

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

<p>STATE OF IOWA,</p> <p><i>Plaintiff,</i></p> <p>v.</p> <p>ROGELIO PABLO MORALES,</p> <p><i>Defendant.</i></p>	<p>NO. FECR091148</p> <p>RULING ON MOTION TO SUPPRESS</p>
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This matter came before the court on Defendant Rogelio Pablo Morales’s Motion to Suppress. A hearing was held on this matter on March 18, 2016. The State was represented by Mark Campbell and James Loomis. Mr. Morales was represented by Peter Tenny. After considering the pleadings contained in the court file, considering the parties’ statements and written summations, and reviewing the applicable law, the Court enters the following ruling.

BACKGROUND FACTS AND PROCEEDINGS

On April 19, 2015, Sioux City Police Officer Joshua Tyler was dispatched to 2018 Iowa Street for a report of an unconscious party. Upon his arrival, Officer Tyler found Officer William Enockson administering CPR to Margarita Morales. Officer Tyler was then instructed by a bystander that he should speak with Rogelio Morales.

Officer Tyler approached Morales, who was sitting on the front steps of the house and crying. Officer Tyler asked Morales what had happened. Morales replied that he and Margarita had been arguing, that Margarita had said that she had slept with someone else, and that Morales had “lost it,” then blacked out. Following further discussion, Officer Tyler placed Morales into custody. During the walk to the patrol car, Officer Tyler read Morales his *Miranda* rights. At the hearing, Officer Tyler testified that Morales had indicated that he understood his rights, though this cannot be heard on Officer Tyler’s patrol car video. Pl. Ex. 3.

Morales was placed into an interrogation room at 1:06 a.m. At 2:22 a.m., Detectives Thompson and Simons entered. Detective Thompson read Morales his *Miranda* rights and asked Morales if he understood those rights. Morales nodded. Detective Thompson then asked if he was willing to speak to the detectives. Morales again nodded. Detectives Thompson and Simons thereafter interrogated Morales.

On February 11, 2016, Morales submitted the present motion to suppress his statements to Detectives Thompson and Simons. Morales does not challenge the admissibility of his statements to Officer Tyler at the scene.

STANDARD OF REVIEW

The Fifth Amendment to the United States Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. This amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Miranda*, 672 N.W.2d 753, 758 (Iowa 2003) (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)). In *Miranda v. Arizona*, the United States Supreme Court held that a person taken into custody or otherwise significantly deprived of his or her freedom must, before questioning begins, be advised “that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” 384 U.S. 436, 479 (1966). Once these warnings are given, the person may “knowingly and intelligently waive these rights and agree to answer questions or make a statement.” *Id.* However, “[u]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.” *Id.* The State

bears the burden to establish such by a preponderance of the evidence. *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) (citing *Colorado v. Connelly*, 479 U.S. 157, 168 (1986)).

ANALYSIS

A) Morales's statements to Detectives Thompson and Simons

Morales contends that his nod is not sufficient to waive his *Miranda* rights, as he had stayed silent until the detectives began the interrogation.¹ *See Miranda*, 384 U.S. at 475 (“[A] valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was in fact eventually obtained.”).

Morales provided a response, though a nonverbal one; he nodded in answer to Detective Thompson’s questions after the *Miranda* recitation. Iowa, however, currently has no law as to whether a nod is sufficient to waive *Miranda* rights.

Morales cites *Barker v. Wingo*, 407 U.S. 514, 525-526 (1972), which states that the court “should ‘not presume acquiescence in the loss of fundamental rights.’” *Barker*, 407 U.S. at 525-526 (quoting *Ohio Bell Tel. Co. v. Public Utilities Comm’n*, 301 U.S. 292, 307 (1937)). In *Barker*, the defendant’s case was repeatedly continued, past the date of speedy trial, without any consent from the defendant. The Supreme Court found that to allow such a delay without any waiver from the defendant of his right to a speedy trial was impermissible. *Id.*

This is distinguishable from the case at bar. In *Barker*, the defendant gave no indication, verbal or otherwise, that he consented to his case being continued beyond the speedy trial

¹ In his brief and at hearing, Morales also questioned if the head gesture seen in the taped interrogation was indeed a nod. After the viewing the interrogation, the Court finds that it is inarguably a nod. When viewing the recording, it is clear that, though Morales’s head is down, he moves it up and down in a manner commonly accepted to be a nod in assent. He does so only in response to Detectives’ questions, and not during the *Miranda* warning or at other times not in answer to a question. Additionally, Morales moves his head in a similar manner at several times throughout the interrogation, all in response to questions, in which a yes or no answer is expected. *See* Pl. Ex. 4 at 2:23:58, 2:24:05, 2:24:52, 2:27:58, 2:30:30, 2:33:16, 2:35:23, 2:36:00, 2:42:53, 2:43:07, 2:43:10, 2:49:57, 2:59:15, 3:01:56, 3:02:00, 3:04:25, 3:10:09, 3:16:22, 3:29:58, 3:36:33, 4:48:03 (affirmative nod); 2:22:35, 2:25:30, 2:36:46, 2:51:08, 2:57:07, 3:01:03, 3:02:47, 3:30:09 (negative head shake).

limitations. In the present case, Morales nodded in answer to questions from the detectives regarding his understanding of his *Miranda* rights and his willingness to speak. This acknowledgement is more than existed in *Barker*.

