br. at 2 n.2, 4 n.3.)

responses throughout his formal interrogation with an FBI special agent and a police detective.

Similarly, the State dismisses Frank's emotional breakdown after twenty-five minutes of repeated interrogation as "momentary" and driven by fear of "getting in trouble." (*See* Appellee's Br. at 33.) Frank's confusion and emotional breakdown were consistent with his significant [redacted]. (Ex. B, Initial Social Assessment at 5.) The interrogation kept going despite Frank's repeated denials, which puzzled a confused Frank who thought "Paul Simon" was the victim at one point and could not "understand why the fuck I'm still in here talkin' to you guys" after he had already answered their questions. (Ex. A at 20:14-20:17, 22:06-22:09, 23:38-24:03.) Finally, Frank broke down and moaned through tears how he hated cops, wanted to die sometimes, and pleaded he did not know or remember what they were talking about. (Ex. A at 25:00-25:38.) The officers were wearing down his will—and continued to do so.

The State presents Frank as a hardened career criminal. (*See* Appellee's Br. at 27.) But Frank's involvement in the criminal system at 27 consisted of several misdemeanors, a juvenile history, and one

felony case. (D.C. Doc. 22 at 10-11.) His felony intimidation case [redacted]. (Ex. B, 2016 PSI at 3-4.) It does not appear that the intimidation case involved a formal interrogation. Frank's prior criminal history did not show he was experienced in formal, adult, police interrogations.

As to the officers' coercive techniques, the State makes the rigid argument that Detective Baker "did not lie" to Frank. (Appellee's Br. at 33.) The State argues that, based on Detective Baker's statement to Frank after he confessed, the officers had a basis to believe video existed because Christopher Brandon said video would back up his statement implicating Frank. (Appellee's Br. at 14, 33-34; Ex. A at 49:15-49:23.)

The record shows that, based on what he was told by the officers when they pressed him for a confession, intellectually challenged Frank made a fair inference the officers were asserting they had seen him "on video," when they had not. Twice, Detective Baker referenced Frank being "on video," and asked: "Would there be any reason why you would be on video, after the hours of darkness, when you're claiming

you left Missoula while it was daylight?" (Ex. A at 22:09-22:31.) Frank was led to believe and did believe that he had been told he was "um, recorded." (Ex. A at 22:32-22:40.) Only after Frank confessed did Detective Baker backtrack these prior assertions. When Frank specifically referenced these prior assertions after his confession, Detective Baker incorrectly recounted and minimized his prior assertions, saying, "I said, we checked the video at that convenience store," and then Detective Baker contradicted that statement by saying, "I haven't seen that video yet." (Ex. A at 49:10-49:26.)

The State offers no response to the officers having used the false premise that Frank had to continue the interrogation "because we're at the lunch break, so they can't move you from here anyway" to persist in interrogating Frank after he said he wanted to leave the room. (Appellant's Br. at 22-23 (citing Ex. A at 38:11-38:25).) In the heart of the interrogation, the officers mislead Frank about his ability to end the interrogation. The record demonstrates the district court wrongly reasoned the record did not show "anything that amounts to . . . deception on the part of the two officers." (D.C. Doc. 22 at 10.)

Rather than being distinguishable (Appellee's Br. at 34), the subtle deception here aligns with *State v. Old-Horn*, 2014 MT 161, 375 Mont. 310, 328 P.3d 638. In *Old-Horn*, authorities wrote two letters referring to immunity for the defendant, and the State argued on appeal that the letters "could not reasonably have [been] interpreted" to grant unqualified immunity as the defendant believed they did. *Old-Horn*, ¶ 19. During his interrogation, Old-Horn's responses showed he believed he had immunity for his involvement, and the Court concluded his belief was reasonable, noting Old-Horn's age of 21 and his eighth-grade education and that one letter explained immunity in such a manner "not readily apparent even to those trained in the law." *Old-Horn*, ¶¶ 19, 21-22. The Court concluded Old-Horn's confession was not voluntary and condemned the officers' having "carefully and deliberately avoided contradicting" Old-Horn's expressed belief of immunity during his interrogation. *Old-Horn*, ¶¶ 25-26.

Here, like *Old-Horn*, Detective Baker carefully avoided contradicting Frank's belief he was "um, recorded" in the area of the incident the night in question and led Frank to believe the interrogation could not end because it was lunch. Detective Baker suggested Frank

was recorded and then did not dispute Frank's expressed belief that he was recorded until after Frank had confessed. The officers carefully avoided Frank's request to leave the room and thereby end the interrogation. Rather, they led him back to questioning on the false premise he could not end the interrogation since it was "lunch break" at the prison. It is deceptive and coercive for officers to suggest untrue facts, not correct the defendant's expressed belief of those untrue facts, and then continue questioning based on those false premises. *See Old-Horn*, ¶¶ 19-26. "We will not condone the use of deception to obtain a confession." *Old-Horn*, ¶ 25.

