Case No. 23-5077

United States Court of Appeals
for the Tenth Circuit

United States of America, Plaintiff/Appellee, v. Justin Dale Little, Defendant/Appellant.	Appeal from the United States District Court, Northern District of Oklahoma D.C. No. 4:21-cr-00162-MWM (Judge Michael Mosman)

Appellant Justin Little's Opening Brief

Oral Argument Requested

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Statement of Related Cases

There are no prior or related appeals.

Jurisdictional Statement

The district court had jurisdiction over Justin Little's conviction and sentence following jury trial. 18 U.S.C. § 3231. This Court has jurisdiction because Little timely appealed. 28 U.S.C. § 1291; 18 U.S.C. § 3742; ROA Vol. I, at 918.

Issues Presented

I. Whether the district court erroneously denied suppression where the state police:

   A. Arrested and executed state warrants without jurisdiction.

   B. Lacked probable cause to arrest.

   C. Entered Little's home and seized his rifle without consent.

   D. Coerced Little's statements, continued interrogation after he requested an attorney, and failed to provide *Miranda* rights.

II. Whether the district court erred by:

   A. Admitting prior act evidence,

   B. Denying Little his confrontation right to recross-examine his ex-girlfriend.

   C. Admitting a rifle and bullet with tenuous relevance and a handgun that was not the murder weapon.

D. Admitting hearsay testimony from Little's ex-girlfriend.

III. Whether erroneous jury instructions on prior act evidence, reasonable doubt, and credibility weighing, as well as a lack of a theory of defense instruction, require a new trial.

IV. Whether the government plainly committed misconduct during closing argument when it referred to prejudicial facts not in evidence, vouched for its witness, and commented on Little's guilt.

V. Whether the trial errors cumulatively require a new trial.

VI. Whether sufficient evidence supported the conviction.

VII. Whether mandatory life imprisonment is constitutional here.

Statement of the Case

A. A man was shot on the Muscogee Creek Nation reservation with no eyewitnesses.

Around noon on April 22, 2018, Johnathon Weatherford was found dying on railroad tracks in Jenks, Oklahoma, in the Muscogee (Creek) Nation, with a gunshot to the back. Trial Exhibit 63. It quickly became apparent to state police there was little evidence to work with. There were no eyewitnesses. ROA, Vol. I, at 627. And the forensic evidence recovered failed to meaningfully identify suspects. ROA, Vol. I, at 88, 690; ROA, Vol. II, at 21–22.

After the shooting, individuals who did not witness the crime contacted police. Hannah Watkins, who lived in another state with her boyfriend but was visiting Jenks and also dating Weatherford, had no idea who committed the shooting. But she threw out the name of Justin Little, the father of her child, who was being deployed soon with the National Guard. Suppression Exhibit B at 3:10–3:20; Trial Exhibit 101. But when Little and their son arrived at her home shortly after the shooting, Watkins noticed nothing out of the ordinary. ROA, Vol. I, at 590. And she was unaware of prior altercations between Little and Weatherford. Suppression Exhibit B at 6:30–6:47. Weatherford's ex-girlfriend and another friend thought there had been conflict between him and Little. ROA, Vol. I, at 104–05, 124. But neither individual described the supposed conflict nor explained when it may have occurred. ROA, Vol. I, at 104–05, 124.

Weatherford's ex-girlfriend admitted to police that her current boyfriend hated Weatherford because Weatherford abused her during their relationship. ROA, Vol. I, at 840–41. She also secretly invited Weatherford to her and her boyfriend's apartment just two weeks prior,

even though her boyfriend did not want Weatherford there. ROA, Vol. I, at 841.

Jenks Police Department Detective Melissa Brown led the investigation and seized on the speculation surrounding Little. The only other evidence police reviewed consisted of grainy photographs of a white pickup truck—resembling Little's—across the street from the railroad tracks. ROA, Vol. I, at 96–97, 636. Despite the lack of evidence, police directed Watkins to lure Little back to Jenks. ROA, Vol. I, at 591–92. Only eight hours after the shooting, and though Little is a Native American and the shooting occurred on the reservation, state police arrested Little at gunpoint. Trial Exhibit 103.

B. State police, despite ignoring Little's repeated requests for an attorney, failed to coerce a confession over two days.

Detective Brown and Officer Jason Weis interrogated Little at the police station that evening. ROA, Vol. I, at 825–26. They first lied to him, falsely claiming several witnesses and messages implicated him in the shooting. Suppression Exhibit C at 1:11:30–1:15:00. When Little admitted he was in the area and heard a gunshot, but denied any involvement, officers employed intimidation tactics. At one point, Weis

smacked Little's hand and demanded a confession. Suppression Exhibit O at 33:30–34:05.

The next morning, officers recognized the interrogation was too hostile, so Detective Nicholas Chandlee replaced Weis. Suppression Exhibit Q at 10:00–10:35. Still, officers rushed for a confession. They failed to read Little his *Miranda* rights. Suppression Exhibit Q at 10:40–11:05. And Brown ignored Little's request for an attorney. Suppression Exhibit Q at 10:52–11:00. Trying a different tactic, Brown acknowledged lying about the evidence. Suppression Exhibit Q at 56:40–56:55, 1:02:00–1:02:25. She told Little he would face little jail time if he admitted he accidentally shot Weatherford. Suppression Exhibit Q at 51:10–51:34, 1:02:55–1:03:35. She asserted a lenient sentence would allow Little time to raise his son. Suppression Exhibit Q at 53:20–53:40. Only when Little again requested an attorney did the interrogation stop. Suppression Exhibit Q at 1:14:12–1:14:20.

C. The state police seized and searched Little's truck under a state warrant and searched his home without a warrant.

After the first night's interrogation, officers went to Little's home on the reservation where he lived with his mother. ROA, Vol. I, at 779–

80. There, officers questioned her in hopes she would implicate her son. Suppression Exhibit J at 0:20–1:40. Officers eventually had her take them into the living room where Little slept and seized his rifle. Suppression Exhibit J at 1:20–1:40. The police later obtained a warrant from state court to seize and search Little's white truck. ROA Vol. I, at 108–11, 116–20. From the truck, officers seized a handgun, a lens cap, and an optic lens, and photographed a sticker on the rear window. ROA, Vol. I, at 115, 120; Trial Exhibits 29–30.

D. The district court denied suppression despite several constitutional violations.

Little was convicted in Tulsa County court of first-degree murder in 2020. *State of Oklahoma v. Justin Date Little*, CF-2018-1700 (Tulsa Cnty., Okla.). After *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the state court vacated Little's conviction. The federal government charged Little with first-degree murder in Indian Country on April 8, 2021. ROA, Vol. I, at 17.

Little moved to suppress all evidence. Because Little is Native American and the crime occurred on a federal reservation, state police lacked authority to investigate. ROA, Vol. I, at 172–78. Officers also

lacked probable cause to arrest him. ROA, Vol. I, at 61–65. Officers otherwise failed to establish consent to enter his home and seize his rifle. ROA, Vol. I, at 65–67. Lastly, police coerced interrogation statements made after he invoked his right to counsel when officers failed to provide *Miranda* rights. ROA, Vol. I, at 145–162. The district court conducted an evidentiary hearing with only Detective Brown testifying. ROA, Vol. I, at 360–431. The court denied suppression. ROA, Vol. I, at 323–25, 332–59.

E. Little was convicted based on propensity evidence, prejudicial and speculative hearsay, closing misconduct, and erroneous jury instructions.

During the two-and-a-half-day trial, and over Little's objection, the government presented dissimilar and remote-in-time evidence painting Little as a stalker who meddled in Watkins's relationships. *Infra*, at 37–38. The court concluded the evidence was intrinsic or admissible only for motive. ROA, Vol. I, at 436–40 & n.7. The government admitted it needed this evidence because other evidence implicating Little was circumstantial. ROA, Vol. I, at 50–51. That evidence consisted of Little's admission he was in the area of the shooting, surveillance showing a white truck similar to Little's in the

area, and Little's rifle being among the 42 makes and models of rifles that could have shot Weatherford. ROA, Vol. I, at 682–85, 777–814; ROA Vol. II, at 22.

The government also relied on prejudicial hearsay. Hoping to portray Little as jealous, Watkins claimed she told Little she wanted to be with Weatherford, not him. ROA, Vol. I, at 546–47, 595–96. Watkins also recounted accusations she made of Little being a jealous liar and the only one with motive to hurt Weatherford. ROA, Vol. I, at 538–46. The court, over objection, allowed Watkins to relay these allegations. ROA, Vol. I, at 464–65, 495.

Additionally, the court denied Little the opportunity to recross Watkins after she sought to undermine his defense theory. ROA, Vol. I, at 596–97. Little had evidence that Weatherford's drug dealing could have motivated the shooting. ROA, Vol. I, at 862. But Little could not question Watkins after she denied that Weatherford sold drugs. ROA, Vol. I, at 596.

Then, in closing, the government introduced prejudicial facts not in the record. The government falsely claimed several witnesses implicated Little after the shooting, ROA, Vol. II, at 51–52, 88;

referenced more dissimilar prior acts the court had prohibited, ROA, Vol. I, at 432–40; ROA, Vol. II, at 37–39; and speculated Little's clothing matched the perpetrator's, even though no such clothing was recovered, ROA, Vol. II, at 87. The prosecutor also vouched for an ex-boyfriend of Watkins who speculated Little cut his brake lines years prior. ROA, Vol. I, at 659–62; ROA, Vol. II, at 82–83. And the prosecutor relayed his personal opinion that Little never acted like an innocent person. ROA, Vol. II, at 47.

The district court compounded these errors with erroneous jury instructions. The court instructed the jury it could consider the prior act evidence for all purposes not only for motive; did not give Little's defense theory instruction; gave a reasonable doubt instruction that lowered and shifted the burden; and gave a credibility weighing instruction favoring government evidence. ROA, Vol. I, at 453–56, 747–50, 874, 879–80.

The jury returned a guilty verdict and Little was sentenced to life in prison. ROA, Vol. I at 898, 911–12. Little now appeals. ROA, Vol. I, at 918–19.

Summary of the Argument

Several errors require a new trial.

1. Suppression was required. First, state authorities lacked jurisdiction to arrest Little or seize evidence from his truck under state warrants. State officers did not act reasonably given precedent establishing that the murder occurred on a federal reservation, leaving the state without authority. Second, the arrest was not supported by probable cause, as officers had only grainy surveillance photographs showing a white truck and vague statements implicating Little from people who were not eyewitnesses. Third, the government failed to prove valid consent to enter Little's home. Fourth, officers coerced Little's statements, continued interrogation after he invoked his right to counsel, and failed to provide *Miranda* rights. The government cannot show that admission of the fruits of these constitutional violations—used extensively at trial—was harmless beyond a reasonable doubt.

2. Numerous evidentiary errors require retrial. First, prior act evidence that was dissimilar and remote in time to the offense but painted Little as a jealous stalker was erroneously admitted. Because the evidence filled crucial evidentiary gaps, the error was not harmless.

Second, the court violated Little's confrontation rights by prohibiting recross-examination of Watkins when the government elicited information about his defense for the first time on redirect. Third, the court erred by admitting a rifle and bullet with no proof the rifle was taken from Little's home or that the bullet was recovered from the deceased, and a handgun not alleged to be the murder weapon. Fourth, the court erroneously admitted Watkins's hearsay accusing Little of committing the offense.

3. The jury instructions erroneously misled the jury. First, the prior act instruction failed to limit consideration of the evidence to motive. Second, Little was denied his defense theory instruction. Third, the reasonable doubt instruction lessened and shifted the government's burden to Little. Fourth, the credibility instruction amounted to the court commenting favorably on the government's evidence.

4. The government committed misconduct in closing argument by referencing prejudicial facts not in evidence, vouching for a witness, and personally opining on Little's guilt.

5. The errors individually and cumulatively prejudiced Little and warrant a new trial. Identity was the contested issue. The

erroneously admitted fruits, propensity, and hearsay evidence fortified proof that Little was the shooter. The instructional errors and closing misconduct improperly tipped the scales for the government in an already-weak case. The government's only non-tainted evidence, a white truck driving around the area, with no eyewitnesses or forensic evidence, was not overwhelming. The evidence presented to the jury was insufficient to support the conviction, and this Court should vacate the judgment.

6. Finally, because neuroscience now shows adolescent brain development continues to age 25, and Little was 24 at the time of the offense, the mandatory life sentence is unconstitutional.

Argument

I. The district court erroneously denied suppression on multiple grounds.

A. Standard of review.

When reviewing denial of suppression, this Court reviews factual findings for clear error and legal conclusions de novo. *United States v. Guillen*, 995 F.3d 1095, 1103 (10th Cir. 2021). Legal conclusions reviewed de novo include whether: (1) the good faith reliance exception

to suppression applies, *United States v. Herrera*, 444 F.3d 1238, 1242 (10th Cir. 2006); (2) probable cause to arrest existed, *United States v. Zamudio-Carrillo*, 499 F.3d 1206, 1209 (10th Cir. 2007); (3) a defendant's statements were voluntary, *United States v. Young*, 964 F.3d 938, 942 (10th Cir. 2020); (4) a defendant invoked his right to counsel, *United States v. Brown*, 287 F.3d 965, 971 (10th Cir. 2002); and (5) police provided sufficient *Miranda* warnings, *United States v. Hernandez*, 93 F.3d 1493, 1501 (10th Cir. 1996). This Court considers "the entire record developed from the trial" when reviewing renewed suppression motions. *United States v. Parra*, 2 F.3d 1058, 1065 (10th Cir. 1993). When determining whether an error was harmless, this Court reviews the record de novo. *United States v. Perdue*, 8 F.3d 1455, 1469 (10th Cir. 1993).

B. Oklahoma state police lacked authority on the federal reservation.

Because Little is Native American and the offense occurred on a federal reservation, the state police lacked jurisdiction to arrest and gather evidence. "A warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without

probable cause." *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990). Thus, the court must "suppress evidence obtained through a search within Indian country authorized and conducted solely by state authorities." *United States v. Baker*, 894 F.2d 1144, 1145 (10th Cir. 1990) (per curiam). The district court erred in refusing to suppress fruits from the state's actions in arresting Little and executing state search and seizure warrants for his truck on a federal reservation. ROA, Vol. I, at 172–78.

The government defended the state's actions only by citing an exception to suppression—good faith—because Oklahoma previously investigated reservation cases. ROA, Vol. I, at 283–89. The district court agreed because (1) this Court stayed the mandate in a published decision establishing the state acted without authority; and (2) police could rely on past practices. ROA, Vol. I, at 323–25. This ruling was erroneous.

1. This Court held in 2017 the state lacked authority in this context.

In 1987, this Court determined in a civil matter that the Muscogee (Creek) Nation Reservation still existed. *Indian Country, U.S.A., Inc. v.*

Oklahoma ex rel. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987). In 2017, this Court confirmed the continued existence of the reservation in the habeas context. *Murphy v. Royal*, 875 F.3d 896, 904, 914–22, 929–66 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020). The defendant in *Murphy* was Native American and the offense occurred in the Creek Nation. *Id.* at 904. This Court vacated the state conviction and sentence because Oklahoma lacked jurisdiction: "when an Indian is charged with committing a murder in Indian country, he or she must be tried in federal court." *Id.* at 904, 914–15, 966.

By the time of the state police's warrantless arrest of Little and execution of search warrants in April 2018, this Court had confirmed that Oklahoma lacked jurisdiction, because Little is Native American and the crime occurred on the Creek reservation. ROA, Vol. I, at 878. Two years later, the Supreme Court confirmed this Court's holding. *See McGirt*, 140 S. Ct. at 2459–60.

2. Staying the mandate in *Murphy* did not alter its precedential effect.

The district court found suppression unwarranted because this Court stayed *Murphy*'s mandate pending *McGirt*. ROA, Vol. I, at 323–24. This understanding of the mandate was erroneous.

The mandate does not determine whether this Court's published decisions have precedential effect. A mandate is an "order from an appellate court directing a lower court to take a specified action." Mandate, *Black's Law Dictionary* (11th ed. 2019). "Issuance of the mandate formally marks the end of appellate jurisdiction" and returns jurisdiction "to the tribunal to which the mandate is directed, for such proceedings as may be appropriate." *In re Sunset Sales, Inc.*, 195 F.3d 568, 571 (10th Cir. 1999). *Murphy* remained binding regardless of the mandate stay. *United States v. Baker*, 49 F.4th 1348, 1358 (10th Cir. 2022) ("[U]nless and until the holding of a prior decision is overruled by the Supreme Court or by the en banc court, that holding is the law of this Circuit.").

3. The government did not show objectively reasonable reliance on the law to meet the good faith exception.

The "good faith exception applies only narrowly, and ordinarily only when an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer." *United States v. Loera*, 923 F.3d 907, 925 (10th Cir. 2019) (cleaned up). The government must prove the exception applies. *United States v. Corral-Corral*, 899 F.2d 927, 932 (10th Cir. 1990).

"[L]aw enforcement officials are presumed to have a reasonable knowledge of the law." *United States v. Gonzales*, 399 F.3d 1225, 1230 (10th Cir. 2005). The good faith exception applies when police act in objectively reasonable reliance on binding precedent. *Davis v. United States*, 564 U.S. 229, 239–41 (2011). The converse is also true: when precedent at the time instructs that police's actions are illegal, the government cannot show that the officers acted objectively reasonably. *See Herrera*, 444 F.3d at 1253–54 (suppression required because state trooper deemed "to have been aware of" precedent holding the state regulatory scheme did not permit the stop at issue). The inquiry is also objective with a warrant and considers whether a "reasonably well

trained officer would have known that the search was illegal despite the magistrate's authorization." *Gonzales*, 399 F.3d at 1230.

The government did not meet its burden. During the April 2018 investigation, binding precedent held Oklahoma did not have jurisdiction because Little is Native American and the shooting occurred on the Creek reservation. *Murphy*, 875 F.3d at 904, 914–22, 929–66. Under *Herrera*, it was not objectively reasonable for state police and courts to ignore this Court's law that squarely applied. 444 F.3d at 1253–54. Furthermore, "the good faith exception does not apply at all when a warrant affidavit is based on tainted evidence from a prior, unlawful [action]." *Loera*, 923 F.3d at 926. The truck search and seizure warrants relied on Little's interrogation, which as explained below is a fruit of the illegal arrest. ROA, Vol. I, at 109, 117.

The district court's novel rule turns this objective inquiry into a subjective one based on police practices. But "the good-faith exception does not apply when officers rely on their own prior conduct." *United States v. Bagley*, 877 F.3d 1151, 1156 (10th Cir. 2017). And this Court has recognized: "To be sure, *McGirt* changed long-standing practice of the criminal-justice system in Oklahoma. But such practice does not

define the law." *United States v. Budder*, 76 F.4th 1007, 1016 (10th Cir. 2023). This Court should therefore reverse the denial of suppression.

