DA 21-0512

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 142

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CLOVIS CHRISTOPHER GENO,

Defendant and Appellant.

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APPEAL FROM: District Court of the Fifteenth Judicial District,
In and For the County of Roosevelt, Cause No. DC-2020-6
Honorable David Cybulski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Colin M. Stephens, Stephens Brooke, P.C., Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Brad Fjeldheim, Daniel Guzynski, Assistant Attorneys General, Helena, Montana

Theresa Diekhans, Roosevelt County Attorney, Wolf Point, Montana

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Submitted on Briefs: March 6, 2024

Decided: July 9, 2024

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Clovis Christopher Geno appeals his conviction of deliberate homicide. He asserts that the Montana Fifteenth Judicial District Court, Roosevelt County, erred when it denied his motion to suppress his statements to investigators and when it imposed fees and costs at sentencing. We restate the following issues on appeal:

> *1. Should Geno's statements to law enforcement officers have been suppressed as involuntary?*
>
> *2. Did Geno's second custodial interrogation violate his right to counsel under the Sixth Amendment of the United States Constitution?*
>
> *3. Did the District Court err by imposing fees and costs without considering Geno's ability to pay?*

## FACTUAL AND PROCEDURAL BACKGROUND

¶2 On the morning of January 26, 2020, the Roosevelt County Sheriff's Office received a report of an unresponsive adult woman inside Geno's apartment in Culbertson, Montana. Deputy Jason Baker responded to the scene and summoned emergency medical personnel, who identified the woman as Ramona Naramore and determined she was deceased. An autopsy performed on January 28 revealed multiple bruises and injuries to Naramore's body.

¶3 On January 31, Geno agreed to accompany Deputy O'Connor and Deputy Kunz to the Culbertson airport for an interview. Deputy O'Connor read Geno his *Miranda* rights.[1] Geno said he understood his rights, agreed to waive them, and signed a written *Miranda*

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

waiver. Geno informed the officers that he and Naramore had dated and lived together on and off for nearly fifteen years. Geno said that he met Naramore at Smokey's Bar in Bainville around 3:30 p.m. on January 25. They stayed for about an hour. Geno had two beers and Naramore had two or three mixed drinks. After they left Smokey's Bar, they went home and ate dinner. At around 5:00 or 6:00 p.m., Naramore went to the Montana Bar while Geno stayed home. When Deputy O'Connor asked Geno if he had called or texted Naramore while she was at the Montana Bar, Geno stated that he texted Naramore only to tell her that he was going to lock the door to their apartment because he did not trust their new neighbor. Geno said that when Naramore returned home later that evening, he had to assist her up the stairs into their apartment after she slipped and fell on the ice outside. Geno went to the bedroom around 9:00 p.m., and Naramore slept on the couch in the living room. He said he awoke later in the night to a loud noise in the bathroom and saw that Naramore had fallen in the bathtub. He assisted Naramore back to the couch and went back to sleep. He stated that he found Naramore on the floor in the kitchen the next morning and could not get her to wake up, so he went downstairs to seek their neighbor's help.

¶4 Geno said that he and Naramore were involved in a physical confrontation three or four days before Naramore's death. He denied that he had ever slapped, pushed, or choked her. Deputy O'Connor asked Geno about a bite mark discovered on Naramore's arm. Geno initially denied that he had ever bitten Naramore, but later stated he had bitten her in a physical confrontation four or five months ago. The interview lasted about two and a half hours.

¶5 On February 18, the State requested leave to file an Information charging Geno with deliberate homicide. In its request for leave, the State submitted that on February 14, Deputy O'Connor received communication from the Deputy Medical Examiner with the Montana Department of Justice, Forensic Science Division, reporting that Naramore's cause of death was "asphyxia caused by strangulation/homicide." The State also provided the court with statements of nine individuals, including neighbors, bartenders who interacted with Geno and Naramore, and friends of Naramore. The court granted the State leave and issued a warrant for Geno's arrest the next day. In its Information, the State represented that it would seek the death penalty.[2]

¶6 On the evening of February 19, Deputy O'Connor and Deputy Kunz went to Geno's residence in Bainville,[3] and Geno let the officers inside. Deputy O'Connor told Geno that he was there to "follow up with some more questions" and "[i]t shouldn't take too long." Geno and Deputy O'Connor sat across from each other, while Deputy Kunz stood nearby. Deputy O'Connor told Geno, "Just so you understand, you're under no obligation to talk to me still . . . . The rights I read to you still apply. If you decide you don't want to talk to me at some point just tell me, okay? I got to explain your rights one more time." Geno responded, "Okay." When Geno stood up, the following exchange occurred:

> Deputy O'Connor: All right. Well, so, here's my worry is I've had some bad experiences when people walk around, and next thing I know they got a knife in their hand.

[2] The State withdrew its intent to seek the death penalty prior to trial.

[3] At that time, Geno was living on the property of his employer.

> Geno: No, there's not, there's not, we don't even have, well, we got water in the corner.
>
> Deputy O'Connor: All right.
>
> Geno: There's no cooking utensils or nothing here.
>
> Deputy O'Connor: No guns, nothing like that?
>
> Geno: You still have my knife.
>
> Deputy O'Connor: I do, as a matter of fact. Remind me when we're done, I'm gonna give that back to you, okay? But, yeah, so it just, it makes me a little nervous.
>
> Geno: Right. Right. I understand. I understand.

¶7 After Geno sat back down, Deputy O'Connor read to Geno a standard *Miranda* warning.[4] Deputy O'Connor asked Geno if he understood each of the rights he explained, and Geno responded, "Yes." Geno affirmed that he wished to proceed without an attorney present. Deputy O'Connor then read aloud another paragraph on the *Miranda* waiver that stated:

> I have read and fully understand my rights, and I am willing to answer questions and make a statement at this time. I do not want the advice of an attorney at this time. I understand and know what I am doing and no promises or threats have been made to me.