Although the officers had no affirmative obligation to discuss the 40-year maximum prison sentence for causing injury while stealing $20 (Appellee's Br. at 34), they are not permitted to misrepresent the offense's severity. Here, the officers chose to repeatedly cajole Frank by framing the incident as "minor" and not "the crime of the century." (Ex. A at 19:37-19:43, 27:16-27:18, 27:49-27:51.) Officers used repeated emphasis of the small amount of money involved to downplay the robbery as a "minor incident." (Ex. A at 19:17-19:23, 19:39-19:41, 27:13-27:15, 27:49-27:51.) A reasonable person in Frank's position, much less

a cognitively impaired person such as Frank, would not have understood such a "minor incident" to carry a potential 40-year prison sentence. Likewise, although the officers made no direct promises of leniency for confessing (Appellee's Br. at 34-35), the officers' implied promises to talk to the prosecutor to "present you in a positive light" showed, at a minimum, the district court did not correctly reason the record lacked "anything that amounts to a promise of leniency." (Ex. A at 30:58-31:30; D.C. Doc. 22 at 10.)

The State relies on Frank's changed, mid-interrogation answers that he was in Missoula and intoxicated on the night of the incident as proving the voluntariness of Frank's confession. (*See* Appellee's Br. at 26-27.) The State's analysis is incorrect. Frank's changed statements showed him bowing to the pressure to get the questioning to cease. The officers had consistently rejected Frank's answers, persistently ignored his confusion about why he was "still in here talkin' to you guys," and repeatedly minimized the offense. (*E.g.*, Ex. A at 20:14-20:20, 22:06-22:09; 24:28-24:32 ("I guess I'll plead to guilty to somethin' that I didn't fuckin' do."); 27:13-27:18.) The officers were unaffected by Frank's mid-interrogation emotional breakdown, and Detective Baker assumed guilt

from it. (*E.g.*, Ex. A at 25:34-25:36 ("You care about this person, didn't ya'?").) That Frank changed his answers following these coercive tactics show the impact of those tactics.

The State's argument that Frank was not coerced to admit the crime ignores Frank's statement in the interrogation that he felt so coerced he would plead to something he denied doing: "I'll plead out to somethin' that I didn't fuckin' do. . . . I just want to get the fuck outta here. . . . I just want to get the fuck outta here, dude . . . seriously this is stressing me out." (Ex. A at 34:00-34:27.) Frank's statements make clear he felt coerced to tell the officers what they wanted to hear to end the interrogation.

The State highlights the officers' empty assurances to Frank near the end of the interrogation they were only concerned with the truth. (Appellee's Br. at 29-30.) But the officers' actions during the preceding 42 minutes had taught Frank that the officers would only accept their "truth," not Frank's. He denied, and they kept going. He broke down, and they didn't relent. He said he wanted to leave the room and end the interrogation, and they said he had to stay and keep going since it

was lunch. The officers would not accept Frank's answers or let him leave until Frank gave the answers *they* were satisfied with.

The district court's ruling and the State's argument on appeal rely on the apparent truthfulness of Frank's eventual confession. (*See* Appellee's Br. at 26, 30-31; D.C. Doc. 22 at 15.) However, the truth of Frank's ultimate confession is irrelevant. *Rogers v. Richmond*, 365 U.S. 534, 544 (1961) (holding the voluntariness of a confession must be answered "with complete disregard of whether or not petitioner in fact spoke the truth").[2] "An involuntary confession may not be used, even if it is truthful." *Eskew*, ¶ 15. The due process question here is what compelled Frank to give the inculpatory answers the State seeks to convict him upon. Frank maintains his inculpatory statements were the product of an imprisoned, disabled young man's will being overborne by the coercive, deceptive, minimizing tactics of two law enforcement officials.

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[2] As to the new details the State asserts that Frank supposedly offered during the interrogation (Appellee's Br. at 30-31), the State does not address that the record continues to contain no evidence as to what Frank learned about the incident when he was visited by a Great Falls detective about the case a week before the formal interrogation at issue here. (Ex. A at 10:05-10:12.)