4. The error is harmful because the government admitted fruits of the constitutional violations at trial.

Suppression of the fruits of the warrantless arrest execution of the warrants was required. *United States v. Olivares-Rangel*, 458 F.3d 1104, 1108–09 (10th Cir. 2006). The fruits of Little's warrantless arrest include his statements during the interrogations, evidence seized from and discovered about his truck, and the rifle from his home. Trial Exhibits 27–33, 46–51, 70. The fruits of the truck warrants overlap and include the lens cap, evidence of a white sticker on the truck window, and a handgun. Trial Exhibits 27–30, 47–51. The government has never contested this evidence is fruits. ROA, Vol. I, at 283–89.

The government must prove beyond a reasonable doubt that admission of these fruits "did not contribute to the verdict obtained." *United States v. Kahn*, 58 F.4th 1308, 1318 (10th Cir. 2023) (cleaned up). This Court must determine that the verdict "actually rendered in *this* trial was surely unattributable to the alleged error." *Id.* (cleaned up). In other words, the Court "must conclude the properly admitted

evidence of guilt is so overwhelming, and the prejudicial effect of the purported error is so insignificant by comparison, that it is clear beyond a reasonable doubt" that the error was harmless. *United States v. Glass*, 128 F.3d 1398, 1403 (10th Cir. 1997) (cleaned up). But here, the fruits were central to the government's case.

Little's interrogations featured prominently at trial. The government played the interrogations during Brown's testimony and relied heavily on Little's statements in opening, closing, and rebuttal. ROA, Vol. I, at 754–55; ROA, Vol. II, at 39, 41–50, 80, 85–87; *cf. Perdue*, 8 F.3d at 1469 (erroneous admission of interrogation not harmless because it was the only direct evidence of the offense). The government also relied on the rifle as the only forensic evidence it presented—its expert's opinion that the rifle could have been the one that shot Weatherford. ROA, Vol. I, at 682–85; ROA, Vol. II, at 53. The government also argued, and Brown testified, that the white sticker was proof it was Little's truck depicted in surveillance. ROA, Vol. I, at 635–36, 754; ROA, Vol. II, at 47. The evidence not subject to suppression, surveillance videos showing a white truck in the area with no eyewitnesses, is not overwhelming or strong. A new trial is required.

C. State police arrested Little without probable cause.

An arrest is "highly intrusive," requiring "probable cause to believe that a person committed a crime." *Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir. 2007) (en banc) (cleaned up). Probable cause exists "only when the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.* at 1116 (cleaned up). This inquiry depends on "the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). The government must prove probable cause existed. *United States v. Valenzuela*, 365 F.3d 892, 902 (10th Cir. 2004).

State police arrested Little eight hours after the shooting. ROA, Vol. I, at 387–88. The officers relied on grainy photographs and third-party statements to justify the arrest. ROA, Vol. I, at 310–11. None of this evidence supplied probable cause.

1. Police did not review surveillance footage before Little's arrest.

At the suppression hearing, Detective Brown said officers reviewed surveillance before arresting Little. ROA, Vol. I, at 366–69. Brown claimed officers found video that followed Little's "particular truck down the road around the corner to where the shooting actually occurred." ROA, Vol. I, at 368. The district court credited this testimony as strong evidence of probable cause, finding police were "able to review video surveillance that day showing a white Chevrolet Silverado pickup truck that drove down the road, around the corner, and to the location of the shooting." ROA, Vol. I, at 334, 342–44.

Yet at trial, Brown admitted police did not review surveillance before Little's arrest. ROA, Vol. I, at 636. Rather, police saw grainy photographs of a white pickup truck nearby. ROA, Vol. I, at 636; ROA, Vol. I, at 96–97 (photographs). Because this admission contradicted Brown's earlier testimony and undermined probable cause, Little renewed his suppression motion. ROA, Vol. I, at 709–10. The district court denied the motion. ROA, Vol. I, at 710.

When a defendant "renews the suppression motion at trial," "alert[s] the court to how the evidence has been altered," and explains "why the change would affect the ruling," a district court should reexamine the motion. *United States v. Bass*, 661 F.3d 1299, 1303 (10th Cir. 2011). Given Brown's "contradictory statements" as to when police reviewed surveillance, "there is an insufficient factual basis to support the district court's finding." *United States v. Wolfe*, 435 F.3d 1289, 1300 (10th Cir. 2006). The district court previously made clear that video surveillance was essential for probable cause because it placed Little's vehicle directly "at the crime scene." ROA, Vol. I, at 96–97. But because the photographs did not contain identifying information about the pictured truck, ROA, Vol. I, at 96–97, they otherwise could not supply probable cause. *See United States v. Johnson*, 43 F.4th 1100, 1107 (10th Cir. 2022) (finding insufficient a photograph "not reveal[ing] much").

2. The remaining evidence weighed against probable cause.

The government lacked other evidence of probable cause. Brown interviewed Watkins shortly after the shooting. Suppression Exhibit B. Watkins at first claimed Little must have committed the crime but

immediately acknowledged anyone could have done it. Suppression Exhibit B at 3:10–3:20. Watkins then explained Little behaved normally when she saw him shortly after the shooting. Suppression Exhibit B at 3:20–3:40. And she was unaware of altercations or threats between Little and Weatherford. Suppression Exhibit B at 6:30–6:47. Watkins's initial "hunch" about Little's culpability could not supply probable cause. *See Valenzuela*, 365 F.3d at 897. Indeed, the information she supplied after this speculation "militate[d] against" probable cause. *Id.*

Weatherford's ex-girlfriend told police Little previously made threats to Weatherford but provided no details. ROA, Vol. I, at 104–05. Another of Weatherford's friends claimed he saw messages "involving conflict" between Weatherford and Little. ROA, Vol. I, at 124. But neither statement established the "*particularized* suspicion" necessary. *United States v. Seslar*, 996 F.2d 1058, 1061 (10th Cir. 1993). Neither individual described what was said nor when the messages occurred, weighing against reliability. *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972) ("probable cause" prevents acting on "vague and uncertain information"). And Watkins, who was closer to Little and Weatherford, told officers she was unaware of threats.

Officers otherwise had no physical evidence implicating Little, had not searched his vehicle, and had no statements about his whereabouts. ROA, Vol. I, at 388–89. Without surveillance, police had only blurry photographs, Watkins's equivocal statements, and vague recitations of conflict between Weatherford and Little. Such evidence did not supply a "substantial probability" that Little "committed the crime." *United States v. Banks*, 884 F.3d 998, 1008 (10th Cir. 2018) (cleaned up).

All fruits—including Little's statements and physical evidence from his truck and home—from this unlawful arrest should be suppressed. *Supra*, at 19. The government cannot show harmlessness because it extensively relied on Little's statements and emphasized the physical evidence. *Supra*, at 20. A new trial is required.

D. The government lacked consent to enter Little's home.

"[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. Mora*, 989 F.3d 794, 800 (10th Cir. 2021) (cleaned up).

The government claimed it had consent from Little's mother to enter their shared home and seize Little's rifle. Little moved to suppress

on two grounds. ROA, Vol. I, at 65–67. He first argued that police lacked valid consent to enter his home or the living room in which he slept. ROA, Vol. I, at 65–66. He also maintained that his mother could not consent to the search of his living space. ROA, Vol. I, at 66–67. The government addressed the second argument, claiming Little's mother had authority over the living room. ROA, Vol. I, at 311–12. Following the government's lead, the district court found Little's mother could authorize the search. ROA, Vol. I, at 343–44.

"The government has the burden of proving that consent is given freely and voluntarily." *United States v. Werking*, 915 F.2d 1404, 1409 (10th Cir. 1990). It must supply "clear and positive testimony that consent was unequivocal and specific and freely given." *United States v. Guerrero*, 472 F.3d 784, 789 (10th Cir. 2007) (cleaned up). "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968). In failing to address Little's first argument—the absence of proof of consent—the government failed to carry its burden.

First, the government did not supply evidence about consent to enter the home. Detective Brown did not testify about the search. *See*

ROA, Vol. I, at 365–74. Brown's body camera started recording after officers already entered the home, Suppression Exhibit J, and therefore did not show what happened before officers went inside. *See llinois v. Rodriguez*, 497 U.S. 177, 179 (1990) (consent is measured "at the time of the entry").

Second, the government lacked sufficient evidence of consent to enter Little's living room. The "[m]ere submission to lawful authority does not equate to consent." *United States v. Manuel*, 992 F.2d 272, 275 (10th Cir. 1993). After Brown asked if she could see Little's firearms, Little's mother led the officers there. Suppression Exhibit J at 1:20–1:40. Little's mother never responded to Brown's question, which reveals the lack of "unequivocal and specific" permission. *See Guerrero*, 472 F.3d at 789. Little's mother could have believed she had no choice. Moments earlier and without asking for permission, Brown advised that officers were seizing Little's truck parked outside. Suppression Exhibit J at 0:20–0:30.

Third, even if these actions sufficed for consent, the government did not show an absence of duress. *Guerrero*, 472 F.3d at 789. Little's mother was emotionally distraught with the news of the shooting and

her son's arrest. Suppression Exhibit J at 1:20–1:40. An individual's "fragile emotional state" weighs against voluntariness. *United States v. Duran*, 957 F.2d 499, 503 (7th Cir. 1992); *United States v. Pena-Sarabia*, 297 F.3d 983, 987 (10th Cir. 2002) (considering a person's mental condition).

Thus, the district court erred in finding the government proved valid consent. Because police immediately seized Little's rifle following this unlawful entry, the rifle is a fruit of this illegal search. *United States v. Shrum*, 908 F.3d 1219, 1240 (10th Cir. 2018). The government cannot demonstrate harmlessness because it relied on the rifle throughout trial. *Supra*, at 20. A new trial is required.

E. Officers repeatedly violated Little's Fifth Amendment rights.

The Fifth Amendment "guarantees that no person shall be compelled in any criminal case to be a witness against himself." *Guillen*, 995 F.3d at 1108 (cleaned up). To protect against the "inherently compelling pressures" of interrogation, a person must be adequately apprised of his rights before questioning begins. *Miranda v. Arizona*, 384 U.S. 436, 467, 479 (1966). Even if these procedural requirements

are satisfied, statements must be voluntary to be admissible. *New Jersey v. Portash*, 440 U.S. 450, 458–59 (1979).

1. Officers coerced Little's statements.

When the court admits an involuntary statement, the conviction "cannot stand." *Rogers v. Richmond*, 365 U.S. 534, 540 (1961). Statements "must be made freely and voluntarily" and cannot be "obtained by compulsion or inducement of any sort." *Griffin v. Strong*, 983 F.2d 1540, 1542 (10th Cir. 1993). The government must prove voluntariness. *Id.* Several factors from Little's two-day interrogation indicate coercion.

First, Little's "personal characteristics" favor coercion. *United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006). Little was 24 years old and had no "previous experience with the criminal justice system." *United States v. Toles*, 297 F.3d 959, 966 (10th Cir. 2002); Suppression Exhibit Q at 51:06–51:10. This inexperience and youth counsel against voluntariness. *Carter v. Bigelow*, 787 F.3d 1269, 1295 (10th Cir. 2015).

Second, Detective Brown falsely promised leniency. Brown told Little if he admitted the shooting was an accident, he would "not spend

the rest of [his] life in jail." Suppression Exhibit Q at 49:55–51:05 (stating there are drunk drivers who accidentally kill "famil[ies] full of people" and "never do a day in jail"). She cemented this promise by explaining she "truly believe[d] they would be very lenient" and would "get [him] the lightest possible time in jail" if he confessed, such as a month for reckless discharge of a firearm. Suppression Exhibit Q at 51:10–51:34, 1:02:55–1:03:35; Suppression Exhibit Q at 1:13:00–1:13:35 (promising "a lesser charge" and "[l]esser time in jail" if Little confessed).

"Promises of leniency" can "render a confession coerced." *Young*, 964 F.3d at 943. Brown referenced lesser charges and a reduced sentence "in exchange for . . . an inculpatory statement." *Griffin*, 983 F.2d at 1543 (cleaned up). These promises went further than descriptions of "potential penalties," as the district court asserted. ROA, Vol. I, at 358. Rather, Brown told Little "about other suspects who had received lenient sentences after confessing to killing by mistake," *Lopez*, 437 F.3d at 1065, and included "a quid pro quo," *Young*, 964 F.3d at 945. Such assurances "critically impair[ed] [Little's] capacity for self-determination." *Lopez*, 437 F.3d at 1065.

Third, police engaged in psychological manipulation by "heavily rel[ying] on false evidence ploys and other forms of deceit" to extract a confession. *Dassey v. Dittmann*, 877 F.3d 297, 320–21 (7th Cir. 2017) (en banc) (Wood, J., dissenting). Officers told Little everyone knew he committed the shooting, referencing non-existent witness statements and Snapchat messages. Suppression Exhibit C at at 1:11:30–1:15:00; Suppression Exhibit O at 7:30–7:50, 29:30–33:45; Suppression Exhibit Q at 56:40–56:55; 1:02:00–1:02:25 (admitting they had "very little evidence"). These tactics "freaked [Little] out," because he knew he did not shoot Weatherford. Suppression Exhibit O at 36:40–37:55. He asked to review evidence, but Brown refused. Suppression Exhibit O at 26:10–26:25, 33:25–34:40, 37:50–37:55. And he stressed officers were "trying to force [him] to say" he shot Weatherford. Suppression Exhibit O at 36:54–37:55. The district court minimized the deception and ignored the significant effect it had on Little. ROA, Vol. I, at 358.

Fourth, officers used Little's son as leverage. *See United States v. Jacques*, 744 F.3d 804, 811 (1st Cir. 2014) (such conduct is coercive). Brown claimed Little could only spend time with his son if he admitted the shooting was an accident. Suppression Exhibit Q at 53:20–53:40.

Her references to lesser charges included the promise he could then raise his son. Suppression Exhibit Q at 51:10–51:34, 1:13:00–1:13:35. The court's belief these were descriptions of "potential future realities," ROA, Vol. I, at 358, ignored the psychological effect of these statements. Such statements "deliberately prey" on a defendant's emotions. *United States v. Tingle*, 658 F.2d 1332, 1336 (9th Cir. 1981).

Fifth, officers physically intimidated Little. *See Young*, 964 F.3d at 942 (physical coercion renders statements inadmissible). After Little tried to highlight problems with the evidence, Officer Weis smacked Little's hand. Suppression Exhibit O at 33:30–33:45. Little immediately told Weis not to touch him. Suppression Exhibit O at 33:45–33:48. After Weis asked him why, Little said he felt threatened. Suppression Exhibit O at 33:48–34:05. Although the court cited the contact, it never acknowledged its effect on Little. *See* ROA, Vol. I, at 357.

With these considerations, "the totality of the circumstances" demonstrate coercion. *Young*, 964 F.3d at 942. Although the district court cited other considerations (e.g., the comfortable room and coherent conversation), ROA, Vol. I, at 357, those "factors are not

dispositive." *Young*, 964 F.3d at 947. The tenor of the interrogation was hostile and officers relied on manipulative techniques.

2. Officers ignored Little's invocation of his right to counsel.

"[A] suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning." *Davis v. United States*, 512 U.S. 452, 457 (1994). A defendant invokes this right through "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). After a defendant makes such a statement, "the interrogation must cease until an attorney is present." *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (cleaned up).

At the beginning of the second interrogation, Brown asked Little if he still wanted to talk. Suppression Exhibit Q at 10:40–10:52. Little claimed he did, but then clarified he first "wanted to talk to a lawyer" to see where he stood. Suppression Exhibit Q at 10:52–11:00. Little later explained he "came out here first to actually talk to a lawyer." Suppression Exhibit Q at 1:14:12–1:14:20.

By inquiring about an attorney, Little invoked his right to counsel. *United States v. Giles*, 967 F.2d 382, 386–87 (10th Cir. 1992). The district court mistakenly believed Little's statement was ambiguous because he continued to speak to officers. ROA, Vol. I, at 356. But the government cannot establish a valid waiver by showing that Little responded to further questioning. *Edwards*, 451 U.S. at 484. Little consistently requested an attorney, yet officers still questioned him.

3. Officers failed to provide *Miranda* rights before the second interrogation day.

Before custodial questioning, police must inform a defendant of his *Miranda* rights. *Guillen*, 995 F.3d at 1108–09. Failing to do so "creates a presumption of compulsion," and unwarned statements must be excluded. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

Police failed to reapprise Little of his *Miranda* rights before the second interrogation. Brown read Little *Miranda* rights at the beginning of the first interrogation. Suppression Exhibit C at 00:35–00:55. Officers then interrogated Little for almost two hours. Suppression Exhibits C, O. When interrogation resumed the next day, Brown simply told Little that "Your *Miranda* rights still stand. Okay?

So you still want to talk to us or?" Suppression Exhibit Q at 10:40–11:05.

"[T]he totality of the circumstances" indicate full warnings were required. *Mitchell v. Gibson*, 262 F.3d 1036, 1058 (10th Cir. 2001) (cleaned up). First, Little had no "previous encounters with law enforcement," which indicates an absence of "familiar[ity] with his *Miranda* rights." *Coddington v. Sharp*, 959 F.3d 947, 960 (10th Cir. 2020); Suppression Exhibit Q at 51:06–51:10. Second, "[a] significant amount of time" had passed since prior warnings. *United States v. Pruden*, 398 F.3d 241, 247 (3d Cir. 2005). Third, the interrogations were not "conducted by the same" officers, as Detective Chandlee replaced Weis because Brown wanted to change the tone. *United States v. Nguyen*, 608 F.3d 368, 375 (8th Cir. 2010); Suppression Exhibit Q at 10:00–10:35.

Although Brown provided a brief reminder of *Miranda* rights, Little equivocated. He did not indicate a "willing[ness] to answer questions" and instead asked to speak to a lawyer. *Pruden*, 398 F.3d at 244; Suppression Exhibit Q at 10:45–11:10. The district court ignored these circumstances. ROA, Vol. at 354.

The government cannot show the Fifth Amendment violations were harmless. The government played and referenced Little's interrogations extensively at trial. *Supra*, at 20. A new trial is required.

II. Multiple prejudicial and unconstitutional evidentiary rulings require a new trial.

A. Standards of Review

Evidentiary rulings are ordinarily reviewed for abuse of discretion, but this Court reviews whether evidentiary decisions violated a defendant's constitutional rights de novo. *United States v. DeChristopher*, 695 F.3d 1082, 1095 (10th Cir. 2012). For constitutional errors, the government must show the error was harmless beyond a reasonable doubt. *United States v. Andasola*, 13 F.4th 1011, 1017 (10th Cir. 2021). For nonconstitutional errors, the government must demonstrate by a preponderance of evidence that the defendant's substantial rights were unaffected. *Id.*

This Court reviews unpreserved issues for plain error and will reverse if (1) an error occurred; (2) that was plain; (3) that affected Little's substantial rights; and (4) that seriously affected the fairness,

integrity, or public reputation of a judicial proceeding. *United States v. Wolfname*, 835 F.3d 1214, 1217 (10th Cir. 2016).