Courts throughout the country have varied on the issue of a nod as a *Miranda* waiver. While there are a few courts have ruled that a nod, alone, is insufficient,² the majority of courts hold that a nod is an adequate affirmation to waive *Miranda* rights and allow questioning.³

² See, e.g., *Dillon v. Commonwealth*, 475 S.W.3d 1, 14 (Ky. 2015) (“The decision to waive the right to remain silent and to have counsel has legal consequences that require a greater level of “intelligent” decision-making than simply nodding yes or no to simple questions while suffering the effects of a massive head trauma.”); *United States v. Maddox*, 2010 WL 4683531, at *2 (E.D. Tenn. 2010) (“[A] waiver cannot be inferred from ambiguous statements of the arrestee, or mere nods of the head, or from the arrestee’s silence.”); *People v. Golden*, 457 N.Y.S.2d 689, 693 (Sup. Ct. 1982) (“Although an express statement of waiver is not required to a finding that an accused has waived his constitutional rights, a valid waiver will not be presumed simply from the defendant’s silence after *Miranda* warnings have been given.”).

³ See, e.g., *People v. Tobar*, 2015 WL 129629, at *4 (Cal. Ct. App. 2015) (“[T]he court found that by nodding his head slightly during the *Miranda* advisement, appellant signaled that he understood his rights. The trial court found appellant’s nodding movements were ‘[not] prominent’ but were ‘noticeable movements of the head up and down.’ It ruled that appellant had impliedly waived his Fifth Amendment privilege by continuing the dialogue with Koutsoubos thereafter, selectively answering subsequent questions posed.”); *United States v. Orellana*, 2014 WL 3767381, at *4 (N.D. Iowa 2014) (“While [the defendant’s] response to ‘Do you understand?’ was nonverbal, it was sufficient to serve as an affirmative answer.”); *United States v. Ravensborg*, 2013 WL 5565891, at *6 (D. Minn. 2013) (“[B]y his earlier head nod, Defendant affirmatively acknowledged that he understood his rights, and he proceeded to answer SA Zavala’s questions entirely voluntarily, and this voluntary conduct was contrary to the right of which he’d previously been informed. As a result, the Court finds that Defendant knowingly and intelligently waived *Miranda*.”); *Com. v. Clarke*, 960 N.E.2d 306, 314 (Mass. 2012) (“[T]he Court has held that, under the Federal Constitution, in order for criminal defendants to invoke their right to remain silent, whether before or after waiving their *Miranda* rights, they must “unambiguously” announce their desire to be silent. This test is an objective one, requiring “that a reasonable police officer in the circumstances would understand the statement” to be an invocation of the *Miranda* right.”); *United States v. Loman*, 2011 WL 4834210, at *7 (E.D. Ky. 2011) (“The United States has met its burden of establishing by a preponderance of the evidence that Defendant validly waived his *Miranda* rights. First, Defendant understood his rights. He initially, at least once, refused to answer Daniel’s questions, suggesting he was aware already that he need not respond. Daniel then read Loman his rights from a standard and compliant script, and Defendant nodded to indicate he understood those rights.”); *Delatorre v. Haws*, 2011 WL 2471027, at *6 (E.D. Cal. 2011) (“Defendant’s waiver of his *Miranda* rights can be implied from the fact that, after nodding affirmatively indicating he understood his rights, and after a pause during which there was ample time for him to choose to refuse to speak to the detectives or to choose to request an attorney, defendant answered the detectives’ questions.”); *United States v. Yockey*, 654 F. Supp. 2d 945, 954 (N.D. Iowa 2009) (Court upheld the defendant’s nonverbal head nod as a consent to speak to detectives following reading of *Miranda* rights.); *People v. Sanchez-Gonzalez*, 2009 WL 2372870, at *2 (Cal. Ct. App. 2009) (“Lacking any evidence that defendant was confused at any point, or that his nod at the conclusion of the advisement and his decision to begin talking with the deputy about the crime were anything other than an informed implied waiver of the rights described to him, the court denied the motion [to suppress].”); *People v. Thanh*, 2008 WL 4175115, at *4 (Cal. Ct. App. 2008) (“A waiver of *Miranda* rights need not be express. Rather, ‘in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.’ Therefore, ‘the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver,’ may support a conclusion that he has waived his *Miranda* rights. Whether the defendant’s conduct amounts to an implied waiver ‘must be determined on ‘the particular facts and