II. Frank repeatedly invoked his constitutional right to remain silent during his interrogation.

Frank's opening brief argued he invoked his constitutional right to remain silent at two distinct points of his interrogation. First, Frank invoked this right when he unambiguously communicated that he wanted to leave the room to end the interrogation: "Let's just get outta here now." (Ex. A at 38:10-38:14; Appellant's Br. at 32-33.) Detective Baker immediately responded, "We can't leave because we're at the lunch break, so they can't move you from here anyway . . . ." (Ex. A at 38:14-38:19.) Second, Frank invoked his right to silence when he said with resignation: "I just wanna get the fuck outta here dude," adding, "I don't wanna talk about this more, I'll go to court and plead out to it. I don't give a fuck. I'm just tired of fuckin' sittin' here with you guys." (Ex. A at 43:21-43:36; Appellant's Br. at 33-34.)

The State's brief does not address the specific facts of Frank's first invocation. Frank's request was not a "running response[]," as the State generically argues. (*See* Appellee's Br. at 21-22.) After making the request to leave, Frank paused and only continued to speak after Detective Baker led him back to the questioning. (Ex. A at 38:10-38:25.) Nor does it matter that Frank answered Detective Baker's continued

questions. An unequivocal request to stop talking requires officers to cease questioning. *State v. Morrisey*, 2009 MT 201, ¶ 38, 351 Mont. 144, 214 P.3d 708. "[A] suspect's post-request responses to further questioning 'may not be used to cast retrospective doubt on the clarity of the initial request itself.'" *Morrisey*, ¶ 41 (citation omitted).

Frank's second invocation also was not a running response. Frank said with resignation he did not want to talk anymore but would deal with the matter in court. (Ex. A at 43:21-43:36.) He paused for several seconds and added that he had already told officers what happened. (Ex. A at 43:36-43:44.) The State acknowledges Frank's intent was, "I don't wanna talk," not "I wanna talk" as found and relied on by the district court. (Appellee's Br. at 22-23; D.C. Doc. 22 at 19-20.) The State argues that the "don't"—although intended—was difficult to hear and that difficulty shows Frank's invocation was ambiguous. (*See* Appellee's Br. at 22-23.) Although Frank maintains the "don't" is clear from the audio recording, whether that precise word was readily apparent or not, Frank's meaning in his statement was unambiguously clear—he wanted to stop talking.

The State argues Frank's reliance on the context of alleged invocation "is not the constitutional standard." (Appellee's Br. at 16.) The State misapprehends Frank's argument. Frank agrees the constitutional standard for an invocation requires that it be unambiguous and unequivocal. (Appellant's Br. at 30 (citing *State v. Nixon*, 2013 MT 81, ¶ 31, 369 Mont. 359, 298 P.3d 408).) Frank's argument about "context" is not attempting to distort the constitutional test but to demonstrate that—within that standard—an alleged invocation is assessed by more than parsing a person's "exact words." *See McCloud v. State*, 208 So. 3d 668, 676 (Fla. 2016); *State v. Rogers*, 760 N.W.2d 35, 64 (Neb. 2009) ("In considering whether a suspect has clearly invoked the right to remain silent, we review not only the words of the criminal defendant, but also the context of the invocation."); *see also*, *Nixon*, ¶ 32. When applying the federal constitutional standard, courts have recognized "'context is generally as important, if not more important, than the exact words a suspect uses in a statement that is alleged to be an invocation of the right to remain silent.'" *McCloud*, 208 So. 3d at 676 (citation omitted).

From the beginning of the interrogation, Frank had expressed frustration with it, confusion about "why am I in here talkin' to you guys?," and a desire to "get the fuck outta here, dude," "to get out of here, like seriously." (Ex. A at 13:39-13:46; 20:14-20:17; 34:18-34:27.) He did speak quickly at times, but when he told officers he wanted to leave the room, his meaning was clear. After all, Detective Baker's immediate response was, "We can't leave because we're at the lunch break." (Ex. A at 38:13-38:17.) Again, when Frank said he did not want to talk anymore, would go to court, and was tired of sitting here, his meaning was clear. In these two instances, Frank had expressed himself "'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request'" to stop talking with police. *Nixon*, ¶ 31 (citation omitted). The district court erred by concluding Frank did not unambiguously invoke his constitutional right to remain silent.

III. Alternatively, the State concedes the written judgment must be amended to reflect the district court's oral order regarding Frank obtaining a counseling assessment.

In the event the Court affirms the district court's denial of Frank's suppression motion, the State concedes the case should be remanded to

conform the written judgment to the oral pronouncement as to Condition 18 in the written judgment and its counseling assessment requirement. (Appellee's Br. at 1, 36-37.) Frank appreciates the State's concession and agrees that if the Court affirms the felony conviction, the matter should be remanded to district court with instructions to amend Condition 18 to reflect that Frank was given credit towards that condition for any program previously completed in prison. (*See* Appellee's Br. at 36-37.) Frank takes no substantive issue with the wording in the State's proposed condition.

Respectfully submitted this 15th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,417, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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