IN THE SUPREME COURT OF THE STATE OF NEVADA

ARIE ROBERT REDEKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48121

FILED

NOV 17 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant Arie Redeker to life imprisonment with the possibility of parole after ten years for the second-degree murder charge, plus an equal and consecutive life sentence with the possibility of parole after ten years for the use of a deadly weapon. The district court gave Redeker 459 days' credit for time served.

This case arises from an incident in which Redeker killed his estranged wife, Skawduan Lannan (Tuk). On appeal, we address whether the district court abused its discretion when it admitted evidence seized inside of Redeker's home without a search warrant, Redeker's two confessions to the homicide detectives, and multiple pieces of bad act evidence without conducting a Petrocelli hearing.[1] We disagree with each

[1]Redeker also challenges the district court's refusal to strike the State's notice of intent to seek the death penalty, the district court's limitations on voir dire, the district court's admission of post-it notes from his home, the constitutionality of NRS 193.165, the district court's denial of his motions to dismiss counsel, the prosecutor's conduct in closing arguments, and the sufficiency of the evidence. He further claims that

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of Redeker's contentions. Therefore, we affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them except as necessary to our disposition.

Evidence from the two searches of Redeker's home

Redeker argues that the district court violated his federal and state constitutional rights when it admitted evidence seized from the warrantless searches of his home. We disagree.

A district court's decision whether to admit evidence is a mixed question of law and fact.[2] This court reviews legal determinations de novo and factual determinations for sufficient evidence.[3]

The United States and Nevada Constitutions ban unreasonable searches and seizures.[4] A warrantless search is unreasonable per se and any seized evidence is excluded unless an exception to the warrant requirement applies.[5]

The initial warrantless search

Under the emergency doctrine, a law enforcement officer may constitutionally conduct a warrantless search if the law enforcement

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cumulative error warrants reversal. We have considered these issues and conclude that each of these additional challenges fails.

[2]Camacho v. State, 119 Nev. 395, 399, 75 P.3d 370, 373 (2003).

[3]Id.

[4]U.S. Const. amend. IV; Nev. Const. art. 1, § 18; Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006).

[5]Camacho, 119 Nev. at 399, 75 P.3d at 373.

officer reasonably believes there is an urgent need to enter the private premises not to arrest or search, but to protect life or property or investigate a "substantial threat of imminent danger."[6] Further, the law enforcement officers must limit their search to the area associated with the emergency.[7]

In this case, the responding officers jumped over a brick wall at Redeker's home and entered the dwelling through an unlocked back door without a warrant. Although the officers did not have a search warrant, we conclude that the search was constitutional because an emergency justified the warrantless search.

There are sufficient facts to suggest that the responding officers' reasonably believed there was an urgent need to enter the house to protect Tuk or investigate a substantial threat of imminent danger. First, by 8 p.m. Tuk had failed to pick-up her young child from daycare, which she usually did by 5 p.m. Second, no one was able to reach Tuk on her cell phone. Third, the police had previously responded to instances of domestic violence between Redeker and Tuk at Redeker's home. Fourth, no one answered Redeker's phone or his front door when the officers arrived. Finally, the police officers' entrance into Redeker's backyard revealed lights and a television on inside the home.

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[6]Koza v. State, 100 Nev. 245, 252-53, 681 P.2d 44, 48 (1984); see U.S. v. Russell, 436 F.3d 1086, 1090 (9th Cir. 2006).

[7]Russell, 436 F.3d at 1090 (quoting U.S. v. Cervantes, 219 F.3d 882, 888 (9th Cir. 2000), overruled on other grounds by Brigham City, Utah v. Stuart, 547 U.S. 398, 404-06 (2006)).

Further, the police did not seize any evidence during this search, but merely scanned the home to make sure Tuk was not inside and in need of assistance. Under the circumstances, it was reasonable for the responding officers to believe that Tuk was in the home or that she needed assistance.

The second warrantless search

Redeker argues that he did not voluntarily consent to the police officers' second warrantless search of his home because his consent resulted from an unlawful search of his home and an unlawful arrest of his person. We conclude that Redeker's argument lacks merit.

Consent is an exception to the warrant requirement.[8] In determining whether a person voluntarily consented to a search, we examine the totality of the circumstances surrounding his consent.[9] "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."[10] Relevant factors include: the person's age, education, and intelligence; the administration of Miranda warnings; the length of the detention and any questioning; and whether the government

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[8]Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Herman, 122 Nev. at 204, 128 P.3d at 472.

[9]Schneckloth, 412 U.S. at 248-49; Canada v. State, 104 Nev. 288, 290-91, 756 P.2d 552, 553 (1988).

[10]Schneckloth, 412 U.S. at 229.

used physical coercion or intimidation, including the deprivation of food or sleep.[11]

We conclude that under the totality of the circumstances, Redeker voluntarily consented to the second warrantless search of his home. The following factors support our conclusion that Redeker voluntarily consented: he was thirty-two years old at the time of the murder; he had a college degree; his degree and employment at Citibank suggests at least an average level of intelligence; he was detained and questioned for only thirty minutes before consenting; there was no evidence of physical coercion or intimidation; at the time of consent, approximately 10 p.m., sleep was not an issue; and Redeker had access to food, drink, and cigarettes. The totality of these circumstances suggests that Redeker's consent was voluntary. As a result, the district court did not abuse its discretion when it admitted the evidence seized from the second warrantless search of Redeker's home because there was sufficient evidence to find that the first search was permitted under the emergency doctrine, and Redeker voluntarily consented to the second search.

Redeker's two confessions

Redeker contends that his Fourth and Fifth Amendment rights were violated when the district court admitted into evidence his two confessions to the homicide detectives. We conclude that Redeker's argument lacks merit.