Particular guidance is found in *United States v. Yockey*, 654 F. Supp. 2d 945, 954 (N.D. Iowa 2009). In *Yockey*, there was no video of the interrogation, only an audio recording. *Id.* The interviewing detective testified that the defendant had nodded in response to a question regarding defendant's willingness to talk to the detective. *Id.* The audio recording supported this testimony via appropriately timed pauses in conversation, and the defendant presented nothing to contradict. *Id.* Additionally, "[t]he interview was conducted in normal conversational tones in what sounds like a relaxed atmosphere[.]" and the detective made "no threats or promises nor [did] he engage in any intimidation, shouting, or employ pressure tactics or psychological pressure." *Id.* Finally, the defendant was "reasonably relaxed and composed" and did "not sound in any way confused." *Id.* Iowa law supports this method of analysis with its adoption of "the totality-of-circumstances test in determining voluntariness: it must appear the statements were the product of 'an essentially free and unconstrained choice, made by the defendant whose will was not overborne or whose capacity for self-determination was not

circumstances surrounding that case, including the background, experience, and conduct of the accused.'"); *People v. Brand*, 787 N.Y.S.2d 169, 172 (Sup. Ct. 2004) ("[D]efendant's brief silence and head nods after being read *Miranda* rights several times, coupled with his failure to request counsel when prompted by police officers and readily answering the questions posed by the officers at the crime scene and police station, cannot be said to have signaled an invocation of his right to remain silent."); *People v. Walsh*, 514 N.Y.S.2d 174, 176 (Sup. Ct. 1987) ("[D]efendant's non-verbal nods constituted an effective waiver of his *Miranda* right."); *People v. Brown*, 496 N.E.2d 1020, 1022 (Ill. App. 1986) ("[D]efendant's nod constituted an express relinquishment of his right to remain silent."); *Com. v. Speaks*, 505 A.2d 310, 316 (Pa. Super. 1986) ("[A] physical manifestation of waiver would exist where an appellant nods his head in answer to a question regarding appellant's desire to speak."); *People v. Chavez*, 632 P.2d 574, 580 (Colo. 1981) ("This is not to say that a waiver never may be implied solely from conduct or from a response to interrogation."); *State v. Simoneau*, 402 A.2d 870, 872 (Me. 1979) ("In light of the other conduct, going on at that time, the affirmative nod of the head with its customary meaning is an indication of understanding and acquiescence."); *People v. Ferran*, 591 P.2d 1013, 1014 (Colo. 1978) ("We hold that where, as here, the defendant's conduct clearly demonstrates his intention to waive his constitutional rights, that waiver may be accomplished by nonverbal communication. In law, as in life generally, there are cases where actions speak louder than words . . ."); *People v. Henne*, 319 N.E.2d 596, 600 (Ill. App. 1974) ("While the defendant's brief raises the question of how to distinguish between a nod in affirmation and a simple nodding or bobbing of a head due to drunkenness, there is no inherent right in the defendant to insist that his nod was a mere drunken gesture rather than a communication. The prior and attendant circumstances do not indicate such an extreme state of mental incapacity due to intoxication as to require an interpretation that the nod was meaningless.").

critically impaired.”” *State v. Countryman*, 572 N.W.2d 553, 558 (Iowa 1997) (quoting *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992)).

Yockey is analogous to the present case. Morales responded to questions of both his understanding of his *Miranda* rights and his willingness to speak to the detectives with a nod. This is clearly seen in the video of the interview. Pl. Ex. 4. Detective Thompson delivered the rights and questions in a conversational tone. There were no threats or promises or intimidation in the conversation. Morales had his head down during the recitation and questions, but there was no indication that he was not listening or was confused. He responded to questions in a logical manner at the appropriate times without prompting. Finally, Morales offers no alternative explanation to contradict the nods being interpreted as affirmative responses to Detective Thompson’s questions.

Morales cites several additional factors that he argues diminish his ability to knowingly, intelligently, and voluntarily waive his *Miranda* rights, including his age, his military service, his lack of a prior criminal record, the location of the interview, the length of wait prior to interrogation, the length of interrogation, the number of law enforcement officers present, his emotional state, deprivation of sleep, and the detectives’ request that he disrobe. When evaluating the totality of the circumstances, the court does not find these persuasive. *See Countryman*, 572 N.W.2d at 558. Morales presents no evidence to support how these factors might have altered his ability to understand or waive his *Miranda* rights. Several of these, in fact, occurred after Morales’s waiver, including the length of the interrogation and the detectives’ request that he disrobe. None of these factors alter Morales’s knowing, intelligent, and voluntary waiver of his *Miranda* rights.

