

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TOLIN GREGG, Defendant.	CR. 17-50044-JLV SEALED ORDER
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INTRODUCTION

A grand jury returned an indictment alleging defendant Tolin Gregg committed two counts of aggravated sexual abuse by force. (Docket 1). The alleged victim is a minor referred to here as R.O.H. Id. Defendant filed motions seeking the disclosure of grand jury testimony, dismissal of the indictment and suppression of statements. (Dockets 28, 34 & 51).

The suppression motion was referred to the magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and the standing order dated March 9, 2015. The court entered orders referring the other two motions to the magistrate judge. (Dockets 46 & 55). Magistrate Judge Daneta Wollmann conducted a hearing and issued a report and recommendation on the motions. (Dockets 49 & 70). The magistrate judge determined: the motion on grand jury testimony should be denied as moot; the motion to dismiss the indictment should be denied, but the witness statements at issue in the motion should be suppressed; and the suppression motion should be denied. (Docket

70 at pp. 1-2). This court heard oral argument on the objections to the magistrate judge's report and recommendation.

Under the Federal Magistrate Act, 28 U.S.C. § 636(b)(1), if a party files written objections to the magistrate judge's proposed findings and recommendations, the district court is required to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Id. The court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id.

Both parties filed objections. (Dockets 71 & 82). The government objects to the magistrate judge's determinations on defendant's motion to dismiss the indictment. (Docket 82). Defendant's objections relate to the magistrate judge's conclusions regarding the suppression motion. (Docket 71).

The government "objects to the Magistrate Judge's factual findings, legal analysis, and conclusions that: 1) Federal Bureau of Investigation Special Agent Mark Lucas (SA Lucas) testified falsely during grand jury proceedings; 2) SA Lucas threatened or intimidated witness Brylee Red Owl thereby depriving the defendant of a defense witness; and 3) SA Lucas' interview with Red Owl should be suppressed in the United States' case-in-chief and as impeachment evidence." (Docket 82 at p. 1). Defendant objects to his suppression motion being denied and argues the statements he made to SA Lucas were elicited in violation of Miranda.¹ (Docket 71).

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

Defendant indicates he does not object to the magistrate judge's factual findings. Id. at p. 2. Aside from the government's statement generally objecting to the magistrate judge's findings of fact, (Docket 82 at p. 1), the government repeatedly asserts the magistrate judge provided an insufficient factual account. Id. at pp. 11, 13, 17-18, 20 n.5, 28-29 & 31. All of these objections from the government relate to the magistrate judge's discussion of defendant's motion to dismiss the indictment. After carefully reviewing the record, especially the report and recommendation and the government's objections, the court provides its statement of the facts below. To the extent the court's factual statement differs from the magistrate judge's or the government's, those accounts of the facts are rejected. Additional facts are set forth where necessary in the legal analysis.

FACTS

During the early morning hours on December 23, 2016, Brylee Red Owl and defendant drove around their community near Kyle, South Dakota, on the Pine Ridge Indian Reservation. Id. at p. 2. The car belonged to Red Owl, and he drove while defendant sat in the front passenger seat. Id.; (Exhibit 102 at p. 5). They were drinking alcohol. (Exhibit 102 at p. 2); (Docket 53 at p. 8). After communicating with R.O.H. electronically, they picked her up. (Docket 53 at p. 8). Red Owl believed R.O.H. had been drinking before she got in the car. (Docket 70 at p. 4). R.O.H. and Red Owl are related; defendant and Red Owl are friends. Id. at p. 3. At the time, Red Owl was 19 years old, defendant was 18 and R.O.H. was 17. (Exhibit 102 at p. 15); (Docket 29 at pp. 1-2).

They drove to a place they called River Road. (Docket 70 at p. 4). Red Owl parked the car and the three of them talked and drank alcohol² until defendant left the front passenger seat to use the restroom outside. Id. R.O.H. then transitioned to the front seat to talk with Red Owl. Id. When defendant returned, he sat in the back and R.O.H. moved to sit in the back as well. Id.

Each person in the car made different statements about what occurred next.

SA Lucas interviewed R.O.H., Red Owl and defendant. Id. at pp. 3-5. In the interview with R.O.H., she stated that while she was in the backseat with defendant he raped her by penetrating her vagina and anus with his penis. Id. at p. 3. According to R.O.H., she physically resisted defendant and shouted “No!” and “Stop!” Id. She claimed Red Owl remained in the driver’s seat and did not participate in or encourage the events. Id. at pp. 3-4.

Defendant told SA Lucas that R.O.H. got on top of him and they eventually had consensual sex for a few minutes using a condom. Id. at p. 5. He claimed R.O.H. head-butted him when she moved to the backseat. Id.

During SA Lucas’ interview of Red Owl, Red Owl said R.O.H. initiated the encounter with defendant, climbing on top of him and arguing and slapping him when he rejected her. Id. at p. 4. Red Owl also stated R.O.H. struck him at one point. (Exhibit 102 at p. 3). The magistrate judge’s determinations and the government’s corresponding objections focus on three subjects in the Red Owl interview: (1) whether a rape (or even sex) occurred in the car; (2) whether

²Red Owl and defendant indicated R.O.H. drank, but she told SA Lucas she did not have any alcohol that night. (Docket 70 at pp. 3-5).