The initial detention

This court reviews de novo whether a detention has evolved into a de facto arrest.[12] An investigative detention, or Terry stop, is based

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[11]Id. at 226.

on reasonable suspicion, and the detention must be limited in scope and duration.[13] An investigative detention becomes a seizure if a reasonable person would conclude that he was not free to leave or the detention was excessive in length, scope, and purpose.[14]

"Under NRS 171.123(1), Lisenbee, and Terry v. Ohio, police officers may temporarily detain a suspect when officers have reasonable articulable suspicion [of criminal activity]."[15] Further, a limited search for weapons is permitted so long as the police reasonably believe the suspect is armed and dangerous.[16] "Such reasonable belief, in both instances, must be based on specific articulable facts that warrant the search and seizure."[17] Nevertheless, conducting an investigative detention that lasts longer than 60 minutes without arresting the individual is per se unreasonable.[18]

We conclude that Redeker's initial detention was within the boundaries of an investigative detention and, therefore, there was no de facto arrest. Our conclusion is based on the following facts in the record:

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[12]State v. McKellips, 118 Nev. 465, 471, 49 P.3d 655, 659 (2002).

[13]Florida v. Royer, 460 U.S. 491, 500 (1983).

[14]McKellips, 118 Nev. at 469-71, 49 P.3d at 659-60.

[15]Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 158 (2008) (footnotes omitted).

[16]Id.

[17]Id.

[18]McKellips, 118 Nev. at 471-72, 49 P.3d at 660.

the responding officers had the discretion to handcuff Redeker during the detention to protect themselves; the responding officers removed the handcuffs after thirty minutes; and there is no evidence that Redeker was not free to leave the scene thereafter. Thus, we conclude that the initial detention did not violate Redeker's Fourth or Fifth Amendment rights because the investigative detention was limited in scope and duration and, therefore, it was not a de facto arrest.

The police station confessions

Redeker argues that his police station confessions were inadmissible because he gave his first confession during a custodial interrogation without the benefit of a Miranda warning, and the homicide detectives employed a two-step interrogation technique in violation of Missouri v. Seibert[19] to elicit his second confession. We conclude that Redeker's argument lacks merit.

This court applies a two-step analysis in reviewing a district court's ruling on whether a defendant was subject to a custodial interrogation.[20] First, this court gives great deference to the district court's factual findings and reviews them only for clear error.[21] Second, this court reviews de novo the district court's ultimate determination of whether the defendant was in custody.[22]

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[19]542 U.S. 600 (2004).

[20]Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

[21]Id., 111 P.3d at 694.

[22]Id., 111 P.3d at 694.

Under the United States and Nevada Constitutions, a person cannot be compelled to be a witness against himself in a criminal case.[23] "The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning."[24] Interrogation is "express questioning or its functional equivalent."[25] In determining whether a person is in custody for Miranda purposes, we consider the totality of the circumstances.[26]

In State v. Taylor, this court concluded that a person is in custody when "there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave."[27] This court further concluded that an individual is not in custody if "police officers only question [him or her] on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process. A suspect's or the police's subjective view of the circumstances does not determine whether the suspect is in custody."[28]

In determining whether objective indicia of custody exist, this court considers the following factors:

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[23]U.S. Const. amend. V; Nev. Const. art. 1, § 8.

[24]State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998).

[25]Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

[26]Taylor, 114 Nev. at 1082, 968 P.2d at 323.

[27]Id., 968 P.2d at 323.

[28]Id., 968 P.2d at 323 (citations omitted).

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.[29]

We conclude that Redeker was not in custody when he made the initial statement at the police station and as such, there was no violation of his Miranda rights. As noted earlier, Redeker was not in custody during the initial detention at his residence. Further, Redeker was not in custody during his initial statement at the police station based on the totality of the following circumstances: Redeker voluntarily went to the police station as evidenced by his riding in the front seat of the police car with no handcuffs; Redeker was not formally under arrest; Redeker's movement was not restricted in the interrogation room; Redeker voluntarily answered the homicide detective's general questions and provided additional information including a spontaneous drawing of a map locating Tuk's body; the homicide detective was the only law enforcement officer present during the questioning. The homicide detective's general line of questioning did not exhibit strong-arm tactics or deception; and Redeker was not arrested until after he voluntarily confessed and was given his Miranda warnings.

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[29]Id. at 1082 n.1, 968 P.2d at 323 n.1.

In conclusion, the homicide detective's questioning was general in nature and consistent with a fact-finding investigation. Under the totality of the circumstances, Redeker was not in police custody when he first confessed, and he was given his Miranda warnings before the second confession. As a result, the district court did not abuse its discretion when it admitted Redeker's two confessions and, therefore, there was no violation of Redeker's Fifth Amendment right against self-incrimination. Because we conclude that Redeker's first confession was not the result of a custodial interrogation, there is no need for this court to apply the Missouri v. Seibert analysis.

Other bad act evidence

Redeker contends that the district court committed prejudicial error and violated his statutory, due process, and confrontation rights when it admitted multiple pieces of bad act evidence. Redeker particularly argues that the district court erred when it admitted, over his objection and without a Petrocelli hearing, the following bad acts evidence: his threats against Tuk, his 2001 arson conviction, and his defamatory comments about B.L., Tuk's daughter from a previous relationship. We conclude that Redeker's argument lacks merit.