Deputy O'Connor asked Geno if he understood that paragraph, and Geno responded, "Yes." Deputy O'Connor asked Geno if he had any questions about his rights; Geno

[4] The *Miranda* warning read as follows: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney and to have him or her present with you while you are being questioned. If you cannot afford an attorney, one will be appointed for you at no cost before any questioning, if you wish. You can decide at any time to stop answering questions and exercise these rights.

responded, "No." Deputy O'Connor said, "All right . . . . I just want to reiterate, if for some reason you don't want to answer a question and you're uncomfortable with this, you just tell me and I'll stop, okay?" Geno responded, "Okay" and signed the *Miranda* waiver. Before proceeding with questions, Deputy O'Connor stated, "If you do have any questions about your rights, make sure you tell me, okay?" Geno said, "Okay."

¶8 After Geno signed the *Miranda* waiver, Deputy O'Connor said, "So, nothing too exciting . . . . [S]o we have Ramona's phone." Deputy O'Connor asked Geno again if he tried to call Naramore or vice versa on the night of January 25; Geno replied that he did not remember. Deputy O'Connor said that they discovered Geno called Naramore around 6:30 p.m. when Naramore was at the Montana Bar, and he was "trying to build" a "timeline" that would show "anything that contributed to [Naramore's] death." Deputy O'Connor asked Geno if he had "give[n] any more thought to that bite on [Naramore's] arm[.]" Geno responded, "I was drinkin', and it could have, it very possibl[y] could have been me." He said he did not remember more.

¶9 Deputy O'Connor told Geno, "I really want to hear from you . . . . [T]here's more to it than what we've discussed, and . . . Ramona's gone." Deputy O'Connor asked Geno whether he and Naramore got into a fight the night before Naramore died. Geno said that they had a "[p]retty good one" that night and admitted that he may have bitten Naramore then but said that he did not remember. Geno explained that he and Naramore would fight often about Geno's refusal to hire a lawyer for Naramore's son. Shortly thereafter, the following exchange occurred:

Deputy O'Connor: Okay. Well, here, I'll lay my cards on the table for you. So, we got a call from the [] pathologist, um, Ramona's death is a homicide. And I gotta explain to you where I'm coming from, okay?

Geno: Okay.

Deputy O'Connor: Because I really want to hear what you [have] to say, because I, I think there's more to it than what we've talked about. Ramona's death is a homicide from asphyxiation, meaning she was choked or strangled or deprived of air somehow . . . .What that tells me . . . this isn't a whodunit. This isn't a, a what happened. We know what happened she was asphyxiated somehow. It's not a whodunit because two people go into the apartment that night, you and her, one person leaves the next day a homicide victim. That leaves one person who was with her.

Geno: Right.

Deputy O'Connor: Right? Please tell me what happened that night because I think there's more to it.

Geno: If I could remember I would tell you, but I was about blacked out my damn self.

Deputy O'Connor: Okay. Okay. I don't think that you're some kind of homicidal maniac. I don't think you're some kind of psychopath. I think maybe something happened or something got out of control, maybe you were defending yourself, something happened, and somehow or another you caused Ramona's death. And that's what I need to figure out, okay? And that's why I want to hear from you.

Geno: Okay. I wish I could remember, I really do.

Deputy O'Connor: Why don't you remember?

Geno: Because I got pretty damn drunk that night myself.

Deputy O'Connor: Okay. Do you think at some point you guys had a tussle?

Geno: Apparently.

Deputy O'Connor: Tell me about it. Because what I'm trying, what I'm trying to do . . . .

> Geno: That's what I'm trying to tell you, I can't tell you about it if I can't remember.

¶10 Deputy O'Connor asked Geno, "[W]ho is my only suspect in this case?" Geno responded, "Like you said, two of us come up, one comes out a homicide victim." Deputy O'Connor told Geno, "[I]f you have some kind of defense, I want to hear it. I don't get brownie points for sticking somebody in jail." Geno responded, "Like I, I wished I could remember it . . . . Believe me, I do. But it's just, it's not there." Deputy O'Connor asked Geno, "Do you think it's possible that you drank so much you blacked out and you may have done something? You could have hurt her?" Geno responded, "Yes. What I'm saying, I do not know." Deputy O'Connor asked Geno how much he drank that night; Geno responded, "Fifteen, sixteen, I don't know." In response to Deputy O'Connor's question about how much Geno normally drinks, Geno said, "Nine, eight, nine." Geno denied that he had ever hit Naramore in the past. Deputy O'Connor asked Geno if he thought he was responsible for Naramore's death; Geno responded, "I don't believe I am, no. I couldn't kill her, I loved her." At the conclusion of the conversation, Deputy O'Connor advised Geno that he had an arrest warrant for Naramore's murder and placed Geno under arrest.

¶11 Geno moved to suppress his statements from the February 19 interview, asserting that law enforcement obtained an involuntary waiver of Geno's rights, in violation of his Fifth and Fourteenth Amendment rights under the United States Constitution and Article II, Section 25, of the Montana Constitution. He further argued that the interview violated

his right to counsel provided by the Sixth Amendment of the United States Constitution and Article II, Section 24, of the Montana Constitution.

¶12 At an evidentiary hearing on Geno's motion, Deputy O'Connor and Deputy Kunz testified that they wore plain clothes at the February 19 interview, and they never unholstered their pistols. The officers denied making threats. They stated that they did not observe anything that would make them suspect that Geno was under the influence of alcohol or other drugs during the interview, and the tone of the conversation was "cordial." Deputy O'Connor estimated that the interview lasted forty minutes; Deputy Kunz testified that it was less than one hour.

¶13 On cross-examination, Geno's counsel confirmed that Deputy O'Connor and Geno had a brief conversation before Deputy O'Connor turned on his body camera to record the interview. Deputy O'Connor agreed with defense counsel that he informed Geno that he was not under arrest at the time. Deputy Kunz confirmed that the officers planned to place Geno under arrest after the interview in Bainville, and they did not inform Geno that there was a warrant for his arrest or that he was going to be arrested prior to Geno filling out the *Miranda* waiver.

