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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
Plaintiff and Appellee,	)	
vs.	)	Supreme Ct. No. 20210079
	)	Dist. Ct. No. 09-2019-CR-02573
Wyatt Scott Kukert,	)	
Defendant and Appellant.	)	

APPELLEE'S BRIEF

Appeal from Criminal Judgment dated February 8, 2021, the Order Denying Motion to Dismiss dated February 21, 2020, and the Order Denying Defendant's Motion to Suppress and Dismiss dated July 6, 2020

East Central Judicial District, Cass County, North Dakota
The Honorable Wade L. Webb Presiding

ORAL ARGUMENT REQUESTED

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[¶ 6] STATEMENT OF CASE

[¶ 7] The Defendant appeals from a criminal judgment entered after he entered conditional guilty pleas to two counts of Gross Sexual Imposition (GSI) under N.D.C.C. § 12.1-20-03(2)(a). During the pendency of the case, the Defendant filed a Motion to Dismiss, citing the corpus delicti doctrine. The Defendant claimed that aside from his confession, there was no independent corroborating evidence to support a conviction for GSI. Following a hearing on February 19, 2020, the district court denied the Motion to Dismiss. The Defendant later filed a Motion to Suppress and Dismiss, renewing his corpus delicti claim and arguing that he did not effectively waive his Miranda rights. A motion hearing was held on June 26, 2020. The district court subsequently denied the Motion to Suppress and Dismiss.

[¶ 8] On appeal, the Defendant contends that the district court erred in denying his motions. Specifically, he argues that he did not understand and appreciate his Miranda rights. Further, he claims that his uncorroborated confessions were the only evidence supporting his GSI convictions.

[¶ 9] The State asserts that the district court properly denied the Defendant's motions. Law enforcement advised the Defendant of his Miranda rights and

interviewed him in a relaxed, non-coercive atmosphere. The Defendant knowingly, voluntarily, and intelligently waived his Miranda rights. There was sufficient evidence to corroborate the Defendant's confession.

[¶ 10] **STATEMENT OF FACTS**

[¶ 11] On June 20, 2019, the Fargo Police Department received information from the Brookings Police Department in South Dakota regarding a video that had been discovered on the cell phone of six-year-old M.S. (Felony Change of Plea Tr. ["COP Tr."] 7:19-22.) The video, which was recorded on March 28, 2019 at the Defendant's mother's apartment in Fargo, North Dakota, showed the Defendant sitting on a couch, exposing his erect penis in the presence of two six-year-old girls—M.S. and K.K. (Index #77; COP Tr. 7:22-25; 8:1.) In the video, K.K. said, "Put it away! Put it away!" The Defendant said, "Calm down…in order for this to work it has to be out." M.S. said, "You can lay on the ground right here. Do it, K.K." K.K. said, "I do not know what to do." The Defendant said, "Well then, come here." M.S. said, "You just sit on it and move your butt." K.K. replied, "God, no." M.S. said, "That's how he did it to me. I laid down on my tummy and he put his wiener in me. That's how I did it." M.S. also said, "I did it once. I'm done with it."

[¶ 12] After learning of this video, law enforcement officers executed a search warrant at the Defendant's mother's apartment. (June 26, 2020 Mot. Hr'g Tr. 6:21-22.) Following the search, Bureau of Criminal Investigation (BCI) agents transported the Defendant to the BCI office in Fargo. (June 26, 2020 Mot. Hr'g Tr. 6:21-22.) Agents detained and handcuffed the Defendant. (June 26, 2020 Mot. Hr'g Tr. 6:25; 7:1-4.) Detective Chris Mathson of the Fargo Police Department and

Homeland Security Special Agent Shane Conroy interviewed the Defendant in a room at the BCI. (June 26, 2020 Mot. Hr'g Tr. 6:2-18; 7:12-14.)

[¶ 13] The interview lasted approximately two hours and forty-eight minutes. (June 26, 2020 Mot. Hr'g Tr. 8:19-22.) The tone of the interview was conversational and laid back. (June 26, 2020 Mot. Hr'g Tr. 9:18-21.) Detective Mathson did not offer the Defendant any leniency or benefit in exchange for participating in the interview. (June 26, 2020 Mot. Hr'g Tr. 9:7-14.) During the interview, the Defendant admitted to exposing himself to the victims and allowing them to put tape on his erect penis. (Index #68.) He said the incident occurred five to ten minutes after the video was taken. (Index #68.) He also admitted to having sexual contact, on several occasions, with M.S. at an apartment in Fargo. (COP Tr. 8:6-8.)