R.O.H. yelled and became upset after going to the backseat with defendant; and (3) whether Red Owl observed a bruise or cut on R.O.H.'s face. An additional contested aspect of the Red Owl interview is whether SA Lucas' comments during the interview influenced Red Owl's statements. The court walks through SA Lucas' interview with Red Owl in detail.³

On the issue of whether sex or rape occurred, Red Owl provided inconsistent statements to SA Lucas. (Exhibit 102). When SA Lucas asked, "So was anybody having sex in that car?" Red Owl answered, "I don't know." Id. at p. 6. Later in the interview, when Red Owl was summarizing the night's events, he stated, "I was probably buzzed up and didn't really notice but then I heard them arguing. And I'll say yeah they probably did have sex." Id. at p. 12. SA Lucas then posed the question, "So. I mean . . . what . . . did a rape occur?" Red Owl said, "I don't think so. I mean yeah probably." Id. Shortly after that answer, SA Lucas asked, "And now we are pretty clear that sex happened in the back seat? Right?" Red Owl answered, "Yeah. Yeah." Id. at p. 13. SA Lucas confirmed this answer, asking, "Okay and you saw that? Right?" and Red Owl said, "Yep." Id. Finally, SA Lucas asked Red Owl whether he was "convinced that a rape or something did occur in that [car]?" and he answered, "Yeah." Id. at p. 16. In discussing whether R.O.H. consented, SA Lucas asked Red Owl, "when you noticed the sex was going on and it probably

³The transcript of the interview between SA Lucas and Red Owl is attached to this order as Attachment A. It was admitted into evidence and labeled Exhibit 102 during the evidentiary hearing the magistrate judge conducted. (Docket 50). The court cites to the interview transcript using the exhibit number assigned during the hearing.

wasn't consensual, did you do anything?" Id. at p. 20. Red Owl responded, "I told them they need to behave and not to do that in the back of my car." Id.

With respect to whether R.O.H. shouted and was upset after moving to the back and encountering defendant, Red Owl made some inconsistent remarks, but the vast majority of his statements establish he believed she did not yell and was not upset. Red Owl stated, "she never did holler No or No. Anything." Id. at p. 9. He reiterated, "I swear she never hollered No, No. Nothing." Id. at p. 12. After asking Red Owl whether he would "have [R.O.H.'s] back[,] SA Lucas inquired, "so you're saying, was she upset afterwards?" and Red Owl replied, "She was upset." Id. at p. 13. But when SA Lucas questioned Red Owl about whether the sex in the car was consensual, Red Owl stated, "I mean it's hard to really say I guess. I want to say [she was] willing but cause [sic] I didn't really hear her say no, no or anything." Id. at p. 14. When asked, "So she wasn't screaming that that [sic] you saw?" Red Owl said, "Yeah. She wasn't screaming." Id. Discussing the moments when he dropped R.O.H. off at her home, Red Owl told Agent Lucas, "I mean she didn't show no signs that she was upset." Id. at p. 25.

On whether Red Owl noticed a bruise or cut on R.O.H.'s face, he provided generally consistent statements. His statements establish he observed a cut and not a bruise. Red Owl asserted he "turned on the light [in the car] and then [he] saw a little cut right here." Id. at p. 12. SA Lucas asked whether he meant he "saw a cut on her face?" and Red Owl answered, "Yeah so I said." Id. Red Owl went on to say, "I didn't notice a bruise." Id. at p. 13. SA Lucas

proceeded to ask, “but you saw that kind of abrasion or cut?” and Red Owl responded, “Yep.” Id. SA Lucas then stated to Red Owl there was a “mark on her face afterwards[,]” to which Red Owl answered, “Yeah.” Id. at p. 15.

Finally, there are the facts relevant to whether SA Lucas’ remarks during the interview influenced Red Owl. After Red Owl said, “I don’t know,” when asked whether sex occurred in the backseat, id. at p. 6, SA Lucas indicated Red Owl could be charged as an accessory, which may result in a “15 year felon[y].” Id. at p. 9. Noting Red Owl’s proximity to the alleged rape, SA Lucas said, “that starts making you into an accessory. Now here is the thing. You gotta make a choice if you’re a witness or an accessory.” Id. SA Lucas began framing the interview differently, stating, “here is what I want to do now that we kinda had this discussion about um, what your liability and culpability can be.” Id. He asserted there was “forensic evidence” that rape occurred and emphasized, “so here is where you need to figure out if you’re a witness or an accessory to a rape. Okay? So let’s be real honest here because, uhm, you don’t want to start getting jammed up.” Id. at p. 10. Red Owl went on to make statements suggesting he believed defendant raped R.O.H. See supra at p. 5.

When Red Owl expressed he “want[ed] to say [R.O.H. was] willing but cause [sic] [he] didn’t really hear her say no, no or anything[,]” (Exhibit 102 at p. 14), SA Lucas commented on how legal problems could negatively affect Red Owl’s future. Id. at pp. 15-16. SA Lucas started, “She’s your family. And we’re talking about differences in jail time.” Id. at p. 15. SA Lucas inquired about Red Owl’s background, and Red Owl stated he was 19 years old and

worked at Rockyford School as a teacher's aide. Id. at pp. 15-16. SA Lucas and Red Owl then had the following exchange:

- SA Lucas:
 - o So you wouldn't want to see a career or something like that have a lot of problems?
- Red Owl:
 - o No.
- SA Lucas:
 - o By trying to cover up a rape that happened?
- Red Owl:
 - o No.
- SA Lucas:
 - o In your car?
- Red Owl:
 - o No.
- SA Lucas:
 - o Rape.
- Red Owl:
 - o No.

Id. at p. 16. Immediately after Red Owl's last answer, SA Lucas asked whether Red Owl was "convinced that a rape or something did occur in that [car]?" and Red Owl answered, "Yeah." Id.; see supra at p. 5.

After the events at River Road, Red Owl drove R.O.H. and defendant to their homes. (Docket 70 at p. 3). Later on December 23, 2016, R.O.H. went to a medical clinic in Kyle, South Dakota. Id. at p. 2. The clinic conducted a sexual assault kit on R.O.H., finding two one-centimeter lacerations to her anus, minor abrasions on her face and that her hymen was intact. Id. at pp. 2-

3. R.O.H. reported that defendant assaulted her and Red Owl was a witness. Id. at p. 3.

ANALYSIS

I. Motion for disclosure of grand jury testimony

No objections target the magistrate judge's conclusion the motion on grand jury testimony should be denied as moot. (Docket 70 at p. 21). The magistrate judge correctly points out the motion became moot because the government provided a portion of the grand jury transcript after defendant made his motion. See id. at p. 2; (Docket 69-1).⁴ With no objections and a proper resolution of the motion by the magistrate judge, the court accepts the report and recommendation on this issue and denies the motion for disclosure of grand jury testimony as moot. (Docket 51).