¶14 Geno testified a third deputy was in the second law enforcement vehicle when the officers arrived to interview him, and Geno asked Deputy O'Connor, "[W]hat's the third deputy for[?] You know am I being arrested or what?" According to Geno, Deputy O'Connor replied, "[N]o, no, no, no he's just here as a backup for me." He testified that he did not think he was a suspect, and it seemed to him that the officers "needed to ask

some questions to close the case." Geno further testified, "[I]f I had known if I was being arrested like I had asked, you know I would have never signed [the *Miranda* waiver]."

¶15 On cross-examination, Geno stated that the tone of the interview was "conversational." On re-direct, Geno testified that he "may have been" told he was a suspect, stating that "[Deputy O'Connor] kind of insinuated [at] the [] interview . . . that two people go up and one [] comes down[5] and . . . that doesn't look very good."

¶16 The District Court denied Geno's motion. The court determined, "[a]lthough it is probable the interview was uncomfortable, it is also clear that there was not inappropriate coercion, so much so that throughout the interview Defendant continued to believe he would be getting a knife back from O'Connor, talked about his plans to clean the apartment, and so on." Geno's case proceeded to trial. The State played an edited version of Deputy O'Connor's body camera footage of the Bainville interview for the jury. At the conclusion of trial, the jury found Geno guilty of deliberate homicide.

¶17 The District Court later sentenced Geno to fifty years in prison and imposed financial conditions, including a felony surcharge fee,[6] a $50 surcharge for victim and

[5] This is likely in reference to Deputy O'Connor's statement to Geno at the Bainville interview that "two people go into the apartment that night, you and her, one person leaves the next day a homicide victim."

[6] Under § 46-18-236(1)(b), MCA.

witness advocate programs,[7] a $10 court information technology fee,[8] the costs of assigned counsel,[9] a $50 PSI fee,[10] and a $100 prosecution fee.[11] Geno appeals.

## STANDARDS OF REVIEW

¶18 We review a district court's decision on a motion to suppress evidence to determine whether its findings are clearly erroneous and whether the court applied its findings correctly as a matter of law. *State v. Eskew*, 2017 MT 36, ¶ 12, 386 Mont. 324, 390 P.3d 129. "A finding of fact is clearly erroneous if it is not supported by substantial evidence; if the district court misapprehended the effect of the evidence; or if this Court is definitely and firmly convinced that the district court made a mistake." *Eskew*, ¶ 12. "[W]hether a defendant has given a confession voluntarily is a factual determination within the province of the district court." *State v. Old-Horn*, 2014 MT 161, ¶ 14, 375 Mont. 310, 328 P.3d 638 (citation omitted). "We will not, on appeal, reweigh the evidence or substitute our evaluation of the evidence for that of the district court." *Old-Horn*, ¶ 14 (citing *State v. Gittens*, 2008 MT 55, ¶ 27, 341 Mont. 450, 178 P.3d 91).

¶19 We review sentencing conditions, such as the imposition of fines and fees, first for legality and then for abuse of discretion. *State v. Ingram*, 2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799 (citing *State v. Daricek*, 2018 MT 31, ¶ 7, 390 Mont. 273, 412 P.3d

[7] Under § 46-18-236(1)(c), MCA.

[8] Under § 3-1-317, MCA.

[9] Under § 46-8-113, MCA.

[10] Under § 46-18-111, MCA.

[11] Under § 46-18-232, MCA.

1044; *State v. Reynolds*, 2017 MT 317, ¶ 15, 390 Mont. 58, 408 P.3d 503). "Whether a sentence is legal is a question of law subject to de novo review." *Ingram*, ¶ 8 (citing *Daricek*, ¶ 7). "We determine legality by considering only whether the sentence falls within statutory parameters, whether the district court had statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes." *State v. Steger*, 2021 MT 321, ¶ 7, 406 Mont. 536, 501 P.3d 394 (quoting *Ingram*, ¶ 8) (internal quotation omitted).

## DISCUSSION

¶20 *1. Should Geno's statements to law enforcement officers have been suppressed as involuntary?*

¶21 The Fifth Amendment to the United States Constitution provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." Article II, Section 25, of the Montana Constitution similarly guarantees, "No person shall be compelled to testify against himself in a criminal proceeding." A person charged with a crime has a right under the Fifth Amendment privilege against self-incrimination, coupled with the due process clause of the Fourteenth Amendment, to not be convicted based upon an involuntary confession. *Eskew*, ¶ 14 (citing *Dickerson v. United States*, 530 U.S. 428, 434-35, 120 S. Ct. 2326, 2330 (2000); *State v. Morrisey*, 2009 MT 201, ¶ 29, 351 Mont. 144, 214 P.3d 708). Thus, "[a] defendant may move to suppress as evidence any confession or admission given by the defendant on the ground that it was involuntary." Section 46-13-301(1), MCA. "A statement that was actually coerced must be excluded from trial for all purposes." *Morrisey*, ¶ 29 (citations omitted); *see also* § 46-13-301(4),

MCA ("If the [suppression] motion is granted, the confession or admission is not admissible in evidence against the movant at the trial of the case."). If the defendant moves to suppress a confession, the burden shifts to the State to "prove by a preponderance of the evidence that the confession or admission was voluntary." *Eskew*, ¶ 14 (quoting § 46-13-301(2), MCA; other citations omitted).

¶22 Whether a confession is voluntary is a factual determination that depends upon a consideration of the totality of the circumstances. *Eskew*, ¶ 16 (citing *State v. Hermes*, 273 Mont. 446, 448, 904 P.2d 587, 588 (1995)). Based on notions of due process, "the essential inquiry is whether the suspect's will was overborne" by the circumstances surrounding the confession. *Morrisey*, ¶ 26 (citing *Dickerson*, 530 U.S. at 433-34, 120 S. Ct. at 2330-31). "This Court has considered numerous factors in individual cases that can bear upon whether a confession is voluntary, and no single factor controls." *Eskew*, ¶ 17 (citing *State v. Grey*, 274 Mont. 206, 210, 907 P.2d 951, 954 (1995)). Relevant factors may include interrogation techniques used by police; the defendant's age and level of education; the defendant's prior experience with the criminal justice system; the defendant's demeanor, coherence, articulation, and capacity to make use of his or her faculties; and whether the defendant was advised of his or her *Miranda* rights. *Eskew*, ¶ 16 (citing *Old-Horn*, ¶ 17).