B. Highly prejudicial and dissimilar prior acts evidence.

The district court allowed the government to fill gaps in its evidence by admitting improper propensity evidence of Little's prior acts with Watkins and other men she dated. The challenged evidence involved: (1) in either 2015 or 2016, Little went to Watkins's coworker's home in the middle of the night looking for Watkins, claiming he had his friend track Watkins's phone; (2) in 2017, Watkins and another man she was dating suspected Little cut the brake lines of the man's car; and (3) sometime later, Little sent nude photographs of Watkins to another man she dated. ROA, Vol. I, at 514–31, 647–48, 659–62.

The government admitted it needed to compensate for its circumstantial case by ensuring the jury understood "the history between Little and Watkins to establish his motive and intent." ROA, Vol. I, at 50–51. Over Little's objection, ROA, Vol. I, at 291–306, the court admitted the evidence as intrinsic or alternatively as motive

evidence under Fed. R. Evid. 404(b). ROA, Vol. I, at 436–40 & n.7. Both rulings were erroneous.

1. Events from years prior involving different people and different acts are not "intrinsic."

Other act evidence is intrinsic only when "the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *United States v. Murry*, 31 F.4th 1274, 1290 (10th Cir. 2022) (cleaned up). Intrinsic evidence is "directly connected to the factual circumstances of the crime and provides contextual or background information to the jury." *Id.* (cleaned up). Extrinsic evidence "is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense." *Id.* at 1291 (cleaned up).

The district court found the evidence intrinsic because the "charged conduct occurred in the context of a tumultuous history between [Little] and Watkins, and [Little] clearly was antagonistic to Watkins' romantic partners." ROA, Vol. I, 438–39. But that the government's jealousy theory may have been assisted by the prior act

evidence does not mean the evidence was intrinsic. Nothing about the alleged actions in 2015 and 2017 with different men and Watkins are "intimately connected or blended with the factual circumstances of the charged offense." *Murry*, 31 F.4th at 1290. Nor were these factually dissimilar and remote-in-time incidents "part of a single criminal episode" or "necessary preliminaries" to the offense. *Id*.

The district court committed legal error, abusing its discretion. *United States v. Chavez*, 976 F.3d 1178, 1193 (10th Cir. 2020). In multi-defendant cases, intrinsic evidence may include what is "necessary to provide the jury with background and context of the nature of the defendant's relationship to his accomplice." *United States v. Cushing*, 10 F.4th 1055, 1076 (10th Cir. 2021). The district court misapplied this principle to the single-defendant context to find that evidence is intrinsic if necessary to provide "background and context of the nature of the defendant's relationship to [other persons]." ROA, Vol. I, at 437. The court provided no legal authority for broadening accomplice rules to include the defendant's relationship to individuals who the government deems helpful to its case.

The prior act evidence was not admissible as intrinsic.

2. These prior acts were not evidence of motive.

The district court alternatively concluded Little's "actions illustrate ongoing and escalating jealousy, which could provide motive to him to kill Weatherford." ROA, Vol. I, at 440 n.7. The evidence, however, was not admissible under Rule 404(b).

Evidence of other acts is not admissible to prove that the defendant committed the charged offense because he acted a certain way in the past. Fed. R. Evid. 404(b)(1). Other act evidence is admissible only when offered for a proper purpose, relevant, and survives Rule 403 balancing. *United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000).

"Relevant evidence tends to make a necessary element of an offense more or less probable." *United States v. Davis*, 636 F.3d 1281, 1298 (10th Cir. 2011). Similarity to the charged offense "is the lynchpin of the analysis." *United States v. Tennison*, 13 F.4th 1049, 1056 (10th Cir. 2021). The government therefore must prove that the prior acts are "similar to the charged crime and sufficiently close in time." *Zamora*, 222 F.3d at 762.

The prior act evidence did not meet these requirements because the events are neither similar to nor close enough in time to the charged offense. First, Little showing up where Watkins was staying almost three years prior and saying he tracked her phone is not similar to nor close in time to the charged offense. Second, the speculation that Little cut Watkins's boyfriend's brake lines in 2017 was dissimilar to the charged offense and happened a year before. And the government did not prove that Little was the actor, as Watkins and the man involved merely assumed it was Little. *Huddleston v. United States*, 485 U.S. 681, 689 (1988) ("[S]imilar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."); ROA, Vol. I, at 519–27, 659–64. Third, Little sending nude photos of Watkins to another boyfriend at an unspecified time between 2017 and 2018, is also dissimilar, remote in time, and violated the pretrial ruling that the government must prove "a timeframe" for the messages. ROA, Vol. I, at 439 n.6, 465, 495, 732–34.

The evidence also failed Rule 403's balancing test. Evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury. *United*

States v. Armajo, 38 F.4th 80, 85 (10th Cir. 2022). The district court's Rule 403 ruling is unhelpful. It conducted this analysis assuming the evidence was intrinsic and also relied on impermissible propensity reasoning. ROA, Vol. I, at 438–40.

Because motive is not an element of murder, the evidence had minimal relevance. *Davis*, 636 F.3d at 1298. And because the disputed issue was identity, evidence tending to prove other issues carried little relevancy. *United States v. Soundingsides*, 820 F.2d 1232, 1236–37 (10th Cir. 1987) (evidence that defendant had beaten a past girlfriend was inadmissible as Rule 404(b) intent evidence in a murder trial as "intent was not a contested issue").

And the unfair prejudice from the evidence outweighed any minimal probative value. Evidence that Little tracked Watkins's phone and showed up where she slept inflamed the jury by insinuating Little stalked Watkins. And speculation that Little cut brake lines allowed the jury to reason that if he would endanger Watkins and a prior boyfriend in that way, he had a propensity for violence and committed the shooting. And as the district court recognized, "revenge porn" has been

criminalized, concretizing prejudice from evidence that Little sent nude photographs of Watkins to another man. ROA, Vol. I, at 438 & n.5.

The limiting instruction only enhanced the unfair prejudice. *See* Fed. R. Evid. 403, Advisory Committee Notes (courts must consider "the probable effectiveness or lack of effectiveness of a limiting instruction"); *Zamora*, 222 F.3d at 762 (upon request court must provide limiting instruction). The instruction informed the jury it could consider the other act evidence for *all* Rule 404(b) purposes and was not limited to motive. ROA, Vol. I, at 880; *infra*, 54–55.

The district court's Rule 403 ruling is unhelpful. It conducted this analysis assuming the evidence was intrinsic and relied on impermissible propensity reasoning. ROA, Vol. I, at 438–40 (evidence not unfairly prejudicial because it demonstrates Little "stalked and obsessed over Watkins and her boyfriends").

The other act evidence was inadmissible under Rules 404(b) and 403.

3. Admission of the prior acts was not harmless.

Reversal is required when an evidentiary error had a "substantial influence on the outcome or leaves one in grave doubt as to whether it

had such effect." *Cushing*, 10 F.4th at 1077 (cleaned up). "Grave doubt" means that "the matter is so evenly balanced" the reviewing court feels "in virtual equipoise as to the harmlessness of the error." *Chavez*, 976 F.3d at 1204. To meet its burden, the government must show the evidence of guilt was "overwhelming." *United States v. Jean-Pierre*, 1 F.4th 836, 843 (10th Cir. 2021).

The government cannot show harmlessness. The evidence that Little killed Weatherford was weak and circumstantial. *Infra*, 68–69. Considering the weakness of its case, the government focused on prior act evidence in opening, closing, and rebuttal. ROA, Vol. I, at 751; ROA, Vol. II, at 37–40, 80–85. The government admitted the prior act evidence was "essential" given the otherwise circumstantial nature of its case. ROA, Vol. I, at 50–51. A new trial is warranted. *See Soundingsides*, 820 F.2d at 1243 (new trial required because the government's case was "only a weak one of circumstantial evidence").

C. Violation of Confrontation Clause by denying recross-examination of Watkins.

The Confrontation Clause guarantees a defendant the fundamental right of cross-examination. *United States v. A.S.*, 939 F.3d

1063, 1072 (10th Cir. 2019). "When material new matters are brought out on redirect examination," the Confrontation Clause "mandates that the opposing party be given the right of recross-examination on those new matters." *United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991). Watkins addressed Little's defense theory for the first time on redirect, yet the district court prohibited recross-examination.

Little consistently argued police did not adequately investigate other individuals with motive. ROA, Vol. I, at 761–64, 840–41; ROA, Vol. II, at 77–80. For example, Weatherford's drug dealing could have provided motive, as Officer Simmons testified he warned Weatherford to be careful with selling drugs. ROA, Vol. I, at 862.

Despite this focus on alternate suspects, the government never questioned Watkins about Little's defense theory on direct. ROA, Vol. I, at 502–57. Rather, for the first time on redirect, Watkins denied that Weatherford was a drug dealer. ROA, Vol. I, at 596. Although Little sought more questioning, the district court denied recross-examination. ROA, Vol. I, at 596–97. Failing to afford Little the "first opportunity" to assess Watkins's new assertion denied him of his "right of any cross-

examination as to that new matter." *United States v. Caudle*, 606 F.2d 451, 458 (4th Cir. 1979).

The government cannot show harmlessness beyond a reasonable doubt. *United States v. Russian*, 848 F.3d 1239, 1249 (10th Cir. 2017). By discrediting the defense theory, Watkins's assertion was "importan[t]" to "the prosecution's case." *United States v. Jeri*, 869 F.3d 1247, 1263 (11th Cir. 2017) (cleaned up). Without recross-examination, Little could not rehabilitate his theory by testing "the truthfulness, accuracy, and completeness" of her assertion. *Caudle*, 606 F.2d at 458. Little could not confront Watkins about her familiarity with other evidence that Weatherford sold drugs. ROA, Vol. I, at 862. The absence of adversarial testing "calls into question the ultimate integrity of the fact-finding process" and requires a new trial. *Riggi*, 951 F.2d at 1376 (cleaned up).

D. Erroneous admission of the rifle.

The district court erroneously denied exclusion of a rifle and scope that the government argued was the murder weapon. ROA, Vol. I, at 495, 731; ROA, Vol. I, at 891 (Exhibit 70); Trial Exhibits 46, 47, 48, 50.

The government did not establish relevancy of the rifle. Fed. R. Evid. 401, 402. There was not a rifle depicted in the surveillance videos that allegedly showed the killer running after Weatherford. Trial Exhibits 44-A, 45; ROA, Vol. I, at 931–32. The ballistics evidence demonstrated the bullet may have been fired from a Remington rifle or one of 42 other makes and models of guns. ROA, Vol. I, at 682–85. The district court even recognized "Remington rifles are not uncommon in Oklahoma," and therefore evidence of a bullet shot from a Remington rifle was insufficient to admit evidence concerning a separate apartment shooting the government speculated was Little. ROA, Vol. I, at 436 n.4; ROA Vol. II, at 22 (defense ballistics expert testifying that over eight million Remington 700 rifles have been manufactured).

Additionally, the government did not prove the rifle was seized from Little's home. The government admitted as a physical exhibit a rifle with a scope attached, while its ballistics expert testified. ROA, Vol. I, at 680. However, the expert could only conclude this was the rifle he analyzed and it "appears to be the same rifle" depicted in the government's photograph exhibits. ROA, Vol. I, at 678; ROA, Vol. I, at

786-87 (Brown testifying only about the photographs, not the actual rifle).

The rifle should have been excluded under Rule 403. Any minimal probative value was significantly outweighed by the risk of unfair prejudice. Allowing the government to admit and allege that the rifle was the murder weapon was unfairly prejudicial.

The government cannot show the error was harmless. It had no other forensic evidence tying Little to the shooting other than owning a rifle that may have been one of millions that could have shot Weatherford.

E. Erroneous admission of a bullet.

For similar reasons, the district court plainly erred in admitting the bullet the ballistics expert analyzed. ROA, Vol. I, at 891 (Exhibit 71). The government did not establish this was the bullet recovered from Weatherford. ROA, Vol. I, at 679–80, 692–75. This error affected Little's substantial rights and the fairness and integrity of the trial. Without evidence this bullet was recovered from Weatherford's body, the ballistics evidence failed to connect any firearm to the shooting. ROA, Vol. I, at 754–55; ROA, Vol. II, at 43, 46, 52, 88.

F. Erroneous admission of a handgun not alleged to be the murder weapon.

The district court plainly erred in admitting testimony and photographs of a handgun found in Little's truck. Trial Exhibit 49; ROA Vol. I, at 755. The government did not allege this handgun was the murder weapon. It therefore only inflamed the jury to find Little a violent person who carried a handgun in his car, which also implicates Rule 404(b)'s prohibition on other act evidence. *Supra*, at 40.

This plain error violated Little's substantial rights. In closing, the government relied on the handgun to argue Little had a "murder fantasy" for killing Watkins's boyfriends. ROA, Vol. II, at 45–46. Yet the evidence that Little shot Weatherford was weak and circumstantial. *Infra*, 68–69. This error seriously affected the fairness, integrity, or public reputation of the trial because criminal convictions should firmly rest on evidence that the defendant committed the charged offense, and not because the jury was persuaded that the defendant was generally a violent person.

G. Erroneous admission of Watkins's hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *United States v. Woody*, 45 F.4th 1166, 1178 (10th Cir. 2022). Hearsay is inadmissible unless it falls under a limited exception. *United States v. Lovato*, 950 F.3d 1337, 1341 (10th Cir. 2020). The district court permitted Watkins to testify about prejudicial out-of-court statements.

First, Watkins provided testimony that bolstered assertions about Little's jealousy. The district court admitted testimony that Watkins told Little she wanted to be with Weatherford for the rest of her life as non-hearsay for its effect on Little as the listener. ROA, Vol. I, at 489, 495, 546–47, 595–96. But Watkins never testified to Little's reaction. *See United States v. Graham*, 47 F.4th 561, 567 (7th Cir. 2022) ("A statement is offered to show an effect on the listener only if the listener heard and reacted to the statement."). Nor was "the actual use of the statement at trial to demonstrate [Little's] response." *Id.* (cleaned up). The government instead asked Watkins what was said and why she had that conversation. ROA, Vol. I, at 546–47. This "open-ended"

questioning "invited the jury to accept as true" Watkins's telling of the conversation. *Graham*, 47 F.4th at 567–68.

The admission of this testimony was not harmless. The government used the conversation's close temporal proximity to the crime to argue Little was jealous of Weatherford. ROA, Vol. II, at 52; ROA, Vol. I, at 595–96. The government also used this statement to rebut arguments that Watkins was romantically involved with Mitchell, who had a motive as he was dating Watkins but never investigated. ROA, Vol. I, at 582–84; ROA, Vol. II, at 56, 77.

Second, Watkins testified to accusations in messages she sent Little. ROA, Vol. I, at 538–46; Trial Exhibits 60–62. She recounted a prior message where she accused Little of trying to sabotage her relationship with Weatherford. ROA, Vol. I, at 541–42; Trial Exhibit 60 at 2. Watkins also portrayed Little as a bad liar and claimed they would never be in a relationship. Trial Exhibit 60 at 2.

The admission of this testimony was plainly erroneous. Hearsay includes a witness's prior written messages. *United States v. Caraway*, 534 F.3d 1290, 1295 (10th Cir. 2008). The government never identified an exception and relied on the truth of Watkins's allegations to argue

Little "can't lie properly but he sure does lie a lot," and to claim Little knew he could not be in a relationship with Watkins. ROA, Vol. II, at 40–41. Because the statements undermined Little's credibility and bolstered the theory of jealousy, the admission of this evidence violated his substantial rights. *See Wolfname*, 835 F.3d at 1222.

Third, Watkins testified—contrary to a pretrial order—about her statement to police that she believed Little committed the shooting. Before trial, the court excluded the statement as hearsay and speculative. ROA, Vol. I, at 464–65, 495. Yet at trial, the government elicited what was excluded—Watkins told the police she was unaware of anyone who wanted to hurt Weatherford other than Little. ROA, Vol. I, at 556. This statement was highly prejudicial. *United States v. Kizzee*, 877 F.3d 650, 659 (5th Cir. 2017) ("The more directly an out-of-court statement implicates the defendant, the greater the danger of prejudice." (cleaned up)).

These hearsay violations allowed the government to rely on unreliable allegations, requiring a new trial.

III. Jury instruction errors require a new trial.

A. Standards of Review

This Court reviews jury instructions to assess "whether the jury, considering the instructions as a whole, was misled." *United States v. Garcia*, 74 F.4th 1073, 1123 (10th Cir. 2023) (cleaned up). If an objection was made, this Court reviews de novo. *Id.* Absent an objection, the instruction is reviewed "de novo for plain error." *United States v. Visinaiz*, 428 F.3d 1300, 1308 (10th Cir. 2005).

B. Violation of procedural rules for settling jury instructions.

The district court violated the rule governing when to instruct the jury. Rather than provide final instructions "before or after the [closing] arguments are completed, or at both times," Fed. R. Crim. P. 30, the court gave the jury a copy of the proposed instructions the day before the defense presented its case and before soliciting objections from the parties. ROA, Vol. II, at 13–14. Although the court later took objections, ROA, Vol. II, at 7–11, that opportunity was meaningless because the jury was already effectively instructed. Given the erroneous procedure employed, this Court should review de novo. *See United States v.*

Middagh, 594 F.3d 1291, 1295 (10th Cir. 2010) (reviewing de novo "[w]hen a party had no opportunity to raise the issue" (citing Fed. R. Crim. P. 51(b))).

C. Prior act instruction failed to limit the permissible purposes.

A prior act limiting instruction "must caution the jury to consider the evidence only for the limited purposes for which it is admitted and not as probative of bad character or propensity to commit the charged crime." *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006). "'Laundry list' limiting instructions that simply recite all of the purposes listed by Rule 404(b) are disapproved because they do not adequately advise the jury of the limited purposes for which the evidence was admitted." *United States v. Hardwell*, 80 F.3d 1471, 1491 (10th Cir.), *on reh'g in part*, 88 F.3d 897 (10th Cir. 1996).

The prior act evidence was admitted only for motive, but the limiting instruction told the jury it could consider that evidence for "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, and for no other purpose." ROA, Vol. I, at 440 n.7, 880. A court errs "when relying on a clearly erroneous

understanding of the record." *United States v. Tony*, 948 F.3d 1259, 1261 (10th Cir. 2020). Failure to tailor the limiting instruction to the sole purpose for which the evidence was admitted allowed the jury to rely on that evidence for improper purposes. ROA, Vol. I, at 440 n.7. Identity was disputed here. Instructing the jury it could consider the prior act evidence to find that Little committed the offense therefore prejudiced Little.

D. Failure to give theory of defense instruction.

Little argued that mere presence and highly circumstantial evidence failed to establish guilt beyond a reasonable doubt. Little requested a defense instruction consistent with this theory. ROA, Vol. I, at 453 ("Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed the crimes charged in this case.").

The district court erred in failing to provide this instruction. "Criminal defendants are entitled to jury instructions upon their theory of defense provided there is evidentiary and legal support." *United States v. Gallant*, 537 F.3d 1202, 1233 (10th Cir. 2008) (cleaned up).