[¶ 14] The Defendant filed a Motion to Dismiss on January 24, 2020, claiming a lack of evidence to corroborate his confessions. (App. at 5, 14-15.) A motion hearing was held on February 19, 2020. (App. at 9.) The district court denied the Motion to Dismiss, concluding that the cell phone video "corroborates many aspects" of the confession. (App. at 22:6-7.) The district court noted that the video shows the Defendant with an erect penis in the presence of the two children. (App. at 23:7-8.) The district court concluded that M.S.'s statements on the video corroborate the elements of the charged crimes. (App. at 23:10-12.) Further, the court found that the Defendant's confession was sufficiently trustworthy, noting that the Defendant was not under any undue stress. (App. at 22:23-24; 23:13-14.)

[¶ 15] On June 11, 2020, the Defendant filed a Motion to Suppress and Dismiss. (App. at 6.) The Defendant renewed his claim that the charges should be dismissed on the ground that his confessions were uncorroborated. (App. at 30.) The Defendant also argued that his statements to Detective Mathson and Agent Conroy must be suppressed because he did not waive his Miranda rights. (App. at 26.) The Defendant acknowledged that he "recognized the Miranda rights on their face" but claimed that he did not fully understand the nature and extent of these rights. (App. at 29, ¶ 17.)

[¶ 16] At the June 26, 2020 motion hearing, the State presented the testimony of Detective Mathson and offered as an exhibit the video from M.S.'s cell phone. (June 26, 2020 Mot. Hr'g Tr. 5:15-16; 41:16-17.) The district court received and viewed the video. (June 26, 2020 Mot. Hr'g Tr. 41:20-22; 43: 1-7.) The Defendant called Dr. Jessica Mugge, a clinical forensic psychologist, to testify. (June 26, 2020 Mot. Hr'g Tr. 50:9-14.) Dr. Mugge conducted an evaluation of the Defendant's "capacity to understand the Miranda waiver and any other issues associated with the interrogation and confession." (June 26, 2020 Mot. Hr'g Tr. 54:7-9.) Dr. Mugge assessed the Defendant's history and background, interviewed the Defendant, and administered psychological tests. (June 26, 2020 Mot. Hr'g Tr. 55:8-23.)

[¶ 17] After completing the evaluation process, Dr. Mugge submitted a written report, which the court received in evidence. (June 26, 2020 Mot. Hr'g Tr. 49:17-25; 50:3-4.) The Defendant was twenty-two years old at the time of the evaluation and had no criminal history. (App. at 35, 37.) He had been employed at

a restaurant from his senior year in high school to the time of his arrest. (App. at 38.) Dr. Mugge said a review of the Defendant's records "did not reveal the presence of a learning disability." (App. at 58.) Rather, the Defendant's '"intellectual abilities' were identified as particular strengths." (App. at 58.) Dr. Mugge referenced a previous evaluation that Dr. Jennifer Krance of the North Dakota State Hospital conducted in 2019. (App. at 52-53.) Dr. Krance concluded that the Defendant's intellectual functioning is "within the Above Average range, reflecting Above Average verbal skills and Average non-verbal abilities." (App. at 58.)

[¶ 18] Dr. Mugge administered several tests to evaluate the Defendant's understanding of the Miranda warnings. (App. at 55-57.) On the Comprehension of Miranda Rights-II (CMR-II) test, the Defendant scored ten out of ten, indicating that "he exhibited adequate ability to meaningfully interpret and communicate his understanding of each of the Miranda statements." (App. at 55.) He scored fifteen out of fifteen on the Comprehension of Miranda Rights-Recognition-II (CMR-R-II) test, which measures a person's "ability to identify whether various interpretations provided by the examiner are the same as or different from the warning that was presented." (App. at 55.)

[¶ 19] The Function of Rights in Interrogation (FRI) test measures a person's "perception and belief about the function and significance of the Miranda warnings in the context of interrogation." (App. at 56.) The Defendant's total score was twenty-four out of a possible thirty, which was "not significantly lower than

average." (App. at 56.) On the Gudjonsson Suggestibility Scale (GSS), the Defendant's overall score reflected that "he is not significantly more suggestible than the average person within the general population." (App. at 57.)