This court will overturn a district court's decision whether to admit bad act evidence only if the ruling was manifestly wrong.[30] If a district court fails to conduct a Petrocelli hearing before admitting prior bad act evidence, then this court will reverse the judgment of conviction unless it is clear from the record that the evidence was admissible or the

[30]Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999).

error was harmless in that the evidence did not have a prejudicial effect on the verdict.[31]

If the district court admits the prior bad act evidence under one of the NRS 48.045 exceptions, it must give a limiting instruction when the evidence is admitted and in the final charge to the jury.[32] If the district court fails to give a limiting instruction, then this court will determine whether the district court's failure was harmless.[33]

As a general rule, "proof of a distinct independent offense is inadmissible" during a criminal trial.[34] Prior bad act evidence, however, is admissible under NRS 48.045(2) for other purposes, such as to show the defendant's motive or intent or the absence of mistake or accident.[35] But before the bad act evidence may be admitted under NRS 48.045(2), a district court is generally required to prescreen the evidence[36] under Petrocelli v. State.[37] In a Petrocelli hearing, "the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing

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[31]Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998); Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005).

[32]Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

[33]Rhymes v. State, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005).

[34]Nester v. State of Nevada, 75 Nev. 41, 46, 334 P.2d 524, 526 (1959).

[35]NRS 48.045(2); Rosky v. State, 121 Nev. 184, 194, 111 P.3d 690, 697 (2005).

[36]Carter, 121 Nev. at 769, 121 P.3d at 598-99.

[37]101 Nev. 46, 692 P.2d 503 (1985).

evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[38]

The admission of Redeker's threats against Tuk

Redeker argues that the district court improperly admitted witness testimony about his threats against Tuk. We conclude that Redeker's argument lacks merit.

Although the district court received an offer of proof in lieu of a formal Petrocelli hearing, it did not abuse its discretion. The record suggests that Redeker made the threats and then on October 21, 2002, he carried them out. The district court ruled that the threat evidence was probative of intent, motive, and ill will toward Tuk. We agree that the evidence was relevant to the crime charged because it was probative of Redeker's intent and motive to commit murder, as well as his ill will against Tuk.[39] Additionally, the record demonstrates that the threats were proven by clear and convincing evidence and that the probative value of the evidence was not substantially outweighed by its prejudicial effect. Thus, the district court did not abuse its discretion.

The district court did, however, fail to give a limiting instruction on the use of the evidence. To the extent that this was error, we conclude that it was harmless. In particular, given the strength of the other evidence against Redeker, including his admissions and the physical

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[38]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (footnote omitted).

[39]See Solorzano v. State, 92 Nev. 144, 145, 546 P.2d 1295, 1295-96 (1976); Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (concluding that the district court properly allowed testimony concerning how the defendant injured the victim just days before the killing).

evidence located at his residence, we conclude that the threat evidence did not have a substantial and injurious effect on the jury's second-degree murder verdict. Moreover, it seems unlikely that the jury afforded the threat evidence much weight since the evidence would have been most relevant to a determination that Redeker deliberated and premeditated the murder and the jury found Redeker guilty of second-degree murder, not first-degree murder.

Redeker's 2001 arson conviction

Redeker argues that the district court improperly admitted evidence of his 2001 arson conviction because the arson and the homicide were completely unrelated. We conclude that Redeker's argument lacks merit.

The arson evidence was relevant to the charged offense in that, like the threat evidence, it showed Redeker's ill will against Tuk. The parties do not dispute that the State proved the arson with clear and convincing evidence, and we conclude that the probative value of the arson evidence was not substantially outweighed by the danger of unfair prejudice. Finally, although the district court did not give proper limiting instructions regarding use of the evidence, any error was harmless because the strength of the other evidence against Redeker, including his confessions and the physical evidence located at his residence, convinces us that the arson-conviction evidence did not have a substantial and injurious influence on the verdict.

Admission of Redeker's defamatory comments about B.L.

Redeker asserts that the district court improperly allowed his neighbors to testify about defamatory comments he had made about B.L. because the evidence was impermissible under NRS 48.045 as prior bad act evidence. We conclude that Redeker's argument lacks merit.

Like the other bad act evidence discussed above, the district court did not conduct a Petrocelli hearing before allowing testimony about Redeker's disparaging comments concerning B.L. After sustaining Redeker's objection, the district court concluded that the testimony regarding Redeker's statement that B.L. was a "whore" and that Redeker mistreated her was relevant to the murder charge because it established the depth of Redeker's animosity against Tuk. We conclude that the district court did not abuse its discretion in finding that the evidence was admissible. Although the district court again did not give the jury limiting instructions regarding the use of this evidence, as explained above, any error in this respect did not have a substantial and injurious influence on the jury's verdict.

Having considered Redeker's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

CHERRY, J., with whom SAITTA, J., agrees, concurring in part and dissenting in part:

I respectfully disagree with the majority's conclusion with respect to the two principal constitutional criminal procedure issues involved in this appeal. First, Redeker's Fourth Amendment rights were violated when the district court admitted evidence retrieved during a warrantless search of his home. And the State failed to meet its burden of proving that its warrantless search satisfied an exception to the warrant requirement. Second, Redeker's Fifth Amendment rights were violated when the district court admitted his confession, which was elicited during a custodial interrogation without a Miranda[1] warning. The State failed to satisfy its burden of demonstrating that the detectives' subsequent Miranda warning cured the constitutional defect.

While the record indicates that Redeker killed Tuk, this fact does not abrogate law enforcement's sacred duty to follow the United States and Nevada Constitutions. Redeker's Fourth and Fifth Amendment rights were violated and the challenged evidence was highly prejudicial. For these reasons, I would reverse Redeker's judgment of conviction and remand for a new trial. Therefore, I respectfully dissent.

Because this appeal is factually complex, I will first set forth the pertinent background facts before proceeding to address the merits of Redeker's contentions.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Background facts

In 1999, Redeker met Tuk while they were working together at a Citibank branch in Las Vegas. The couple began dating and, sometime thereafter, purchased a home and had a daughter named Arieanne. After a few years, their relationship became turbulent as Redeker developed mental health problems, financial difficulties, and alcoholism. In February 2002, law enforcement officers responded to their residence based on a report of domestic disturbance, but no arrests were made and no charges were filed. In early October 2002, Tuk and Arieanne moved out of the residence and moved in with Tuk's parents.