II. Motion to dismiss the indictment

This motion revolves around SA Lucas' interview of Red Owl. (Docket 34). Defendant seeks dismissal of the indictment based on government misconduct. (Docket 70 at p. 6). The misconduct allegations are two-fold: (1) SA Lucas testified falsely to the grand jury about Red Owl's statements; and (2) SA Lucas intimidated Red Owl during their interview. Id. The magistrate judge rejected both of defendant's bases for dismissal. Id. at pp. 8, 15-16.

However, despite concluding SA Lucas' grand jury testimony does not justify dismissing the indictment, the magistrate judge did determine SA Lucas

⁴Because the disclosed grand jury testimony is relevant to the court's discussion of defendant's motion to dismiss, the transcript of the testimony is attached to this order as Attachment B.

testified falsely.⁵ Id. at pp. 7-8. The government fiercely objects to this. (Docket 82 at pp. 2-13). No party objects to the finding that dismissal is not appropriate based on SA Lucas' testimony.

Also, although the report and recommendation found the indictment should not be dismissed based on the intimidation of Red Owl, the magistrate judge concluded SA Lucas did threaten Red Owl and the appropriate remedy is suppression of the entire Red Owl interview. (Docket 70 at pp. 8-17). The government submitted lengthy objections to the conclusions that SA Lucas intimidated Red Owl and that suppression is justified. (Docket 82 at pp. 13-38). Defendant did not submit objections on these issues.

a. Grand jury testimony

The court must note that defendant's motion does not argue the indictment should be dismissed based on SA Lucas' grand jury testimony. (Dockets 34 & 34-1). At the evidentiary hearing, defense counsel questioned SA Lucas on his truthfulness before the grand jury. (Docket 53 at pp. 61-62). The magistrate judge granted the parties leave to submit briefs following the hearing. Id. at pp. 88-89. Defendant filed a post-hearing brief and the government submitted a response. (Dockets 58 & 65). Then defendant filed a reply, which, as the government points out in its objections to the report and recommendation, (Docket 82 at p. 2 n.1), raises for the first time prejudice the defendant suffered because SA Lucas provided false testimony to the grand

⁵The magistrate judge found dismissal was not justified because there was sufficient evidence (separate from the Red Owl interview) presented to the grand jury to support the charge. (Docket 70 at p. 8).

jury. (Docket 69 at pp. 5-7); see Docket 69-1 (attached exhibit of partial grand jury testimony). This is not a problem because the magistrate judge eventually concluded SA Lucas' statements to the grand jury do not warrant dismissal, no party objects to that determination and the court finds it is the proper resolution of that issue. Nonetheless, the government objects to findings the magistrate judge made before that ultimate conclusion.⁶

The magistrate judge determined "SA Lucas gave false statements to the grand jury about Mr. Red Owl's interview." (Docket 70 at p. 8). In an exhibit attached to the report and recommendation, the magistrate judge contrasted specific portions of the interview with SA Lucas' testimony. (Docket 70-1). The government's objections divide SA Lucas' relevant testimony into three parts: (1) whether a rape (or even sex) occurred in the car; (2) whether R.O.H. yelled and became upset after going to the backseat with defendant; and (3) whether Red Owl observed a bruise or cut on R.O.H.'s face. (Docket 82 at pp. 5-13); see supra Facts at pp. 4-5.

In addressing allegations of "prosecutorial misconduct during grand jury proceedings," the United States Court of Appeals for the Eighth Circuit emphasized, "grand jury proceedings are afforded a strong presumption of regularity, and a defendant seeking to overcome that presumption faces a

⁶The government's objections on this issue have no effect on the court's ultimate determination of whether SA Lucas' testimony justifies dismissing the indictment. Still, the court is required to resolve objections to a report and recommendation. See 28 U.S.C. § 636(b)(1) ("[T]he court *shall* make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.") (emphasis added).

heavy burden.” United States v. Wadlington, 233 F.3d 1067, 1073 (8th Cir. 2000) (internal alteration and quotation marks omitted).⁷ “Where a defendant alleges prosecutorial misconduct, dismissal of the indictment ‘is proper only when the defendant demonstrates flagrant misconduct and substantial prejudice.’” United States v. Darden, 688 F.3d 382, 387 (8th Cir. 2012) (quoting Wadlington, 233 F.3d at 1073). “[A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.” United States v. Morrison, 449 U.S. 361, 365 (1981).

The government argues that in order to reach the conclusion that SA Lucas testified falsely, the elements for the crime of perjury must be met. (Docket 82 at p. 3) (claiming that finding “SA Lucas gave false testimony . . . is tantamount to finding SA Lucas committed perjury”); *id.* at pp. 2-5. The court rejects this position. Under 18 U.S.C. § 1623(a), it is a crime to provide false testimony to a grand jury.⁸ “A witness testifying under oath commits perjury if he ‘gives false testimony concerning a material matter with the willful intent to

⁷“The fact that the alleged misconduct involves the F.B.I., rather than individuals in the prosecutor’s office per se, does not change this result since, in either case, the government is involved in corruption of the truth-seeking function of the trial process.” Ray v. United States, 588 F.2d 601, 603 (8th Cir. 1978).

⁸The statute provides: “Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.” 18 U.S.C. § 1623(a).

provide false testimony, rather than as a result of confusion, mistake, or faulty memory.’” United States v. Plumley, 207 F.3d 1086, 1095 (8th Cir. 2000) (quoting United States v. Dunnigan, 507 U.S. 87, 94 (1993)) (citing 18 U.S.C. § 1623). It is possible for an FBI agent to make false statements to a grand jury that amount to “flagrant misconduct[.]” Darden, 688 F.3d at 387, without those statements meeting every element of perjury under 18 U.S.C. § 1623(a). For instance, an agent could commit misconduct by providing false statements incriminating a defendant without the “willful intent to provide false testimony[.]” Plumley, 207 F.3d at 1095. The court need not adopt the government’s constrained view. Instead, the court evaluates the truthfulness of SA Lucas’ grand jury testimony within the broad context of its inquiry into government misconduct.