It is clear that Morales's nods were meant to be affirmative responses to Detective Thompson's questions. This, along with Officer Tyler's testimony that Morales had indicated that he understood his *Miranda* rights while in the patrol car, is sufficient to waive Morales's *Miranda* rights.

B) Statements during Interrogation

i) Prejudicial statements/Misstatements of Fact

Morales next contends that several statements made by Detectives Thompson and Simons were highly prejudicial and were made specifically with the intent to influence the jury.

At particular issue are the following statements:

- 1) Detective Thompson: "You said you were pretty sure at one point you grabbed her with both hands." Cor. Tr. p30 ln 5-7.
- 2) Detective Simons: "How can you remember everything before and everything after, but you don't remember anything about what you did with you –" Cor. Tr. p 32 ln 1-4.
- 3) Thompson: "I understand that you probably feel betrayed and stuff . . . I have had that same thing happen to me and it doesn't feel very good . . ." Cor. Tr. p 34 ln 1-2, 6-7.
- 4) Thompson: ". . . you said at one point that you were pretty sure that you grabbed her with two hands . . ." Cor. Tr. p46 ln 10-12.
- 5) Simons: ". . . he's going to want to take a swab of your hands, okay? It takes two seconds. Is that all right? Is that still good?"
Rogelio Morales: [moves head in an affirmative manner.]
Simons: "I want him to do this before he goes home in a little bit. It won't take but a couple of seconds." Cor. Tr. p 50 ln 3-11.
- 6) Polak: "Going to do a buccal swab, both hands, a swab of both hands."
Simons: "Yeah . . ." Cor. Tr. p51 ln 24 – p52 ln 1.
- 7) Simons: ". . . because now it's time for you to start thinking a little bit harder about what happened." Cor. Tr. p55 ln 1-3.
- 8) Simons: "So what it's telling me though is that every time you choke her is the only time you think you don't remember. You remember everything but choking her." Cor. Tr. p56 ln 9-12.

- 9) Simons: “So now we’re talking about today, you remember going to – taking her to work – taking her to work. You remember picking her up from work. You remember going to get some food. You remember pulling over at 21st and Floyd. You remember talking to her about the conversation that you had about getting back with each other. . . .” Cor. Tr. p56 ln21 – p57 ln3.
- 10) Simons: “. . . the only thing you can’t remember are the times that you choked her. The deputy told you that you choked her. . . .” Cor. Tr. p57 ln 9-11.
- 11) Simons: “And you are a powerful, big guy.” Cor. Tr. p60 ln 13-14.
- 12) Simons: “. . . You are a strong, dangerous dude, you know . . .” Cor. Tr. p60 ln 18.
- 13) Thompson: “. . . you remember everything throughout the whole night other than the most important part.” Cor. Tr. p61 ln 3-5.
- 14) Simons: “I know you are crying and everything that you are doing now. I haven’t seen one tear in an hour and a half. Ain’t no tears.”
Morales: “There were tears.”
Simons: “Garbage. Start telling the truth, Rogelio, and tell us what you did. Man up now.” Cor. Tr. p61 ln 6-13.
- 15) Simons: “. . . Doesn’t your son and doesn’t her parents deserve the right to know exactly –” Cor. Tr. p62 ln 23-24.
- 16) Thompson: “You have a medical background, and you don’t try to give her CPR. You don’t check to see if she’s breathing, nothing.” Cor. Tr. p63 ln 3-6.
- 17) Simons: “You are scared for yourself because you are scared that you killed her.” Cor. Tr. p63 ln 10-12.
- 18) Simons: “. . . Why did you try to cover it up . . .” Cor. Tr. p63 ln 22.
- 19) Thompson: “. . . to come in here and give us this bullshit line that you blacked out is just making it worse.” Cor. Tr. p64 ln 7-9.
- 20) Simons: “Rogelio, have we given you the opportunity to tell us the truth?” Cor. Tr. p65 ln 16-17.
- 21) Simons: “If we traded chairs right now, and I sat there, you killed her because you got pissed off because she told you she didn’t want to be with you anymore.” Cor. Tr. p66 ln 3-6.
- 22) Simons: “I don’t know how else we can put it to you. You murdered her because you were mad that she didn’t want to be with you anymore, and you murdered her in front of your son.” Cor. Tr. p66 ln 9-13.

