UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. Nodin Makwa, Defendant.	Court File No. 16-cr-0006 (MJD/LIB) (1) **REPORT AND RECOMMENDATION**

This matter comes before the undersigned United States Magistrate Judge upon Defendant Nodin Makwa's ("Defendant") Motion to Suppress Statements, Admissions, and Answers, [Docket No. 24]; and Motion to Dismiss for Lack of Jurisdiction and Improper Charging. [Docket No. 25]. This case has been referred to the undersigned Magistrate Judge for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1) and Local Rule 72.1. The Court held a motions hearing on March 1, 2016, regarding Defendant's pretrial motions.

Following the motions hearing, the parties requested an opportunity to submit supplemental briefing which was completed on March 15, 2016, and Defendant's Motion to Suppress Statements, Admissions, and Answers, [Docket No. 24]; and Motion to Dismiss for Lack of Jurisdiction and Improper Charging, [Docket No. 25], were then taken under advisement by the undersigned on March 15, 2016.

For reasons discussed herein, the Court recommends **DENYING** Defendant's Motion to Suppress Statements, Admissions, and Answers, [Docket No. 24], and **DENYING** Defendant's Motion to Dismiss for Lack of Jurisdiction and Improper Charging. [Docket No. 25].

I. STATEMENT OF FACTS[1]

Defendant is charged with one count of forcibly assaulting, resisting, or impeding a person assisting an officer or employee of the United States in the performance of official duties, in violation of 18 U.S.C. §§ 111(a)(1) and 111(b). (Indictment, [Docket No. 14]).

The Red Lake Indian Reservation (the "Reservation") was created as the product of treaties between the Red Lake Band of Chippewa Indians (the "Tribe") and the United States that were entered into in 1863, 1864, 1889, and 1902. The Reservation is comprised of a single large primary parcel of land, as well as, a number of smaller non-contiguous land parcels that, combined, span five counties in north central Minnesota.

The Tribe is governed by an elected Tribal Council. Prior to the mid-1990s, the United States Department of the Interior Bureau of Indian Affairs ("BIA") provided law enforcement services on the Reservation. In the mid-1990s, the Tribal Council and the BIA concluded an agreement by which the Tribe assumed the BIA's responsibilities for providing law enforcement on the Reservation and, currently, law enforcement services on the Reservation are provided by a police force that is overseen by a director who reports to the Tribal Council. Pursuant to the agreement, the source of the tribal police force's jurisdiction to provide law enforcement services on the Reservation comes from the BIA as do the standards for the provision of those law-enforcement services. The BIA also provides federal funding for the Tribe's police force through an annual funding agreement, by which the BIA makes an annual lump sum payment to the Tribe that encompasses funding for tribal law enforcement services on the Reservation, as well

[1] The Court's Statement of Facts is based, except where expressly indicated otherwise, on the testimony of Michelle Paquin of the Legal Department of the Red Lake Band of Chippewa Indians, Red Lake Police Officer Alexandra Dow, Red Lake Police Officer Kerry Petschl, Federal Bureau of Investigation Special Agent Christopher Dudley, Beltrami County Sheriff's Office Deputy David Hart, and Minnesota Bureau of Criminal Apprehension Special Agent Ricky Wouri, Jr., from the March 1, 2016, motions hearing.

as, some other programs. However, Red Lake tribal police officers are employed by the Tribe and the agreement commits day-to-day supervision of tribal police officers to the Tribe.

At approximately 5:00 p.m. on August 8, 2015, the Red Lake Police Department received a call reporting that a fight had occurred at the Buffalo residence. Red Lake Police Officer Alexandra Dow was dispatched to the residence. While en route, Officer Dow spotted a then unidentified male driving a car away from the residence. When she arrived at the residence, Officer Dow spoke to Nicole Buffalo, who told Officer Dow that Defendant had been at the residence, that he had been intoxicated and had wanted to fight people at the residence, and that Defendant had since left. A child, who was also at the residence, told Officer Dow that Defendant was in possession of a handgun.

After determining that no one at the residence had been harmed, Officer Dow left to look for Defendant and the vehicle that she had previously observed driving away from the residence. Officer Dow put out a broadcast over the tribal police radio to other officers in the area in which she described Defendant and the car, including its license plate number, and that she had seen the car driving away from the Buffalo residence. In the broadcast, Officer Dow reported that Defendant was intoxicated, that he had been involved in an assault at the Buffalo residence, and that she had been told that Defendant had a handgun when he left the residence. Broadcasts over the Red Lake Police radio can be heard by other Red Lake Police officers, the dispatch center of the Red Lake Police Department, as well as, law enforcement officers from other agencies who may be in the area.