This approach is consistent with the Eighth Circuit’s decision in United States v. Moore, 184 F.3d 790, 794 (8th Cir. 1999). Discussing whether mistaken testimony before a grand jury warranted dismissing an indictment, the Eighth Circuit stated, “in order to have a charge dismissed for an alleged misstatement *or* even a perjurious statement, [defendant] must show that the misstatements were material.” Id. (emphasis added). The Moore court’s use of the word “or” confirms the inquiry encompasses perjury and other types of misstatements. Id.

The court turns to the first relevant part of testimony—Red Owl’s statements on whether sex or rape occurred in the car. Here is SA Lucas’

testimony on this subject in response to questions from Assistant United States Attorney Eric Kelderman (“AUSA Kelderman”):

- AUSA Kelderman:
 - o And can you summarize for the ladies and gentlemen of the grand jury what Brylee Red Owl told you about what occurred?
- SA Lucas:
 - o So, I interviewed Brylee at his home and talked with him. He did acknowledge that he picked up [R.O.H.] and Tolin Gregg was there in the vehicle. I asked him if a rape occurred and initially he lied to me and told me different stories. Once I challenged him and told him I had possibly some evidence that would rebuff that, eventually he said, “Yes, she was raped in the backseat of my car by Tolin Gregg?”
- AUSA Kelderman:
 - o He told you things that were inconsistent with things you already knew, or consistent with the physical evidence?
- SA Lucas:
 - o That’s correct.
- AUSA Kelderman:
 - o He specifically said that Tolin Gregg had done what to [R.O.H.]?
- SA Lucas:
 - o He said that he had sexual intercourse with her in the backseat.

- AUSA Kelderman:
 - o Did he use the word “rape?”
- SA Lucas:
 - o He did. He said he raped her.

(Docket 69-1 at pp. 5-6).

The court quotes this language, including quotation and question marks, as it is in the transcript. With respect to SA Lucas’ first answer summarizing his interview with Red Owl, the government takes issue with the quotation marks the court reporter included. (Docket 82 at pp. 5-6). But Agent Lucas’ testimony was that Red Owl said “. . . she was raped in the backseat of my car” *Id.* at p. 5 (emphasis added). This can only be viewed as a quote from Red Owl speaking about what allegedly happened in his own car. The agent’s quote of Red Owl was unambiguous and false.

In addition, SA Lucas’ use of the word “said” and not the court reporter’s quotation marks also create a problem. “Said” is past-tense for “say,” which has a lengthy definition in Webster’s Third New International Dictionary. The first listed definition of “say” is “to express in words,” and “declare” and “state” are synonyms. *Say*, Webster’s Third New International Dictionary (3d ed. 2002).⁹ In his testimony, SA Lucas does not specify whether Red Owl declared or stated that defendant raped R.O.H., or whether Red Owl indirectly expressed that rape occurred. It is true Red Owl acknowledged sex and possibly rape

⁹See also say, Oxford English Dictionary (3d, June 2015), available at <http://www.oed.com/view/Entry/171590?rskey=NstUMf&result=5#eid> (“To utter, speak; to express in words, declare[.]”).

took place in his car. See supra Facts at pp. 5-6. In the context of an FBI agent testifying to grand jurors about people's statements during an investigation, SA Lucas' use of the word "said" makes his answer at worst a lie and at best extremely misleading.¹⁰ SA Lucas' next contested statement does not need parsing. He testified Red Owl used the word "rape." (Docket 69-1 at p. 6). In fact, Red Owl did not use the word "rape" during his interview. See Attachment A. This piece of SA Lucas' testimony was false.

The next relevant part of the testimony relates to R.O.H.'s conduct after the alleged rape:

- AUSA Kelderman:
 - o Did he acknowledge or did he say what [R.O.H.] had done after this rape?
- SA Lucas:
 - o Well, she was very upset. She was crying and yelling at both of them and demanded to be taken home.

(Docket 69-1 at p. 6).

The court noted above that the vast majority of Red Owl's statements to SA Lucas establish he believed R.O.H. did not yell and was not upset. See supra Facts at p. 6. However, SA Lucas' testimony can be understood as unresponsive to AUSA Kelderman's question and an answer that incorporates

¹⁰Within its argument that the magistrate judge failed to appreciate Red Owl's statements indicating rape occurred, the government draws attention to SA Lucas' question about what Red Owl did once the sex "probably wasn't consensual," to which Red Owl responded, "I told them they need to behave and not do that in the back of my car." (Docket 82 at p. 28). The response supports finding Red Owl did not think defendant was raping R.O.H. It defies common sense that someone in the presence of a rape would tell—both the victim and the perpetrator—that "they need to behave[.]" Id.

information SA Lucas gathered from other sources, such as R.O.H. But again, it is important to appreciate the context of the statement—an FBI agent’s testimony to a grand jury in support of an indictment. SA Lucas’ testimony on this point is misleading at worst and unresponsive at best.

The government argues SA Lucas’ testimony is not false because Red Owl’s remarks demonstrate R.O.H. “displayed behavior consistent with being upset.” (Docket 82 at p. 10). It may be true that Red Owl’s statements contradict each other because he claims R.O.H. was not upset even though she hit him and defendant. *Id.* at pp. 10-11. But the critical issue is whether Red Owl believed R.O.H. was upset, and the clear message from his statements is that he believed she was not.

The final portion of testimony at issue relates to whether Red Owl observed a bruise or cut on R.O.H.’s face:

- AUSA Kelderman:
 - o What did [Red Owl] notice about her, physically?
- SA Lucas:
 - o He saw that she had been hit. He acknowledged that he saw an abrasion on each cheek. One was more of a cut and then there was a bruise on the other cheek.

(Docket 69-1 at p. 6).