- 23) Thompson: “The way it looks to me is this has been coming for a while. . .” Cor. Tr. p66 ln 16-17.
- 24) Simons: “. . . you are not crying . . .” Cor. Tr. p67 ln 4.
- 25) Simons: “. . . You just murdered somebody.” Cor. Tr. p67 ln 7-8.
- 26) Simons: “You just murdered your wife in front of your kid, and you have no emotion.” Cor. Tr. p67 ln 10-12.
- 27) Simons: “You are not going to show it to us. Who are you going to show it to?” Cor. Tr. p67 ln 15-17.
- 28) Simons: “Why are you talking like that? You remind me of a three-year old kid.”
- 29) Simons: “Don’t give me any more of that. Don’t do that though. Either tell me what happened, Rogelio, or – tell me. Don’t say you blacked out. That’s a piss poor excuse, especially for a marine.” Cor. Tr. p69 ln 22 – p70 ln 1.
- 30) Simons: “Rogelio, I have been doing this for a while. I have talked to a lot of people here in this room. You know that?”
Morales: “Yeah.”
Simons: “They are sitting in the same chair you have right there, and you know how it feels to me, the whole time we’re talking?”
Morales: “I don’t know.”
Simons: “Once you’re a murderer and you have got a very cold heart and not ready to man up. . .” Cor. Tr. p 70 ln 25 – p71 ln 11.
- 31) Thompson: “Rogelio, she never came at you. She never pointed a gun at you. She never told you she was going to kill you. There was no self-defense, no nothing. You just reached over there and killed her. Because you knew it was the end of the road with you and her.”
- 32) Simons: “She didn’t point a gun at you. She didn’t threaten you. She didn’t say shit to you. She was someone that you’re not. She told you to your face, I don’t want to be with you no more. Bless her soul. At least she was an honest adult and an honest mother. Am I correct? She told you that. I don’t want to be with you, to your face. She didn’t write a letter to you. She didn’t text you that. She told you right to your face. I don’t want to be with you no more. You couldn’t handle it, so then you said you put your left hand around her neck and blacked out, and the next thing you remember she’s unconscious, almost dead.” Cor. Tr. p72 ln 8 – p73 ln 5.
- 33) Simons: “What do you think should happen to you, Rogelio? What do you think should be the punishment for what you just did to your wife?”
Morales: “I don’t know.”

Simons: "What do you think? Did she deserve to be murdered?"

Morales: "No."

Simons: "So what do you think should be the punishment to you?"

Morales: "I don't know. I don't know."

Thompson: "If somebody murdered your son, what would you want to have happen to them?" Cor. Tr. p73 ln 22 – p74 ln 10.

34) Simons: "Do you want to write a letter to her, or her family? Maybe something that we could put on her gravesite or something?" Cor. Tr. p74 ln 19-22.

35) Simons: ". . . And you know you killed her for her telling you the truth. Did you want her to lie to you? Would the result have been different if she lied to you and said, you know, Rogelio, I didn't have sex with somebody. I want to be with you? When she doesn't want to be with you, and when she's already been with somebody else, would you rather have her lie to you? Do you know how that feels when somebody lies to you like that?" Cor. Tr. p75 ln 15-24.

36) Simons: ". . . I'm giving you the opportunity. I don't think you deserve that opportunity. Rogelio, but it's up to you. If you want to write her folks a letter or her a letter. . ." Cor. Tr. p76 ln 5-8.

37) Thompson: "I just don't get how a combat veteran who has obviously seen some pretty nasty stuff has never blacked out during that, but blacks out when he assaults his wife and kills her. That just doesn't make any sense. . ." Cor. Tr. p76 ln 12-17.

38) Simons: "I have never blacked out and choked my wife out. All of the combat things that I have seen. All the dead bodies that I have seen when I was in the Marine Corps. I saw a guy's head get run over by a tank. So someone threatened to call the fire department."

Morales: "I seen a lot of things."

Detective Simons: "I didn't black out and choke my wife. I didn't black out and choke my girlfriend. But you are going to pull that card now." Cor. Tr. p76 ln 24 – p77 ln 10.

39) Thompson: "And I want to tell you, if my wife is laying there lifeless. I'm calling 911 and I'm going to give her CPR. I'm going to do everything I can to try to save her life." Cor. Tr. p77 ln 11-15.

40) Simons: "Pretty selfish, Dude, what you did tonight. Do you agree with that, when you look at the big picture?" Cor. Tr. p77 ln 16-18.

41) Simons: ". . .it appears to me that you committed a pretty selfless act . . ." Cor. Tr. p81 ln 9-10.

Morales cites two cases in support of his argument. The first, *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), is not applicable to the present facts. *Graves* disallows prosecutors

from “asking the defendant whether another witness is lying” *Id.* at 873. Additionally, *Graves* states that “it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar comments.” *Id.* at 876.