In the afternoon of October 21, 2002, Tuk drove over to her former home to try and convince Redeker to seek medical treatment. Tuk and Redeker argued, and Redeker strangled her with a telephone cord. He dumped Tuk's body in a deserted location outside of Las Vegas. Around 8:00 that night, Tuk's parents arrived at their home, but Tuk had not returned as expected. Shortly after their arrival, they received a phone call, informing them that Tuk had not yet picked up Arieanne from day care. Concerned, Tuk's stepfather (Savage), called Tuk's cell phone, but she did not answer. Thereafter, Savage called the police and informed them that Tuk might be in danger.

At approximately 9:00 p.m., Officers Brian Jensen and Drew Burnett (hereinafter, the responding officers) arrived at Redeker's residence. The responding officers rang the doorbell, but nobody answered. The responding officers then instructed dispatch to call the home telephone, but again there was no answer. Unable to get a response, the responding officers did not seek a search warrant. Instead, the responding officers jumped over a brick wall and into the backyard so that they could better see into the home. The responding officers noticed that a

television and some lights were on, and coupled with the fact that Tuk had not picked-up her daughter from day care and the instance of domestic violence six months prior, the officers believed that an emergency entrance was warranted. The responding officers entered the home through an unlocked rear sliding glass door. Inside of the master bedroom, they observed a skewed mattress with no sheets, a drop of blood on the mattress, and a single gold hoop earring. They also discovered a telephone cord tied to the bed's headboard and draped across the mattress. Suspecting that a crime may have been committed, the responding officers exited the residence and summoned for back-up.

At approximately 10:00 p.m., the responding officers saw Redeker drive by the home in Tuk's vehicle, and they immediately ordered him to stop and exit it. Redeker complied. The responding officers handcuffed him and frisked him for weapons, finding none. Without advising Redeker of his Miranda rights, the responding officers questioned him about Tuk's whereabouts. During their questioning, the responding officers specifically asked him about the incriminating evidence that they had seen inside the residence. Redeker denied any wrongdoing but indicated that he had argued with Tuk earlier that day. The responding officers denied Redeker's requests for food, water, and to enter his home. The officers asked Redeker for consent to search his home and vehicle. Only after Redeker agreed to their request and signed a consent-to-search card, did the responding officers remove his handcuffs. The responding officers questioned Redeker for approximately 30 to 40 minutes, during which time he remained handcuffed, and at no point was Redeker given a Miranda warning.

At around 12:00 a.m., approximately two hours after the initial stop, frisk, and detention, Detective Mel Jackson ordered Redeker

into the back seat of a police car for a videotaped interview. Detective Jackson did not inform Redeker of his Miranda rights. Instead, Jackson interrogated Redeker about Tuk's whereabouts, which the district court judge later described as "hammering." With sometimes slurred responses, Redeker repeatedly denied any wrongdoing and asked to leave the vehicle. Detective Jackson's interrogation lasted for approximately an hour, and at no point was Redeker advised of his Miranda rights.

After Redeker was released from the police car, he was allowed to remain in his front yard and smoke a cigarette, but he was denied reentry into his home. A law enforcement officer supervised Redeker at all times. At around 4:00 a.m., homicide Detectives Ken Hardy and George Sherwood arrived at the scene (collectively, homicide detectives). Detective Hardy asked Redeker to accompany them to the Las Vegas police department to discuss Tuk's disappearance, and Redeker agreed.

Before commencing the interrogation into Tuk's disappearance, the detectives did not inform Redeker of his Miranda rights. Detective Hardy asked a number of background questions, during which Redeker twice asked for "help." Detective Hardy did not advise Redeker that he had the right to an attorney or the right to remain silent. After a number of additional probing questions, Redeker confessed to murdering Tuk. Detective Hardy immediately administered an oral Miranda warning, and Redeker orally acknowledged his rights. After receiving the acknowledgment, Detective Hardy then asked: "Okay. How, how'd you strangle her?" Redeker again admitted to killing Tuk and informed the detectives of the location of her body. Redeker was thereafter placed under arrest.

The State charged Redeker with premeditated murder with the use of a deadly weapon and sought the death penalty. The district court denied Redeker's pretrial motions to suppress the evidence seized from his home and his confessions made to the police. The jury subsequently found Redeker guilty of second-degree murder with the use of a deadly weapon.

This factual backdrop provides the basis for my conclusion that Redeker's constitutional rights were violated by the admission of evidence recovered during a warrantless search of his home and his confessions to police officers.

Search of Redeker's residence and vehicle

Redeker argues that the district court violated his federal and state constitutional rights when it admitted evidence seized from the warrantless searches of his home and vehicle. I agree. A warrantless search is per se unreasonable under the United States and Nevada constitutions, and thus, the burden shifts to the State to demonstrate that evidence seized during a warrantless search satisfies an exception to the warrant requirement.[2] Here, the responding officers did not have a search warrant for either search of Redeker's home. Accordingly, any evidence obtained during these searches was per se unconstitutionally obtained and inadmissible at trial unless the State satisfied its burden of proving that an exception to the warrant requirement applied. Contrary to the majority, for the reasons discussed below, I believe that the State did not

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[2]U.S. Const. amend. IV; Nev. Const. art. 1, § 18; Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006); Camacho v. State, 119 Nev. 395, 399, 75 P.3d 370, 373 (2003).

satisfy its burden and the district court abused its discretion in admitting evidence recovered during the searches.[3]

The emergency exception

The State contends that the responding officers' initial warrantless search was justified under the emergency doctrine to the warrant requirement. I disagree.