¶23 "We will not condone the use of deception to obtain a confession." *Old-Horn*, ¶ 25 (citing *State v. Reavley*, 2003 MT 283, ¶ 16, 318 Mont. 150, 79 P.3d 270; *State v. Phelps*, 215 Mont. 217, 225, 696 P.2d 447, 452 (1985); *State v. Allies*, 186 Mont. 99, 113, 606 P.2d 1043, 1051 (1979)). "A confession induced by any direct or implied promises, however slight, may be involuntary." *Old-Horn*, ¶ 24 (citing *State v. Hoffman*, 2003 MT 26, ¶ 19,

314 Mont. 155, 64 P.3d 1013; *State v. Loh*, 275 Mont. 460, 476, 914 P.2d 592, 602 (1996)) (internal quotation omitted). Further, "[w]hen a defendant's *Miranda* rights are downplayed and he is assured that he is not a suspect, the waiver of those rights may be considered involuntary." *Old-Horn*, ¶ 26 (citing *State v. Grimestad*, 183 Mont. 29, 37, 598 P.2d 198, 203 (1979)).

¶24 Recognizing that he signed a valid *Miranda* waiver, Geno contends that Deputy O'Connor downplayed Geno's *Miranda* rights by telling Geno he was there to ask "follow-up" questions and that he would give Geno's knife back to him at the end of his interview, thereby deceiving Geno that he was not a suspect. Further, Geno asserts that Deputy O'Connor's failure to inform Geno of the arrest warrant and assurance that Geno was not under arrest prior to the interview constituted a "misrepresentation if not outright lie to Geno" that procured an involuntary waiver of Geno's *Miranda* rights.

¶25 Geno likens his case to *Eskew*, but we find the comparison inapposite. There, interrogating the defendant for nearly four hours while her infant child was hospitalized with injuries they reasonably suspected that Eskew inflicted, officers told Eskew that she was the only one who could help her daughter and was "hurting" her daughter by not talking to them about what happened. *Eskew*, ¶¶ 3-5, 7. Though she initially denied the officers' allegations that she shook her daughter, Eskew ultimately relented to their insistent questioning and told them that she had shaken the baby. *Eskew*, ¶¶ 6-7.

¶26 We held that the District Court erred by concluding that the interrogation was not unduly coercive or manipulative and by concluding that Eskew was "fully cognizant of her situation." *Eskew*, ¶ 23. "Eskew could not have been 'fully cognizant' of her situation

because the officers conducting the interrogation lied to her about material elements of her situation." *Eskew*, ¶ 23. "The officers told [Eskew] lies, not about peripheral points, but about the fundamental nature of the proceeding; about her part in it; and about her part in her daughter's fight for life. Her responses were manipulated by the misrepresentations of the officers about the nature of the interrogation and the importance of her responses." *Eskew*, ¶ 26. We determined that the officers "imposed extreme psychological pressure on her to agree with their descriptions of what had happened" to her daughter. *Eskew*, ¶ 27.

¶27 Geno contends that, like in *Eskew*, Geno was not "fully cognizant" of his situation because Deputy O'Connor and Deputy Kunz lied to him about two "material elements" (*see Eskew*, ¶ 23) of Geno's situation: first, the Information charging Geno with deliberate homicide; and second, the State's notice that it intended to seek the death penalty against Geno.

¶28 The circumstances of Geno's interview in Bainville do not approach the tactics used in *Eskew*. There is no evidence that Deputy O'Connor and Deputy Kunz subjected Geno to "extreme psychological pressure"; Geno showed no signs of being upset or under duress during the interview and acknowledged that the tone of the interview was "conversational"; and Geno's interview lasted only about forty minutes.

¶29 Nor is this case comparable to *Old-Horn*. There, we affirmed a suppression order on the State's appeal because officers unlawfully deceived Old-Horn—who was twenty-one years old and had an eighth-grade education—by giving him a false understanding that he had been promised immunity. *Old-Horn*, ¶¶ 19, 23. Old-Horn not only was not advised that he had been charged with deliberate homicide until after his

incriminating interview with police, but officers affirmatively led him to believe that the county attorney had "not changed his mind" about an immunity offer. *Old-Horn*, ¶¶ 8, 22, 25. The county attorney's letter, however, stated expressly that he would "not . . . offer immunity for any acts which would constitute accountability for the homicide[.]" *Old-Horn*, ¶ 4. The officers never explained this, and we found substantial evidence that Old-Horn reasonably believed he would not be prosecuted for his involvement in the homicide. *Old-Horn*, ¶¶ 21-22. We observed further that the *Miranda* warnings were interwoven with explanations and assurances about an immunity offer. *Old-Horn*, ¶ 26.

¶30 Here, in contrast, Deputy O'Connor made no promises of favorable treatment in exchange for a confession. The record contradicts Geno's belief that Deputy O'Connor needed only to ask some questions to close the case. Deputy O'Connor told Geno during the interview this was a homicide case. Far from assuring Geno "that he [was] not a suspect," *Old-Horn*, ¶ 26, Deputy O'Connor asked Geno directly who his only suspect in the case was; Geno acknowledged it was him.