In the present case, there is no allegation that the prosecutor has performed any of these acts. Instead, Detectives Thompson and Simons, the officers who conducted Morales’s interrogation, are alleged to have called Morales a liar. The *Graves* court made no ruling on the comments of a police officer, particularly in a recorded interrogation. *Graves* is, therefore, inapplicable to the present case.

Morales next cites *State v. Davis*, 858 N.W.2d 36 (Iowa 2014). In *Davis*, a taped interrogation of the defendant was played for the jury. In this interrogation, detectives made two statements of fact, both of which were untrue. *Davis*, 858 N.W.2d at *6. The court ruled that this recording was inadmissible because it “does not advance ‘fairness, a clear understanding, or an adequate explanation’” *Id.* at *7 (quoting Iowa R. Evid. 5.106(a)). “A court cannot admit recorded statements for the purpose of providing context if “there was no statement from the defendant for which the detective’s statements provided context.” *Id.* (quoting *People v. Musser*, 835 N.W.2d 319, 332 (Mich. 2013)). This error is not cured by a jury instruction stating that the officers’ statements were not presented for the truth of the matter asserted.

The State cites *State v. Enderle*, 745 N.W.2d 438 (Iowa 2007). In *Enderle*, the interviewing police officers stated that “they thought [the defendant] was being untruthful, and the video of the interview, including those statements, was played to the jury.” *Enderle*, 745 N.W.2d at 442. The Iowa Supreme Court held “that statements by police officers during interrogations are not ‘testimony’ given by witnesses at trial and were not offered at trial to impeach the defendant, but to provide context for his responses.” *Id.* at 442-43 (citing *Dubria v.*

Smith, 224 F.3d 995, 1001-02 (9th Cir.2000); *State v. Demery*, 30 P.3d 1278, 1282 (Wash. 2001)).

When read together, *Davis* and *Enderle* make clear that the test for admissibility of statements by police officers during interrogation is whether those statements provide context for the defendant's responses. *Enderle*, 745 N.W.2d at 442-43; *Davis*, 858 N.W.2d at *7.

Morales objects to 41 statements by Detectives Thompson and Simons, or other police staff, as either prejudicial or misstatements of fact. *See supra*. When analyzed under the test as defined under *Davis* and *Enderle*, it is clear that several of the statements by the Detectives provide no context for Morales's statements. Specifically, statements (as numbered *supra*) 3, 7-8, 10, 13, 21-22, 24-25, 28-29, 31, 36, and 38-39 offer no context for Morales's following statements. Without these statements, Morales's statements are still able to be read and understood with clarity.

The remaining statements, numbered 1-2, 4-6, 9, 11-12, 14-20, 23, 26-27, 30, 32-35, 37, and 40-41, are necessary to provide context for Morales's statements. Without these statements by the Detectives, it is not clear what Morales is saying or to what he is responding.

Morales objects to several of the Detectives' statements on the basis that they misstate facts. For example, Morales challenges statements 1 and 4-6 because Detectives refer to Morales having placed both hands on Margarita. Prior to these statements, Morales had only indicated that he had only placed one hand on Margarita. Without these statements, however, Morales's following statements lose context and meaning. If these statements are struck, it will not be clear to what Morales is responding. This is distinguishable from *Davis* as the statements in *Davis* both misstated the facts and provided no context for the defendant's responses. Additionally, the

court will instruct the jury that the officers' statements are not presented for the truth of the matter asserted. *Davis*, 858 N.W.2d at *6.

Morales also objects to statements 14, 24, 26, and 30, on the basis that the Detectives either imply or expressly state that Morales is showing no emotion and has no tears. Morales states that he was crying throughout the interrogation and that these statements can only have been made with the purpose of misleading the jury. These statements are admissible as they provide context for Morales's subsequent answers. In nevertheless addressing Morales's objection, it is clear that, throughout the interrogation, Morales is sobbing. Due to the placement of the camera, however, it is impossible to tell if he is or is not indeed crying. The court is therefore unable to make any judgment on the veracity of the Detectives' statement.

Statements numbered 1-2, 4-6, 9, 11-12, 14-20, 23, 26-27, 30, 32-35, 37, and 40-41 are admissible to provide context for Morales's statements. Statements numbered 3, 7-8, 10, 13, 21-22, 24-25, 28-29, 31, 36, and 38-39 are not admissible, as they do not provide any such context.

ii) Statements regarding Hubbard arrest

Morales next objects to statements in the interview regarding his assault of Margarita in Hubbard, Nebraska two weeks prior. These statements include:

42) Morales: "No. Like – well, yeah. But I (indiscernible) – I hit her, and I got arrested in Nebraska.

Thompson: "When was that?"

Morales: "A week ago, or two weeks ago, I think."

Thompson: "When you say you hit her, you are talking about Margarita?"