The defense instruction was warranted here, especially given the government's misuse of prior act evidence to make up for its lack of proof that Little committed the shooting, rather than being in the wrong place at the wrong time. The erroneous admission of the prior act evidence was compounded by the instruction allowing jurors to consider that evidence for identity. Therefore, the instructions were otherwise erroneous and inadequate for Little's defense, as further established below.

E. Erroneous reasonable doubt instruction.

The presumption of innocence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) (cleaned up). Thus, the beyond-a-reasonable-doubt burden "plays a vital role in the American scheme of criminal procedure." *In re Winship*, 397 U.S. 358, 363 (1970). "A misstatement of law that affirmatively negates a constitutional right or principle frequently results in a serious infringement of a defendant's constitutional rights." *United States v. Starks*, 34 F.4th 1142, 1162 (10th Cir. 2022) (cleaned up).

The reasonable doubt instruction diluted the presumption of innocence and shifted the burden to Little. The instruction, read twice, stated the jury should not convict if there is a "real possibility that he is not guilty." ROA, Vol. I, at 455–56, 747–48, 874. This tracks the model, but model instructions "are not binding" and "merely intended to serve as a guide." *United States v. Freeman*, 70 F.4th 1265, 1280 n.13 (10th Cir. 2023). The instruction shifted the burden to Little to show a "real possibility" he was not guilty, rather than the government overcoming all reasonable doubt.

F. Prejudicial credibility instruction.

The district court's influence on the jury "is necessarily and properly of great weight and [its] lightest word or intimation is received with deference, and may prove controlling." *Quercia v. United States*, 289 U.S. 466, 470 (1933) (cleaned up). The court's "privilege of comment" "to give appropriate assistance to the jury is too important to be left without safeguards against abuses." *Id.* The court must "use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided." *Id.* (cleaned up).

The credibility weighing instruction favored the government's evidence. The model instruction, which was read twice, stated: "You should keep in mind that innocent misrecollection—like failure of recollection—is not uncommon." ROA, Vol I, at 749-50, 879. And the instruction favored the government, as the government's witnesses failed to recall important information. ROA, Vol. I, at 842–43 (Brown failing to recall that the night before the shooting Weatherford got a text saying "click click" from an Andrew Gonzalez); ROA Vol. I, at 560 (Watkins told police she has a "shitty memory"); ROA, Vol. I, at 525–26, 528, 530, 538, 558–59, 572–73, 588–89 (Watkins failing to recall: information concerning the prior act evidence; a conversation she had with Brown; whether she discussed with Brown whether Little had ever pulled a gun on her boyfriends; and that Little called her when he was near her apartment the day of the shooting). The instructions misled the jury's assessment of the evidence to the government's benefit.

G. The errors meet plain error review.

Even under plain error review, this Court should reverse. A plain error affects substantial rights when there is a reasonable probability that but for the error the result of the proceeding would have been

different. *Starks*, 34 F.4th at 1157. This requires only a probability sufficient to undermine confidence in the outcome. *Id.* Thus, reversal is warranted when the error "concerns a principal element of the defense" or when the government's evidence was "not overwhelming or uncontroverted." *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998); *United States v. Samora*, 954 F.3d 1286, 1295 (10th Cir. 2020).

The limiting instruction error went to the central defense—identity. Same for failing to give the theory of defense instruction. And the government's evidence was not overwhelming. Where the evidence is weak and circumstantial, any instruction that erroneously placed a thumb on the scale for the government was prejudicial, rendered Little's trial unfair, and constituted a miscarriage of justice. *Starks*, 34 F.4th at 1157. A new trial is warranted.

IV. The government plainly committed misconduct during closing argument.

A. Standard of Review

This Court reviews unpreserved claims of prosecutorial misconduct for plain error and reverses if: (1) "the prosecutor's statement is plainly improper; and (2) the defendant demonstrates that

the improper statement affected his or her substantial rights." *United States v. Christy*, 916 F.3d 814, 826–27 (10th Cir. 2019) (cleaned up).

B. Several instances of misconduct violated due process.

Prosecutorial misconduct violates due process. *United States v. Ainesworth*, 716 F.2d 769, 771 (10th Cir. 1983). Misconduct during closing argument is worrisome, as "no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence." *Herring v. New York*, 422 U.S. 853, 862 (1975). Here, the government speculated about favorable facts not in evidence, vouched for an important witness, and expressed a personal opinion about Little's guilt.

1. Repeated references to prejudicial facts not in evidence.

Prosecutors act improperly "when they refer to matters not in the evidence or distort the record by misstating the evidence." *United States v. Hammers*, 942 F.3d 1001, 1014 (10th Cir. 2019). The government thrice introduced extra-record prejudicial facts.

First, the government stated multiple people told the police Little committed the murder, in contravention of the evidence. Brown testified

that "[t]hree or four witnesses" went to the police station, but never described what they said. ROA, Vol. I, at 636–37. The only person who speculated about Little was Watkins, but even she was equivocal. ROA, Vol. I, at 555–556, 570–73. Yet in closing, the government asserted that "all" of the people who volunteered information said "[l]ook at Justin Little." ROA, Vol. II, at 51–52. The government proclaimed Watkins, "along with everyone else the police talked to said Justin Little did it . . . they all said in unison, look at Justin Little." ROA, Vol. II, at 88. These statements invented prejudicial "facts not proven," violating due process. *United States v. Latimer*, 511 F.2d 498, 502–03 (10th Cir. 1975).

Second, the government violated the Rule 404(b) order by referencing prior acts evidence not presented. The government tried to establish a pattern of Little interfering with Watkins's relationships. ROA, Vol. I, at 40–52. But because several incidents involved "unsubstantiated suspicions," the court limited the government to incidents involving three of Watkins' ex-boyfriends. ROA, Vol. I, at 432–440.

The government's closing argument went beyond these three. The government proclaimed that "every single time [Watkins] tried to have a relationship . . . Little found a way to interfere with it in some way." ROA, Vol. II, at 37–39. There was no evidence of interference with any relationships beyond the three. Watkins acknowledged on cross-examination she "had a number of other boyfriends" in the three years after leaving Little. ROA, Vol. I, at 568–69. "Given the centrality of the government's misstatements" to its theory of jealousy, a new trial is required. *United States v. Watson*, 171 F.3d 695, 701–02 (D.C. Cir. 1999).

Third, the government speculated about extra-record facts to connect Little to the scene. The government showed a surveillance video of Weatherford moments before his death where he was followed by an individual in dark clothing. ROA, Vol. I, at 808–11; Trial Exhibits 44A and 45. But when police interviewed Little, he had a light-colored shirt and police did not recover a dark jacket from Little's truck or home. ROA, Vol. I, at 830–31.

Little highlighted this hole in the evidence. ROA, Vol. II, at 71, 74. The government dismissed its evidentiary gap by speculating that Little

"[c]ould . . . have had a dark colored jacket." ROA, Vol. II, at 87; ROA, Vol. I, at 850–51 (court prohibiting Brown from speculating on the matter). Because this speculation implicated crucial evidence from moments before the crime, this misconduct requires a new trial. *Latimer*, 511 F.2d at 502–03.

2. Vouching for the credibility of its witness.

"Vouching or an assurance by the prosecuting attorney of the credibility of a government witness through personal knowledge or by other information outside of the testimony" is misconduct. *United States v. Coulter*, 57 F.4th 1168, 1186 (10th Cir. 2023) (cleaned up). Vouching "may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Starks*, 34 F.4th at 1173 (cleaned up).

The prosecutor assured the jury of Justin Lackey's credibility. Lackey testified that though he did not witness the incident or report it, in 2017, Little purportedly cut the brake lines to Lackey's car. ROA, Vol. I, at 659–64. The prosecutor referenced this testimony to argue Little's propensity to interfere with Watkins' relationships. ROA, Vol. II, at 37–40, 82. After Little argued it was speculative, ROA, Vol. II, at

60, 75, the prosecutor rehabilitated Lackey by proclaiming he "ha[d] no dog in this fight" and therefore told the truth. ROA, Vol. II, at 82–83.

The prosecutor's assurance placed "the imprimatur of the Government" on Lackey's credibility. *Starks*, 34 F.4th at 1173. It also misstated the record. It let the jury believe Lackey lacked motivation to exaggerate the incident. Lackey testified about his animosity towards Little because Little wanted Lackey to end his relationship with Watkins. ROA, Vol. I, at 658–60. This distortion of the record requires a new trial. *Hammers*, 942 F.3d at 1014.

3. Improper comments on Little's guilt.

A prosecutor cannot provide personal opinion about a defendant's guilt. *United States v. Meienberg*, 263 F.3d 1177, 1179–80 (10th Cir. 2001). Yet here, the prosecutor twice gave his theory of what innocent people do.

First, in describing Little's interrogation, the prosecutor claimed Little lied about lie detector results, which—in his view—is not "what an innocent person does." ROA, Vol. II, at 53. Second, when speaking about Little's interrogation behavior broadly, the prosecutor asserted that "none of [it was] what an innocent person does." ROA, Vol. II, at

47. Because these statements revealed the prosecutor's experience with innocent behavior, they gave his personal belief of Little's guilt. This misconduct requires a new trial.

4. The misconduct amounts to plain error.

The misconduct affected Little's substantial rights. The government's case was weak and circumstantial. *Infra*, at 68–69. The misconduct compensated for these evidentiary gaps. First, the misstatements about Lackey's credibility and Little's history with Watkins's relationships bolstered the theory that Little was jealous. Second, the government speculated about clothing connecting Little to the scene. Third, the government "induce[d] the jury to trust the Government's" beliefs about guilt, *Starks*, 34 F.4th at 1173, and inflated the number of individuals who implicated Little.

Although the court said that counsel's arguments were not evidence, ROA, Vol. II, at 30, "the court's curative instruction was not strong enough to mitigate the harm." *Starks*, 34 F.4th at 1142 (cleaned up). The "consistent and repeated misrepresentations" went to motive, proximity to the crime, and Little's behavior. *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974). And "the closeness of the case" demonstrates

"that a conviction was far from assured." *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1197 (9th Cir. 2015). "[T]he cumulative prejudicial effects" of these errors thus "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Starks*, 34 F.4th at 1175 (cleaned up). A new trial is required.

V. These errors cumulatively require a new trial.

When assessing cumulative error, this Court aggregates the individual errors and analyzes whether their cumulative effect is such that they collectively cannot be deemed harmless. *Starks*, 34 F.4th at 1169. When there are both preserved and unpreserved errors, this Court reviews the preserved errors as a group, and if those errors are collectively harmful, reversal is required. *Id.* If they are not, the Court reviews the preserved errors with the unpreserved errors and reverses if the errors collectively affected the defendant's substantial right. *Id.*

Cumulative error is shown here. The preserved issues include the erroneously admitted (1) interrogation statements, rifle, and other fruits of the state police's illegal actions and (2) inflammatory and dissimilar prior bad act evidence and hearsay from Watkins, whom Little could not fully cross examine. These errors collectively are not

harmless because the evidence "fortified the proof regarding the 'main issue,'"—whether Little shot Weatherford. *Starks*, 34 F.4th at 1172. And combined with the plain evidentiary errors concerning the rifle, bullet, and handgun, jury instruction errors, and prosecutorial misconduct, the errors affected Little's substantial rights. They undermine confidence in the verdict, as the remaining weak circumstantial evidence consisted only of surveillance videos showing a white truck driving around the area. *Starks*, 34 F.4th at 1156–57 (reversing based on two unpreserved misconduct errors and a preserved evidentiary error that cumulatively were not harmless); *supra*, at 20.

Regardless, the substance of these errors compels the exercise of this Court's discretion. "At issue here, in substantial part, are errors of constitutional magnitude." *Starks*, 34 F.4th at 1175. The "failure to notice and correct the constitutional error would impugn the fairness, integrity, or public reputation of judicial proceedings." *Id.* A new trial is warranted.

VI. The evidence was insufficient to convict.

The district court erroneously denied a judgment of acquittal. ROA, Vol. I, at 708–09; ROA, Vol. II, at 25. This Court reviews

sufficiency of the evidence de novo, taking the evidence and reasonable inferences in the light most favorable to the government to determine whether a reasonable jury could find the defendant guilty. *United States v. Rufai*, 732 F.3d 1175, 1188 (10th Cir. 2013). The evidence "must be substantial," and this Court will not uphold a conviction "obtained by nothing more than piling inference upon inference." *Id.* (cleaned up).

The government presented insufficient evidence that Little shot Weatherford. Little did not confess and admitted only he was in the area and heard a shot. Trial Exhibit 32, at 30:30–31:10. The government did not test his rifle for gunshot residue. ROA, Vol. I, at 833–34. The rifle was inoperable by lacking a bolt when seized, and police did not recover the bolt. ROA, Vol. I, at 680. The ballistics evidence demonstrated that the bullet could have come from millions of commonly-owned rifle models. ROA, Vol. I, at 436 n.4; ROA Vol. II, at 22. And the government's inflammatory but dissimilar prior act evidence could not establish identity—it allowed only for inferring that because Little was jealous years ago, he was jealous now and shot Weatherford. *Supra*, at 37–44. Watkins admitted Little never

threatened nor physically harmed anyone. ROA, Vol. I, at 594–95. And police failed to investigate other individuals who had motive to harm Weatherford. ROA, Vol. I, at 838–841. This Court should vacate the conviction.

VII. Mandatory life imprisonment here is unconstitutional.

The prohibition on mandatory life sentences should extend to Little because he was 24 at the time of the offense and neuroscience now demonstrates that the adolescent brain develops until age 25 or 26. ROA, Vol. I, at 900–06; *Miller v. Alabama*, 567 U.S. 460, 473–80, 489 (2012) (mandatory life without parole sentences for individuals under 18 at the time of the offense is unconstitutional because neuroscience demonstrated juveniles are more impulsive and thus less morally culpable); *but see United States v. Williston*, 862 F.3d 1023 (10th Cir. 2017). Little preserves the issue for further review.

Conclusion

This Court should vacate and remand for new trial.

Statement in Support of Oral Argument

This appeal raises numerous issues implicating important jurisdictional and constitutional principles. Oral argument would therefore aid decision in this case.

Dated: December 15, 2023.

Respectfully submitted,

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Cristen C. Thayer
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Certificate of Compliance

I hereby certify that, to the best of my knowledge and belief, formed after a reasonable inquiry, this brief is proportionally spaced and contains 12,931 words and therefore complies with the applicable type-volume limitations.

/s/Cristen C. Thayer
Cristen C. Thayer
Assistant Federal Public Defender

Attachment A

Order Denying Motion to Suppress for Lack of Jurisdiction

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JUSTIN DALE LITTLE,** **Defendant.**	**Case No. 21-CR-162-JFH**

OPINION AND ORDER

Before the Court is a motion to suppress evidence based on the state's lack of jurisdictional authority to investigate and prosecute ("Motion") filed by Defendant Justin Dale Little ("Defendant"). Dkt. No. 58.[1] The United States of America ("Government") opposes the Motion. Dkt. No. 66. For the reasons stated, the Motion is DENIED.

Defendant is charged with one count of first degree murder in Indian country relating to events which occurred on or about April 22, 2018. Dkt. No. 2. He argues that Oklahoma state investigators lacked jurisdiction to investigate or prosecute him because he is an Indian man and the alleged offense occurred in Indian country. Dkt. No. 58 at 1.

In 2017, the Tenth Circuit decided *Murphy v. Royal*, holding that Congress had not disestablished the Muscogee (Creek) Nation and Oklahoma state courts lacked jurisdiction to prosecute Indians on tribal land. 875 F.3d 896 (10th Cir. 2017). However, the Tenth Circuit stayed

[1] Two other motions to suppress remain pending: one on Fourth Amendment grounds and one on Fifth Amendment grounds. *See* Dkt. No. 54; Dkt. No. 56. The Court has set an evidentiary hearing on these motions. *See* Dkt. No. 60. The Court notes that defense counsel's filing of three motions to suppress violated the Court's scheduling order, which states one motion to suppress per defendant is allowed without leave of court. Dkt. No. 49 at 1. The Court recognizes that the case was recently reassigned and that defense counsel are from out of state. However, it expects all attorneys, regardless of home district, to familiarize themselves with and abide by the Court's scheduling orders in their Northern District cases.

issuance of its mandate pending appeal to the Supreme Court. *See Murphy v. Royal*, Case Nos. 07-7068 & 15-7041, Document No. 01019902688 (10th Cir. Nov. 16, 2017). "As a result, that decision lacked the force of law until the Supreme Court affirmed it in July 2020." *United States v. Patterson*, Case No. CR-20-71-RAW, 2021 WL 633022, at *5 (E.D. Okla. Feb. 18, 2021) (citing *Sharp v. Murphy*, --- U.S. ---, 140 S. Ct. 2412, 207 L.Ed.2d 1043 (2020) (per curiam)). In July 2020, the Supreme Court decided *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), and held that while Congress had diminished the Creek reservation in Eastern Oklahoma, it had never formally disestablished it. This imposed federal "jurisdiction over the apprehension and prosecution of major crimes by or against Indians in a vastly expanded Indian Country." *State ex rel. Matloff v. Wallace*, 497 P.3d 686, 692 (Okla. Crim. App. 2021). *McGirt*'s holding was later extended to other reservations as well.

Defendant argues that the Tenth Circuit's *Murphy* decision—issued in 2017, before the 2018 charged conduct in this case—requires suppression of all fruits of Defendant's arrest and warrants. Dkt. No. 58. However, courts have repeatedly rejected this argument. In *Patterson*, Judge Ronald A. White of the Eastern District of Oklahoma explained that *Murphy* lacked the force of law until after *McGirt* was decided. 2021 WL 633022 at *5. Judge White also noted that police officers are not attorneys and "even nine of this country's pre-eminent jurists were sharply divided on the question of whether Congress disestablished the Muscogee (Creek) Nation Reservation." *Id.* at *4. He wrote:

> Put bluntly, Defendant asks the court to declare that [law enforcement] acted in willful ignorance of the law even though the State of Oklahoma ha[d], for the past century, investigated, arrested, prosecuted, and convicted Native Americans for crimes on the lands in question. [Law enforcement] certainly ha[d] every right to rely on the regular and consistent practices of not just [their] own agency, or even other agencies, but the practices of courts throughout the region in exercising jurisdiction in the form of search warrants,

> arrest warrants, and criminal proceedings. To hold that [they were] unreasonable in relying on that history is no different than penalizing an officer who relies in good faith on the incorrect findings of a neutral magistrate with respect to a warrant.