Red Lake Police Officer Kerry Petschl was driving northbound on Highway 89 towards the Reservation when he initially heard Officer Dow's broadcast. After he crossed onto the Reservation and was approximately one mile north of the Reservation's southern border, Officer

Petschl encountered a car travelling southbound towards him on Highway 89 that matched Officer's Dow's description of the vehicle that had left the Buffalo residence. Officer Petschl also determined that the license plate on the car matched the one identified by Officer Dow.

Officer Petschl turned his pickup truck around to follow the car and he engaged his emergency lights and siren to attempt to initiate a traffic stop. The car, however, continued travelling southbound on Highway 89 towards the southern boundary of the Reservation at a high rate of speed. The truck that Officer Petschl was driving was not able to keep up with the car and he radioed for assistance in pursuing the car. He contacted the Red Lake Police Department dispatch center and told the dispatcher that the car he was pursuing was likely heading off the Reservation. Officer Petschl asked the dispatcher to notify the Beltrami County Sheriff's Office that he was continuing to pursue the car as it left the Reservation.

Federal Bureau of Investigation ("FBI") Special Agent Christopher Dudley ("SA Dudley") is stationed at the Bemidji resident agency, the primary responsibility of which is to investigate violent crimes on the Reservation. Shortly before 5:30 p.m. on August 8, 2015, SA Dudley was travelling northbound in an SUV on Highway 89 to the Reservation. Approximately a quarter-mile north of the southern boundary of the Reservation, SA Dudley spotted Officer Petschl travelling southbound towards him at a high rate of speed with his emergency lights and siren activated. Officer Petschl's truck was the only emergency response vehicle SA Dudley could see travelling southbound, and he believed that Officer Petschl was alone in responding to a possible incident at a casino located just inside the southern boundary of the Reservation. SA Dudley turned his SUV around to follow Officer Petschl, and he also activated his emergency lights and siren. SA Dudley also turned up the volume on his radio and heard radio traffic between Officer Petschl and the Red Lake Police dispatcher indicating that Officer Petschl was

pursuing a possibly armed individual suspected of committing an assault on the Reservation who was travelling in excess of 100 miles per hour. SA Dudley concluded that the reported assault was likely to have been a violent crime that the FBI would eventually become involved in investigating. He contacted the Red Lake Police Department dispatcher by radio to inform the Red Lake Police that he was in the area and that he was joining the pursuit.

Immediately after contacting the Red Lake Police dispatcher, SA Dudley then used his cellular telephone to contact the Beltrami County Sheriff's Office to request assistance because the pursuit was heading off of the Reservation. Within minutes of initiating the call, he was informed that Beltrami County had dispatched officers to respond and that a Beltrami County Deputy, Deputy David Hart, and a Minnesota State Trooper would be setting up spike strips on Highway 89 approximately ten miles south of the Reservation at the intersection with Grange Road.

Defendant ultimately avoided the spike strips and turned westbound on Grange Road. Both SA Dudley and Officer Petschl continued to pursue Defendant as the Minnesota State Trooper and Deputy Hart pulled up the spike strips and then got in their vehicles to join the pursuit.

The Beltrami County Sheriff's Office and the Red Lake Police Department maintain a reciprocal policy regarding pursuits that proceed on to and off of the Reservation. Pursuant to that policy, deputies of the Beltrami County Sheriff's Office, once they are able, will become primary in a pursuit that comes off of the Reservation into Beltrami County; and Red Lake Police officers, once they are able, will become primary on pursuits that proceed from Beltrami County onto the Reservation. Once the Minnesota State Trooper and Deputy Hart caught up to the pursuit, SA Dudley motioned to Deputy Hart to take the primary position in the pursuit while

SA Dudley and Officer Petschl dropped behind the other law enforcement vehicles because their vehicles were not pursuit rated and were not able to match Defendant's speed, which at times exceeded 120 miles per hour. Neither SA Dudley nor Officer Petschl, however, abandoned the pursuit.

The pursuit continued westbound for approximately six miles, where Defendant turned northbound at a county line road. Before the pursuit returned to the Reservation boundary, Defendant turned eastbound onto Highway 61 heading back towards Highway 89.