Morales: "Yeah. I hit my wife, and she reported it and I got arrested, because she didn't think I would get arrested."

Thompson: "So do you guys live in South Sioux, or do you live in Sioux City?"

Morales: "No. We were living at my mom's house, but since – because I hit her." Cor. Tr. p16 ln 23 – p17 ln 13.

43) Morales: (Moves head in an affirmative manner) "When I hit her the first time, and I got arrested I blacked out again. When I finally came to my senses, I said, what the fuck did I do? I was just so scared."

Thompson: "Was that in South Sioux?"

Morales: "No. At my mom's house."

Thompson: "Where is that at?"

Morales: "22 – over in Hubbard, Nebraska, on a farm." Cor. Tr. p19 ln 17 – p20 ln 2.

44) Thompson: "Have you guys had other issues other than the Hubbard thing, and then this issue?" Cor. Tr. p22 ln 24 – p23 ln 1.

45) Morales: "Yeah. It was just like it happened the first time I hit her at my mom's house. I don't remember hitting her. I just remember hitting her twice, and then I blacked out, you know."

Simons: "You hit her twice?"

Morales: "I hit her twice."

Simons: "And you were at your mom's?"

Morales: "And then I blacked out . . ." Cor. Tr. p29 ln 12-21.

46) Morales: ". . . Like it happened when I remember just hitting her twice, you know." Cor. Tr. p32 ln 7-8.

47) Thompson: "When you had your incident happen in Hubbard, was it the sheriff's office that you talked to over there?"

Morales: "Yeah."

Simons: "That was just a couple weeks ago you got arrested for domestic?"

Morales: "I did."

Thompson: "Did they talk to you about what happened?"

Morales: "They told me that – they said that I was choking her, and that I wouldn't get my son, and I was – then I kept hitting her. I was like, I don't remember none of that, you know."

Thompson: "That's what you told them?"

Morales: "Yeah. Because I just remember hitting her twice, and then when I came to I jumped off of her. That's when I came to. I just remember jumping off of her."

Simons: "So two weeks ago you got arrested in Hubbard, Nebraska, for choking her, and then tonight you choked her again? That's what you remember?"

Morales: "That's what I remember. . ." Cor. Tr. p40 ln 21 – p41 ln 20.

48) Thompson: "Rogelio, have you ever been arrested other than for the deal a couple of weeks ago?"

Morales: "Just DUI back in 2011. . ." Cor. Tr. p52 ln 4-7.

49) Thompson: ". . . And you did the same thing in Hubbard, Nebraska, what, a week ago, two weeks ago?"

Morales: "I just hit her twice."

Thompson: "You said you remember hitting her two weeks ago."

Morales: "And then I blacked out, and they told me – they said that I choked her."

Simons: "So what it's telling me though is that every time you choke her is the only time you think you don't remember. You remember everything but choking her."

Morales: "I don't know. I blacked out. I just remember hitting her twice, like getting up and going bop, bop, but I don't remember anything after that because they said that I choked her, that I kept hitting her and then – then I got on top of her and choked her, and then I remember when I jumped off of her, that's when I came to." Cor. Tr. p56 ln 2-20.

50) Morales: ". . . like when I hit her last – two weeks ago." Cor. Tr. p61 ln 21-22.

51) Thompson: ". . . Two weeks ago you choked her." Cor. Tr. p68 ln 7-8.

52) Simons: "He choked her in Hubbard . . ." Cor. Tr. p71 ln 21-22.

53) Simons: ". . . you choked her two weeks ago . . ." Cor. Tr. p81 ln 12-13.

54) Simons: ". . . Because you remember punching her in the face two weeks ago, but you don't remember choking her."

Morales: "I don't remember – I don't remember. I just remember jumping off of her."

Simons: "How can you remember punching her?"

Morales: "Because it was like the first moment – the first thing that I did."

Simons: "How did you punch her? Show me. Tell me what you remember. Did you punch her with a closed first in the face?"

Morales: "Yeah, because she hit me first. She hit me. She hit me."

Simons: "Fold both of your fists up and just –"

Morales: "I just (indiscernible) one."

Thompson: "Punched her where?"

Morales: "Right here on the cheek."

Simons: "What happened to the cheek?"

Morales: "I didn't even – nothing. There was nothing really. She had like a lip – I didn't use my full force at all. I remember going bop, bop, and then I don't remember anything after that."

Thompson: "You got a bop, bop, but then you don't remember choking her."

Morales: "I just remember jumping off of her, and that was it." Cor. Tr. p81 ln 21 – p82 ln 25.

All these statements refer to the same event, where, on April 6, 2015, Morales was arrested for punching and choking Margarita Morales in Hubbard, Nebraska.