[¶ 20] Despite the Defendant's test scores, Dr. Mugge opined that "it is a serious question as to whether Mr. Kukert had the capacity to apply his constitutional rights to his particular situation *at the time of the interrogation*, and his responses during the recorded interview failed to show that he appreciated his rights." (App. at 59.) In her evaluation of the Defendant's interview with law enforcement, Dr. Mugge noted the Defendant's statement that it is "better to cooperate and hope for the best than…to cause more problems," and Detective Mathson's response that "[c]ooperation goes a long way. We certainly want you to be truthful." (App. at 58.) Dr. Mugge concluded that "while [the Defendant] was able to meaningfully interpret and communicate his understanding" of the Miranda rights, "he exhibited deficient ability in applying these rights to realistic scenarios." (App. at 59.) Dr. Mugge cited the Defendant's anxiousness during the interview, his inexperience with the legal system, and Detective Mathson's reinforcement of the Defendant's "decision to 'cooperate' in order to avoid 'more problems.'" (App. at 59.)

[¶ 21] The district court announced its ruling at the close of the hearing. (App. at 61.) Denying the Defendant's Motion to Suppress, the court ruled that under the totality of the circumstances, "Miranda was properly explained," and the Defendant "did demonstrate his ability to appreciate the consequences of waiving

his Miranda rights." (App. at 67:8-13.) The court acknowledged that it had viewed the video recording of the Defendant's interview with law enforcement. (App. at 62: 23-25.) The court found that although the Defendant was in custody and not free to leave, it was, "frankly, a rather polite interrogation." (App at 63:11-23; 64:5-6.) Detective Mathson and Agent Conroy were not "standing, pointing, yelling, directing." (App. at 63:13-14.) Rather, the court found the tone of the interview to be a conversational, back-and-forth discussion. (App. at 64:3-5.) Citing Simmons v. Bowersox, 235 F.3d 1124 (8th Cir. 2001), the court ruled that Detective Mathson's statement about cooperation did not render the confession involuntary.

[¶ 22] The court found Dr. Mugge to be a credible witness and noted her opinion that the Defendant may have an imperfect ability to appreciate the consequences of waiving his rights. (App. at 66:1-5.) However, the court observed that the Defendant "did pretty well" on Dr. Mugge's tests, and in fact "in several of the tests he was rather perfect." (App. at 65:16-18; 66:5.) Considering the totality of the circumstances, the court concluded that the Defendant "had a requisite level of understanding of the consequences of his decision." (App. at 66:21-22.) The Defendant chose to engage in lengthy conversation with the investigators after stating that he understood his rights. (App. at 66:15-25.)

[¶ 23] Further, the district court denied the Defendant's renewed Motion to Dismiss. (App. at 67.) The court concluded that the Defendant's confession was trustworthy, citing factors such as the "explanation of the statement of the Miranda rights," the Defendant's "bantering, engaging in a give-and-take with the officer in

a conversational manner," and the setting and duration of the interview. (App. at 68:4-12.) The court found the Defendant to have "above-average intelligence or at least average intelligence" and the "ability to have this conversation in a knowing and voluntary way." (App. at 68:14-16.) The court concluded that the cell phone video constitutes "sufficient corroborating evidence" that, together with the Defendant's knowing and voluntary confession," satisfy the corpus delicti rule. (App. at 68:22-25.)

[¶ 24] **STANDARD OF REVIEW**

[¶ 25] The standard of review for a trial court's denial of motion to suppress is well-established. State v. Heitzmann, 2001 ND 136, ¶ 8, 632 N.W.2d 1. This Court defers to a trial court's factual findings and resolves conflicts in testimony in favor of affirmance. Id. A trial court is in the best position to assess witness credibility and weigh evidence. Id. The Court will not reverse a trial court's decision "'if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence.'" Id. (quoting State v. Wanzek, 1999 ND 163, ¶ 5, 598 N.W.2d 811). However, "[q]uestions of law are fully reviewable" on appeal. State v. Kitchen, 1997 ND 241, ¶ 12, 572 N.W.2d 106. The same standard of review applies to a trial court's denial of a motion to dismiss. See e.g. State v. Thill, 2005 ND 13, ¶ 6, 691 N.W.2d 230 (outlining the standard of review for preliminary proceedings in criminal cases).

[¶ 26] **LAW AND ARGUMENT**

[¶ 27] **I. The district court properly denied the Defendant's Motion to Suppress.**

[¶ 28] The Defendant's first claim is that he did not waive his Miranda rights before speaking with investigators. (Def.'s Br. ¶ 42.) The evidence does not support this contention. The Defendant acknowledges that Detective Mathson read the Miranda warnings, that Detective Mathson asked him whether he understood the warnings, and that he replied, "Yes." (Def.'s Br. ¶ 33.) Nevertheless, the Defendant argues that the district court erred in concluding that he waived his rights. (Def.'s Br. ¶ 42.)