The pursuit ended in Beltrami County at approximately 5:30 p.m., as the pursuit approached Highway 89, when one of the pursuing officers executed a P.I.T. maneuver that caused Defendant's car to spin out and come to a stop. While Defendant's vehicle was stopped, Deputy Hart parked his vehicle on the side of Defendant's car to attempt to pin it in. Deputy Hart then exited his vehicle and approached the passenger side of Defendant's car. As he did so, Defendant put his car in reverse and struck Deputy Hart in an apparent attempt to flee. After Defendant's car struck Deputy Hart, SA Dudley, who had arrived on the scene in time to see Defendant's car begin to reverse, maneuvered his SUV to block Defendant's car in. Defendant was then arrested.

After Defendant was arrested, he was transported to a local emergency room for a blood draw and then to the Beltrami County Sheriff's Office. At approximately 9:30 p.m. that same evening, FBI Special Agent Jonathan Tjernagel ("SA Tjernagel") and Minnesota Bureau of Criminal Apprehension Special Agent Ricky Wuori, Jr., ("SA Wuori") interviewed Defendant in an interview room inside the Beltrami County Sheriff's Office. Both SA Tjernagel and SA Wuori were dressed in plain clothes. SA Wuori was armed but he testified at the motions hearing

that he did not recall whether his weapon was displayed. The agents made both audio and video recordings of the interview, which lasted approximately fifty-three (53) minutes.

During the interview, SA Wuori detected a faint odor of alcohol coming from Defendant. To SA Wuori, however, Defendant did not appear to be intoxicated. Defendant appeared to understand SA Wuori's questions and be able to respond appropriately to those questions. SA Wuori also had no problems understanding Defendant. Neither of the agents made any threats or promises to Defendant to get him to answer their questions.

The agents began the interview by confirming Defendant's name and reading Defendant the Miranda warnings.[2] (Id. at 2-3). The following exchange occurred:

SA Wuori: But ah, being you're in handcuffs, and you were arrested by police officers, okay, you have what's called the Miranda rights.

Defendant: Right (inaudible)

SA Wuori: Yup. Yes. You may have heard it before but procedure is doing everything I have to go over it and then whatever you decide after we talk that's totally your call. Okay. Okay. You have the right to remain silent. Do you understand? And just so we can speak up, I don't yell but … my ears I got kids that yell all the time so … you have the right to remain silent. Do you understand?

Defendant: Yes.

SA Wuori: Okay. Anything you say can and will be used against you in court. Do you understand?

Defendant: Yes.

[2] The Court's statement of facts regarding the interview is drawn from a transcript of the recording of the interview that was submitted as Government's Exhibit 1 without objection by Defendant. Typically, the Court draws its statement of facts regarding a custodial interview directly from an audio or audio/visual recording of an interview rather than a mere transcript. Although the Government indicated at the motions hearing that it was submitting an audio recording of the interview on a computer disk into evidence as Government's Exhibit 2, the computer disk on which the recording was purported to be stored does not actually contain an audio recording of the interview, but rather other document files. Because the Government represented at the motions hearing that Government's Exhibit 2 contained only a digital copy of the audio recording of the interview, it is not apparent to the Court whether Defendant would have made any objections to the actual contents of the submitted computer disk. Accordingly, the Court has examined the contents of Government's Exhibit 2 only to the extent necessary to determine that none of the electronic documents included thereon are the actual audio recording mentioned by the Government at the motions hearing. The Court has not relied on the documents contained on the computer disk in making its findings of fact or conclusions of law with regard to the motions presently before the Court in the above-captioned matter.

SA Wuori: You have the right to talk to a lawyer and to have a lawyer present now or at any time during questioning. Do you understand?

Defendant: Yes.

SA Wuori: If you cannot afford a lawyer one will be appointed for you without cost. Do you understand?

Defendant: Yes.

SA Wuori: Do you understand at any point in time you can exercise these rights and refuse to answer any questions?

Defendant: Yes.

SA Wuori: Yeah. Nodin do you understand each of these rights I've explained to you?

Defendant: Yes.

SA Wuori: Okay. Is it okay if we talk about what happened here tonight?

Defendant: Sure.

(Id. at 2-3).

The agents then began asking Defendant questions about the incident at the Buffalo residence and the subsequent police chase, to which Defendant responded. (Id. at 3-29). At some point after the midway point of the interview, the following exchange occurred:

Defendant: Is there any way I can speak to an attorney tonight?

SA Wuori: If you want to right now we can ah, we can stop that ah, and to get you to a phone.