In order for evidence of this prior bad act to be admissible, that evidence must be relevant, there must be clear proof that the event occurred, and the evidence's probative value must outweigh its prejudicial effect.

a) Relevancy

First, it is necessary to determine if the arrest in Hubbard is relevant to the present proceedings. Rule 5.404(b) allows for the admission of “other crimes wrong or acts . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Iowa R. Evid. 5.404(b). The State argues that this incident goes to Morales’s motivation and intent. It must therefore be determined if motivation and intent are at issue here. *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004).

Morales has been charged with Murder in the First Degree under Iowa Code § 707.2(1)(a).⁴ This charge includes the element of specific intent to kill, as well as the element of malice aforethought. *State v. Serrato*, 787 N.W.2d 462, 469 (Iowa 2010). Morales’s intent will therefore be an issue at trial.

Additionally, “[d]omestic abuse often has a history highly relevant to the truth-finding process.” *State v. Laible*, 594 N.W.2d 328, 335 (Iowa 1999). “[T]he defendant’s prior conduct directed to the victim of a crime, whether loving or violent, reveals the emotional relationship between the defendant and the victim and is highly probative of the defendant’s probable motivation and intent in subsequent situations.” *Taylor*, 689 N.W.2d at 125. Evidence regarding the arrest in Hubbard is relevant.

b) Clear Proof

There must also be “clear proof [that] the defendant committed the prior act[] of violence,” *Id.* at 129. “In assessing whether there is clear proof of prior misconduct, it is not required that the prior act be established beyond a reasonable doubt, nor is corroboration necessary. There simply needs to be sufficient proof to ‘prevent the jury from engaging in

⁴ “A person commits murder in the first degree when the person commits murder under any of the following circumstances:

(a) The person willfully, deliberately, and with premeditation kills another person . . .” IOWA CODE § 707.2(1).

speculation or drawing inferences based on mere suspicion.” *Id.* (quoting *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997)) (internal citations omitted).

In *State v. Taylor*, the victim’s previous petition for relief from domestic abuse was admitted, despite the defendant not being convicted on either of the two incidents described in the petition. *Id.* at 130. There was no corroboration at trial of those incidents having occurred, and, in fact, the victim played down their severity in her testimony. *Id.* Nonetheless, the trial court, and, later, the Court of Appeals, found these events to be “adequately established.” *Id.*

Here, Morales himself alerted the Detectives to the previous arrest and described the events. *See* Cor. Tr. p16 ln 23 – p17 ln 13. Though Morales maintains that he blacked out, and cannot remember choking Margarita, he does not contradict or deny the events as described to him by Dakota County deputies. *Id.* Morales’s account was corroborated by Deputy Epting’s testimony at hearing. These events are sufficiently established so as to constitute “clear proof.”

c) Probative vs. Prejudicial

It is thus left to determine if the probative value of this evidence substantially outweighs the prejudicial effect.

Certainly a fact finder, whether a judge or jury, would have a tendency to conclude from the defendant’s past misconduct that he has a bad character. But that type of prejudice is inherent in prior-bad-acts evidence and will not substantially outweigh the value of highly probative evidence. The more pertinent question is whether the evidence will prompt the fact finder to make a decision based on an emotional response to the defendant.

Taylor, 689 N.W.2d at 130.

Here, the Court does not believe that this incident is such as would prompt the fact finder to make its decision based on an emotional response, rather than the evidence. This evidence is relevant to the motive and intent of Morales and is probative beyond its prejudicial value. Therefore, Detectives’ statements regarding the Hubbard arrest are admissible.

SUMMARY

Based on the foregoing discussion, Morales affirmatively waived his *Miranda* rights, and Detectives Thompson and Simons did not violate his rights when they questioned him. Statements numbered 1-2, 4-6, 9, 11-12, 14-20, 23, 26-27, 30, 32-35, 37, and 40-41 are admissible to provide context for Morales's statements. Statements numbered 3, 7-8, 10, 13, 21-22, 24-25, 28-29, 31, 36, and 38-39 are not admissible, as they do not provide any such context. Statements 42-54, in regard to Morales's arrest in Hubbard, Nebraska, are admissible to show motive and intent. An instruction will be given to the jury that the officers' statements during interrogation are not presented for the truth of the matter asserted.

ORDER

IT IS THEREFORE ACCORDINGLY ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Suppress is SUSTAINED in part and OVERRULED in part.

SO ORDERED.



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
FECR091148 STATE VS PABLO MORALES, ROGELIO (IN CUSTODY)

So Ordered

A handwritten signature in black ink, reading "Jeffrey L. Podlison". The signature is written in a cursive style and is positioned above a horizontal line.

Jeffrey L. Podlison, District Court Judge,
Third Judicial District of Iowa