The United States Supreme Court held in Brigham City, Utah v. Stuart that police officers may enter a residence without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with serious injury.[4]

Here, the record indicates that the responding officers did not have reasonable grounds to believe that there was an urgent need for assistance or that there was an imminent danger because Tuk had been missing a short time—approximately one hour—before the search commenced, and the responding officers were not aware that any crime had been committed before entering the residence. And Tuk had moved out of Redeker's house several weeks prior to her death and she did not alert anyone that she was going to visit Redeker on the day she was killed. Officer Jensen testified that when he entered the home, he had no proof that Tuk had been inside that day. Further, the neighbors did not report any suspicious noises or sounds emanating from the residence. While the record indicates that the police had responded to a domestic disturbance

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[3]Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004).

[4]547 U.S. 398 (2006).

call at the residence approximately eight months before Tuk's death, this fact does not rise to the level of an ongoing emergency. When the officers first arrived at the residence, they did not observe any signs of a struggle or any indication that an emergency was ongoing inside of the home; instead the facts simply indicate that nobody answered the front door or the telephone.

While the majority relies on the responding officers' observation that a television and lights were left on, these facts cannot support the emergency exception because the warrantless search commenced when the officers jumped over the backyard fence to reach their vantage point. Moreover, a television and lights left on are not indicative of an ongoing emergency. Further, contrary to the majority's conclusion, Savage's inability to reach Tuk on her cell phone, just a few hours after she normally got off of work, does not indicate that there was an emergency at Redeker's residence. And in my view, the responding officers' scan of the residence's interior without seizing any evidence, does not make their warrantless entry and search any less unconstitutional.

Probable cause plus exigent circumstances exception

The State argues that the responding officers' initial warrantless search was justifiable by the existence of probable cause and exigent circumstances. I disagree. The warrant requirement is excused when law enforcement officers conduct a search with probable cause and under exigent circumstances.[5] The government bears the burden of proving that exigent circumstances justified a warrantless search.[6]

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[5]Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991).

[6]State v. Hardin, 90 Nev. 10, 13, 518 P.2d 151, 153 (1974).

Probable cause to conduct a warrantless search exists only when "law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched."[7] Exigent circumstances exist when the situation would lead "'a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers and other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'"[8]

Here, the record does not support a conclusion that probable cause existed to justify a warrantless search. Officer Jensen testified that he did not have probable cause to arrest Redeker even after searching his home and that he had no proof that Tuk had been inside the residence that day or that a crime had even been committed before he entered the home. Further, none of the neighbors reported hearing any screams or suspicious noises emanating from inside of the home, nor did the responding officers hear any suspicious sounds when they arrived at the residence.

The record also indicates that exigent circumstances did not exist when the responding officers searched Redeker's residence. In particular, the responding officers did not enter the home to prevent physical harm to themselves, they did not know whether anyone was

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[7]Keesee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994).

[8]Doleman, 107 Nev. at 414, 812 P.2d at 1290 (quoting United States v. MaConney, 728 F.2d 1195, 1199 (9th Cir. 1984)).

inside, nobody had reported any suspicious behavior from inside of the home, they were not seeking to prevent the destruction of relevant evidence, and they were not chasing an escaping suspect. While Tuk's whereabouts had not been determined in approximately an hour, this fact was not sufficient justification for an exigent search.

Tainted consent

Redeker contends that his consent to the second search, while perhaps voluntarily given for Fifth Amendment purposes, was tainted by the initial Fourth Amendment violation. I agree. Although I agree with the majority that the district court did not err when it determined that Redeker voluntarily consented to the second search of his residence for Fifth Amendment purposes, the analysis of Redeker's claim does not end there. Instead, the next inquiry is whether the initial unconstitutional search tainted Redeker's consent. I believe that it did.

If a court determines that law enforcement officers conducted an unconstitutional search and thereafter, for Fifth Amendment purposes a suspect voluntarily consents to a later search, a court must determine whether the initial Fourth Amendment violation tainted the voluntariness of the consent to search.[9] In determining whether the subsequent consent is tainted, a court must determine whether it was "'sufficiently an act of free will to purge the primary taint of the unlawful invasion.'"[10] Whether free will existed depends on whether the suspect knew of the prior

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[9]U.S. v. Furrow, 229 F.3d 805, 813 (9th Cir. 2000), overruled on other grounds by U.S. v. Johnson, 256 F.3d 895, 913 n.4 (9th Cir. 2001).

[10]Id. (quoting United States v. George, 883 F.2d 1407, 1416 (9th Cir. 1989) (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963))).

unconstitutional search,[11] and intervening factors such as time, space, and events.[12]

The district court erred when it determined that the responding officers' initial unconstitutional search did not taint Redeker's consent to the second search because four pertinent facts in the record indicate that his consent was not sufficiently an act of free will necessary to purge the taint of the initial violation. First, and most critically, Redeker knew that the responding officers had already searched his home before he consented.[13] While Redeker sat on the sidewalk handcuffed, police officers questioned him about things seen inside the home such as the cord tied to the headboard in the master bedroom. Second, the time factor weighs in favor of concluding that Redeker's consent was tainted because only an hour separated the initial warrantless search and Redeker's consent. Third, the space factor weighs in favor of concluding that Redeker's consent was tainted because the search and Redeker's consent occurred at the exact same place, at his residence. Fourth, the events factor weighs in favor of concluding that Redeker's consent was tainted because no intervening events separated the responding officers' initial search and Redeker's consent, aside from the responding officers'

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[11]Id. at 814 (explaining that if defendant knew of prior unconstitutional search, then his consent might be tainted; however, if defendant was unaware of prior unconstitutional search when he consented, then his voluntary consent was not tainted).