Defendant: Mmm I would prefer to speak in person.

SA Wuori: Okay. Well it'll take some time but they can like the rights I read to you says you have the right to talk to an attorney now or at any time during questioning, you remember that so if you wanna invoke that…

Defendant: It's not about questioning I need an attorney.

SA Wuori: Yes. So what I would like to understand do you want an attorney you wanna talk to an attorney before we go any further?

Defendant: No that's fine.

SA Wuori: So you don't wanna . . . I just need to be clear?

Defendant: Not right now. I … I (inaudible).

SA Wuori: You don't want one?

Defendant: I need to talk to an attorney yes.

SA Wuori: You wanna speak to an attorney in the future?

Defendant: Yes.

SA Wuori: Okay um at this point in time do you want an attorney?

Defendant: At this time no because I (inaudible).

SA Wuori: Okay. And you understand that you do have that right if you want an attorney . . . I just wanna make sure that we're clear okay?

Defendant: Yes.

SA Wuori: Okay so you're not . . .

Defendant: (Inaudible) determine that I'm not gonna say anything that can and will be used against me and I have a right to an attorney and if I can't afford one, one will be appointed for me.

SA Wuori: Okay so you understand all that and right now you do not want an attorney correct?

Defendant: Yes.

SA Wuori: Okay.

Defendant: Not right now later on.
SA Wuori: In the process down the road I guess is the way I understand it . . .

Defendant: Yeah.

(Id. at 29-30).

The agents then returned to questioning Defendant about the events at the Buffalo residence and the police chase that followed. (Id. at 30-41). After approximately fifty-three minutes, the agents terminated the interview.

II. DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND IMPROPER CHARGING. [Docket No. 25]

Defendant moves the Court to dismiss the Indictment against him. Defendant contends that the Court lacks subject matter jurisdiction over the actions for which he has been charged in the Indictment and that the Indictment does not charge a federal offense.

A. Standard of Review

"Pursuant to section 3231, federal district courts possess original jurisdiction over all violations of federal law." United States v. Hayes, 574 F.3d 460, 472 (8th Cir. 2009) (citing *United States v. Watson,* 1 F.3d 733, 734 (8th Cir. 1993) (per curiam)). To determine whether a court has jurisdiction over an offense charged in an indictment, the court must determine whether the indictment sufficiently alleges a violation of the laws of the United States. Id.

B. Analysis

The Indictment in the present case charges Defendant with a violation of 18 U.S.C. §§ 111(a)(1) and 111(b). In pertinent part, 18 U.S.C. § 111 sets forth:

> **In general.**--Whoever—
>
> > **(1)** forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; . . .
>
> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault . . ., be fined under this title or imprisoned not more than 8 years, or both.

18. U.S.C. § 111(a). 18 U.S.C. § 1114 designates the persons who are protected under 18 U.S.C. § 111, as:

> [A]ny officer or employee of the United States or of any agency in any branch of the United States Government . . . while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance[.]

18 U.S.C. § 1114.

The Indictment alleges that, on or about August 8, 2015, Beltrami County Deputy Hart was assisting FBI SA Dudley and Red Lake Officer Petschl in the performance of their official federal duties when he was struck by Defendant's car. (Indictment, [Docket No. 14]). Defendant contends, however, that Deputy Hart was engaged in purely local law enforcement functions when he was struck, and that the fact that the chase began on the Reservation and initially involved a Red Lake Police officer does not support the allegations in the Indictment because Red Lake Police officers are not federal officers. (Def.'s Memorandum in Support of Motions, [Docket No. 32], 3-4).

The pertinent case law does not support Defendant's arguments.

The Eighth Circuit has explained:

> The Secretary of the Interior (Secretary), through the Bureau of Indian Affairs (Bureau), is charged with providing or assisting in the provision of law enforcement services on Indian lands. 25 U.S.C. § 2802(a). In connection with this responsibility, the Secretary "may charge [Bureau] employees with a broad range of law enforcement powers." United States v. Schrader, 10 F.3d 1345, 1350 (8th Cir.1993); 25 U.S.C. § 2803. In addition to utilizing Bureau employees, "[t]he Secretary may enter into an agreement for the use . . . of the personnel or facilities of a Federal, tribal, State, or other government agency" to assist in the provision of law enforcement services in Indian Country. 25 U.S.C. § 2804(a). The Secretary may authorize an officer of the agency contemplated by such an agreement "to perform any activity the Secretary may authorize under section 2803." Id. "When acting under such authority, 'a person who is not otherwise a Federal employee shall be considered to be an employee of the Department of the

> Interior' " for purposes of 18 U.S.C. §§ 111 and 1114. Schrader, 10 F.3d at 1350 (quoting 25 U.S.C. § 2804(f)).