[¶ 29] The Fifth Amendment of the United States Constitution and Sec. 12, Article I of the North Dakota Constitution provide for a privilege against self-incrimination in criminal cases. State v. Webster, 2013 ND 119, ¶ 9, 834 N.W.2d 283. The Supreme Court held in Miranda v. Arizona, 384 U.S. 436 (1966), that "a person subjected to custodial interrogation is entitled to four specific warnings" to protect this privilege. Webster, 2013 ND 119, ¶ 9, 834 N.W.2d 283. Prior to questioning a person who is in custody, a law enforcement officer must warn the person of the right to remain silent, that anything he says can be used against him in court, that he has the right to an attorney, and that if he wants an attorney but cannot afford to hire one, the court will appoint an attorney to represent him prior to any questioning. Id. The prosecution may not use a defendant's statements "whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant

unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." State v. Klevgaard, 306 N.W.2d 185, 194 (N.D. 1981).

[¶ 30] A defendant may waive the Miranda rights. Id. at 195. However, the waiver "must be made voluntarily, knowingly, and intelligently." State v. Brickle-Hicks, 2018 ND 194, ¶ 11, 916 N.W.2d 781. Voluntariness may be challenged on due process or self-incrimination grounds. Id. For both types of challenges, the Court considers the totality of the circumstances. Id. The Court's analysis is twofold:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Webster, 2013 ND 119, ¶ 21, 834 N.W.2d 283 (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).

[¶ 31] A valid waiver of Miranda rights "does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might ... affec[t] his decision to confess."' Colorado v. Spring, 479 U.S. 564, 576 (1987) (quoting Moran, 475 U.S. at 422). The police are not required to "show their entire hand" during questioning. State v. Murray, 510 N.W.2d 107, 112 (N.D. 1994). Police do not need to "supply a suspect with a flow of information to help

him calibrate his self-interest in deciding whether to speak or stand by his rights." Moran, 475 U.S. at 422. Although additional information could affect the wisdom of waiving Miranda, it does not affect its knowing and voluntary nature. Spring, 479 U.S. at 577. Put another way, a "defendant's awareness of the possible subjects of questioning [i]s not relevant in determining whether he voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." State v. Hunter, 2018 ND 173, ¶ 29, 914 N.W.2d 527.

[¶ 32] The Court's inquiry into voluntariness focuses on the following factors:

> (1) the characteristics and conditions of the accused at the time of the confession, including age, sex, race, education level, physical and mental condition, and prior experience with police; and (2) the details of the setting in which the confession was obtained, including the duration and conditions of detention, police attitude toward the defendant, and the diverse pressures that sap the accused's powers of resistance or self-control.

State v. Goebel, 2007 ND 4, ¶ 16, 725 N.W.2d 578.

[¶ 33] A defendant's "weak mental abilities," standing alone, do not invalidate a confession. Winfrey v. Wyrick, 836 F.2d 406, 411 (8th Cir. 1987). Level of intelligence is only one factor among many others to consider when evaluating the characteristics of the accused. In Goebel, the Court held that although there was evidence that the defendant had a low intelligence level and could not read or write well, "this alone is not enough to render his confession involuntary." Id. at ¶ 18. Similarly, the Eighth Circuit upheld the voluntariness of the defendant's confession, despite the defendant's low-average to borderline intelligence. United

States v. Turner, 157 F.3d 552, 555 (8th Cir. 1998). The Court considered the circumstances surrounding the interview and concluded that the defendant understood his rights. Id.

[¶ 34] In this case, the Defendant claims that he did not actually appreciate and understand his rights. (Def.'s Br. ¶ 41.) An evaluation of the factors in the voluntariness inquiry—the characteristics of the accused and the setting in which the confession was obtained—lead to the opposite conclusion. There is no evidence that the Defendant was in poor health, that he is uneducated, or that he has low intelligence. The Defendant was twenty-two years old at the time of the interview and had no criminal history. (App. at 35, 39.) Dr. Krance found the Defendant's intellectual functioning to be "within the Above Average range, reflecting Above Average verbal skills and Average non-verbal abilities." (App. at 58.) Dr. Mugge's findings also show that the Defendant is intellectually capable. The Defendant's performance on the Miranda comprehension tests largely demonstrated his ability to interpret the warnings and communicate his understanding to others. On the GSS test, the Defendant's scores indicated that "he is not significantly more suggestible than the average person within the general population." (App. at 57.)

[¶ 35] When announcing its decision at the conclusion of the suppression hearing, the district court stated that it found Dr. Mugge to be a credible witness and acknowledged her opinion regarding the Defendant's capacity to understand his constitutional rights. However, the court pointed out that the Defendant performed rather well on Dr. Mugge's tests. Having watched the video of the Defendant's

interview with law enforcement, the court concluded that the interrogation was quite polite. (App at 63:11-23; 64:5-6.) The court found that rather than "standing, pointing, yelling, directing," the investigators used a conversational tone and engaged in a back-and-forth discussion with the Defendant. (App. at 63:13-14; 64:3-5.)