As the court set forth above, Red Owl’s statements demonstrate he noticed a cut and not a bruise on R.O.H.’s face. *See supra* Facts at pp. 6-7. SA Lucas’ testimony that Red Owl observed a bruise is false. The government more or less concedes this, stating “[t]here is no indication SA Lucas

intentionally testified falsely on this point. Furthermore, whether R.O.H. had a bruise on her cheek is not material to the allegations against Gregg.” (Docket 82 at pp. 11-12). Drawing from its view that perjury is the only framework for analyzing SA Lucas’ testimony, the government argues, “any misstatement by SA Lucas was immaterial and certainly did not rise to the level of false testimony.” Id. at p. 11. The court does not adopt the government’s framework and finds the testimony regarding Red Owl seeing a bruise on R.O.H.’s face is false.

The government’s fury over the magistrate judge’s finding Agent Lucas testified falsely is misplaced. At any point, the AUSA conducting the examination of Agent Lucas before the grand jury could have clarified the agent’s testimony to accurately reflect what Red Owl actually told the agent. If we presume the AUSA was prepared to conduct a careful presentation of the agent’s testimony in seeking an indictment, we can also presume the AUSA thoroughly studied and understood what Red Owl actually said to Agent Lucas. Here there was no follow up by the AUSA to clarify or correct obviously misleading or false testimony by the agent. This kind of careless grand jury presentation can have dire consequences after an indictment is returned. Rather than rage at the magistrate judge, the U.S. Attorney’s Office would better serve justice by assuring the competent and accurate presentation of grand jury testimony.

To the extent the court’s findings on SA Lucas’ testimony differ from the government’s objections, the objections are overruled. Insofar as the court

makes findings inconsistent with the magistrate judge's report and recommendation, it is rejected. With no remaining objections on this issue, the court turns to whether the government intimidated Red Owl.

b. Witness interference

The magistrate judge found defendant demonstrated a violation of his Fifth Amendment right to Due Process based on SA Lucas' statements during the Red Owl interview. (Docket 70 at pp. 8-17). The magistrate judge focused on SA Lucas' threats about Red Owl being an accessory and the negative impact of legal problems on his future. Id. Rather than recommend dismissal of the indictment, the magistrate judge found "the appropriate remedy is suppressing Mr. Red Owl's statements to SA Lucas[]" for both substantive and impeachment purposes. Id. at p. 16. The government objects. (Docket 82 at pp. 13-38).

The magistrate judge's analysis starts with the United States Supreme Court decision Webb v. Texas, 409 U.S. 95, 98 (1972) (per curium), which held government interference with the testimony of a defense witness can violate due process. Id. ("In the circumstances of this case, we conclude that the judge's threatening remarks [regarding perjury], directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law[.]"). The government argues a different analytical framework applies. (Docket 82 at pp. 14-17). From the government's perspective, Red Owl's statements may be suppressed only if the court concludes SA Lucas obtained them through coercion. Id. (citing United

States v. House, 825 F.3d 381, 388-89 (8th Cir. 2016)). The court finds both of these frameworks applicable to the issues at hand.¹¹

1. Coercion

While defendant “does not have standing to vindicate [Red Owl’s] right against self-incrimination, he has standing to raise a Fifth Amendment claim to protect his own right to a fair trial.” House, 825 F.3d at 388 (citing United States v. Dowell, 430 F.3d 1100, 1107 (10th Cir. 2005)). “Where a defendant seeks to exclude witness testimony because it is a result of a coerced confession, he has the burden to prove that the earlier confession was coerced and led to false trial testimony.” Id. “Unless a serious factual dispute can be shown to exist, and one in which, if successful, the defense would be entitled to exclusion, no hearing at all is necessary.” Dowell, 430 F.3d at 1107 (internal quotation marks omitted); see House, 825 F.3d at 388 (“Here, House’s Fifth Amendment challenge fails because he did not show a ‘serious factual dispute’ about whether Stitt was coerced to confess or whether Stitt’s confession actually affected the reliability of his trial testimony.”). “The standard for determining whether a statement was voluntary is the same whether we are dealing with a defendant or a third party.” Dowell, 430 F.3d at 1107 (internal alteration and quotation marks omitted). As these cases indicate, they apply

¹¹The court adopts the report and recommendation’s determination—to which no party objected—that SA Lucas’ remarks do not justify dismissing the indictment. (Docket 70 at p. 16). Accordingly, the court addresses only the magistrate judge’s objected-to conclusion that Red Owl’s interview should be suppressed.

most directly after trial testimony occurs. But because voluntariness is applicable to this case's circumstances, the court analyzes that issue.

"To determine whether a confession is voluntary, [courts] look at the totality of the circumstances, examining both the conduct of the officers and the characteristics of the accused." United States v. Vega, 676 F.3d 708, 718 (8th Cir. 2012) (internal quotation marks omitted). "The [United States] Supreme Court has long indicated that one of the key concerns in judging whether confessions were involuntary, or the product of coercion, was the intelligence, mental state, or any other factors possessed by the defendant that might make him particularly suggestible, and susceptible to having his will overborne." Wilson v. Lawrence Cty., 260 F.3d 946, 952 (8th Cir. 2001).

"A statement cannot be rendered involuntary by the incapacity of the defendant alone; there must be some coercive police activity." United States v. Anaya, 715 F. Supp. 2d 916, 931-32 (D.S.D. 2010) (citing Colorado v. Connelly, 479 U.S. 157, 164, 167 (1986)). "It is improper for a police officer to obtain a confession through an express or implied promise of leniency." Smith v. Bowersox, 311 F.3d 915, 922 (8th Cir. 2002). However, in the United States Court of Appeals for the Eighth Circuit, officers may "elicit confessions through a variety of tactics, including claiming not to believe a suspect's explanations, making false promises, playing on a suspect's emotions, using his respect for his family against him, deceiving the suspect, conveying sympathy, and even using raised voices. . . . unless the overall impact of the interrogation caused

the defendant's will to be overborne.” United States v. Brave Heart, 397 F.3d 1035, 1041 (8th Cir. 2005) (internal quotation marks and citations omitted).

Earlier the court set forth the facts regarding SA Lucas' threats to Red Owl. See supra Facts at pp. 4-9. Additional facts and background about the environment of the interview are relevant to voluntariness. The interview occurred in SA Lucas' vehicle. (Docket 53 at p. 7). At the outset, SA Lucas told Red Owl the car's doors were unlocked, he was not under arrest and he could end the conversation at any point. Id. at pp. 7, 15-17. SA Lucas' weapon was not visible, he did not raise his voice and no physical contact with Red Owl occurred. Id. at pp. 15-17; (Exhibit 1).