¶31 We acknowledge nevertheless that Deputy O'Connor was misleading when he told Geno he was not under arrest and failed to inform Geno that charges had been filed. It was inevitable that Geno would be arrested by the end of the interview. These factors weigh in favor of the defendant in considering whether a confession is voluntary. Unlike in *Eskew* and *Old-Horn*, however, officers did not affirmatively deceive Geno. Geno was never "assured that he [was] not a suspect." *Old Horn*, ¶ 26. Review of the totality of circumstances established in the record shows no clear error in the District Court's finding

that Geno's statements were voluntary. At the time of the offense, Geno was fifty-four years old. The *Miranda* waiver that Geno signed at the interview at his residence noted Geno's prior education. Geno graduated from high school and completed two years of college. Geno had prior experience with the criminal justice system—he was convicted of misdemeanor "profanity/drunkenness in public" in Mississippi in 2014 and three DUIs, a driving while driver's license suspended offense, and two contempt of court offenses in North Dakota between 2014 and 2016. Geno's military record shows that he served as a military police officer for two years and four months in the Army; he received an honorable discharge. Deputy O'Connor and Deputy Kunz testified that Geno did not seem to be under the influence of drugs or alcohol during the Bainville interview. Geno was advised of his *Miranda* rights prior to both the interview at the Culbertson airport and the interview at his Bainville residence. He readily agreed to speak with the officers and signed two *Miranda* waivers. Deputy O'Connor notified Geno that he was not obligated to speak to the officers and gave Geno multiple reminders that he could stop the interview at any time. Geno did not dispute the testimony of Deputy O'Connor and Deputy Kunz that they did not raise their voices during the course of the interview and that it was "cordial" in nature.

¶32 Voluntariness is a question of fact within the discretion of the district court; we do not substitute our judgment for that of the trial court. *Old-Horn*, ¶ 14. Geno appropriately points out deficiencies in the District Court's spartan order. But we may uphold a judgment on any basis supported by the record. *State v. Wilson*, 2022 MT 11, ¶ 34, 407 Mont. 225, 502 P.3d 679 (citations omitted). And the District Court made a factual finding that Geno's statements were not obtained by coercion; Geno has not established clear error in this

finding. The totality of the circumstances leads us to agree that Geno's will was not overborne by the circumstances of his interview. *Morrisey*, ¶ 26 (citing *Dickerson*, 530 U.S. at 433-34, 120 S. Ct. at 2330-31). Geno's age, level of education, and prior experience with law enforcement all weigh in favor of a finding of voluntariness. Geno was coherent and articulate in his responses to the officers, and neither his demeanor nor that of the officers suggests coercion. Geno was comprehensively advised of his *Miranda* rights. The police did not use threatening or coercive tactics. They made no promises of immunity or lenient treatment. As he acknowledged at the suppression hearing, Geno knew he was a suspect in the investigation. He affirmed to the officers that he would talk to them without an attorney present. Despite Deputy O'Connor's reminder that he would stop asking questions if "for some reason [Geno did not] want to answer a question and [was] uncomfortable," Geno did not show any hesitancy to answer questions—even after Deputy O'Connor told him they discovered that Naramore had been strangled. The State met its burden of proof by a preponderance of the evidence that Geno's statements were voluntary. *See* § 46-13-301(2), MCA. Under our standard of deference to the trial court's findings, we cannot say that the District Court erred in denying Geno's motion to suppress on these grounds. We affirm on this issue.

¶33 *2. Did Geno's second custodial interrogation violate his right to counsel under the Sixth Amendment of the United States Constitution?*

¶34 In addition to the right to counsel guaranteed under the privilege against self-incrimination found in the Fifth Amendment to the United States Constitution and

Article II, Section 25, of the Montana Constitution,[12] the right to counsel is guaranteed by the Sixth Amendment to the United States Constitution, which states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This right also is expressly recognized by Article II, Section 24, of the Montana Constitution, which states, "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." A defendant's right to counsel extends to "all pretrial critical interactions between the defendant and the State" once a criminal prosecution has commenced by way of formal charge, preliminary hearing, indictment, information, or arraignment. *State v. Scheffer*, 2010 MT 73, ¶ 16, 355 Mont. 523, 230 P.3d 462 (citations and internal quotations omitted). The Sixth Amendment right to counsel "broadly guarantees an accused 'aid in coping with legal problems or assistance in meeting his adversary' (the government) at critical stages of the criminal proceedings." *Scheffer*, ¶ 20 (quoting *United States v. Ash*, 413 U.S. 300, 310-11, 313, 93 S. Ct. 2568, 2574, 2575 (1973)). An accused may, however, waive his right to have counsel present and speak voluntarily with law enforcement even after the right has attached. *Scheffer*, ¶ 26 (citing *Davis v. United States*, 512 U.S. 452, 458, 114 S. Ct. 2350, 2354 (1994)). Both parties agree that Geno had a Sixth Amendment right to counsel at the time law enforcement interviewed him in Bainville because the State had filed charges the day prior

[12] "The right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege [against self-incrimination]." *Miranda*, 384 U.S. at 469, 86 S. Ct. at 1625.

to the interview. *See Scheffer*, ¶¶ 16, 23-24 (right to counsel attaches when a prosecution has been commenced).

¶35 Geno asserts that his statements were in violation of his right to "meet his adversary" with the assistance of counsel during a critical stage of his proceeding. The State responds that under United States Supreme Court precedent, a valid *Miranda* waiver is sufficient to waive a defendant's Sixth Amendment right to counsel. *See Montejo v. Louisiana*, 556 U.S. 778, 795, 129 S. Ct. 2079, 2090 (2009) (stating that because "the right under both sources is waived using the same procedure"—namely, a valid *Miranda* waiver—"doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver"). *See also Patterson v. Illinois*, 487 U.S. 285, 296, 108 S. Ct. 2389, 2397 (1988) ("As a general matter . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda*, 384 U.S. at 479, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one."); *Commonwealth v. Rawls*, 256 A.3d 1226, 1234 (Pa. 2021) (concluding that agents' failure to advise suspect at time of *Miranda* warnings that criminal charges already had been filed against him did not mandate suppression under the Sixth Amendment). Since Geno's waiver was voluntary for the same circumstances considered in the Fifth Amendment voluntariness analysis above, the State contends, the *Miranda* warnings sufficiently waived Geno's Sixth Amendment right to counsel as well.