[12]Id. at 813-14.

[13]See id. at 814.

short wait for Redeker's arrival at the residence and the approximately 30 minutes of questioning while Redeker was handcuffed.

In sum, Redeker's United States and Nevada constitutional rights were violated when the district court admitted the evidence that was seized, without a warrant, from inside of his residence and vehicle. The State was unable to satisfy it burden of demonstrating that a warrant exception applied. Accordingly, the district court abused its discretion when it admitted the evidence. Having concluded that the challenged evidence was erroneously admitted, I now turn to the issue of prejudice.

Prejudicial error

"In deciding whether error is harmless or prejudicial, this court must consider such factors as whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."[14] When an error occurs, this court will reverse a conviction and remand for a new trial unless this court can conclude "without reservation that the verdict would have been the same in the absence of error."[15]

As discussed above, the district court abused its discretion when it admitted the unconstitutionally seized evidence from Redeker's home. The error was highly prejudicial because the gold hoop earring, the blood stain on the mattress, and the torn telephone cord all identified Redeker as the perpetrator of Tuk's murder and supported the State's premeditation theory. And the torn telephone cord was highly prejudicial because it was the key piece of evidence supporting the State's deadly

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[14]Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999).

[15]Id.

weapon enhancement. I cannot say without reservation that the verdict would have been the same without the introduction of this unconstitutionally obtained evidence. Accordingly, Redeker deserves a new trial.

Redeker's confessions at the police station

Redeker contends that his Fourth and Fifth Amendment rights were violated when the district court admitted into evidence his two confessions to the homicide detectives. More particularly, Redeker argues that law enforcement officers elicited the confessions during an arrest unsupported by probable cause and in violation of his Miranda rights. I agree.

"The Fifth Amendment privilege against self-incrimination requires that a suspect's statements made during custodial interrogation not be admitted at trial if the police failed to first provide a Miranda warning."[16] A district court's determination as to whether a person is in custody is reviewed de novo.[17] This court will review for clear error a district court's determination of facts surrounding an interrogation.[18] Substantial evidence review applies to a district court's decision whether to admit a confession because the inquiry "is primarily a factual question."[19]

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[16]Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001).

[17]Casteel v. State, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006).

[18]Id.

[19]Floyd v. State, 118 Nev. 156, 171-72, 42 P.3d 249, 260 (2002), abrogated on other grounds by Grey v. State, 124 Nev. ____, ____, 178 P.3d 154, 160 (2008).

For the reasons explained below, I conclude that the district court erred by admitting Redeker's confessions, which were obtained in violation of his constitutional rights.

Improper arrest

Redeker contends that he confessed to homicide detectives during an unconstitutional arrest. I agree. Law enforcement officers may detain a suspect when the officers have a reasonably articulable suspicion that criminal activity is afoot.[20] An investigative detention must be based on reasonable suspicion and the duration must be limited in scope and duration.[21] An investigative detention becomes a seizure when it lasts "longer than is necessary to effectuate the purpose of the stop"[22] and when a reasonable person would conclude that he or she was not free to leave.[23] In undertaking this inquiry, this court reviews whether the detention was excessive in length, scope, and/or purpose.[24] As the majority noted above, pursuant to NRS 171.123(1) and NRS 171.123(4), a detention statutorily becomes per se unreasonable and thus ripens into an arrest requiring probable cause when the detention lasts longer than 60 minutes.[25] "It is the State's burden to demonstrate that the seizure it seeks to justify on

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[20]Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 158 (2008) (footnotes omitted).

[21]Florida v. Royer, 460 U.S. 491, 500 (1983).

[22]Id.

[23]McKellips v. State, 118 Nev. 465, 469-70, 49 P.3d, 655, 659 (2002).

[24]Id. at 471, 49 P.3d at 660.

[25]See id. at 471-72, 49 P.3d at 660 (interpreting NRS 171.123).

the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure."[26]

The district court erred when it determined that the State satisfied its burden of demonstrating that the responding officers' investigative detention did not evolve into a de facto arrest because (1) Redeker was detained by the police for over six hours before he confessed; (2) the responding officers ordered him to pull his vehicle over and exit it; (3) the responding officers handcuffed him for approximately 30 to 40 minutes and questioned him about Tuk's disappearance; (4) the responding officers denied Redeker's requests for food, water, and entry into his home; (5) Redeker was constantly surrounded by multiple uniformed officers during the evening; (6) Detective Jackson ordered Redeker into the back seat of a police cruiser and interrogated him for approximately an hour in a fashion that the district court described as "hammering;" (7) Redeker accompanied homicide detectives from his residence to the police station for questioning at approximately 4:00 a.m.;[27] and (8) homicide detectives escorted Redeker into a small interrogation room and started interrogating him about Tuk's whereabouts at around 4:30 a.m on October 22. Additionally, the record

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[26]Royer, 460 U.S. at 500.

[27]While the record indicates that Redeker voluntarily agreed to accompany the homicide detectives to the station, the record indicates that he did not voluntarily consent to their request as a submission to authority. See Arterburn v. State, 111 Nev. 1121, 1125, 901 P.2d 668, 670 (1995) (concluding that defendant's detention following traffic stop evolved into arrest requiring probable cause and that defendant's consent to accompany officer to station was involuntary because it was submission to authority).

indicates that Redeker did not speak or interact with anyone other than law enforcement following his initial detention at around 10:00 p.m. on October 21.

I find unpersuasive the State's argument that even if the law enforcement officers did not believe that probable cause existed to arrest Redeker, his confession was still admissible because probable cause actually existed and there was a sufficient break between Redeker's initial unconstitutional arrest and his subsequent confession.