Id. (denying motion to suppress evidence of a 2019 post-*Murphy*, pre-*McGirt* state investigation). This same conclusion has been reached by other judges in both the Northern and Eastern Districts of Oklahoma—including the undersigned. *See United States v. Pemberton*, Dkt. No. 47, Case No. 21-CR-012-JFH (E.D. Okla. Aug. 20, 2021) (Heil, J.); *United States v. Bailey*, No. 20-CR-0188-CVE, 2021 WL 3161550, at *3 (N.D. Okla. July 26, 2021) (Eagan, J.); *United States v. Hamett*, 535 F. Supp. 3d 1133, 1140 (N.D. Okla. 2021) (Eagan, J.); *cf. United States v. Budder*, --- F. Supp. 3d ---, No. 6:21-CR-00099-DCJ, 2022 WL 1948762, at *7 (E.D. Okla. Apr. 29, 2022) (Joseph, J.) (borrowing from suppression analysis in another context and explaining "Because, prior to *McGirt*, all parties were operating under the belief that Oklahoma had jurisdiction over these areas, Oklahoma federal courts have uniformly refused to suppress evidence gathered by police officers reasonably acting under that belief.").

Defendant advances no new arguments beyond those already considered in *Patterson*, *Pemberton*, *Bailey*, and *Hamett.* Because the Tenth Circuit's 2017 *Murphy* decision did not have force of law until after the Supreme Court's 2020 *McGirt* decision, exclusion of Defendant's 2018 state arrest and related investigation is not warranted.

IT IS THEREFORE ORDERED that Defendant's motion to suppress evidence based on the state's lack of jurisdictional authority to investigate and prosecute [Dkt. No. 58] is DENIED.

DATED this 24th day of October 2022.

JOHN F. HEIL, III
UNITED STATES DISTRICT COURT

Attachment B

Order Denying Fourth and Fifth Amendment Suppression Motions

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JUSTIN DALE LITTLE,** **Defendant.**	**Case No. 21-CR-162-JFH**

OPINION AND ORDER

Before the Court are two (2) motions to suppress evidence filed by Defendant Justin Dale Little ("Defendant"): one on Fourth Amendment grounds and one on Fifth Amendment grounds. Dkt. No. 54; Dkt. No. 56. The United States of America ("Government") opposes the motions. Dkt. No. 68; Dkt. No. 64. The Court held a hearing on the motions on October 26, 2022. For the reasons stated below, both motions are DENIED.

STANDARD

A suppression motion under Federal Rule of Criminal Procedure 12(b)(3)(C) is meant to "determine preliminarily the admissibility of evidence allegedly obtained in violation of defendant's rights under the Fourth and Fifth Amendments." *United States v. Merritt*, 695 F.2d 1263, 1269 (10th Cir. 1982). The Federal Rules of Evidence generally do not apply to suppression issues. *Id.* (citing Fed. R. Evid. 104(a)). "On a motion to suppress, the district court must assess the credibility of witnesses and determine the weight to give to the evidence presented; the inferences the district court draws from that evidence and testimony are entirely within its discretion." *United States v. Goebel*, 959 F.3d 1259, 1265 (10th Cir. 2020). "The defendant has the burden of showing the Fourth [or Fifth] Amendment was implicated, while the government has the burden of proving its warrantless actions were justified." *Id.* (citing *United States v.*

Carhee, 27 F.3d 1493, 1496 (10th Cir. 1994); *United States v. Simpson*, 609 F.3d 1140, 1146 (10th Cir. 2010)). Both these burdens require proof by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974). The Court must state essential factual findings on the record. Fed. R. Crim. P. 12(d).

BACKGROUND[1]

Defendant is charged with one count of first degree murder in the killing of Johnathon Weatherford[2] ("Weatherford") on April 22, 2018. Dkt. No. 2. Weatherford was found by a bystander laying on train tracks in Jenks, Oklahoma with a gunshot to the back around noon that day. The bystander called 911, which dispatched Jenks Police Department ("JPD") and other emergency responders. JPD Detective Melissa Brown ("Brown") arrived at the scene around 12:09 p.m. and took the lead on the investigation. Dkt. No. 55-1 at 2.

The morning of the charged conduct, Weatherford had been at a residence with Hannah Watkins ("Watkins"), who had romantic history with each Weatherford and Defendant. Watkins and Defendant have a son ("E.L.") together and had legally married two (2) days before the charged conduct, as Watkins believed the marriage was necessary for their son to receive full benefits as Defendant's dependent. The morning of the charged conduct, Watkins asked Weatherford to leave the residence before Defendant brought E.L. to her. Watkins did not witness the shooting.

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[1] The evidentiary basis for the background recapped herein includes the exhibits to Dkt. No. 54 (filed as Dkt. No. 55 and Dkt. No. 62) and Dkt. No. 56 (filed as Dkt. No. 57 and Dkt. No. 61), which the Government stipulated to at hearing, as well as the testimony of Melissa Brown at the October 26, 2022 hearing.

[2] The indictment spells the alleged victim's first name as "Jonathan." The Court adopts the spelling used in reports issued by the Jenks Police Department and the Office of the Chief Medical Examiner.

During the afternoon and evening of April 22, 2018, patrol officers canvased the area near where Weatherford was found, searching for witnesses and video surveillance. Dkt. No. 55-1 at 3. Witnesses described a white Chevrolet Silverado pickup truck with a sticker of multiple firearms and the word "family," which matched the description of Defendant's vehicle. Brown testified that JPD was able to review video surveillance that day showing a white Chevrolet Silverado pickup truck that drove down the road, around the corner, and to the location of the shooting. She explained on cross-examination that JPD reviewed these videos during the day of April 22, 2018 but that it was only able to obtain still pictures, not digital copies of the full videos, at the time. *See also* Dkt. No. 55-1 at 4 (explaining that recordings from Jenks Public Schools cameras needed a third party to access them). Officers obtained physical copies of several videos in the days after the shooting. *Id.*

Watkins was interviewed several times. During the first interview—which occurred on the afternoon of the charged conduct and was recorded on Brown's body camera—she told Brown that she was not aware of threats between Defendant and Weatherford.[3] However, she also told Brown, "I feel like he's the only person that could have done this—I mean, not could have; I mean, it could have been any other person, but I feel like that's not likely" because Defendant was the only person Watkins knew who was "crazy enough" and "had enough motive" to "flip some shit." Watkins told Brown that she was concerned for E.L's safety with Defendant because she "heavily believe[d]" Defendant had shot Weatherford. Watkins told Brown that Defendant owned multiple firearms and always carried a 9mm handgun with him.

[3] During later interviews, Watkins told Brown that Defendant "had made threats to Weatherford in the past, near the end of January or early February and that many people knew of those threats." Dkt. No. 55-1 at 3.

Brown testified that although Watkins did not report threats between Defendant and Weatherford on the day of the charged conduct, other people did. She stated multiple people came to the JPD station after the news of the shooting broke, with three or four people reporting that there had been past violence or threats between Defendant and Weatherford. Multiple search warrants state that Weatherford's ex-girlfriend, Jana Robinson ("Robinson"), came to JPD on April 22, 2018 around 7:00 p.m. and reported that Defendant had previously made death threats to Weatherford, including some through social media. Dkt. No. 55-5 at 3, 6-7, 10, 15, 19, 26. One search warrant states another witness, Landon Ellenburg ("Ellenburg"), told officers at an unspecified time on April 22, 2018 that "messages . . . involving conflict" between Defendant and Weatherford had been exchanged on Facebook Messenger and Snapchat. *Id.* at 26. Brown also testified that Ellenburg reported prior incidents between Defendant and Weatherford.

During Watkins' April 22, 2018 interview, Brown asked her if Defendant would come to Watkins' apartment if Watkins called him. Watkins said she believed he would. In the evening of April 22, 2018, around 8:00 p.m., Watkins called Defendant and asked him to come visit her. Defendant drove a red Toyota Camry sedan owned by his mother, Sherri Bear ("Bear"), rather than his white Chevrolet Silverado pickup truck. When he arrived outside Watkins' front door, body camera footage shows several JPD officers approached him with firearms drawn, told him to lay down, and then told him to put his hands out and cross his feet. Brown approached and handcuffed Defendant, then helped him to stand and walked him toward a cluster of squad cars.

During the walk from Watkins' apartment to a squad car, Brown asked Defendant if he had things in his pockets and why he did not drive his car. Defendant said he had gotten a flat tire and that his truck had gotten stuck when he had gone to Edna, Oklahoma, that morning. Brown then told Defendant he was being detained in Weatherford's homicide, to which Defendant responded,

"What?" Brown repeated that Defendant was being detained in Weatherford's homicide, and Defendant asked, "Was he killed?" When Brown answered affirmatively, Defendant asked when and what time. Brown responded that they would talk when they got to the JPD station and that other officers were coming to pat him down. Defendant said he had left his jacket and phone somewhere and asked officers to get them, which Brown said they would. JPD Officer Nicholas Chandlee ("Chandlee") then patted down Defendant, who informed Chandlee that there were keys in his shorts pocket along with dog tags around his neck.

At one point in the video, Brown says that she wanted to "take" the red Toyota sedan Defendant drove to Watkins' apartment even though he had not driven the sedan that morning, as she believed the weapon from the shooting may have been in it based on Watkins' statement that Defendant always carried a gun with him. Several officers then surrounded the vehicle and located a cell phone in plain sight. They retrieved the phone and Brown handed it to Chandlee, who made a frustrated noise after discovering the phone required a "fingerprint pattern" to unlock it. Chandlee then said that he was going to take the phone to Defendant to see if he would put it in airplane mode, making air quotes as he said, "so that 'the battery wouldn't die'" and remarking that that would yield Defendant's pattern or passcode. Chandlee then approached Defendant, who was seated in a squad car. When Chandlee asked Defendant if the phone was his, Defendant replied, "Yes. Need the passcode?" Chandlee responded, "Yeah, I was gonna put it in airplane mode for you so that the battery wouldn't die." Chandlee offered Defendant the option to "swipe" it or have Chandlee swipe it, and Defendant volunteered the pattern to unlock the phone.

After JPD transported Defendant to its station, Brown and Officer Jason Weis ("Weis") placed him in an office with a round table around 9:30 p.m. Brown immediately mirandized Defendant, reading his rights to him and then presenting him with a written waiver, which he

signed. Brown asked Defendant if he wished to talk to them right now, to which Defendant said, "I just wanna know what's all goin' on." Det. Brown then told Defendant that he could tell them he didn't want to answer questions at any time. Brown and Weis questioned Defendant for approximately forty-three (43) minutes. Defendant gave several conflicting stories, discussed Watkins' various past boyfriends, and denied being acquainted with Weatherford. At one point, he told the officers he thought that an ex-girlfriend of the alleged victim had put a hit on Weatherford. Defendant denied driving his pickup truck to Jenks, saying it had already gotten stuck and that he was driving his mother's car. He also repeatedly denied shooting Weatherford. After approximately forty-three (43) minutes, the officers left Defendant alone in the room for almost thirty (30) minutes.

When they returned, Brown and Weis were more confrontational in their questions than before. Brown told Defendant she knew Defendant was the one who shot Weatherford. In response, Defendant asked if they had him on video and, when Brown said yes, he asked to see the video. Defendant also continued to deny that he drove his truck to Jenks. Defendant repeatedly requested the surveillance video and wanted to review the video with Brown and Weis. He then changed his story, admitting he did drive his truck the first time he went to Jenks that day and admitting that he saw Weatherford near the tracks. Defendant told Brown and Weis that he was going to confront Weatherford about taking care of E.L. during Defendant's upcoming deployment, but he changed his mind. Defendant also made conflicting statements about how long or well he knew Weatherford.

Toward the end of the recording, Weis and Defendant raised their voices with each other. Defendant reached across more than half the table and pointed at something on Weis' notepad. Weis brushed Defendant's hand back, which caused Defendant to immediately recoil and say,

"Please don't touch me." When Weis asked why, Defendant said he felt "a little bit threatened right now," and Weis immediately apologized. The interview concluded approximately two (2) hours after it initially began.

Later in the evening of April 22, 2018, Brown visited Bear's home, where Defendant had been living. Bear confirmed that Defendant drove his pickup truck to Jenks that morning. When Brown asked if there were guns in the residence, Bear said she had some and that Defendant had some "in the living room" because they only had one bedroom. Brown asked Bear if she could show them the guns. After they entered the living room, Brown asked Bear if the living room was where Defendant and E.L. slept and Bear said yes before pointing out several firearms she said belonged to Defendant. Brown also asked Bear if Bear came into the living room to watch television, to which Bear said, "Eh, sometimes, yeah."

Brown questioned Defendant again on the morning of April 23, 2018. Chandlee, rather than Weis, sat in on this second interview. At the beginning of the interview, Brown told Defendant that his *Miranda* rights still stood. She then asked Defendant if he still wanted to talk to them. Defendant replied, "Yeah, I can still talk to you. I wanted to talk to a lawyer—I just, wanted to see where I stand at right now." Brown then gave a summary of the case and theory so far and Defendant actively participated in the conversation.

The April 23, 2018 interview included questions about details, such as places where Defendant was parked, where cameras were located, what roads he drove, and what his timeline was like. Defendant was calm and level-headed throughout the interview. He requested to watch surveillance video again. Brown tells Defendant at one point that they were "bluffin' him a little bit" the night before. Throughout the interview, Brown told Defendant that it looked likely that he will be booked on and charged with first degree murder. She asked him for mitigating

information that would support a lesser booking or a lesser charge, which would potentially carry a lighter sentence. Brown expressed regret at the idea of Defendant and his son being separated indefinitely if he was booked on and later convicted of first degree murder, but her references to Defendant's son and Defendant's responses were made in even tones of voice with no particular emphasis or emotion distinct from the overall conversation.

Approximately an hour into the April 23, 2018 interview, Defendant attempted to invoke counsel by saying, "You know, I really came out here at first to actually talk to a lawyer." Brown asked, "Out where?" and Defendant replied, "Y'all said you were going to appoint me a lawyer." Brown then asked if he wants to talk to a lawyer and he said, "Yeah. I just kinda want to see where I stand at and everything." Brown answered, "You don't want to talk to me anymore?" Defendant replied, "I would gladly, but I'd like to just see where I stand at right now." Brown asked if he had a lawyer he would like to call and he said no, that he would like them to appoint him one. She explained that JPD couldn't appoint him a lawyer, but that they could let him call Bear so that she could try to hire an attorney for him. Brown and Chandlee then left to arrange Defendant's phone call.

Between April 23 and April 26, 2018, officers obtained search warrants for Defendant's phone; AT&T cell phone location data; Defendant's white pickup truck; Bear's red sedan; and Defendant's Facebook account. Dkt. No. 55-5. Each warrant is between seven (7) and fourteen (14) individual numbered paragraphs describing investigative efforts, such as JPD's interview of Bear, its review of security camera footage, and the reports Robinson and Ellenburg made on April 22, 2018. The search warrants also mention that Jenks High School video footage showed "a white, single cab, Chevrolet Silverado" and that Defendant "was found at the residence of

[Watkins] at approximately 8:00pm and was detained for questioning and brought to the Jenks Police Department."

Defendant's arrest warrant was issued on April 30, 2018. Dkt. No. 55-6. The affidavit is seven (7) single-spaced pages, printed in 11-point Calibri typeface. *Id.* It has sixteen (16) numbered paragraphs, with most paragraphs having multiple lettered subparagraphs. *Id.* The warrant has almost two (2) full single-spaced pages describing the positioning of multiple cameras and videos from those cameras reviewed by officers, including multiple videos showing the distinctive "gun family" sticker on Defendant's vehicle. *Id.* at 4-5. There is also one mention that "at 1140 hours J. Little was seen by Larry Kern [sic] parked in a parking lot." *Id.* at 5. Other statements in the affidavit include but are not limited to summaries of Ellenburg's report of social media threats; Defendant's two JPD interviews; a forensic interview of E.L., who said that "Daddy shot his friend and he died [and E.L.] watched Weatherford fall and die;" forensic investigation of Defendant's phone, which indicated most of the day of April 22, 2018 had been deleted; and cell phone tower location information placing Defendant in the area of the shooting during the relevant time frame. *Id.* at 5-8.

AUTHORITY AND ANALYSIS

I. Fourth Amendment motion [Dkt. No. 54]

A. Probable cause for arrest

Defendant alleges that he was placed under arrest on the evening of April 22, 2018 when officers "surrounded [him] at gunpoint, handcuffed him, searched his person, locked him up overnight, and subjected him to multiple interrogations." Dkt. No. 54 at 6. He claims the arrest lacked probable cause and that all fruits of the arrest—including data from his phone; the

statements he made during interviews with JPD on April 22 and April 23, 2018; and the evidence found in his and his mother's vehicles—must be suppressed. *Id.* at 6-9.

"An investigative detention is a seizure within the meaning of the Fourth Amendment but, unlike an arrest, it need not be supported by probable cause." *Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir. 2007) (quotation omitted). Conversely, "[a]n arrest is distinguished by the involuntary, highly intrusive nature of the encounter." *Id.* (quotations and citations omitted). Brevity is important for investigative detentions—neither the Supreme Court nor the Tenth Circuit has considered detentions lasting ninety (90) minutes or longer "to be anything short of an arrest." *Manzanares v. Higdon*, 575 F.3d 1135, 1148 (10th Cir. 2009) (citing *United States v. Place*, 462 U.S. 696, 709-10 (1983)). "Whether an investigative detention has evolved into an arrest is always a case-specific inquiry, but it has been clear for some time that the use of handcuffs generally converts a detention into an arrest." *Id.* at 1150; *see also id.* (detention in a squad car while handcuffed was an arrest, not an investigative detention). Use of firearms may also convert a detention to an arrest. *Cortez*, 478 F.3d at 1116.

The Court agrees with Defendant that the events of April 22, 2018 constituted an arrest. Body camera footage shows that JPD approached Defendant with firearms drawn, told him to lay on the ground with hands and feet visible, and immediately handcuffed him. Defendant was then placed in a squad car with an officer for an unclear amount of time before being taken to JPD's station. Once at the station, he was interviewed for more than an hour, held overnight, and interviewed again in the morning. However, the Court disagrees with Defendant's conclusion that the arrest occurred without probable cause.

"A police officer may arrest a person without a warrant if he [or she] has probable cause to believe that person committed a crime." *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995).

"Probable cause is a concept 'incapable of [a] precise definition or quantification into percentages.'" *Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs*, 962 F.3d 1204, 1220 (10th Cir. 2020) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). However, the Supreme Court and the Tenth Circuit have described that an officer has probable cause to make a warrantless arrest if the facts and events known to the officer at the time of the arrest would be sufficient for an objectively reasonable police officer familiar with those facts and events to believe with "substantial probability[,] as opposed to a bare suspicion," that an offense has been or is being committed. *Id.* *See also District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). This is "not a high bar" and requires only "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Hinkle*, 962 F.3d at 1220 (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). Officers may rely on the totality of the facts available to them in establishing probable cause. *See id.* at 1221.

The Court finds Brown and other JPD officers had probable cause to arrest Defendant on the evening of April 22, 2018. According to Brown's testimony, they had reviewed video footage of Defendant's distinctive vehicle at the crime scene. The fact that investigators had not obtained their own copies of the digital files with this footage does not dissipate their knowledge of what the videos contained. Watkins had told Brown that Defendant was always armed. Multiple people, including Robinson and Ellenburg, had reported a history of antagonism or threats between Defendant and Weatherford. Although Watkins said she did not know of past threats by Defendant toward Weatherford, she also told Brown, "I feel like [Defendant is] the only person that could have done this—I mean, not could have; I mean, it could have been any other person, but I feel like that's not likely" because Defendant was the only person Watkins knew who was "crazy enough" and "had enough motive" to "flip some shit." Watkins also reported that she feared for

the safety of the child she shared with Defendant because of the day's events. These facts, along with the totality of the circumstances depicted in Brown's body camera footage and testimony at hearing, satisfy the threshold for probable cause. No Fourth Amendment violation occurred in JPD's arrest of Defendant on April 22, 2018.