[¶ 36] Indeed, the video of the interview shows that the Defendant did not seem upset or overly emotional. Dr. Mugge noted that the Defendant was anxious, "[b]ut mere emotionalism, confusion, or depression do not dictate a finding of mental incompetency or insanity" that would render a confession involuntary. United States v. Rouco, 765 F.2d 983, 993 (11th Cir. 1985). During the interview, the Defendant spoke in a calm, conversational tone throughout the entire interview, never crying or raising his voice. The Defendant's demeanor was pleasant and relaxed. The Defendant had no difficulty communicating with the investigators. He was not slow to comprehend or respond to questions. In fact, he even offered his own insight at times, demonstrating his intellectual ability to analyze situations. The Defendant clearly understood the questions and provided relevant information. He was able to articulate his thoughts in a coherent, intelligent manner. Nothing in his words or actions suggested that he was incapable of comprehending the meaning of the Miranda warnings.

[¶ 37] Additionally, there was nothing unusual or coercive about the setting or duration of the interview in this case. The Defendant was in custody at the BCI office during the interview. Although the interview lasted approximately two hours

and thirty-five minutes, this Court has upheld the voluntariness of confessions given during lengthy custodial interviews. See Hunter, 2018 ND 173, ¶ 26, 914 N.W.2d 527 (concluding that the defendant's confession was voluntary, where the three-hour interview was conducted in a room at the police station, the defendant was seated close to the door with two detectives across from him, and the defendant was handcuffed and in custody).

[¶ 38] The Defendant makes much of the exchange in which he asked Detective Mathson about the reason for the interview, and Detective Mathson said the investigators would explain it but first wanted to make sure the Defendant was agreeing to speak with them. (Def.'s Br. ¶ 33.) The Defendant said, "It's better to cooperate and hope for the best…than to cause more problems." (Def.'s Br. ¶ 33.) Detective Mathson responded, "Cooperation goes a long way. We certainly want you to be truthful." (Def.'s Br. ¶ 33.) The Defendant argues that Detective Mathson's statement regarding cooperation denied him the opportunity to fully understand his rights. (Def.'s Br. ¶ 39.)

[¶ 39] Although "promises implying leniency or threats of prosecution are part of the totality of the circumstances to be weighed by the trial court, without more, they are insufficiently coercive to render a confession involuntary." State v. Syvertson, 1999 ND 134, ¶ 25, 597 N.W.2d 652. See also Simmons, 235 F.3d at 1133 (holding that a promise of leniency is a relevant consideration in assessing police conduct, but "it is only one circumstance to be considered and does not render a confession involuntary per se"). Rather, confessions are involuntary "when a

defendant's will is overborne at the time the confession is given." Murray, 510 N.W.2d at 111.

[¶ 40] A law enforcement officer's "statement to an accused that telling the truth 'would be better for him' does not constitute an implied or express promise of leniency for the purpose of rendering his confession involuntary." Simmons, 235 F.3d at 1133. Informing a suspect that it would be to his benefit to cooperate is not improperly coercive. United States v. Ruggles, 70 F.3d 262, 265 (2d Cir. 1995). Such statements are "merely common sense factual observations." Id. See also United States v. Umana, 750 F.3d 320, 344 (4th Cir. 2014) ("We have consistently declined to hold categorically that a suspect's statements are involuntary simply because police deceptively highlight the positive aspects of confession."); United States v. Davidson, 768 F.2d 1266, 1271 (11th Cir. 1985) ("A statement made by a law enforcement agent to an accused that the accused's cooperation would be passed on to judicial authorities and would probably be helpful to him is not a sufficient inducement so as to render a subsequent incriminating statement involuntary.")

[¶ 41] Here, Detective Mathson's acknowledgment that "cooperation goes a long way" was a vague observation, not a method of coercion. Detective Mathson did not make promises or offer the Defendant any specific benefit for participating in the interview. He simply encouraged the Defendant to tell the truth, which is certainly permissible for police officers to do.

[¶ 42] The tone of the custodial interview in this case was relaxed and conversational. There is no evidence that anyone forced or coerced the Defendant

into speaking with investigators. Det. Mathson recited the Miranda warnings, and the Defendant confirmed that he understood his rights. The Defendant is a person of above average intelligence who had no trouble communicating with the investigators. The district court heard the testimony of Det. Mathson, reviewed the video of the interview, and correctly determined that the Defendant voluntarily, knowingly, and intelligently waived his Miranda rights.