Defendant argues the cumulative effect of SA Lucas' remarks and the environmental factors show SA Lucas coerced Red Owl into incriminating defendant. (Docket 87 at pp. 4-8). However, SA Lucas' threats are “simply one factor to be considered in the totality of the circumstances.” See Brave Heart, 397 F.3d at 1041. The interview was not extremely lengthy; SA Lucas and Red Owl were calm throughout; Red Owl knew he could terminate the interactions at any point; and Red Owl understood the questions and provided responsive answers. In the Eighth Circuit, the situations where statements are not voluntary are extremely narrow. See id. (listing the tactics law enforcement can employ without eliciting involuntary statements). This is not one of those unique cases. Defendant fails to show “the overall impact of the interrogation caused [Red Owl's] will to be overborn.” Id. Based on the totality of the

circumstances, defendant has not demonstrated Red Owl made involuntary statements to SA Lucas.

Because Red Owl's statements were voluntary, SA Lucas' alleged coercion may not serve as a basis for excluding the statements. The court turns to the next framework for analyzing this issue.

2. Webb

As noted above, the magistrate judge analyzed the Red Owl interview through the lens of Webb, 409 U.S. at 98. Most directly, the magistrate judge relied on the application of Webb in two cases coming from different courts of appeals. (Docket 70 at pp. 11-17). The first case is out of the Eleventh Circuit, United States v. Heller, 830 F.2d 150, 152-53 (11th Cir. 1987). While the source of the government interference in Webb was a judge, Heller determined that interference from federal investigators can also violate due process. See Heller, 830 F.2d at 152-53. And the second is a Ninth Circuit case, United States v. Juan, 704 F.3d 1137, 1141-42 (9th Cir. 2013). In Juan, the Ninth Circuit extended Webb, holding "substantial and wrongful interference with a prosecution or defense witness that does not 'drive the witness off the stand,' but instead leads the witness to materially change his or her prior trial testimony can, in certain circumstances, violate due process." Juan, 704 F.3d at 1142. Juan enlarged Webb in two ways: the subject of the interference can be a prosecution (as opposed to defense) witness, and altered testimony (as opposed to refusal to testify) can constitute interference. See Juan, 704 F.3d at 1142.

The magistrate judge determined SA Lucas made remarks to Red Owl during their interview that “deprived [defendant] of an important defense witness by substantial interference on the part of the government.” (Docket 70 at p. 15). In the magistrate judge’s view, “[i]f not for SA Lucas’ threats, Mr. Red Owl could have provided significantly material, exculpatory testimony at trial.” Id. Acknowledging “the government’s interference may not drive Mr. Red owl off the stand,” the magistrate judge concluded, “the threats instead led the witness to materially change his statements and prevented prospective testimony that would have bolstered Mr. Gregg’s case.” Id. at pp. 15-16.

The government argues Webb and its progeny do not support excluding Red Owl’s interview. (Docket 82 at p. 14). The government claims those cases apply only when a witness refuses to testify. Id. It is true that at this point Red Owl has not indicated a refusal to testify. The latest filing from defendant states, “the defense anticipates that Brylee will testify in trial and that he will give truthful testimony that will be favorable to the defendant.” (Docket 87 at p. 1).

Anticipating Red Owl will testify in support of defendant is central to resolving the issues surrounding potential government interference. Specifically, whether Webb is implicated at all, and whether defendant has shown prejudice.

As the government argues, some cases indicate the witness with whom the government interfered must refuse to testify for Webb to apply. In Wadlington, the Eighth Circuit stated, “a defendant has a right to present his

own witnesses to establish a defense and that this right is a fundamental element of due process of law. However, this right will not be violated absent some force influencing defense witnesses not to testify.” Wadlington, 233 F.3d at 1076 (citing Webb, 409 U.S. at 98) (internal citation and quotation marks omitted). Two United States District Courts within the Eighth Circuit adopted this view. See United States v. Modisett, No. 3:14-CR18-1, 2017 WL 74698, at *2 (D.N.D. Jan. 5, 2017) (“[W]arnings concerning the dangers of perjury only rise to the level of depriving a defendant of a fair trial where they threaten and intimidate the witness into refusing to testify.”) (internal quotation marks omitted); United States v. Soto-Garica, No. 15-05034-01, 2016 WL 5844170, at *3 (W.D. Mo. Aug. 24, 2016) (discussing a motion to dismiss an indictment based on warnings to a witness about perjury, holding, “Defendant has raised an issue which should be addressed at trial and only when there is certainty that [the witness] will not testify for Defendant.”).

But in a decision before Wadlington, the Eighth Circuit conducted a Webb inquiry even though the subject of the intimidation ultimately testified. See United States v. Risken, 788 F.2d 1361, 1370-71 (8th Cir. 1986). The prosecutor in Risen cautioned a witness about committing perjury, and “the prosecutor’s ‘advice’ did not in fact prevent [the witness] from testifying and being cross-examined at appellant’s trial.” Id. at 1370. Nonetheless, the Eighth Circuit explored Webb, concluding the “prosecutor’s statements in the present case do not approximate the sort of government misconduct held unconstitutional in the leading case of Webb[, 409 U.S. at 98,] in which the

trial court gratuitously and at great length admonished only the defendant's single witness not to lie and warned him of the dire consequences of perjury[.]” Id. at 1370-71. At least four circuits do not require a witness to refuse to testify before considering a Webb argument. See, e.g., United States v. Morrison, 535 F.2d 223, 227-28 (3d Cir. 1976) (“The District Court sought to distinguish Webb on the grounds that the witness in that case had been driven from the stand by the judge’s warning whereas Sally Bell testified freely to non-incriminating matters before the jury and testified out of jury hearing on the conversation she had with Mr. Villanova. We do not find these distinctions relevant to the issue of whether the actions of the prosecutor interfered with Mr. Boscia’s right to have his witness give evidence in his favor.”); see also Juan, 704 F.3d at 1141-42; Griffin v. Davies, 929 F.2d 550, 553-54 (10th Cir. 1991); Anderson v. Warden, Maryland Penitentiary, 696 F.2d 296, 299 (4th Cir. 1982).