United States v. Roy, 408 F.3d 484, 489 (8th Cir. 2005). The Eighth Circuit has thus held that an agreement between a tribe and the BIA that delegates to a tribe the BIA's law enforcement authority requires that tribal police officers be considered federal officers when the tribal police officers are acting in the scope of their law-enforcement duties. E.g., United States v. Janis, 810 F.3d 595, 597 (8th Cir. 2016); Roy, 408 F.3d at 489; United States v. Young, 85 F.3d 334, 335 (8th Cir. 1996); United States v. Schrader, 10 F.3d 1345, 1350 (8th Cir. 1993)[3]. "[T]o constitute a proper delegation, the contract need only be 'an agreement for the use . . . of the personnel or facilities of a Federal, tribal, State, or other government agency' to aid in law enforcement in Indian Country and authorize that agency to perform some law enforcement activity that the Secretary could authorize the Bureau to perform under section 2803." Roy, 408 F.3d at 490 (quoting 28 U.S.C. § 2803, edits in Roy).

At the hearing, the Government presented evidence that, in the mid-1990s, the Red Lake Band of Chippewa Indians entered into an agreement with the BIA, through which the Tribe took on the BIA's law enforcement duties on the Reservation. The Government also presented evidence that the source of the authority for the Tribes law enforcement powers is the BIA, and

[3] In Schrader, the Eighth Circuit detailed the origin of such agreements:

> In 1990, Congress passed the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801–2809, "to clarify and strengthen the authority of the law enforcement personnel and functions within the [BIA]." S.Rep. No. 167, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 712, 712. Under that Act, the Secretary of Interior may charge BIA employees with a broad range of law enforcement powers. See 25 U.S.C. § 2803. In addition, the Secretary may contract with a tribe to assist BIA in enforcing tribal laws and, in connection with such a contract, may authorize a tribal law enforcement officer "to perform any activity the Secretary may authorize under section 2803." 25 U.S.C. § 2804(a).

Schrader, 10 F.3d at 1350. Such contracts "are commonly known as '638 contracts,' named for the public law number of the 1975 [Indian Self Determination] Act." Schrader, 10 F.3d at 1350.

that the BIA provides both funding and standards for reservation law enforcement. In light of the foregoing, the Court concludes that the mid-1990s agreement between the Tribe and BIA delegated the BIA's law enforcement authority for crimes on the Reservation to the Tribe, such that Red Lake police officers are federal officers for purposes of 18 U.S.C. § 111, when they are engaged in performing their law enforcement duties. E.g., Janis, 810 F.3d at 597; Roy, 408 F.3d at 489; Young, 85 F.3d at 335; Schrader, 10 F.3d at 1350.

In addition, Defendant's argument overlooks the clear and direct involvement of Federal Bureau of Investigation Special Agent Dudley in the pursuit at issue here. The pursuit began as a result of an allegedly armed assault on the Reservation. The FBI resident agency at which SA Dudley is stationed is responsible for investigating violent crimes, including assaults, on the Reservation, and SA Dudley's jurisdiction extends to the territorial boundaries of the United States. Further, like Officer Petschl, SA Dudley at no time abandoned the pursuit of Defendant after it began on the Reservation, which was related to and arose from Officer Dow's investigating the original alleged crime at the Buffalo residence. Accordingly, the pursuit of Defendant from its inception involved not one, but two federal officers.

Defendant goes on to argue, however, that Deputy Hart was merely performing his own local law enforcement duties by pursuing Defendant, and that he was not assisting the federal officers. The Fifth Circuit considered a similar argument in United States v. Smith, 296 F.3d 344 (5th Cir. 2002). In Smith, an Irving, Texas, police officer responded to a call reporting a bank robbery and began pursuing the robbers. Id. at 345. As the officer approached, one of the robbers fired at him, causing him to retreat. Id. Two Dallas police officers then took over the pursuit. Id. The robbers fired on those officers, eventually disabling their vehicle and prompting two other Dallas police officers, Kenney Lopez and Percy Trimble, and two FBI agents, D. Richard