B. Search of Defendant's residence

Defendant challenges the search of his mother's one-bedroom residence, where he had been sleeping in the living room with his son. Body camera footage shows that Bear allowed officers to search the living room after they asked her if she watched television there and she replied "Eh, sometimes, yeah." Defendant claims Bear did not have authority to consent to the search because the "footage demonstrates that the room was not used as a common living room but was in fact [Defendant's] and his son's bedroom." Dkt. No. 54 at 11.

"A third party's consent to search is valid if that person has either the actual authority or the apparent authority to consent to a search of that property." *United States v. Kimoana*, 383 F.3d 1215, 1221 (10th Cir. 2004) (quotation and citation omitted).[4] Actual authority exists if the third party has "either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it." *Id.* (quoting *United States v. Rith*, 164 F.3d 1323, 1329 (10th Cir. 1999)). The "gravamen" of this rule is "it is reasonable to recognize that 'any of the co-habitants has the right to permit the inspection in his [or her] own right and . . . the others have assumed the risk that one of their number might permit the common area to be searched.'" *Id.* (quoting *Matlock*, 415 U.S. at 171 n.7). Apparent authority exists if "the facts available to the officer at the moment warrant[ed] a [person] of reasonable caution to believe that the consenting party had authority over the

[4] The Court notes that Defendant does not cite or discuss *Kimoana* or other third-party consent cases, such as *Rith* or *Matlock*. He relies instead on *United States v. Werking*, 915 F.2d 1401 (10th Cir. 1990), which addressed only a defendant's consent to search.

premises." *Id.* (quoting *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230 (10th Cir. 1998)). Common authority cannot be implied from a "mere property interest," nor does it require a property law inquiry; it rests "on mutual use of the property generally having joint access or control for most purposes." *Id.* (quoting *Matlock*, 415 U.S. at 171 n.7).

The Court finds that Bear had actual or apparent authority to consent. Contrary to Defendant's depiction of Brown's body camera footage, the recording shows that Bear referred to the room in question as "the living room"—not as Defendant's bedroom. After Brown and Bear entered the living room, Brown asked Bear if the living room was where Defendant and E.L. had been sleeping. Bear did not volunteer that information, nor did she treat the room like she was entering another's private space. Bear reached into a large pile of personal property without hesitation, pulling out firearms she said belonged to Defendant. Bear also said that she sometimes came to watch television in the room. The facts depicted in this recording create a reasonable objective conclusion that Bear had authority over the premises, including the room where Defendant slept.

C. Seizure of the red Toyota sedan

When JPD arrested Defendant on April 22, 2018, he had driven his mother's car to Watkins' apartment. Body camera footage shows officers planning to seize the vehicle and get a warrant before searching it. Defendant alleges that the warrantless seizure of the car was illegal because the search warrant obtained the next day was based on information that officers did not have at the time that they seized the vehicle.[5]

[5] The Government does not contest Defendant's standing to object to seizure of the car he was driving. Dkt. No. 68 at 6-9. Nevertheless, "standing is a matter of substantive fourth amendment law" and Defendant "may not challenge an allegedly unlawful search or seizure unless he demonstrates that his *own* constitutional rights have been violated." *United States v. Rubio-Rivera*, 917 F.2d 1271, 1275 (10th Cir. 1990) (emphasis added). Body camera footage from

The general rule that warrantless search or seizure is per se unreasonable under the Fourth Amendment has a few specifically established and well-delineated exceptions, one of which is the "automobile exception." *United States v. Burgess*, 576 F.3d 1078, 1087 (10th Cir. 2009).[6] This doctrine developed first because "a 'necessary difference' exists between searching 'a store, dwelling house or other structure' and searching 'a ship, motor boat, wagon or automobile' because a 'vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.'" *Collins v. Virginia*, 138 S. Ct. 1663, 1669 (2018) (quoting *Carroll v. United States*, 267 U.S. 132, 153 (1925)). Later, the Supreme Court "introduced an additional rationale based on 'the pervasive regulation of vehicles capable of traveling on the public highways.'" *Id.* (quoting *California v. Carney*, 471 U.S. 386, 392 (1985)).

Under the automobile exception, "officers may search an automobile without having obtained a warrant so long as they have probable cause to do so." *Id.* (quotation omitted). "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *United States v. Lopez*, 777 F.2d 543, 550 (10th Cir. 1985) (quoting *Carroll*, 267 U.S. at 158-59). *See also id.* at 551 ("The probable cause requirement is satisfied when the officers conducting the search have reasonable or probable cause to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin

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officers' interactions with Bear demonstrate that Defendant had driven the car with Bear's permission. "Where the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle." *Id.* The Bear video is sufficient to establish standing.

[6] The Court notes that Defendant again did not cite the appropriate doctrine, relying on the general per se unreasonableness rule without mention of the century-old and well-developed automobile exception. *See* Dkt. No. 54 at 11-12.

their warrantless search." (quoting *United States v. Matthews*, 615 F.2d 1279, 1287 (10th Cir. 1980))). When officers "have probable cause to believe a vehicle contains contraband or evidence of criminal activity, the police may seize it without a warrant and hold it for 'whatever period is necessary to obtain a warrant for the search.'" *United States v. Shelton*, 817 F. App'x 629, 634 (10th Cir. 2020) (quoting *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970)).[7]

Here, the officers seized but did not search the vehicle before obtaining a warrant. The warrantless seizure was simultaneous with Defendant's arrest and probable cause existed based on similar facts—particularly that Watkins had told JPD that Defendant was always armed, which created a reasonable basis to believe that officers would find a firearm from the charged conduct in the vehicle Defendant was driving. Hence, the automobile exception applies, and no constitutional violation occurred in the seizure of Defendant's mother's vehicle.

D. Location records

Defendant invokes *Carpenter v. United States*, 138 S. Ct. 2206 (2018), to advance a theory that investigators' subpoena of his PikePass automated toll road payment records was a Fourth Amendment violation. Dkt. No. 54 at 12-13. *Carpenter* was a narrowly tailored decision on facts that involved years of data compiled from an individual's cell phone. *See* 138 S. Ct. at 2220 (describing the case as being "about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years"). It specifically did not address "a person's movement at a particular time" or "business records that might incidentally reveal location information." *Id.* Toll transaction records are primarily business records which incidentally reveal

[7] Unpublished opinions are not binding precedent but may be cited for their persuasive value. *See* 10th Cir. R. 32.1; Fed. R. App. P. 32.1.

discrete location information. *Carpenter* does not control. Nor does Defendant's theory withstand scrutiny under general Fourth Amendment law.

"A defendant invoking the protection of the Fourth Amendment 'must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.'" *United States v. Maestas*, 639 F.3d 1032, 1035 (10th Cir. 2011) (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). This requires both subjective and objective components. *United States v. Johnson*, 584 F.3d 995, 999 (10th Cir. 2009). "[T]he Supreme Court has appeared to utilize four distinct but coexisting approaches to the reasonable expectation of privacy test, reflecting four models of Fourth Amendment protection: a probabilistic model, a private facts model, a positive law model, and a policy model." *Id.* (quotation and citation omitted). Defendant has not demonstrated that he had either a subjectively reasonable or an objectively reasonable privacy interest in PikePass records under any of these theories. As the Government correctly points out, Defendant "chose to use the toll road when he could have taken non-toll roads," he "chose to pay with PikePass rather than pay the toll in cash," and "[t]he same information could be obtained from a security camera recording at the toll booth." Dkt. No. 68 at 10. No Fourth Amendment violation occurred in investigators' subpoena of PikePass records.

E. Warrant affidavits

In his last Fourth Amendment argument, Defendant alleges that warrant affidavits omitted crucial information that tended to dissipate probable cause, misrepresented evidence crucial to establishing probable cause, and misrepresented circumstances relating to Defendant's arrest on April 22, 2018. Dkt. No. 54 at 13-17. Defendant identifies three (3) alleged material misrepresentations. First, Kerns told police that he saw a man between the ages of twenty-five (25) and thirty-five (35) with dark hair and a mustache, but Defendant says he did not have a

mustache at the time. *Id.* at 14. Second, warrant affidavits said that security camera footage showed the make and model of the vehicle near the shooting, but still photos collected from the surveillance do not show that detail. *Id.* And third, the affidavits state that Defendant was "found" at Watkins' apartment when actually "Ms. Watkins[] coordinated [Defendant's] arrest by calling him and asking him to come to her home so that the police could arrest him." *Id.* at 15.

To merit suppression from misrepresentations or omissions in a warrant, a defendant must establish at "hearing by a preponderance of the evidence that the false statement was included in the affidavit by the affiant 'knowingly and intentionally, or with reckless disregard for the truth,' and the false statement was 'necessary to the finding of probable cause.'" *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)).[8] The Tenth Circuit elaborated,

> [W]hether we're talking about acts or omissions the judge's job is much the same—we must ask whether a warrant would have issued in a but-for world where the attesting officer faithfully represented the facts. If so, the contested misstatement or omission can be dismissed as immaterial. If not, a Fourth Amendment violation has occurred and the question turns to remedy.

United States v. Herrera, 782 F.3d 571, 575 (10th Cir. 2015). When considering whether a false statement was necessary to probable cause, the Court should keep in mind the general rule that "One of the Supreme Court's central teachings on the Fourth Amendment is that probable cause is a practical, nontechnical conception, designed to operate in conjunction with the commonsense, practical considerations of everyday life, rather than the elaborate rules employed by legal technicians." *United States v. Biglow*, 562 F.3d 1272, 1281 (10th Cir. 2009) (quotations omitted).

[8] At the October 26, 2022 hearing, the Court made an oral finding that Defendant had met the preliminary threshold required for a *Franks* hearing. However, Defendant did not question Brown about the warrant affidavits at the October 26, 2022 hearing despite the opportunity to do so.

"Because probable cause is a flexible, commonsense standard, we must interpret the Government's affidavit in a flexible, commonsense way." *Id.* at 1282. Here, Defendant has failed to establish that there were knowing, intentional, or reckless false statements made in the warrant affidavits, and certainly failed to establish that any such statements were necessary to a probable cause finding.

Regarding Defendant's facial hair or lack thereof, the warrants are silent.[9] Only Defendant's arrest warrant—not the various search warrants—describes his physical appearance or mentions Kerns at all. His physical appearance was stated only briefly, while the vast majority of affidavit describes physical and digital evidence connecting Defendant to the scene of the charged conduct. Defendant has not proven a false statement or omission here. And even if he had, Defendant's facial hair was immaterial to probable cause given the location data, surveillance footage, and admissions by Defendant himself all demonstrating he was in proximity to the scene of the charged conduct at the relevant time.

Regarding the video footage, search warrants do mention that Jenks High School video footage showed "a white, single cab, Chevrolet Silverado." Defendant attempts to demonstrate falsity through several still photos which do not show the make or model of the white pickup truck pictured in them. However, Brown testified that more was visible in the videos JPD reviewed than was visible in the still photos they captured that day. Defendant has not proven a false statement. Further, even if the statement that video footage showed make and model was proven to be false and excised from the relevant[10] warrant affidavits, probable cause would still exist. The affidavits

[9] Moreover, the Kerns statement upon which Defendant relies is equivocal about facial hair: it states "person was 25-35 dark hair & mustache *(I think)*." Dkt. No. 55-8 at 2 (emphasis added).

[10] The search warrant for Bear's red Toyota sedan does not mention the video footage since the sedan was not present that morning.

described the way that Defendant's story shifted throughout his interviews with law enforcement and the way Defendant eventually admitted that he was at the scene of the charged conduct. They also included Bear's confirmation that Defendant had been driving his white Chevrolet pickup truck that morning, as well as Robinson's and Ellenburg's statements that Defendant had sent threatening messages to Weatherford over social media.

Finally, Defendant has not established that the statement that JPD "found" Defendant at Watkins' apartment was false. Defendant's whereabouts were unknown during the afternoon of April 22, 2018. JPD was trying to locate him. They asked Watkins for her help and Watkins invited Defendant to her apartment. When he arrived, JPD did indeed "find" him in at least one sense of the word. And once again, the warrants affidavits had plenty of factual detail for probable cause even if the sentence about Defendant being "found" were removed.

II. Fifth Amendment motion [Dkt. No. 56]

A. *Miranda* issues

1. Pre-*Miranda* April 22 statements

At hearing, Defendant argued that the questions at the time of his April 22, 2018 arrest coupled with later post-*Miranda* questions once Defendant was at the JPD station constituted an improper two-step interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004). There were two main types of questioning at the time of Defendant's arrest: first, Brown asking him about the contents of his pockets and why he did not drive his pickup truck to Watkins' apartment, and second, Chandlee asking him for his phone passcode.

The Court finds *United States v. Carrizales-Toledo*, 454 F.3d 1142 (10th Cir. 2006), instructive. There, a law enforcement officer initiated a traffic stop with a defendant who had more than five hundred (500) pounds of marijuana in his vehicle. When the officer initially

stopped the defendant, the officer asked him, "What he's doing." Defendant replied with a "brief (albeit damning) reply that he was trying to evade the agent to avoid being caught with 'that stuff.'" *Id.* at 1151. The officer asked, "With what stuff," and the defendant said, "This stuff. The marijuana." *Id.* at 1152. Defendant was subsequently arrested and read *Miranda* warnings, after which he again confessed. *Id.* at 1148. He sought suppression on the theory that the situation constituted an improper two-step interrogation under *Seibert* because he was not mirandized before his first confession and the second confession was a direct result of the first. *Id.*

The Tenth Circuit distinguished *Seibert* from an earlier Supreme Court case, *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, the Court "rejected the theory that [an] initial, unwarned statement creates a 'lingering compulsion' based on the 'psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate.'" *Carrizales-Toledo*, 454 F.3d at 1149 (quoting *Elstad*, 470 U.S. at 311). It reasoned instead that "absent deliberately coercive or improper tactics in obtaining the initial statement . . . subsequent administration of *Miranda* warnings ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.* (quoting *Elstad*, 470 U.S. at 314). Conversely, in *Seibert*, a plurality of the Court found that interrogating officers withheld *Miranda* warnings "'to obscure both the practical and legal significance of the admonition when finally given' and that the interrogation reflected a strategy 'dedicating to draining the substance out of *Miranda*.'" *Id.* (quoting *Seibert*, 542 U.S. at 617).

In *Carrizales-Toledo*, the Tenth Circuit ruled that the brief exchange between agent and defendant was more analogous to *Elstad* than to *Seibert*. It explained that even if the questions were considered to be a custodial interrogation, they were made with "brevity and spontaneity" that "[fell] far short of the interrogator's conduct in *Seibert*, where 'the initial questioning was

systematic, exhaustive, and managed with psychological skill.'" 454 F.3d at 1152 (quoting *Seibert*, 542 U.S. at 616). It also considered four other factors set out by *Seibert*'s plurality: the two confessions had differing content; there was a time lapse, a change in location, and additional officers present between the first and second confessions, which "all allowed Mr. Carrizales-Toledo to see that the second round of questioning was a new and distinct experience rather than a coordinated and continuing interrogation"; and there was "no evidence that the agents ever referred back to [the] initial statements during the second interrogations." *Id.* (quotation omitted).

So too here. Brown's questions to Defendant were brief. Her question about the contents of his pockets had immediate relevance to safety. Her question about him driving a different car was spontaneous. It was Defendant who continued the conversation, asking whether, when, and where Weatherford was killed. Brown immediately prevented any further discussion by saying they would talk after they arrived at the JPD station. Although Defendant gave similar stories in the first and the beginning of the second interactions, the other factors discussed in *Carrizales-Toledo* weigh against finding a *Seibert* violation. The second and third interviews happened after a time lapse, a change of location, and a change of personnel; and there was no point in the mirandized interviews when Brown referred back to the brief exchange while she walked Defendant to the squad car. Defendant has not demonstrated any indicia of a systematic, exhaustive, or skillful interrogation in violation of *Seibert* in Brown's brief questioning.

Since *Seibert* does not warrant suppression of Defendant's pre-*Miranda* statements to Brown, "the only remaining question with respect to the admissibility of [the] statements is whether they were voluntary," as *Elstad* held that "subsequent administration of *Miranda* warnings after a voluntary but unwarned custodial confession will 'remove the conditions that precluded admission of the earlier statement.'" *Carrizales-Toledo*, 454 F.3d at 1153 (quoting *Elstad*, 470

U.S. at 314). "The essence of voluntariness is whether the government obtained the statements by physical or psychological coercion such that the defendant's will was overborne." *Rith*, 164 F.3d at 1333. Nothing indicates Defendant's will was "overborne" in the moments of his arrest. As stated, *he* attempted to continue the conversation, asking Brown for details of the homicide. She refrained from engaging with him at this point and told him that there would be time for discussion at the station, presumably after the warnings she immediately administered once in the interview room.

Chandlee's approach to Defendant's passcode is closer to the situation *Seibert* contemplated, but other circumstances weigh against exclusion. Chandlee is seen on camera using air quotes as he discusses taking Defendant's phone to him so that they could put the phone in airplane mode to conserve the battery. This indicates a purposeful intention to get Defendant's passcode before mirandizing him. However, before Chandlee can put this plan into action, Defendant asks if he would like the passcode. Defendant made this voluntary statement in the same situation and time when Defendant attempted to engage Brown in conversation about the homicide. This does not give rise to a situation where the "substance" of *Miranda* is "drained out." *See Carrizales-Toledo*, 454 F.3d at 1149. Moreover, even if a *Seibert* violation had occurred with Chandlee's passcode ruse, the Court has ruled that the search warrant for Defendant's phone was not unconstitutionally obtained. Thus, any information that JPD may have obtained from Defendant's phone would fall within the inevitable discovery doctrine, which "permits evidence to be admitted if an independent, lawful police investigation inevitably would have discovered it." *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005).

2. April 23 statements

Defendant next challenges his April 23, 2018 JPD interview, claiming his *Miranda* rights should have been readministered in full. Dkt. No. 56 at 8-9. That morning, Brown entered the interview room and immediately told Defendant, "Your *Miranda* rights still stand." Defendant contends this was insufficient. This argument fails under Tenth Circuit law.

> The mere passage of time does not compromise a *Miranda* warning. Courts have consistently upheld the integrity of *Miranda* warnings even in cases where several hours have elapsed between the reading of the warning and the interrogation. In *United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir. 1995), for example, the court determined that new warnings were not required when the defendant was interviewed the day after the warnings had been given.