[¶ 43] **II. The district court properly denied the Defendant's Motion to Dismiss.**

[¶ 44] The Defendant's second claim is that the district court erred in denying his Motion to Dismiss because the State's case improperly relied solely on the Defendant's uncorroborated confession. (Def.'s Br. ¶¶ 43-44.) Citing the corpus delicti doctrine, the Defendant argues that the case should have been dismissed because there is no other evidence to support his convictions. (Def.'s Br. ¶¶ 48, 52.) The State asserts that the video located on M.S.'s cell phone independently corroborates the Defendants statements to law enforcement, and the Defendant's confession was trustworthy and reliable.

[¶ 45] **A. The United States Supreme Court and North Dakota Supreme Court have recognized the corpus delicti doctrine.**

[¶ 46] The term "corpus delicti" is Latin for "body of the crime." Black's Law Dictionary (11th ed. 2019). The United States Supreme Court has acknowledged the general rule that "an accused may not be convicted on his own uncorroborated confession." Smith v. United States, 348 U.S. 147, 152 (1954). The

corpus delicti doctrine provides that the state must establish two factors in crimes involving damage to persons or property: (1) "that the injury for which the accused confessed did occur"; and (2) "that some person was criminally responsible for it." Lufkins v. Leapley, 965 F.2d 1477, 1482 (8th Cir. 1992). These two factors comprise the corpus delicti. Id.

[¶ 47] The purpose of the rule is to prevent wrongful convictions based on false confessions alone. Smith, 348 U.S. at 153. In Smith, the Court noted that "confessions may be unreliable because they are coerced or induced." Id. Even though a statement may not be 'involuntary' within the meaning of this exclusionary rule, "its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past." Id. However, the Court cautioned that "because this rule does infringe on the province of the primary finder of facts, its application should be scrutinized lest the restrictions it imposes surpass the dangers which gave rise to them." Id. Indeed, "a detailed, uncoerced admission by a defendant will tell a jury more about a particular crime than any other evidence." Lufkins, 965 F.2d at 1483. Thus, the court "give[s] great weight" to an uncoerced confession detailing a defendant's involvement in committing the crime. Id.

[¶ 48] There are very few North Dakota Supreme Court opinions addressing the issue of uncorroborated confessions; it appears the term "corpus delicti" has only been used in seventeen cases, either within the text of the opinions or in headnotes.

The Court has declined to reach the corpus delicti argument in two cases because the defendant failed to raise it in the trial court or on direct appeal. See Bell v. State, 2001 ND 188, ¶ 10, 636 N.W.2d 438; State v. Foley, 2000 ND 91, ¶ 12, 610 N.W.2d 49. In several cases, the term "corpus delicti" was merely mentioned in the opinion or cited in Westlaw headnotes, but it was not specifically an argument raised on appeal. See e.g. State v. York, 326 N.W.2d 208, 209-10 (N.D. 1982) (reversing the trial court's dismissal of an attempted theft case for lack of jurisdiction, holding that the court erroneously concluded that the burning of the vehicle itself constituted the corpus delicti of the offense).

[¶ 49] When the Court has addressed corpus delicti arguments, it has generally found sufficient evidence to support defendants' convictions or has declined to substitute its judgment for that of juries. See State v. Champagne, 198 N.W.2d 218, 228 (N.D. 1972) (concluding that sufficient evidence supported the jury's verdict in a murder case, noting that the "jury has weighed the evidence, determined the credibility of the witnesses who appeared before it, and rendered its verdict"); State v. Tjaden, 69 N.W.2d 272, 279 (N.D. 1955) (holding that the State established direct proof of the murder victim's death and concluding that the jury could find beyond a reasonable doubt that the defendant caused the death); State v. Gibson, 284 N.W. 209, 223, 228 (N.D. 1938) (noting in a homicide case that only the *fact* of death must be established by direct proof, and finding sufficient evidence to support the jury's verdict); State v. Smestad, 247 N.W. 556, 557 (N.D. 1933) (finding sufficient evidence to establish the corpus delicti of larceny); State v.

Reilly, 141 N.W. 720, 733 (N.D. 1913) (concluding that the evidence was sufficient to sustain the defendant's murder conviction); State v. Schumacher, 132 N.W. 143, 144 (N.D. 1911) (finding it unnecessary to address the question of whether the defendant could be convicted of the offense based upon his uncorroborated admissions because the record was "replete with evidence as to the corpus delicti and defendant's connection therewith aside from such admissions"). But see State v. McKenzie, 273 N.W. 1, 4 (N.D. 1937) (reversing the trial court's denial of defendant's motion for a new trial, finding insufficient evidence to convict the defendant of larceny); State v. Sogge, 161 N.W. 1022, 1026 (N.D. 1917) (reversing and remanding for new trial because the trial court erroneously instructed the jury that the fact of the victim's death could be established by circumstantial evidence).