Burkhead and Christy Jones, who had joined the chase in the interim, to take over the pursuit. Id. at 345-46. During the pursuit, the robbers ambushed Officers Lopez and Trimble, and disabled their car. Id. at 346. The robbers were eventually apprehended by other Dallas Police officers, including Mike Walton, at whom the robbers had also fired a number of shots. Id. at 346. The robbers were ultimately convicted of a number of charges, including for the relevant purposes of the present motion, three counts of attempted murder in violation of 18 U.S.C. § 1114 for shooting at Officers Lopez, Trimble, and Walton.[4]

On appeal, the robbers challenged their convictions for attempted murder in violation of 18 U.S.C. § 1114, arguing that Officers Lopez, Trimble, and Walton had not been assisting federal officers when the robbers had fired upon them. Id. The Fifth Circuit concluded that Officers Lopez, Trimble, and Walton had been assisting the federal agents, reasoning that a federal investigation had commenced by the time that the FBI agents had joined the other officers' pursuit of the robbers, and that those other officers were then assisting the FBI agents by jointly pursuing suspects in what had become a federally investigated robbery. Id. at 346-47.[5]

The Court finds the reasoning of the Fifth Circuit in Smith, 296 F.3d 344, persuasive and sees no material distinction between the joint pursuit of the suspects in the federally investigated robbery in Smith and Deputy Hart's joint pursuit of Defendant with SA Dudley and Red lake Officer Petschl for Defendant's suspected involvement in a federally investigated crime in this case.[6]

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[4] The robbers were not charged under 18 U.S.C. § 1114 for the shots they fired at the officers who had been in pursuit before the FBI agents joined it. Smith, 296 F.3d at 347.

[5] Cf. United States v. Reed, 375 F.3d 340, 344 (5th Cir. 2004) (concluding that Dallas Police officer had not been assisting FBI agent who had only traveled to the scene where the shots had been fired at the Dallas Police officer as part of the post-arrest investigation).

[6] In fact, in the present case, Deputy Hart only became involved in the pursuit of Defendant because of SA Dudley's direct request for assistance in the pursuit of Defendant which SA Dudley made to Deputy Hart's department.

Based on all of the foregoing, the Court recommends **DENYING** Defendant's Motion to Dismiss for Lack of Jurisdiction and Improper Charging, [Docket No. 25].

III. DEFENDANT'S MOTION TO SUPPRESS STATEMENTS, ADMISSIONS, AND ANSWERS, [DOCKET NO. 24]

Defendant also moves the Court to suppress the statements he made while being interviewed by SA Wuori and SA Tjernagel during the interview later on August 8, 2015. (Def.'s Motion to Suppress Statements, Admissions, and Answers, [Docket No. 24]). In his moving papers, Defendant generally asserted that the statements should be suppressed because the agents did not provide him with a full Miranda warning, and because Defendant did not knowingly or voluntarily waive his right to remain silent and his right to counsel.

A. Standard of Review

"[Miranda] prohibits the government from introducing into evidence statements made by the defendant during a custodial interrogation unless the defendant has been previously advised of his [F]ifth [A]mendment privilege against self-incrimination and right to an attorney." United States v. Chipps, 410 F.3d 438, 445 (8th Cir. 2005) (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)). Accordingly, Miranda warnings are required for official interrogations where a person has been "taken into custody or otherwise deprived of his freedom of action in any significant way[.]" Stansbury v. California, 511 U.S. 318, 322 (1994) (quoting Miranda, 384 U.S. at 444).

C. Analysis

In Defendant's brief in support of his motions, he offers no specific fact-based argument as to why the statements he made during the August 8, 2015, interview should be suppressed. As the moving party, Defendant bears the burden of proving that the evidence he seeks to have suppressed was obtained by unlawful means. United States v. Edwards, 563 F. Supp. 2d 977, 994

(D. Minn. 2008), aff'd sub nom United States v. Bowie, 618 F.3d 802 (8th Cir. 2010). As such, the Court would be well warranted in recommending that Defendant's motion be summarily denied on the basis that Defendant has failed to meet his burden of production. United States v. Jones, 2009 WL 4723341, at *4 (D. Minn. Dec. 2, 2009) (citing United States v. Mims, 812 F.2d 1068, 1074 (8th Cir. 1987); United States v. Quiroz, 57 F. Supp. 2d 805, 822-23 (D. Minn. 1999), adopted by 57 F. Supp. 2d 805, 811 (D. Minn. 1999)).