¶36 Geno did not file a reply brief in response to the State's arguments. He makes no separate argument under Article II, Section 24, of the Montana Constitution nor asserts that

it provides greater protection than its federal counterpart. Rather, his argument also focuses on the Sixth Amendment right to counsel. Geno points simply to our statement in *Scheffer* that "[t]he Sixth Amendment's protection of the attorney-client relationship—the right to rely on counsel as a 'medium' between [the accused] and the State—extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel." *Scheffer*, ¶ 20 (quoting *Patterson*, 487 U.S. at 296 n. 9, 108 S. Ct. at 2397 n. 9).[13]

¶37 Under the particular facts of this case, we find it unnecessary to determine whether, as a matter of federal constitutional law, the Sixth Amendment required officers to inform Geno, along with the *Miranda* advisory, that charges had been filed.[14] Even if Geno were to prevail on that claim, he has not demonstrated how the admission of uncounseled statements from his February interview—statements we have determined were given voluntarily and without coercion—substantially prejudiced his rights.

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[13] Because the State had not yet commenced a formal criminal prosecution against Scheffer at the time of his custodial interrogation, the Court's analysis in that case involved only his Fifth Amendment and Article II, Section 25 right to counsel. *Scheffer*, ¶¶ 23-24. *Scheffer* did not address the issue raised here.

[14] Absent the assertion or development of any separate claim here, we likewise decline to consider whether Montana's Constitution would require such an affirmative advisory. We have made clear that "a defendant must establish sound and articulable reasons that the Montana Constitution affords greater protection for a particular right." *State v. Covington*, 2012 MT 31, ¶ 20, 364 Mont. 118, 272 P.3d 43 (citing *State v. Rosling*, 2008 MT 62, ¶ 66, 342 Mont. 1, 180 P.3d 1102). "We accordingly will undertake a unique, state constitutional analysis only when the defendant has satisfied his burden of proof that a unique aspect of the Montana Constitution, or the background material related to the provision, provides support for the greater protection that he seeks to invoke." *Covington*, ¶ 21. *See also State v. Porter*, 2018 MT 16, ¶ 17, 390 Mont. 174, 410 P.3d 955; *State v. Nixon*, 2013 MT 81, ¶ 26, 369 Mont. 359, 298 P.3d 408. In rejecting the defendant's Sixth Amendment claim, the *Rawls* Court similarly noted that "this Court may take a different view when presented with an analogous claim under the Pennsylvania Constitution." *Rawls*, 256 A.3d at 1234.

¶38 "We may affirm a trial court on any ground supported by the record, regardless of its reasoning." *Wilson*, ¶ 34 (citations omitted). We will not reverse a conviction for an error that does not violate a defendant's substantial rights. Section 46-20-701(1), MCA; *Wilson*, ¶ 34. A claimed error in the admission of evidence, being a trial error that occurs during the presentation of a case to the jury, is reviewed to determine if "there is a reasonable possibility that the inadmissible evidence might have contributed to" the defendant's conviction. *State v. Smith*, 2021 MT 148, ¶ 34, 404 Mont. 245, 488 P.3d 531 (citing *State v. Kaarma*, 2017 MT 24, ¶ 89, 386 Mont. 243, 390 P.3d 609; *State v. Van Kirk*, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735). "Inadmissible evidence is not prejudicial so long as the jury was presented with admissible evidence proving the same facts as the tainted evidence." *Smith*, ¶ 34 (citations omitted).

¶39 As Geno's counsel aptly described in her opening statement, Geno made no admissions to any involvement in Naramore's death, and he never changed his story. During his first custodial interrogation—which he did not move to suppress and does not challenge on appeal—Geno acknowledged that he and Naramore had a fight several days before her death. He also acknowledged that he had bitten her in another physical confrontation, which he said was months earlier. But he denied that he had ever slapped, pushed, or choked Naramore. In the February 19 interview, Geno acknowledged that he could have bitten Naramore during a fight the night before her death but again denied that he had ever hit her in the past. He said he could not remember what happened the night of her death but denied responsibility for causing it, insisting he "couldn't kill her" because he "loved her."

¶40 The evidence, however, pointed to no other reasonable possibility. The State medical examiner testified to a reasonable degree of medical certainty that Naramore was killed by asphyxiation due to manual strangulation, that her body showed signs of struggle, including injuries that could not have been sustained by a fall, and that the strangulation injuries and at least some of the bruising occurred within twelve hours of her death. Testimony from a neighbor showed that though Naramore had fallen on the ice outside, she walked up the steps without assistance. None of the witnesses who had seen her earlier that night noticed any injuries. There was no sign of any forced entry into the apartment and no evidence that anyone besides Geno was in the apartment with Naramore that night. Viewing the record as a whole, we conclude that Geno's statements from the February 19 interview with Deputy O'Connor did not contribute to his conviction such that, had they been excluded, there is a reasonable possibility the outcome could have been different. Geno's own unchallenged statements included most or nearly all of the same facts, and there was independent admissible evidence that amply established the elements of the offense. On that basis, we accordingly affirm his conviction.

¶41 *3. Did the District Court err by imposing fees and costs without considering Geno's ability to pay?*

¶42 At sentencing, the District Court confirmed that Geno reviewed the presentence investigation report (PSI) with his counsel and asked whether there were any "physical mistake[s]" in the report; Geno replied, "No." The State recommended a sentence of 100 years without the possibility of parole. During Geno's sentencing recommendation,

defense counsel requested that the court strike the statutory fees due to Geno's inability to pay:

> The PSI requests and it[']s in the [judgment] lots of times, public defender costs and fees, we ask the Court to strike that. We don't anticipate [Geno] is going to be able to pay that. Plus, he has a $3,500 restitution obligation. We certainly think that should be paid first. So and also, we would ask the Court to strike the $50 PSI fee. He's probably not going to be able to afford that. And like I said he's got [a] restitution obligation. I know there is not much we can do about the statutory fees so they are what they are. I guess if you could make a finding of inability to pay to strike those, obviously he's not going to be working and he hasn't been working. He has no income right now and he isn't going to have any income in [the] foreseeable future depending on what happens here. That is all I have your Honor, thank you.