If law enforcement officers arrest a person without probable cause in violation of his or her Fourth Amendment rights, a district court is not required to suppress a confession if the State can demonstrate that (1) probable cause actually existed,[28] or (2) there was a sufficient break in the events between the constitutional violation and the subsequent confession.[29] "Probable cause to arrest 'exists when police have reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that [a crime] has been . . . committed by the person to be arrested.'"[30] In determining whether a sufficient break in the circumstances occurred, this court will consider the following three factors: "(1) 'the temporal proximity of the arrest and the confession,' (2) 'the presence of intervening

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[28]State v. McKellips, 118 Nev. 465, 472-73, 49 P.3d 655, 660-61 (2002) (reversing district court's grant of defendant's motion to suppress results of his blood and urine test because probable cause supported law enforcement officer's de facto arrest).

[29]Arterburn, 111 Nev. at 1126, 901 P.2d at 671.

[30]McKellips, 118 Nev. at 472, 49 P.3d at 660 (alterations in original) (quoting Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991)).

circumstances,' and (3) 'the purpose and flagrancy of the official misconduct.'"[31]

The State failed to satisfy its burden of demonstrating that probable cause supported Redeker's arrest. Even after viewing the inside of Redeker's home, the responding officers acknowledged that they did not have probable cause to arrest Redeker when they apprehended him. Additionally, Detective Hardy testified that he did not have probable cause to arrest Redeker until after he confessed to the murder. Therefore, the record indicates that a person of reasonable caution would not believe that Redeker had committed a crime when his detention had evolved into an arrest at the police station.

The State also failed to satisfy its burden of alternatively demonstrating that there was a sufficient break in events between Redeker's unconstitutional arrest and his subsequent confession. The temporal proximity factor weighs against concluding that there was a sufficient break because the record indicates that Redeker was under constant police supervision from the moment he was ordered out of his vehicle and placed into handcuffs until he confessed more than six hours later.[32] The presence of intervening circumstances also weighs against concluding that there was a sufficient break because the record indicates that Redeker did not leave his home or speak to anyone besides law enforcement between the time of his initial detention and his subsequent

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[31]Arterburn, 111 Nev. at 1126, 901 P.2d at 671 (quoting Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

[32]See id.

confession.[33] Lastly, the purpose and flagrancy of the official misconduct factor also militates against a sufficient break because the record indicates that the law enforcement officers, during the more than six-hour detention, did not administer a single Miranda warning until his confession.[34]

Accordingly, Redeker's confessions emanated from an unconstitutional arrest, and the district court abused its discretion when it admitted the confessions.[35] Further, as discussed below, the subsequent Miranda warning did not cure this Fourth Amendment violation for a variety of reasons.

Miranda violation

Redeker argues that the district court erred by denying his motion to suppress because he gave his first confession during a custodial interrogation without the benefit of a Miranda warning. Further, although Redeker was advised of his Miranda rights, his second confession was obtained in violation of Missouri v. Seibert.[36]

First confession

The majority erroneously concludes that, under the totality of the circumstances, Redeker was not in custody for Miranda purposes when he confessed at the police station because the record indicates that a reasonable person would not have felt free to leave the police station

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[33]See id.

[34]See id.

[35]See People v. Harris, 762 P.2d 651, 659 (Colo. 1988).

[36]542 U.S. 600 (2004).

interrogation room at 4:45 a.m. In State v. Taylor, this court set forth several factors to consider in determining whether a person is in custody.[37] The first Taylor factor, the site of the interrogation, weighs in favor of concluding that Redeker was in custody because he confessed in a police station interrogation room.[38] Other indicia of arrest, as articulated in Taylor, also weigh in favor of concluding that Redeker was in custody for Miranda purposes. In particular, the record indicates that (1) the detectives did not tell Redeker that he was free to leave; (2) Redeker was a suspect as evidenced by the responding officers' search of his residence, the interrogation in the squad car, and Tuk's whereabouts had not been determined by 4:30 a.m.; (3) Redeker was confined to a small interrogation room; (4) the atmosphere was clearly police dominated as he confessed inside a police station interrogation room while surrounded by two detectives; (5) the detectives arrested Redeker at the conclusion of the questioning; and (6) the interrogation occurred at the police station.[39]

While the majority points out that the record indicates that Redeker voluntarily accompanied the police detectives to the station, this factor weighs minimally in favor of concluding that he was not in custody for Miranda purposes because Redeker may have interpreted the request as an implied obligation.[40] Further, although the record indicates that

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[37]114 Nev. 1071, 968 P.2d 315 (1998).

[38]Id. at 1082, 968 P.2d at 323.

[39]See id.

[40]See People v. Byers, 421 N.Y.S.2d 462, 464 (App. Div. 1979) ("The request to come to the police station may easily carry an implication of

continued on next page . . .

Redeker voluntarily responded to Detective Hardy's questions, this factor does not strongly weigh in favor of concluding that he was not in custody for Miranda purposes because he twice indicated during the questioning that he needed "help."[41] Further, while the record indicates that the detectives did not employ strong-arm tactics or deception during the questioning, this factor also does not strongly weigh in favor of concluding that Redeker was not in custody. In particular, the record indicates that law enforcement had previously weakened Redeker's resolve following (1) the responding officers' approximately 30 to 40 minutes of questioning while he sat handcuffed on the sidewalk and (2) Officer Jensen's approximately hour-long interrogation in the back of the squad car.[42] Further, the record indicates that Redeker had been under constant police supervision for more than six hours and had not interacted with anyone else before he confessed at approximately 4:45 a.m. Most problematic, the majority concludes that Redeker was not in custody for Miranda purposes because the atmosphere inside the police interrogation room was not police dominated. To the contrary, a police interrogation room is the archetype example of a police-dominated atmosphere where Miranda warnings are required.[43] Further, although Redeker was not handcuffed

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. . . continued

obligation, and the appearance itself, unless clearly shown to be voluntary, may be an awesome experience for the ordinary citizen").