Mitchell v. Gibson, 262 F.3d 1036, 1057-58 (10th Cir. 2001) (quotations and citations omitted). "An earlier *Miranda* warning is sufficient to cover a subsequent interrogation 'unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a knowing and intelligent relinquishment or abandonment of his rights.'" *Silsby v. Hamilton*, No. 16-CV-098-JHP-JFJ, 2019 WL 470909, at *4 (N.D. Okla. Feb. 6, 2019) (quoting *Mitchell*, 262 F.3d at 1058). Defendant has not highlighted any serious changed circumstances. The one changed circumstance he references—that Chandlee, rather than Weis, sat in on the second interview—did not fundamentally alter the interview dynamic, as both Chandlee and Weis had been part of the investigative team the night before and all other elements of the two interviews were similar. Defendant and Brown were in the same room, discussing the same events, based on the same history. There was no *Miranda* violation.

B. Invocation of counsel

Early in the April 23, 2018 interview, Brown asks Defendant if he still wanted to talk to her. Defendant response, "yeah, I can still talk to you. I wanted to talk to a lawyer—I just, wanted to see where I stand at right now." Brown then gives a summary of their theory so far and

Defendant engages in conversation for approximately an hour before saying "You know, I really came out here at first to actually talk to a lawyer." Brown immediately stops the interview, the two discuss appointment of a lawyer, and Defendant says again, "I just kinda want to see where I stand at and everything." Brown asks whether that meant that Defendant did not want to talk to her any longer and Defendant replies, "I would, gladly, but I'd like to just see where I stand at right now." Brown then helps arrange for Defendant to call his mother about retaining an attorney. Defendant argues that his first statement was a clear invocation of his right to counsel. Dkt. No. 56 at 9-10.

The Supreme Court has held that "custodial interrogation may continue unless and until the suspect *actually invokes* his right to counsel; ambiguous or equivocal statements that *might* be construed as invoking the right to counsel do not require the police to discontinue their questioning." *United States v. Nelson*, 450 F.3d 1201, 1212 (10th Cir. 2006) (emphasis in original) (citing *Davis v. United States*, 512 U.S. 452, 458-59 (1994)). *See also Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) ("If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong."). Invocation of counsel is an objective determination based on the question of "whether the suspect's statement is 'sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Nelson*, 450 F.3d at 1212 (quoting *Davis*, 512 U.S. at 459).

The circumstances at the beginning of the April 23, 2018 interview are equivocal at best. The first statement Defendant made to Brown was "Yeah, I can still talk to you." He then followed this statement with an unclear remark that he wanted "to see where I stand." The "see where I

stand" statement coupled with "yeah, I can still talk to you" could be construed that he wanted to see where he stood with JPD before spending the time and money of retaining counsel. At the same time, the "see where I stand" statement could mean he wanted to see where he stood with a lawyer before continuing to talk to JPD. This is exactly the sort of ambiguous situation that *Davis* and *Nelson* indicate does not require cessation of questioning. The ambiguity of the situation was compounded when Brown gave him her summary of the case, as Defendant did not object and did not reiterate any sort of desire to consult a lawyer. He instead chose to engage for approximately an hour before again mentioning a lawyer. This second time, he did not say "yeah, I can still talk to you" and instead made his request for counsel clear. While hindsight can discern similarities between the initial and later statements—both at the beginning and at the end of the interview, Defendant wanted to "see where he stood"—Brown and Chandlee did not have the benefit of hindsight at the beginning of the interview. With the circumstances as they were at the start of the April 23, 2018 interview, it was not a Fifth Amendment violation for JPD to continue its questioning.

C. Voluntariness

Defendant's last Fifth Amendment argument is that his statements at the JPD station on April 22 and April 23, 2018 were made involuntarily and through psychological coercion because officers employed the "Reid technique," lied to Defendant, repeatedly referred to his three-year-old son and how Defendant would not see E.L. for a prolonged period if he was charged with and convicted of first degree murder, and refused to watch surveillance video with him. Dkt. No. 56 at 10-18.

"Voluntariness is determined under the totality of the circumstances, and no single factor is determinative." *United States v. Young*, 964 F.3d 938, 942 (10th Cir. 2020). "A number of

factors must be considered in assessing whether a confession is voluntary. These factors include the age, intelligence, and education of the suspect; the length of the detention and questioning; the use or threat of physical punishment; whether *Miranda* safeguards were administered; the accused's physical and mental characteristics; and the location of the interrogation." *United States v. Perdue*, 8 F.3d 1455, 1466 (10th Cir. 1993). The Government bears the burden to establish voluntariness by a preponderance of the evidence. *Id.*

> The question this court must resolve is whether "the confession [is] the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

United States v. Lopez, 437 F.3d 1059, 1063 (10th Cir. 2006) (quoting *Perdue*, 8 F.3d at 1466).

Here, Defendant was a legal adult over the age of twenty-one (21). He had been enlisted in the United States military for six (6) years and had completed high school. JPD questioned him for approximately two (2) hours the first evening and one (1) hour the next morning. Brown, Weis, and Chandlee did not use or threaten the use of physical punishment. The only brief physical contact occurred when Defendant reached across a table to point at something on Weis' notepad and Weis brushed his hand back. *Miranda* safeguards were clearly given and, as stated earlier, applied to both the April 22 and April 23 interviews. Defendant did not exhibit any physical or mental difficulties, instead remaining coherent, generally polite, and conversational throughout the interviews. The interrogations took place in an office at JPD with padded chairs, good lighting, and drinking water easily available. None of these factors indicate that Defendant's will and self-determination had been critically impaired.

The Court next examines the specific reasons Defendant claims his statements were involuntary. First, Defendant describes the Reid technique as an approach that "heavily relies on

false evidence ploys and other forms of deceit." Dkt. No. 56 at 11. He does not present any caselaw indicating that the Tenth Circuit has rejected the Reid technique, instead citing only a dissenting opinion from the Seventh Circuit. Nor has he presented evidence that the Reid technique happened in this case, as he does not demonstrate *heavy* reliance on false ploys or deceit. Brown admitted on April 23 that she was "bluffin' him a little bit" on April 22 as far as what evidence JPD did or did not have. The majority of what Brown, Weis, and later Chandlee referenced, however, was based on the video surveillance and witness testimony discussed earlier. Similarly, Defendant does not cite any cases that Brown's "bluffin'" negated the voluntariness of his statements considering the totality of the circumstances.

Defendant alleges the references to his son were psychological coercion. Brown repeatedly described the consequences of a first degree murder charge, including a potential long period of incarceration and separation from Defendant's son. These were descriptions of potential future realities, not an instance of manipulation. Brown was not trying to extract a confession of premeditated murder to trump up greater chargers—it was clear from her questioning that premeditated murder *was* the planned charge at the time of Defendant's interviews. Rather, Brown repeatedly asked Defendant for extenuating or mitigating circumstances that could form the basis for a lesser charge, which in turn could potentially mean less incarceration time and less separation from his son. Describing the serious consequences of a first degree murder conviction was not coercion. In fact, *mis*representing potential penalties may affect the voluntariness of a statement. *See Young*, 964 F.3d at 944 ("Although we do not require a law enforcement officer to inform a suspect of the penalties for all the charges he may face, if he misrepresents these penalties, then that deception affects our evaluation of the voluntariness of any resulting statements.").

Defendant's argument that he was deprived the opportunity to review surveillance footage fares no better. Even once indicted, a criminal defendant has no constitutional right to the discovery against him. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . ."). JPD had no obligation to show the surveillance video to Defendant, and their refusal to watch it with him was not an overpowering of his will. Brown was clear that they would not review the videos with Defendant, yet he continued to talk with JPD. That was Defendant's free and unconstrained choice.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's motions to suppress [Dkt. No. 54 and Dkt. No. 56] are hereby DENIED.

DATED the 2nd day of November 2022.

JOHN F. HEIL, III
UNITED STATES DISTRICT JUDGE

Attachment C

Denial of Renewed Suppression Motion

Mr. Weatherford. There's no video of Mr. Little shooting Mr. Weatherford.

In addition to that, Your Honor, Mr. Little did not -- did not make a confession that he shot Mr. Weatherford. The evidence, the real evidence supporting a conviction, is minimal. There's no DNA evidence, there's no fingerprint evidence. The ballistics evidence that was presented here, Your Honor, is marginal at best. It is inconclusive, as the witness stated.

Because of all those grounds, Your Honor, there is not sufficient evidence to go ahead and send the matter to the jury, sir.

THE COURT: Thank you.

Of course, it is a circumstantial case, but circumstantial evidence can be sufficient, and certainly in the light I'm required to evaluate motions like this, I find it sufficient to send to the jury. I deny your motion.

Any other motions or requests from the defense at this time?

MR. VALLADARES: Yes, Your Honor. If we may have one second, please?

THE COURT: Absolutely.

MR. VALLADARES: Yes, we have one matter, Your Honor.

THE COURT: Go ahead, Ms. Tanaka.

MS. TANAKA: Your Honor, just for purposes of making

our record, we wanted to request a motion to reconsider the Fourth Amendment suppression motion in light of some of the testimony that came out on direct examination from Chief Brown.

There was testimony saying that at the time of the arrest that they did not yet have video surveillance footage which does not match up with what came out at the evidentiary hearing. And then, of course, there was a line in the direct testimony, as well, saying, you know, there was -- basically things were unclear at the time that they had detained the defendant.

So, just for purposes of making our record, we are requesting a motion to reconsider.

THE COURT: Thank you.

I view my role, even as a visiting judge here, to take seriously a motion to reconsider, that is, I wouldn't simply deny it merely because another judge had ruled a particular way.

My own review of what has transpired here in court -- of course, I wasn't at the hearing itself -- is that on the grounds I heard here in court I would come to the same conclusion as Judge Heil. Therefore, I deny the motion to reconsider.

Any other requests or motions from the defense this afternoon?

MR. VALLADARES: Not at this point, Your Honor.

Attachment D

Order Denying Prior Act Motion in Limine

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JUSTIN DALE LITTLE,** **Defendant.**	**Case No. 21-CR-162-JFH**

OPINION AND ORDER

Before the Court is a motion to preclude the Government's proffered 404(b) evidence ("Motion") filed by Defendant Justin Dale Little ("Defendant"). Dkt. No. 67. Defendant objects to evidence described by the United States of America ("Government") in its opposed notice of intent to offer evidence pursuant to Rule 404(b) ("Notice"). Dkt. No. 52. This evidence, according to the Government, would show that Defendant "had previously stalked his ex-girlfriend, Hannah Watkins, and that four months before murdering Johnathon Weatherford, [Defendant] had shot into Weatherford's home." *Id.* at 1. For the reasons stated, Defendant's Motion is GRANTED IN PART AND DENIED IN PART.

BACKGROUND

Defendant is charged with one count of first degree murder in the killing of Johnathon Weatherford ("Weatherford") on April 22, 2018. Dkt. No. 2. The morning of the charged conduct, Weatherford had been at a residence with Hannah Watkins ("Watkins"), who had romantic history with each Weatherford and Defendant.

The Government alleges the Defendant was "obsessed with Watkins since their child was born in 2014." Dkt. No. 52 at 2. Watkins did not want a romantic relationship with Defendant after November 2014, but Defendant "pushed for them to be together for the sake of their child."

Id. at 3. Although Watkins and Defendant continued to be intimate on occasion, she dated several other men in the following years.

In August 2015, Watkins spent the night on the couch at the residence of a male coworker, Leon Hong ("Hong"). She had not been to Hong's home before. Around 4:00 a.m., Defendant appeared at Hong's residence. Watkins was surprised because she had not told Defendant she was going to Hong's residence, she had not been to Hong's residence in the past, and Defendant had not unexpectedly appeared where Watkins was before. During this interaction, Defendant told Watkins he was tracking her cell phone. Watkins and Hong later began dating. About a month after they developed a romantic relationship, Hong discovered two of his tires were flat. In the Government's description, "He suspected [Defendant]." *Id.*

In fall 2016, Watkins dated Justin Lackey ("Lackey"). The Government describes an interaction in November that year, while Watkins and Defendant were staying with Watkins' relative in Asher, Oklahoma. Lackey drove to Asher from Tulsa to visit.[1]

> Everything appeared amicable as Little, Lackey, and Watkins played cards before they left . . . . Little went outside, claiming to clean out his car. About thirty minutes later, Little walked back into the house in an odd manner to avoid showing Lackey or Watkins his back. When confronted, Little told them he fell down outside, his back was dirty, and he was trying to stop them from making fun of him. This behavior was out of character for Little.
>
> A few minutes later, Lackey and Watkins left in his car . . . however, Lackey quickly discovered his brakes were not working and they could not stop the car. Once the car rolled to a stop, the two returned to the house, where Lackey was able to see the brake lines were cut. He confronted Little about cutting the line.

Id. at 4.

[1] The Court may take judicial notice of public geographic records such as Google Maps. *See United States v. Orozco-Rivas*, 810 F. App'x 660, 668 n.7 (10th Cir. 2020). Google Maps shows Tulsa, Oklahoma, and Asher, Oklahoma are approximately 123 to 134 miles apart from each other.

At an unspecified time after the Lackey incident, Watkins dated Dennis Mitchell ("Mitchell"). Defendant allegedly sent "Mitchell and his friends nude and intimate photos of Watkins from their past, claiming she was currently sending them to Little." *Id.* at 4-5.

In 2017, Watkins discovered her car had water poured in the gas tank. Defendant allegedly told her that the water had been put in her car by Defendant's "friends who were upset they were not together." *Id.* Later in 2017, while Watkins was dating Weatherford, Watkins found her car set on fire. *Id.* This occurred within weeks after Watkins told Defendant "that whatever happened, Weatherford was going to be a part of her life and their child's life" and that "[b]ased on their history, she told Little if anything weird happened to Weatherford, she would hold him accountable." *Id.* The Jenks Police Department and Tulsa Fire Department investigated Watkins' car fire but were not able to determine a cause. "Watkins told police she suspected Little." *Id.*

On December 7, 2017, Weatherford and Watkins allegedly discovered bullet holes in his bedroom window. *Id.* at 6. "Weatherford told police the shots could have been from someone he shorted on a drug deal, but police believed Watkins was the target of the shooting." *Id.* No additional evidence was recovered, but ballistics analysis came back that the bullets involved were thirty-caliber class with markings consistent with being fired from a Remington rifle. Defendant owned a Remington Model 783 .300 caliber Winchester Magnum. *Id.*

On April 22, 2018, Weatherford was found laying on train tracks in Jenks, Oklahoma with a gunshot to the back. He died later the same day. Defendant was subsequently arrested and charged with first degree murder related to the shooting.

Defendant gave two interviews to the Jenks Police Department on April 22 and 23, 2018.[2] The Government summarizes the relevant parts of the interview as:

> After being Mirandized, [Defendant] told detectives about his issues with Watkins's past boyfriends. He admitted to confronting Leon Hong in 2016, but claims the two engaged in a fist fight. He further described catching Watkins with an unidentified friend and how he almost shot them with his pistol but refrained for the sake of his son. Although he denied cutting Lackey's brake line, he confirmed the incident and that he had been confronted as the suspect.

Id.

AUTHORITY AND ANALYSIS[3]

I. Evidence based on speculation

As an initial matter, the burden of proof for prior-act evidence under Rule 404(b) is not well established in Tenth Circuit precedent. This contrasts with Rule 413/414 evidence of prior sexual assaults, where binding precedent clearly requires the Court to make a preliminary finding that the prior assaults did in fact happen. *See United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1988) ("[S]imilar acts must be established by sufficient evidence to support a finding by the jury that the defendant committed the similar act. The district court must make a preliminary finding that the jury could reasonably find by a preponderance of the evidence that the other act

[2] The Court reviewed these videos as part of its consideration of Defendant's motions to suppress [Dkt. No. 54; Dkt. No. 56]. The Court denied both suppression motions. Dkt. No. 73.

[3] Before reaching the substance of the parties' arguments, the Court notes that Defendant claims the Government should be precluded from introducing any of the evidence in the Notice because the Notice was untimely under the Court's scheduling order. Rule 404(b) itself only requires notice at before trial, which the Government certainly met, so any sanction would be for violation of the Court's order, not for violation of the Federal Rules of Evidence. It is true that the Court disfavors untimely filings. However, Defendant's argument is fatally weakened by the fact that Defendant himself failed to comply with the Court's scheduling order by filing numerous motions to suppress, as the Court recently noted. *See* Dkt. No. 69 at 1 n.1. Exclusion of evidence is a drastic sanction and one that the Court is not inclined to impose on the Government at this time, particularly since the Court chose not to impose sanctions on Defendant for his own noncompliance.

occurred."). Discussions of prior-act evidence generally instead involve two distinctions: first, the evidence's quality of being intrinsic or extrinsic; and second, the balance between the evidence's probative value and its unfair prejudice. However, the Court believes it does not reach either of these distinctions about several of the occasions described in the Government's Notice.

The Government's own descriptions rely on speculation and conjecture for several prior bad acts. For instance, the Government says that "Hong suspected Defendant" cut his tires, but the Government does not describe any evidence beyond this suspicion. Similarly, the Government says "Watkins . . . suspected [Defendant]" set fire to her car, but Jenks Police Department and Tulsa Fire Department could not determine the cause of the fire. And Weatherford told investigators that he believed it was a customer shorted on a drug deal who shot at the bedroom where he and Watkins slept, not Defendant. Although "police believed Watkins was the target of the shooting," the Government does not state that anything substantiated this belief.[4] Rule 404(b) is not meant to invite speculation. *See United States v. Cody*, 22-CR-63-JFH, 2022 WL 2333493, at *5 (N.D. Okla. June 28, 2022). The Court will grant Defendant's Motion as far as it applies to these unsubstantiated suspicions.

II. Evidence based on personal knowledge

The remaining events from the Government's Notice include the August 2015 incident where Defendant appeared at Hong's residence after tracking Watkins' location there through her cell phone; the November 2016 incident where Defendant acted strangely upon returning from being outside (including sheltering his back from view) and Watkins and Lackey shortly thereafter

[4] The Government's remark that ballistics analysis indicated a thirty-caliber bullet shot from a Remington rifle is insufficient without any further evidence connecting it to Defendant. Although the Government states Defendant owned a .300 caliber Remington rifle, Remington rifles are not uncommon in Oklahoma.

discovered the brakes on Lackey's car had been cut; incidents in unspecified timeframes where Defendant sent Mitchell and his friends nude photographs of Watkins; and the 2017 incident where Watkins discovered her car had water in the gas tank and Defendant allegedly told her that the water had been put there by Defendant's "friends who were upset they were not together."