¶43 The court announced that it would sentence Geno to fifty years in the Montana State Prison with no parole restriction and would impose the restitution and fees, including the cost of court-appointed counsel. Prior to the court adjourning, the following exchange occurred between defense counsel and the court:

> Defense Counsel: You weren't going to impose the OPD fees?
>
> Court: Yeah.
>
> Defense Counsel: You did.
>
> Court: They can be addressed as part of his parole plan.
>
> Defense Counsel: I have no other questions your Honor.

¶44 Geno asserts that the District Court erred by failing to comply with statutory mandates to consider Geno's ability to pay fines and costs before it imposed those financial burdens as part of Geno's sentence. He argues that under our precedent in *State v. Hotchkiss*, 2020 MT 269, 402 Mont. 1, 474 P.3d 1273, the District Court did not "scrupulously and meticulously" inquire as to Geno's ability to pay. *Hotchkiss*, ¶ 24 (citing

§ 46-8-113(4), MCA; *State v. Gable*, 2015 MT 200, ¶ 22, 380 Mont. 101, 354 P.3d 566). The State responds that Geno's failure to object to the fees and costs imposed at sentencing waives this argument on appeal.

¶45 Section 46-18-232(2), MCA, provides in part:

> The court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose.

¶46 We have interpreted this language to require that district courts make a "serious inquiry or separate determination" about a defendant's ability to pay the costs. *Steger*, ¶ 34 (citing *State v. McLeod*, 2002 MT 348, ¶ 34, 313 Mont. 358, 61 P.3d 126; *Ingram*, ¶ 16). "However, this Court will not review issues where the defendant failed to make a contemporaneous objection to the alleged error at the trial court." *Ingram*, ¶ 17 (quoting *State v. Hammer*, 2013 MT 203, ¶ 28, 371 Mont. 121, 305 P.3d 843) (internal quotation omitted). Additionally, when the imposition of a fine or other financial obligation is within the allowable statutory parameters, the District Court's failure to inquire into affordability and make specific findings regarding a defendant's ability to pay renders the sentence objectionable, not illegal. *Ingram*, ¶ 18; *see also Steger*, ¶ 11 (citing *State v. Kotwicki*, 2007 MT 17, ¶ 21, 335 Mont. 344, 151 P.3d 892).

¶47 "A general objection regarding a defendant's inability to pay invokes a defendant's rights under statutes like § 46-18-232, MCA, where applicable, and raises for the District Court the inquiry required." *Steger*, ¶ 14. In *Steger*, the trial court announced that it would impose "all of the financial obligations" listed in Steger's PSI. *Steger*, ¶ 4. One of the

obligations listed in Steger's PSI included fees for the cost of his public defender, and the court began a conversation with Steger about whether he would be able to afford those costs. *Steger*, ¶ 4. Steger said he was disabled, and his counsel advised the court that he would "have problems paying that when we factor in the $4,600 fine he's got to deal with." *Steger*, ¶ 4. The District Court waived the $800 public defender fee but ordered Steger to pay a total of $660 in fees and other costs. *Steger*, ¶¶ 4-5. On appeal, Steger argued that the court should have waived the $500 surcharge for the same inability-to-pay reasons that it waived the public defender fee. *Steger*, ¶ 6.

¶48 We rejected the State's argument on appeal that Steger's comments to the sentencing court were too nonspecific to count as an objection to the surcharge. *Steger*, ¶¶ 12-13. Despite Steger's counsel's statement at the beginning of the hearing that they had reviewed the PSI and that they had no additions or corrections, *see Steger*, ¶ 17 (Baker, J., dissenting), we held that Steger's attorney's objection was "sufficient to notify the District Court that the required ability-to-pay inquiry was at play." *Steger*, ¶ 14.

¶49 Similarly here, Geno's counsel asked the District Court to strike the public defender costs and fees and the $50 PSI fee. Counsel put the court on notice that "[w]e don't anticipate [Geno] is going to be able to pay," given his $3,500 restitution obligation. He further specified that Geno "has no income right now" and "isn't going to have any income in [the] foreseeable future[.]" Geno's request that the District Court make a finding of an inability to pay constitutes a "general objection" to the financial conditions of Geno's sentence under our precedent in *Steger*. The District Court did not take into consideration Geno's ability to pay, as required by statute.

## CONCLUSION

¶50 We affirm the District Court's denial of Geno's motion to suppress and his conviction. The case is remanded for the District Court to either strike the imposition of fees and costs from the judgment or conduct a hearing to determine his ability to pay.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Ingrid Gustafson, specially concurring.

¶51 I write in further discussion of Issue Two. I believe that the failure of the law enforcement officers to inform Geno that he had already been formally charged with Naramore's murder prior to obtaining his waiver of the right to counsel violated his Sixth Amendment right under the United States Constitution as it was neither knowing nor intelligent. However, as the State received no new information or evidence during the February 19 interview, I concur that it may not have been technically necessary to make this determination. I would further conclude any error in failing to inform Geno that he had already been charged with deliberate homicide was harmless.

¶52 The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This fundamental right—enshrined in

the Bill of Rights—is indispensable to the fair administration of our adversarial system of justice and is applicable to the states through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 795 (1963). The purpose of this right is "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023 (1938).

¶53 Once formal charges have been filed, the Sixth Amendment right to counsel attaches and applies to all critical stages of the prosecution, including post-indictment interrogations by law enforcement. *Patterson v. Illinois*, 487 U.S. 285, 290, 108 S. Ct. 2389, 2393 (1988); *United States v. Gouveia*, 467 U.S. 180, 189, 104 S. Ct. 2292, 2298 (1984); *United States v. Wade*, 388 U.S. 218, 227, 87 S. Ct. 1926, 1932 (1967). Importantly, a defendant need not explicitly invoke this right for it to be applicable. *Carnley v. Cochran*, 369 U.S. 506, 513, 82 S. Ct. 884, 889 (1962). Any waiver of this right must be voluntary, knowing, and intelligent, which the prosecution bears the burden of proving. *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 2085 (2009).