In 1997, this court applied Webb and Risken to a case where the witnesses subjected to intimidation went on to testify. See United States v. Red Elk, 955 F. Supp. 1170, 1180-81 (D.S.D. 1997) (discussing Webb and Risken even though “[a]ll of the witnesses were able to testify and did so even after the perjury explanation was given to them”). Because the Eighth Circuit analyzed Webb despite a witness proceeding to testify in Risken, a panel decision pre-dating¹² Wadlington, the court will apply Webb to this case.

¹²See United States v. Anderson, 771 F.3d 1064, 1066-67 (8th Cir. 2014) (“It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel. This rule, however, does not apply when the earlier panel decision is cast into doubt by an intervening Supreme Court decision.”) (internal alteration, citation and quotation marks omitted).

Defendant must demonstrate sufficient prejudice based on SA Lucas' conduct. In United States v. Habhab, 132 F.3d 410, 415 (8th Cir. 1997), the Eighth Circuit rejected a due process witness intimidation argument because the defendant failed to show she "suffered any actual prejudice as a result."¹³ See also Peeler v. Wyrick, 734 F.2d 378, 381-82 (8th Cir. 1984) (discussing prejudice in the context of a Webb argument). As mentioned earlier, defendant indicates Red Owl will provide truthful testimony favorable to the defense at trial. That eliminates a bulk of the prejudice the magistrate judge identified. It is no longer the case that the government "prevented prospective testimony that would have bolstered" the defense. (Docket 70 at p. 15). According to defendant, Red Owl will still bolster the defense via trial testimony.

One prejudicial aspect the magistrate judge highlighted was that "without SA Lucas' threats, Mr. Red Owl would have been Mr. Gregg's only exculpatory witness." Id. at p. 16. But the defendant's expectation that Red Owl's trial testimony will support his case confirms he is still an exculpatory witness. The only downside for defendant is Red Owl may be vulnerable to impeachment based on some answers he gave to SA Lucas. Assuming without deciding SA Lucas' threats to Red Owl were improper under Webb and Eighth

¹³In a comparable inquiry—whether pre-indictment delay violates due process by rendering witnesses unavailable—a defendant must show actual and substantial prejudice. See United States v. Benshop, 138 F.3d 1229, 1232-33 (8th Cir. 1998) ("We now turn to the question of whether defendant suffered actual and substantial prejudice as a result of . . . unavailability [of] a trial witness.").

Circuit precedent,¹⁴ the only prejudice the court perceives at this point is Red Owl made potentially inconsistent statements on whether defendant raped R.O.H. If the government seeks to impeach Red Owl with his interview, the defense can bring out SA Lucas' alleged interference with Red Owl's recollection and the jury can weigh witness credibility. With the information before the court at this point, the risk of prejudice is insufficient to find a deprivation of due process. See Habhab, 132 F.3d at 415; Peeler, 734 F.2d at 381-82.

On this issue, the court limits its determinations to only those necessary to resolve defendant's motion and the parties' objections to the report and recommendation. Bringing claims of witness intimidation in a motion prior to trial is generally premature. See United States v. Goodwin, 625 F.2d 693, 703 (5th Cir. 1980) ("The normal time to dispose of claims of witness intimidation is at the trial.").¹⁵ Defendant's argument could change based on Red Owl's ultimate choice whether to testify at trial and the content of his testimony. At this point, although the court resolves defendant's current argument under Webb, if the circumstances of the case change, it may be proper to readdress the issue. Accordingly, the court sustains in part and overrules in part the government's objections. The court accepts the report and recommendation's

¹⁴Although the court does not decide this issue because it is not necessary at this stage, the parties should be aware the court finds it likely SA Lucas' threats were improper under the applicable law. If so, that would leave prejudice as the remaining issue.

¹⁵On this note, the court highlights Juan, 704 F.3d at 1141-42, is inapplicable at this stage of the case. Juan dealt with government conduct that "leads the witness to materially change his or her prior trial testimony[.]" Id. at 1142. Trial has yet to occur here.

framing of defendant's argument under Webb but rejects the conclusion that Red Owl's interview should be excluded at this time.

III. Motion to suppress statements

Defendant filed a motion to suppress statements he made to SA Lucas, claiming a Miranda violation based on inadequate Miranda warnings. (Docket 28). The magistrate judge determined no violation of Miranda occurred and defendant's motion should be denied. (Docket 70 at pp. 17-21). Defendant objects.¹⁶ (Docket 71).

SA Lucas interrogated defendant during the afternoon on December 24, 2016, at the Kyle Medicine Root Detention Center. (Docket 70 at p. 5). Defendant had been taken into tribal custody for the events giving rise to this case. (Exhibit 103). SA Lucas began by asking whether defendant knew why SA Lucas was there, noting defendant had been arrested, and defendant said he did know. Id. SA Lucas indicated he would provide defendant his rights and stated:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided to you at no cost to you by the court. Anything you say to me today is voluntary. If at any time you want to talk without having a lawyer present, you can just say, hey, Mark, I don't want to talk anymore.

¹⁶Defendant's objection claims his statements to SA Lucas were not voluntary. To the extent defendant alleges his statements were elicited involuntarily and in violation of due process, the court rejects the argument. See supra Section II.b.1. at pp. 20-22 (setting forth the law on voluntariness).

Id.¹⁷ SA Lucas asked whether defendant understood, and defendant said he did. (Exhibit 103); (Docket 70 at p. 18). The interrogation went on for approximately 30 minutes. (Exhibit 103).