[¶ 50] **B. Under the modern adaptation of the corpus delicti rule, the State is only required to establish that a confession is trustworthy.**

[¶ 51] The Eighth Circuit has recognized that a "defendant could not be convicted on the basis of nothing but an uncorroborated confession or admission." United States v. Wolf, 535 F.2d 476, 478 (8th Cir. 1976). However, the Court has also noted that modern interpretation of the corpus delicti rule is not as strict as it had been in earlier times. United States v. Kirk, 528 F.3d 1102, 1110 n.9 (8th Cir. 2008). "Long ago, the Supreme Court rejected a strict interpretation of the traditional corpus deliciti rule, which required the Government to 'introduce independent evidence of every element of the crime.'" Id. (quoting United States v. Corona-Garcia, 210 F.3d 973, 978 (9th Cir. 2000)). Now, the Court "merely

requires that '[a]ll elements of the offense . . . be established by independent evidence or corroborated admissions.'" Id. (quoting Smith, 348 U.S. at 156). As the Kansas Supreme Court aptly explained:

> [W]hile the formal corpus delicti rule focuses on whether there is sufficient evidence of the body of the crime, rigidly severing a confession from the calculus, the trustworthiness standard looks to the totality of the circumstances to assess both whether the crime occurred and whether the confession was trustworthy—i.e., reliable. Applying this standard, a reliable confession is itself sufficient evidence to establish the corpus delicti of the alleged offense.

State v. Dern, 362 P.3d 566, 581 (Kan. 2015).

[¶ 52] An archaic interpretation of the corpus delicti rule is unworkable in numerous cases that modern courts encounter. For example, strict application of the rule would be nonsensical in cases that typically produce no evidence of tangible injury. Crimes involving the sexual abuse of children undoubtedly fall into this category. The Kansas Supreme Court observed that "applying the formal corpus delicti rule to crimes involving inappropriate sexual contact 'seems especially troublesome' because the contact 'often produces no tangible injury.'" Id. at 579 (quoting State v. Mauchley, 67 P.3d 477, 484–85 (Utah 2003)). This problem "is compounded when . . . young victims are unable to qualify as witnesses who could present evidence of the corpus delicti independent of the confession." Id. In such cases, strict application of the corpus delicti rule "potentially operates to obstruct justice." Mauchley, 67 P.3d 477 at 484.

[¶ 53] Consequently, "[m]ost modern commentators writing on the subject have criticized the rule, and many courts have abandoned or greatly modified its

requirements." Dern, 362 P.3d at 578. These criticisms often stem from the fact that the formal corpus delicti rule "is difficult to apply and ill-suited to many crimes, and "either fails to accomplish its goal or its goals can be better achieved without the costs inherent in the formal corpus delicti rule." Id.

[¶ 54] The modern rule provides that "evidence establishing the corpus delicti—independent of the accused's extrajudicial admission—need not be conclusive." Lufkins, 965 F.2d at 1482. In a homicide case, "it is sufficient to show a 'reasonable probability' that the criminal act of another caused the death of the victim." Id. Where there is no tangible evidence of the crime to which the defendant has confessed, "the Government must introduce substantial independent evidence establishing the reliability or trustworthiness of the defendant's statement." United States v. Kirk, 528 F.3d 1102, 1111 (8th Cir. 2008). See also Rachlin v. United States, 723 F.2d 1373, 1379 (8th Cir. 1983) (noting that although there must be "substantial independent evidence" to corroborate the confession, "[i]t is sufficient if the government's independent evidence tends to establish the reliability or trustworthiness of the confession").

[¶ 55] Under the Eighth Circuit's "trustworthiness approach" to the corroboration rule, "the quantity and type of independent evidence necessary to corroborate a confession depends upon the facts of each case." Kirk, 528 F.3d at 1112. "Corroborative facts may be of any kind, so long as they tend to produce confidence in the truth of the confession." Id. Further, "circumstantial evidence may justify a jury's inference that a defendant's statement is true." Id. The

corroborating evidence "need not be sufficient, on its own, to establish the body of the offense beyond a reasonable doubt, or even by a preponderance of the evidence." Id. at 1111. Instead, it "is sufficient if it 'merely fortifies the truth of the confession without independently establishing the crime charged.'" Id. (quoting Wong Sun v. United States, 371 U.S. 471, 489 (1963)). Inversely, circumstantial evidence may show that a defendant's confession is demonstrably false and therefore untrustworthy. The Utah Supreme Court gave the following example: "[I]f a man spontaneously confesses that he fondled a child, but the evidence demonstrates he was never in physical proximity with the child, his confession is likely untrustworthy because the facts related in the confession are inconsistent with otherwise known or established facts." Mauchley, 67 P.3d at 489.