¶54 In the case at hand, Geno was formally charged with deliberate homicide on February 18, yet law enforcement did not inform him of this fact before obtaining his waiver of the right to counsel during the interview on February 19. This omission is critical. The U.S. Supreme Court in *Patterson* specifically left open the question of whether an accused must be informed of formal charges before a post-indictment waiver of the right to counsel can be valid. *Patterson*, 487 U.S. at 295 n.8, 108 S. Ct. at 2396 n.8. Given the facts of this case, it is my view that Geno's waiver was not informed and thus not valid under the Sixth Amendment.

¶55 In *Patterson*, the Supreme Court held that the *Miranda* warnings generally suffice to inform an accused of his/her rights under the Sixth Amendment. However, the Court also acknowledged that there may be situations where these warnings are insufficient, particularly where an accused is unaware of the formal charges against them. *Patterson* 487 U.S. at 296 n.9, 108 S. Ct. at 2397 n.9. Because Patterson conceded law enforcement informed him of the murder charge indictment against him before he waived his *Miranda* rights, the Supreme Court did not decide the precise issue before us—whether a waiver under the Sixth Amendment can be deemed knowing and intelligent if the accused is not informed that he has already been charged. Consideration as to whether to talk to law enforcement investigators without counsel present is inherently different for a defendant who has been formally charged and a defendant who has not. A defendant who has not already been charged with a crime may accept the risk of proceeding without an attorney in hopes of convincing law enforcement he was not involved in any offense. If that same defendant knew he had already been charged and he is not told of the charge, especially if the charge is homicide and the death penalty is being sought, he cannot weigh the risk of proceeding without an attorney against the true situation of already being charged. He is deprived of weighing the risks against the lack of any potential benefit—depriving the defendant of protection from conviction from his ignorance of his legal and constitutional rights.

¶56 The interrogation tactics used in this case further underscore the invalidity of Geno's waiver. During the interview, Deputy O'Connor did not disclose to Geno that a warrant had been issued for his arrest or that formal charges had been filed. Instead, the officers

led Geno to believe that he was merely helping to "close the case." This misleading approach significantly undermines the validity of Geno's waiver. To knowingly waive his right to counsel, Geno needed to be fully aware of the serious legal jeopardy he faced, including the fact that the state had already taken formal steps to prosecute him for homicide and to seek the death penalty.

¶57 The *Patterson* court recognized there will be situations where a waiver would be valid under *Miranda* but would not meet a Sixth Amendment standard—voluntary, knowing, and intelligent to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights. *Patterson*, 487 U.S. at 296 n.9, 108 S. Ct. at 2397 n.9. The Supreme Court has placed limits on law enforcement tactics which circumvent the right to have counsel present after charges have been brought. *Maine v. Moulton*, 476 U.S. 159, 176-77, 106 S. Ct. 477, 487-88 (1985) (in light of "the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking [the] right [to counsel]" the State deliberately circumvented Moulton's right to have counsel present by surreptitiously using an informant to elicit incriminating statements the State "knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel."); *United States v. Henry*, 447 U.S. 264, 273, 100 S. Ct. 2183, 2188 (1980) (the concept of a knowing and voluntary waiver of the right to counsel does not apply in communications with an undisclosed undercover informant acting for the government); *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232 (1976) (defendant deprived of the right to assistance of counsel, as judicial proceedings had been initiated against him before the start of the car ride, and

the officer deliberately set out to elicit information from him when he was entitled to the assistance of counsel); *Patterson*, 487 U.S. at 296 n.9, 108 S. Ct. at 2397 n.9 (police may not trick a defendant into agreeing to talk by withholding from him information that his lawyer is trying to reach him). "In announcing [these] bright-line rules favoring the continuous entitlement to counsel over investigatory strategies in these situations, the Court focused upon the particular sleights of mind used to subvert the defendants' awareness of their Sixth Amendment rights, whether or not formal attorney-client relationships existed at the time." *Commonwealth v. Rawls*, 256 A.3d 1226, 1238 (Pa. 2021) (Wecht, J., dissenting).

¶58 Reliance on the fact that Geno received *Miranda* warnings and signed a waiver form is insufficient to address the concerns raised by the manner in which the waiver was obtained. The context and circumstances of the waiver are critical in assessing its validity. As the Supreme Court has stated, "the determination of whether there has been an intelligent waiver of [the] right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson*, 304 U.S. at 464, 58 S. Ct. at 1023.

> The filing of formal charges categorically alters the dynamic between the accused and his government. "It is the starting point of our whole system of adversary criminal justice," the moment at which "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby* [*v. Illinois*], 406 U.S. [682,] 689[, 92 S. Ct. 1877, 1882 (1972)]. If all that law enforcement must do to effectuate a waiver of the right to counsel under the Sixth Amendment is regurgitate Miranda warnings—even after misleading a defendant about his legal risk—attachment would be reduced to "a mere formalism." [*Kirby*, 406 U.S. at 689, 92 S. Ct. at 1882]. Where does that

> leave "the crucible of meaningful adversarial testing"? *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, [2045] (1984).

*Rawls*, 256 A.3d at 1242 (Wecht, J., dissenting).

¶59 To protect and preserve the fundamental right to counsel at all critical stages, I am in favor of a "bright-line rule" requiring law enforcement investigators to inform defendants in clear terms whether they have already been charged with an offense when attempting to obtain waiver of their constitutional rights to counsel under both the U.S. Constitution and the Montana Constitution.

¶60 Given the facts of this case, including the failure to inform Geno of the formal charges and the misleading nature of the interrogation, I conclude that Geno's waiver was not knowing and intelligent. I would, however, conclude the error was harmless as the State did not obtain a confession or other new evidence during the February 19 interview it did not already have.

¶61 I concur with the Court's resolution of the remaining issues.

/S/ INGRID GUSTAFSON

Justice Laurie McKinnon joins in the special concurrence of Justice Gustafson.

/S/ LAURIE McKINNON