“To give force to the Constitution’s protection against compelled self-incrimination, the [Supreme] Court established in *Miranda* ‘certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth . . . Amendment[] before commencing custodial interrogation.’ ”

Florida v. Powell, 559 U.S. 50, 59 (2010) (quoting Duckworth v. Eagan, 492 U.S. 195, 201 (1989)). Miranda requires the following four warnings:

A suspect must be warned prior to any questions [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 59-60 (internal alteration and quotation marks omitted). While the “four warnings *Miranda* requires are invariable,” the Supreme Court “has not dictated the words in which the essential information must be conveyed.” Id. at 60; California v. Prysock, 453 U.S. 355, 359 (1981) (per curium) (“*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures.”). Absent Miranda’s precise warnings, the warnings provided must be “a fully effective equivalent[.]” Prysock, 453 U.S. at 360 (emphasis omitted).

Defendant argues the warnings were inadequate because SA Lucas failed to specify defendant had a right to the *presence* of counsel. (Docket 71 at

¹⁷This is SA Lucas’ recitation verbatim.

pp. 3-9). Defendant also claims the final sentence in SA Lucas' recitation misled defendant about his right to counsel. Id.

Emphasizing the right to counsel, the Supreme Court held, "as an absolute prerequisite to interrogation, that an individual held for questioning must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." Powell, 559 U.S. at 60 (internal quotation marks omitted). However, Miranda is not violated when "nothing in the warnings . . . suggest[s] any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right to a lawyer before [the suspect is] questioned, . . . while [he is] being questioned, and all during the questioning." Prysock, 453 U.S. at 360-61. "[T]here is a split among the circuits with respect to whether the warning must explicitly provide that a suspect is entitled to the presence of counsel during interrogation." Bridgers v. Dretke, 431 F.3d 853, 859 (5th Cir. 2005). The Fifth, Sixth, Ninth and Tenth Circuits "require a more explicit warning indicating that a suspect is entitled to counsel during questioning." Id. (collecting cases). "On the other hand, the Second, Fourth, Seventh, and Eighth Circuits under various circumstances have held that warnings are adequate without explicitly stating that the right to counsel includes having counsel present during the interrogation." Id. (collecting cases).

In United States v. Caldwell, 954 F.2d 496, 502 (8th Cir. 1992), the Eighth Circuit stated it "has not strictly required that a defendant be explicitly

advised of his right to an attorney before and during questioning.” The detective in Caldwell provided the following warnings:

You got the right to remain silent. Anything you say will and can be used against you in the court of law. You have a right for an attorney. If you can’t afford one, one will be appointed to you.

Id. at 498. Finding the Caldwell defendant failed to preserve his challenge to the Miranda warnings, the Eighth Circuit reviewed the issue for plain error. Id. at 500-01. The Eighth Circuit noted “the ambiguity of the warning,” but determined that “deficiency” did not “actively misle[a]d Caldwell by suggesting a false limitation of his right to counsel.” Id. at 502. Although the Eighth Circuit stated the detective “could, and arguably should, have been more explicit in advising Caldwell of his right to an attorney,” the court held, “the warning provided does not rise to the level of plain error.” Id. at 503. “When the only claimed deficiency is that of generality,” the Eighth Circuit concluded, “we cannot hold the warning in this case amounts to plain error.” Id. at 502.

Beyond arguing SA Lucas’ statement regarding the right to counsel was unclear, defendant attacks SA Lucas’ last sentence: “If at any time you want to talk without having a lawyer present, you can just say, hey, Mark, I don’t want to talk anymore.” (Exhibit 103). There is no way around it, this sentence does not make sense. During the evidentiary hearing, SA Lucas testified to that. When asked whether the sentence was a mistake and came out the wrong way, SA Lucas answered, “That’s correct.” (Docket 53 at p. 74). Defense counsel asked SA Lucas, “Would you agree with me that that makes no sense? I mean, logically, legally, what you told him in that sentence just doesn’t make any

sense at all does it?” Id. SA Lucas responded, “Yes. After hearing that now, that’s the—that is the statement that I made.” Id. at p. 75.

A misstatement will not invariably violate Miranda. For instance, the Eighth Circuit found it meritless to argue that erroneously telling a suspect “anything you *can* say and *will* be used against you in a court of law” was “an independent basis for suppressing [] post-Miranda statements.” United States v. Class, 883 F.3d 734, n.2 (8th Cir. 2018) (emphasis in original) (rejecting the argument also because it failed to comply with Fed. R. App. P. 28(a)(8)(A)).

The magistrate judge correctly applied Caldwell in concluding the Miranda warnings reasonably conveyed defendant’s rights. Though the meaning of Agent Lucas’ final statement to defendant was unclear, the Miranda warnings were constitutionally and factually adequate. On this issue, the court overrules defendant objections and adopts the report and recommendation.

CONCLUSION

With respect to defendant’s motion for the disclosure of grand jury testimony, the court accepts the report and recommendation and denies the motion as moot. The court denies defendant’s motion to dismiss the indictment. The court’s findings on the collateral issue of SA Lucas’ truthfulness before the grand jury are set forth above. On the issue of suppressing the Red Owl interview, the court sustains the government’s objections and rejects the report and recommendation. At this point, Red Owl’s interview is not excluded, but defendant may seek its exclusion if he

sufficiently shows the case's circumstances changed. The court denies defendant's suppression motion and overrules defendant's objections regarding his post-Miranda statements.

ORDER

Based on the above analysis, it is

ORDERED that defendant's objections to the magistrate judge's report and recommendation (Docket 71) are sustained in part and overruled in part.

IT IS FURTHER ORDERED that the government's objections to the magistrate judge's report and recommendation (Docket 82) are sustained in part and overruled in part.

IT IS FURTHER ORDERED that the magistrate judge's report and recommendation (Docket 70) is adopted in part and rejected in part.

IT IS FURTHER ORDERED that defendant's motion to suppress (Docket 28) is denied.

IT IS FURTHER ORDERED that defendant's motion to dismiss the indictment (Docket 34) is denied.

IT IS FURTHER ORDERED that defendant's motion for disclosure of grand jury testimony (Docket 51) is denied as moot.

IT IS FURTHER ORDERED that a scheduling order will follow.

Dated October 17, 2018.

BY THE COURT:

/s/ *Jeffrey L. Viken*

JEFFREY L. VIKEN
CHIEF JUDGE