Nonetheless, in an abundance of caution, the Court addresses the merits of Defendant's general assertions that his August 8, 2015, statements should be suppressed. Jones, 2009 WL 4723341, at *4 (citing Edwards, 563 F. Supp. 2d at 995).

1. Sufficient *Miranda* Warning

Defendant first asserts that his waivers of his right to remain silent and his right to counsel were not knowingly and voluntarily made because he did not receive a "complete" Miranda warning. With regard to the adequacy of provided Miranda warnings, the U.S. Supreme Court has explained:

> The four warnings Miranda requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed. . . . In determining whether police officers adequately conveyed the four warnings, we have said, reviewing courts are not required to examine the words employed "as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" Duckworth[v. Eagan, 492 U.S. 195, 201 (1989)] (quoting Prysock, 453 U.S., at 361, 101 S.Ct. 2806).

Florida v. Powell, 559 U.S. 50, 60 (2010) (internal citations omitted).

Miranda requires that, prior to any questioning, a suspect subject to custodial interrogation must be advised that:

> [1] 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.

Miranda, 384 U.S. at 479. In addition, in Duckworth, the U.S. Supreme clarified that the right to the presence of attorney referred to in Miranda requires that the suspect be informed "that he has the right to an attorney before and during questioning[.]" Id., 492 U.S. at 204.

At the beginning of the interview, SA Wuori informed Defendant: (1) that he had the right to remain silent; (2) that anything he said can be used against him in court; (3) that he had the right to talk to an attorney and to have an attorney present during the interview or at any time during questioning; and (4) that a lawyer would be appointed for him if he could not afford one. The only significant difference between SA Wuori's reading of the Miranda warnings and the Miranda rights as described in Miranda itself, is that SA Wuori did not inform Defendant that his statements could be used against him in a court "of law." The Court does not find the omission of the words "of law" to be a significant deviation from the prescribed Miranda warnings on the facts of the present case. See Buckingham v. Symmes, No. 11-CV-2489 PJS/SER, 2013 WL 4781038, at *11 (D. Minn. Sept. 6, 2013) (Miranda warnings do not need to precisely match the language of the Miranda decision). Accordingly, SA Wuori's reading of the Miranda warnings reasonably conveyed to Defendant the substance of his rights under Miranda.

2. Waivers

Defendant also challenges the validity of his waiver of his right to remain silent and his right to counsel. In the present case, SA Wuori informed Defendant of his right to remain silent and his right to have counsel present at the beginning of the interview. When asked if he understood those rights, Defendant expressly indicated that he had.

"An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either

necessary or sufficient to establish waiver." N. Carolina v. Butler, 441 U.S. 369, 373 (U.S. 1979). The validity of a Miranda waiver requires consideration of two distinct inquiries, namely whether the waiver was voluntary "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[,]" and whether the waiver was knowingly and intelligently made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." United States v. Vinton, 631 F.3d 476, 483 (8th Cir. 2011) (internal citations omitted) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). "The government has the burden of proving the validity of the Miranda waiver by a preponderance of the evidence." United States v. Haggard, 368 F.3d 1020, 1024 (8th Cir. 2004).

1. Voluntariness

Courts assess whether a waiver of the rights described in a Miranda warning was made voluntarily by considering "the conduct of law enforcement officials and the suspect's capacity to resist any pressure." United States v. Contreras, 372 F.3d 974, 978 (8th Cir. 2004). The United States Supreme Court has previously explained "that coercive police activity is a necessary predicate to . . . finding that a confession is not 'voluntary,'" Colorado v. Connelly, 479 U.S. 157, 167 (1986), and the Eighth Circuit has read that holding to mean "that police coercion is a necessary prerequisite to a determination that a waiver was *involuntary* and not as bearing on the separate question whether the waiver was knowing and intelligent." United States v. Turner, 157 F.3d 552, 555 (8th Cir. 1998) (quoting United States v. Bradshaw, 935 F.2d 295, 299 (D.C.Cir. 1991) (emphasis in Turner)).

In determining whether a waiver was made voluntarily, a court "looks at the totality of the circumstances and must determine whether the individual's will was overborne." United

States v. Syslo, 303 F .3d 860, 866 (8th Cir. 2002). In considering the totality of the circumstances, a court reviews whether the statement was "extracted by threats, violence, or direct or implied promises, such that the defendant's will was overborne and his capacity for self-determination critically impaired." United States v. Sanchez, 614 F.3d 876, 883 (8th Cir. 2010) (internal quotation marks and citations omitted). "More specifically, [a court] consider[s], among other things, the degree of police coercion, the length of the interrogation, its location, its continuity, and the defendants maturity, education, physical condition, and mental condition." Id. (citing Sheets v. Butera, 389 F.3d 772, 779 (8th Cir. 2004)).