[41]See Taylor, 114 Nev. at 1082, 968 P.2d at 323.

[42]See id.

[43]See, e.g., U.S. v. Butler, 249 F.3d 1094, 1101 (9th Cir. 2001); U.S. v. Guarino, 629 F. Supp. 320, 324-26 (D. Conn. 1986); State v. Rodriguez,

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while riding to the police station, he had been handcuffed just a few hours earlier in the evening. Lastly, while Detective Hardy testified that he did not know that Redeker had been detained for several hours and that he would have been free to leave the police station, Detective Hardy's subjective knowledge and beliefs do not determine whether Redeker was in custody for Miranda purposes.[44]

Under the totality of the circumstances, the record indicates that Redeker was in custody for Miranda purposes. Further, the detectives' questioning constituted an interrogation as they particularly asked him about Tuk's disappearance and his involvement in it.[45] Accordingly, Redeker's first confession was inadmissible because he was subjected to custodial interrogation without the benefit of a Miranda warning.[46] And the State failed to show that Detective Hardy's subsequent Miranda warning alleviated the constitutional defect.

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921 P.2d 643, 649 (Ariz. 1996); U.S. v. Little, 851 A.2d 1280, 1286-87 (D.C. Ct. App. 2004); State v. Houser, 450 N.W.2d 697, 700-01 (Neb. 1990).

[44]See State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998).

[45]See Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (explaining that interrogation is "express questioning or its functional equivalent").

[46]Taylor, 114 Nev. at 1081, 968 P.2d at 323 ("The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning.").

Second confession

As stated above, Redeker admitted to killing Tuk before he was advised of his Miranda rights. After this first admission, Redeker was advised of his rights and again admitted to killing Tuk. However, in my view, Redeker's second confession is inadmissible as well.

If a defendant makes incriminating statements during a custodial interrogation without the benefit of a Miranda warning and thereafter voluntarily and intelligently waives his rights, then any subsequent statements are admissible unless the investigation is tainted by "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will . . . ."[47] However, when a law enforcement officer intentionally withholds a Miranda warning until midstream in an interrogation, a defendant's subsequent statements are inadmissible unless the warnings effectively communicated the fact that his prior statements were inadmissible and that he could discontinue the interrogation.[48] In determining whether a midstream Miranda warning dispelled a suspect's uncertainty about the effect of his prior incriminating remarks and his ability to terminate the interrogation, a court should consider the following factors:

> [1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second, [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions

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[47]Oregon v. Elstad, 470 U.S. 298, 309 (1985).

[48]See Missouri v. Seibert, 542 U.S. 600, 611-15 (2004).

> treated the second round as continuous with the first.[49]

Considering these five factors, I believe that Redeker did not voluntary waive his Miranda rights. First, the completeness and detail of the questions and answers in the first interrogation weighs against a voluntary waiver because Detective Hardy and Redeker talked about Redeker's and Tuk's biographical backgrounds, the location of Tuk's body, and the cause of her death. Second, the overlapping content of the second confession weighs against a voluntary waiver because Redeker admitted that he strangled Tuk and described the location of her body in both confessions. Third, the timing and setting of the two statements strongly weighs against a voluntary waiver because the first confession occurred inside the police station interrogation room shortly after 4:36 a.m. and the second confession occurred just moments after Redeker was advised of his Miranda rights. Fourth, the continuity of police personnel also weighs against a voluntary waiver because the same police detectives elicited both confessions. Fifth, the degree to which the interrogator's questions treated the second interrogation as a continuation of the first interrogation also weighs against a voluntary waiver because the homicide detectives did not take a break after the first confession or even wait for Redeker to sign a Miranda waiver. Instead, after receiving Redeker's oral acknowledgement of his Miranda rights, Detective Hardy immediately asked: "Okay. How, how'd you strangle her?"

Redeker was under custodial interrogation at the moment the interview began at the police station because a reasonable person would

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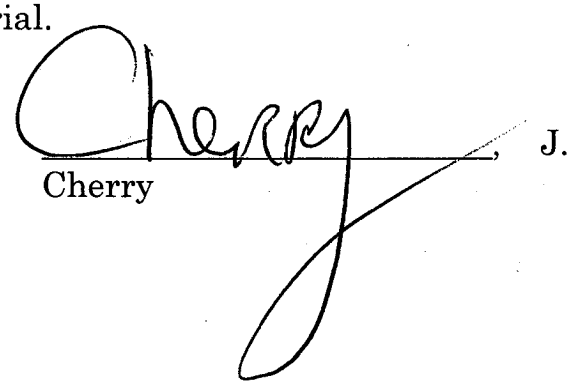
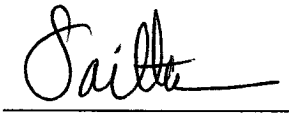
[49]Id. at 615.

not have felt free to leave. Redeker's first confession was made without the benefit of a Miranda warning and was inadmissible on this basis. The State failed to satisfy its burden of proving by a preponderance of the evidence that Redeker knowingly and voluntarily waived his Miranda rights because the record indicates that Redeker's Miranda waiver was tainted pursuant to the Seibert voluntariness factors. Accordingly, the district court abused its discretion by admitting his confessions into evidence. Further, admitting Redeker's confessions into evidence was highly prejudicial because of the character and import of the erroneously admitted evidence and the gravity of the crime charged, murder.[50] I cannot conclude without reservation that the verdict would have been the same if the confessions had not been admitted.[51] Therefore, I would reverse and remand for a new trial.



_____, J.
Cherry

I concur:



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[50]Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999).

[51]Id.