[¶ 56] Noting that a "determination of trustworthiness will depend on the totality of the circumstances," the Kansas Supreme Court identified a number of "nonexclusive factors or indicia of reliability" to consider when evaluating a confession:

> (1) independent corroboration of details or specific facts contained in the confession; (2) the number of times the confession was made and the consistency or lack thereof between different versions of the confession; (3) the circumstances of the confession, including the identity of the person or persons to whom the confession was made and the state of mind of the defendant at the time of the confession; (4) the availability of the facts or details contained in the confession from sources outside the defendant's personal knowledge; (5) the defendant's age, education, experience, and mental health; and, (6) if the confession was made to law enforcement, then the overall fairness of the exchange including whether there was deception, trickery, undue pressure, or excessive length.

Dern, 362 P.3d at 583. This analysis is similar to the determination of whether a defendant voluntarily, knowingly, and intelligently waived his right to remain silent. See e.g. Hunter, 2018 ND 173, ¶ 22, 914 N.W.2d 527 (noting that in determining whether a defendant's statements to law enforcement are voluntary, the Court considers characteristics such as the defendant's "age, sex, race, education level, physical and mental condition, and prior experience with police" and "the details of the setting in which the confession was obtained"). Evidence of a defendant's opportunity to commit the crime is another factor that may be considered in order to corroborate a confession. State v. McGill, 328 P.3d 554, 561 (Kan. Ct. App. 2014).

[¶ 57] **C. The Defendant's confession was trustworthy.**

[¶ 58] The Defendant claims that his confession is the only evidence supporting the convictions in this case. However, the district court correctly concluded that the cell phone video "corroborates many aspects" of the confession. (App. at 22:6-7.) During his interview with law enforcement, the Defendant discussed an incident in which he said the victims put tape on his penis. He said the incident occurred five to ten minutes after the cell phone video was taken. M.S. appeared on the cell phone video, and the Defendant talked to K.K. in the background and referred to K.K. by name. M.S. and K.K. are the same two children whom the Defendant said placed tape on his penis. The video shows the Defendant exposing his penis, the same body part on which the Defendant said the children put the tape after the video was taken.

[¶ 59] The cell phone video corroborates the fact that the Defendant knew the victims, had interacted with them, and had the opportunity to be alone with them. The fact that the Defendant somehow found it acceptable to expose his erect penis to these children lends support to his admission that he sexual contact with them. On the video, the Defendant said to K.K., "Calm down…in order for this to work it has to be out." When K.K. said that she did not know what to do, the Defendant said, "Well then, come here." These statements, considered together with the Defendant's conduct in the video, demonstrate the Defendant's sexual interest in these children and further corroborate his confession.

[¶ 60] As the district court appropriately noted, M.S.'s statements on the video also corroborate the offenses in this case. M.S. said, "You sit on it and move your butt…That's how he did it to me. I had to lay down on my tummy, and he had to put his wiener in me. That's how I did it." This disturbing comment supports the Defendant's confession that he had tried to have sexual intercourse with M.S.

[¶ 61] Moreover, the Defendant's confession was sufficiently trustworthy. The cordial, nonconfrontational tone of the interview provided a noncoercive atmosphere in which the Defendant was permitted speak freely. The Defendant provided details in his interview that no one else would have known, aside from the child victims. As previously discussed in the Miranda analysis, the Defendant understood his rights. He voluntarily spoke with investigators; there is no evidence of coercion. Given these circumstances, the district court properly ruled that the corpus delicti rule is satisfied.

[¶ 62] **CONCLUSION**

[¶ 63] Based on the forgoing reasons, the State asks this Court to affirm the judgment of the district court. The State requests oral argument to assist the Court in evaluating this matter and to answer any questions the Court may have.

[¶ 64] Respectfully submitted this 24th day of June 2021.

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[¶ 65] CERTIFICATE OF COMPLIANCE

[¶ 66] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count is thirty-two pages.

[¶ 67] Dated this 24th day of June 2021.

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[¶ 68] CERTIFICATE OF SERVICE

[¶ 69] A true and correct copy of the foregoing document was sent by e-mail on the 24th day of June 2021, to Ashley K. Schell at willistonpublicdefender@nd.gov.

Renata J. Olafson Selzer, #06076