Defendant focuses his argument here on whether he had the ability to resist coercive pressures. He, in essence, argues that his capacity to resist coercive pressures was reduced due to alcohol intoxication. The totality of the evidence in the record presently before the Court indicates that while Defendant may have been intoxicated at some point prior to his leaving the Buffalo residence, there is, however, no evidence in the record regarding Defendant's exact blood alcohol content at the time of the interview four hours–after Defendant had left the Buffalo residence. Even assuming that Defendant had been and was still intoxicated to some unknown degree at the time of the interview by SA Wuori and SA Tjernagel, evidence that a suspect was intoxicated does "not automatically render a confession involuntary.'" See, e.g., United States v. Gaddy, 532 F.3d 783, 788 (8th Cir. 2008) (holding waiver voluntary even when defendant had consumed alcohol along with pain killers, muscle relaxants, and a mixture of cocaine and marijuana several hours before the interrogation, where officers testified that defendant appeared awake and coherent) (internal quotation marks and citation omitted); see also Turner, 157 F.3d at 555-56 (refusing to adopt a per se rule for intoxication). "[T]he test is whether these mental

impairments caused the defendant's will to be overborne." United States v. Casal, 915 F.2d 1225, 1229 (8th Cir. 1990).

Further, there is nothing in the record presently before the Court to suggest that the officers engaged in any specific coercive tactics that caused Defendant's will to be overborne during the interview. Indeed, SA Wuori's testimony and the Court's independent review of the transcript of the interview indicate that the agents did not make any promises or threats to Defendant. See United States v. Makes Room, 49 F.3d 410, 415 (8th Cir. 1995) (concluding no coercive tactics were used where, among other things, officers made no threats or promises to the defendant). Further, the interview, which lasted only fifty-three minutes, was also not coercive in its duration. See Id. (noting that interrogation lasting more than two hours was not coercive in duration).

Based on the totality of the evidence, there is no basis on which to find that the agents engaged in any coercive tactics or that any possible intoxication caused Defendant's will to be overborne. Therefore, the Court concludes that Defendant's waiver of his right to remain silent and right to counsel was voluntary.

2. Knowing and Intelligent

The Court must also consider whether Defendant's waiver of his rights was knowingly and intelligently made. Vinton, 631 F.3d at 483. The evidence in the record regarding Defendant's understanding of his rights and presence of mind during the interview consists of SA Wouri's testimony and the transcript of the August 8, 2015, interview. SA Wuori testified that Defendant appeared to understand his questions, that Defendant responded appropriately during the interview to SA Wuori's questions, and that SA Wuori had no difficulty understanding Defendant's responses. The transcript of the interview indicates that SA Wuori

initially read Defendant the Miranda warnings and that Defendant at that time plainly indicated that he understood those warnings. In addition, when SA Wuori later attempted to clarify whether Defendant might have actually invoked his right to have counsel present during questioning, the Defendant himself recited a significant portion of the Miranda warnings back to SA Wuori to demonstrate that he understood the scope of his rights. Based on the foregoing, the Court concludes that Defendant's waiver of his rights in the present case was knowingly and intelligently made.

Because Defendant was provided with an adequate Miranda warning and then knowingly, intelligently, and voluntarily waived his right to remain silent and his right to counsel, the Court recommends **DENYING** Defendant's Motion to Suppress Statements, Admissions, and Answers. [Docket No. 24].

IV. CONCLUSION

Based on the foregoing and all the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Defendant's Motion to Suppress Statements, Admissions, and Answers, [Docket No. 24], be **DENIED**; and,
2. Defendant's Motion to Dismiss for Lack of Jurisdiction and for Improper Charging, [Docket No. 25], be **DENIED**.

Dated: March 23, 2016

/s/ Leo I. Brisbois
Leo I. Brisbois
U.S. MAGISTRATE JUDGE

N O T I C E

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "A party may file and serve specific written objections to a magistrate judge's proposed findings and recommendation within 14 days after being served with a copy of the recommended disposition[.]" A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in LR 72.2(c).

Under Advisement Date: This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after the objections are filed; or (2) from the date a timely response is filed.