When considering admissibility of prior bad acts, the Court must "distinguish between evidence that is extrinsic or intrinsic to the charged crime." *United States v. Kupfer*, 797 F.3d 1233, 1238 (10th Cir. 2015) (citing *United States v. Pace*, 981 F.2d 1123, 1135 (10th Cir. 1992), *abrogated on other grounds as recognized in United States v. Bell*, 154 F.3d 1205, 1209-10 (10th Cir. 1998)). Intrinsic evidence is "directly connected to the factual circumstances of the crime and provides contextual or background information to the jury." *United States v. Murry*, 31 F.4th 1274, 1290-91 (10th Cir. 2022) (quotations omitted). It takes many forms, such as evidence that:

- Is "inextricably intertwined with the charged conduct;"
- Occurs "within the same time frame as the activity in the conspiracy being charged;"
- Is "a necessary preliminary to the charged [crimes];"
- Provides "direct proof of the defendant's involvement with the charged crimes;"
- Is "entirely germane background information, directly connected to the factual circumstances of the crime;" or
- Is "necessary to provide the jury with background and context of the nature of the defendant's relationship to [other actors]."

United States v. Cushing, 10 F.4th 1055, 1075-76 (10th Cir. 2021) (citing *Kupfer*, 797 F.3d at 1238). If the Court determines evidence is intrinsic, it must conduct a Rule 403 analysis to determine that the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. *Irving*, 665 F.3d at 1212. Conversely, extrinsic evidence "is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense."

Murry, 31 F.4th at 1291. If the Court determines the evidence at issue is extrinsic, it must conduct a Rule 404(b) analysis. *Kupfer*, 797 F.3d at 1238.

The Government argues that the events it describes are intrinsic because the charged conduct "was not an isolated incident but a culmination of five years of harassment and violence perpetrated with a singular focus." Dkt. No. 52 at 8. The Government argues that without the described events, the jury will be "left with an incomplete picture that fails to adequately show the depths of Little's obsession with Watkins and his motivations for killing Weatherford." *Id.*

The Court agrees. The charged conduct occurred in the context of a tumultuous history between Defendant and Watkins, and Defendant clearly was antagonistic to Watkins' romantic partners. Defendant's appearance at Hong's residence at 4:00 a.m. after tracking Watkins' phone is not reasonable behavior, nor is Defendant's suspicious behavior directly before Lackey discovered his brakes were cut. Defendant's distribution of unsolicited nude photographs of Watkins to Mitchell and his friends was potentially criminal[5] and undeniably inappropriate. Defendant's statement to Watkins that "friends" of Defendant sabotaged her vehicle because they were upset that Watkins and Defendant were not together indicates that Defendant was at the very least complicit in this behavior through knowledge, participation, and/or acquiescence. And Defendant himself described appearing at Hong's residence and being accused of cutting Lackey's brakes, although he denied responsibility for the cut brake lines. Defendant also described another instance of past antagonism to one of Watkins' boyfriends, where he said he almost shot Watkins and her partner with his pistol but refrained for the sake of his son. Taken together, these events

[5] This type of behavior, commonly known as "revenge porn," has been criminalized in at least forty-six (46) states, including Oklahoma. *See* Ruobing Su, Tom Porter, & Michelle Mark, *Here's a map showing which US states have passed laws against revenge porn — and those where it's still legal*, BUSINESS INSIDER (Oct. 30, 2019), https://www.businessinsider.com/map-states-where-revenge-porn-banned-2019-10.

are necessary to provide the jury with background and context of the nature of Defendant's relationship to Watkins and, in turn, Weatherford. They are admissible at trial so long as a proper foundation is laid.[6]

Because this evidence of Defendant's antagonism toward Watkins and her boyfriends is intrinsic, a Rule 404(b) analysis is not necessary. However, the Court must still consider Rule 403 and whether the evidence's probative value is substantially outweighed by unfair prejudice.

"[O]ur law favors admission of all relevant evidence not otherwise proscribed [and] exclusion under [Rule 403] is an extraordinary remedy that should be used sparingly." *Irving*, 665 F.3d at 1213 (emphasis removed); *Murry*, 31 F.4th at 1291 (same). "Evidence is not unfairly prejudicial simply because it is damaging to [a party's] case." *United States v. Caraway*, 534 F.3d 1290, 1301 (10th Cir. 2008) (quotation omitted). Rather, it must have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* "In weighing the probative value of evidence against unfair prejudice, district courts must give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Murry*, 31 F.4th at 1291 (internal quotations omitted).

Affording the evidence the weight it must, the Court is confident that Rule 403 does not bar admission of this intrinsic evidence. The evidence is highly probative of Defendant's ongoing hostile actions toward Watkins' romantic partners. While prejudicial, the evidence is not unfairly so, because the emotional impact of the evidence is directly related to its relevancy: it

[6] As two non-exhaustive examples, the Government will need to lay a foundation that Lackey's brakes were working normally before Defendant went outside and returned with a dirty back, as well as a timeframe for the revenge porn messages Defendant sent.

demonstrates that Defendant stalked and obsessed over Watkins and her boyfriends despite Watkins' desire to not be in a romantic relationship with Defendant. The evidence is admissible.[7]

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's motion to preclude the Government's proffered 404(b) evidence [Dkt. No. 67] is GRANTED IN PART AND DENIED IN PART. Specifically, the Government MAY NOT introduce evidence of Hong's cut tires, Watkins' car fire, or the shooting of Weatherford's bedroom window. With proper foundation, the Government MAY introduce evidence of Defendant appearing at Hong's residence, Defendant's odd behavior and dirty back immediately before Lackey discovered his brakes were cut, Defendant sending revenge porn of Watkins, and Defendant telling Watkins that friends of his put water in her car's gas tank.

DATED this 4th day of November 2022.

JOHN F. HEIL, III
UNITED STATES DISTRICT JUDGE

[7] The Court notes that, even if it considered the evidence to be extrinsic rather than intrinsic, it would still be admissible under Rule 404(b). The Rule allows evidence to be admitted to demonstrate motive. Defendant's actions illustrate ongoing and escalating jealousy, which could provide motive to him to kill Weatherford.

Attachment E

Ruling Limiting Re-Cross Examination

A. I did.
Q. How long did Jonathan Weatherford live after that conversation?
A. Two days.
Q. How long?
A. Two days. I believe it was within a week. I don't remember when that conversation happened specifically.
Q. To your knowledge, was Jonathan Weatherford a drug dealer?
A. No.
Q. Do you feel confident about that?
A. Yes.
Q. Why?
A. While me and Jonathan were together the several months that we were together in 2017 I spent almost every day, almost every hour with Jonathan. I was literally with him all the time. We spent the night at my house, at his house, at his parents' house. We had holidays together. I never seen him be a drug dealer. I never seen him carrying around drugs, meeting shady people, exchanging money. Those are never things that I saw him do.
Q. So, I want to talk about the issue that was raised on cross-examination about potential threats to Mr. Weatherford. So, you said that you never heard Mr. Little directly threaten Mr. Weatherford?
A. Correct.

Q. But he did tell him he didn't want him dating you anymore?
A. Yes.
Q. And he told you the same thing; right?
A. Correct.
Q. You mentioned that the 300 Win Mag rifle that we saw earlier was not something that Mr. Weatherford regular- -- sorry -- Mr. Little regularly carried?
A. Not to my knowledge.
Q. So, when did he carry it in that truck?
A. To my knowledge, he carried it when he was intending on shooting it at the range or carrying it back and forth to specific places to shoot it.
Q. Okay. So he carried it when he intended to use it?
A. Yes.

MR. REGAL: Your Honor, if I can have a moment?

THE COURT: Yes.

MR. REGAL: I have no further questions. Thank you.

THE COURT: Thank you.

Ma'am, you're excused.

MS. TANAKA: Your Honor, just a few -- brief redirect -- I'm sorry -- recross questions.

THE COURT: That's okay. We'll go ahead.

You're excused, ma'am.

You may call your next witnesses.

MR. BUSCEMI: Your Honor, the government would call

Attachment F

Order Denying Motion to Preclude Rifle and Hearsay

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To:Courtmail@localhost.localdomain
Bcc:
--Case Participants: Thomas Edward Buscemi (caseview.ecf@usdoj.gov, sharlet.chalakee@usdoj.gov, thomas.buscemi@usdoj.gov), Kenneth Allan Elmore (kenneth.elmore@usdoj.gov, tabatha.berka@usdoj.gov), Victor A S Regal (caseview.ecf@usdoj.gov, kortni.barton@usdoj.gov, victor.regal@usdoj.gov), Katherine A. Tanaka (cristen_thayer@fd.org, katherine_tanaka@fd.org, lauren_conklin@fd.org), Cristen C. Thayer (cristen_thayer@fd.org), Rene Valladares (felicia_darensbourg@fd.org, marcus_a_walker@fd.org, rene_valladares@fd.org), Chief Judge John F Heil, III (jfhintake_oknd@oknd.uscourts.gov)
--Non Case Participants: Chambers JFH3 (hope_forsyth@oknd.uscourts.gov), United States Marshal (okn.usms.ops@usdoj.gov)
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U.S. District Court

U.S. District Court for the Northern District of Oklahoma

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Document Number:	85(No document attached)

Docket Text:

MINUTE ORDER by Judge Michael W Mosman *In light of Governments Trial Brief [82] and Defendants Trial Brief [79], I make the following rulings. Governments motion to exclude all witnesses from the courtroom until their testimony is complete is GRANTED. Fed. R. Evid. 615. Governments motion to designate Melissa Brown as the case agent and exempt her from the exclusion is GRANTED. Fed. R. Evid. 615(b); United States v. Avalos, 506 F.3d 972, 978 (10th Cir. 2007) (vacated on other grounds). Defendants motion to exclude the seized rifle under Rules 401 and 403 is DENIED because the rifle is relevant and its probative value is not substantially outweighed by any danger. Fed. R. Evid. 401; Fed. R. Evid. 403; Reed v. United States, 377 F.2d 891, 891 (10th Cir. 1967). Defendants motion to exclude Watkinss statements regarding who she believed was responsible for the murder is GRANTED because they are speculative and unfairly prejudicial. Fed. R. Evid. 602; Fed. R. Evid. 403. Governments motion to admit Watkinss statements regarding her intention to continue dating Weatherford despite her and Defendants upcoming marriage and that Weatherford would be in their lives for a long time is GRANTED because they are offered for effect on the listener and therefore are not hearsay. Fed. R. Evid. 801(c); United States v. Smalls, 605 F.3d 765, 785 n.18 (10th Cir. 2010). Defendants motion for the foundational testimony for the admitted 404(b) evidence to be presented outside the presence of the jury is DENIED because the admitted evidence is not inextricably intertwined with the excluded evidence. The Court ADOPTS the verdict form provided by Government* as to Justin Dale Little (This entry is the Official Order of the Court. No document is attached.) (alg, Dpty Clk)

Attachment G

Denial of Motion for Acquittal

Oklahoma.

Thank you.

THE COURT: Thank you.

Subject to going through exhibit numbers later, does the government otherwise rest?

MR. BUSCEMI: Your Honor, the government rests.

THE COURT: Thank you.

Folks, that concludes the government's presentation of evidence in this case. It is close to 5 and I have some legal matters to attend to that always occur in every case at the conclusion of the government's presentation of evidence, so I'm going to send you folks home now and ask you to be here right on time just before 9 o'clock tomorrow morning.

(THE JURY WAS EXCUSED FROM THE COURTROOM, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: Please be seated.

Mr. Valladares.

MR. VALLADARES: Thank you very much, Your Honor.

At this point, Your Honor, if the court could entertain a 29(a) motion on behalf of the defense, please.

THE COURT: Go ahead, sir.

MR. VALLADARES: Thank you, sir.

Yeah, it's our position, Your Honor, that at this point there's insufficient evidence for this case to go to the jury. As the court has heard, no witness saw Mr. Little shooting

Mr. Weatherford. There's no video of Mr. Little shooting Mr. Weatherford.

In addition to that, Your Honor, Mr. Little did not -- did not make a confession that he shot Mr. Weatherford. The evidence, the real evidence supporting a conviction, is minimal. There's no DNA evidence, there's no fingerprint evidence. The ballistics evidence that was presented here, Your Honor, is marginal at best. It is inconclusive, as the witness stated.

Because of all those grounds, Your Honor, there is not sufficient evidence to go ahead and send the matter to the jury, sir.

THE COURT: Thank you.

Of course, it is a circumstantial case, but circumstantial evidence can be sufficient, and certainly in the light I'm required to evaluate motions like this, I find it sufficient to send to the jury. I deny your motion.

Any other motions or requests from the defense at this time?

MR. VALLADARES: Yes, Your Honor. If we may have one second, please?

THE COURT: Absolutely.

MR. VALLADARES: Yes, we have one matter, Your Honor.

THE COURT: Go ahead, Ms. Tanaka.

MS. TANAKA: Your Honor, just for purposes of making

Attachment H

Denial of Renewed Motion for Acquittal

Any further witnesses for the defense?

MR. VALLADARES: No, Your Honor. Thank you very much, sir.

THE COURT: Any rebuttal case for the United States?

MR. BUSCEMI: No, Your Honor.

THE COURT: That concludes the presentation of evidence in this case. I am going to briefly take up a couple of legal matters. I'll excuse the jury for probably under five minutes then you'll come back in for me reading you these instructions and closing argument.

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, OUT OF THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: Mr. Valladares, do you wish to renew your motion made at the close of the government's case?

MR. VALLADARES: I do, Your Honor. I will stand on my arguments from yesterday.

In addition to that, Your Honor, I would like to take the chance to apologize to the court regarding my mistake between a 23 and 18, sir.

THE COURT: Thank you, sir.

I deny the motion for the same reasons I denied it at the close of the government's case.

Any other legal matters before we bring the jury immediately back out for closing instructions and argument for the United States?

Attachment I

Order Denying Sentencing Motion

MIME-Version:1.0
From:CM-ECFMail_OKND@oknd.uscourts.gov
To:Courtmail@localhost.localdomain
Bcc:
--Case Participants: Thomas Edward Buscemi (caseview.ecf@usdoj.gov, hunter.marone@usdoj.gov, thomas.buscemi@usdoj.gov), Kenneth Allan Elmore (caseview.ecf@usdoj.gov, cathy.heard@usdoj.gov, kenneth.elmore@usdoj.gov, tabatha.berka@usdoj.gov), Victor A S Regal (caseview.ecf@usdoj.gov, kortni.barton@usdoj.gov, victor.regal@usdoj.gov), Katherine A. Tanaka (cristen_thayer@fd.org, katherine_tanaka@fd.org, lauren_conklin@fd.org), Cristen C. Thayer (cristen_thayer@fd.org), Rene Valladares (felicia_darensbourg@fd.org, marcus_a_walker@fd.org, rene_valladares@fd.org), Judge Michael W Mosman (chambers_mosman@ord.uscourts.gov, michael_mosman@ord.uscourts.gov)
--Non Case Participants: Sherry Biggs (anthony_marsh@oknd.uscourts.gov, paige_lovoi@oknd.uscourts.gov, sean_dooley@oknd.uscourts.gov), Karl Lockhart (karl_lockhart@ord.uscourts.gov), Monica Mahal (monica_mahal@ord.uscourts.gov), Kara Scheele (kara_scheele@ord.uscourts.gov), Dpty Clk alg (alyssa_gifford@oknd.uscourts.gov), United States Marshal (okn.usms.ops@usdoj.gov)
--No Notice Sent:

Message-Id:2902120@oknd.uscourts.gov
Subject:Activity in OKND case 4:21-cr-00162-MWM USA v. Little - Order
Content-Type: text/html

U.S. District Court

U.S. District Court for the Northern District of Oklahoma

Notice of Electronic Filing

The following transaction was entered on 6/5/2023 at 4:38 PM CDT and filed on 6/5/2023

Case Name:	USA v. Little
Case Number:	4:21-cr-00162-MWM
Filer:	
Document Number:	108(No document attached)

Docket Text:

MINUTE ORDER by Judge Michael W Mosman *Defendants Motion to Declare Mandatory Life Sentence Unconstitutional [107] is DENIED. Defendants argument is foreclosed by precedent. United States v. Williston, 862 F.3d 1023, 1039-40 (10th Cir. 2017).*, ruling on motion(s)/document(s): #107 denied (Re: [107] MOTION to Declare Mandatory Life Sentence Unconstitutional) as to Justin Dale Little (This entry is the Official Order of the Court. No document is attached.) (alg, Dpty Clk)

4:21-cr-00162-MWM-1 Notice has been electronically mailed to:

Cristen C. Thayer   cristen_thayer@fd.org

Katherine A. Tanaka   katherine_tanaka@fd.org, cristen_thayer@fd.org, Lauren_Conklin@fd.org

Kenneth Allan Elmore   kenneth.elmore@usdoj.gov, CaseView.ECF@usdoj.gov, cathy.heard@usdoj.gov, tabatha.berka@usdoj.gov

Attachment J

Judgment

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Oklahoma

UNITED STATES OF AMERICA
v.
JUSTIN DALE LITTLE

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:21CR00162–1-JFH

USM Number: 43031-509
Rene Valladares, Katherine A. Tanaka and Cristen C. Thayer
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the Court.

☒ was found guilty on count One of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1151, 1153, and 1111(a)	First Degree Murder in Indian Country	4/22/18	1

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

June 22, 2023
Date of Imposition of Judgment

Signature of Judge

Michael W. Mosman, United States District Judge
Name and Title of Judge

6/23/23
Date:

AO 245B (Rev. 10/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Justin Dale Little
CASE NUMBER: 4:21CR00162-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Life.

☒ The Court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be placed at one of these Bureau of Prisons' facilities: USP Pollack, VSP Yazoo City or FCI El Reno.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By

_____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Justin Dale Little
CASE NUMBER: 4:21CR00162-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: Five years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: Justin Dale Little
CASE NUMBER: 4:21CR00162-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervision, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when to report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, notify the person about the risk or require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3B — Supervised Release

DEFENDANT: Justin Dale Little
CASE NUMBER: 4:21CR00162-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit his person, residence, office or vehicle to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2. The defendant shall successfully participate in a program of mental health treatment and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will determine the treatment modality, location, and treatment schedule. The defendant shall waive any right of confidentiality in any records for mental health treatment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant must pay the cost of the program or assist (co-payment) in payment of the costs of the program if financially able.

U.S. Probation Officer Use Only

A U.S Probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this Judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Justin Dale Little
CASE NUMBER: 4:21CR00162-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100	Not Ascertainable	N/A	N/A	N/A

☐ The determination of restitution is deferred until
An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to Plea Agreement $ _____

☐ The defendant must pay interest on any fine or restitution of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Justin Dale Little
CASE NUMBER: 4:21CR00162-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 100 due immediately, balance due

☐ not later than _____ , or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this Judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 90 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Any monetary payment is due in full immediately, but payable on a schedule to be determined pursuant to the policy provision of the Federal Bureau of Prisons' Inmate Financial Responsibility Program if the defendant voluntarily participates in this program. If a monetary balance remains, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments of $50 or 10% of net income (take home pay), whichever is greater, over the duration of the term of supervised release and thereafter as prescribed by law for as long as some debt remains. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before or after the date of this Judgment.

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Certificate of Service

I hereby certify that on December 15, 2023, I electronically filed the foregoing using the court's CM/ECF system which will send notification of the filing to the following:

Thomas Duncombe
Thomas.duncombe@usdoj.gov

/s/ Marcus Walker
An Employee of the Office of the
Federal Public Defender