

**CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
LINCOLN & MINNEHAHA COUNTIES**

425 North Dakota Avenue
Sioux Falls, SD 57104-2471

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November 13, 2008

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RE: *State of South Dakota v. Amy Marie Dierks*
Cr. 07-6751

Defendant's Motion to Suppress

Dear Counsel:

A hearing on Defendant's Motion to Suppress was held on August 28 – 29, 2008. After reviewing the parties' submissions, examining the record, and considering the parties' arguments at hearing, the Court renders the following decision:

I. Facts

At the time of the incident, Defendant Amy Dierks (Dierks) was operating an in-home daycare at her residence. Six-month old Henry Johnson (Henry/Victim) had been in Dierks' daycare twelve times over a five-week period of time. On November 12, 2007, Henry arrived at Dierks' house at approximately 12:35 p.m. According to Dierks, Henry fell asleep at approximately 1:45 p.m., woke up at

sometime around 4:00 p.m. and began acting "fussy." Soon after, Henry fell back to sleep. Dierks tried to feed Henry, but could not wake him. Dierks gently jostled Henry in an attempt to wake him.

When Dierks' husband (Stacy) arrived home around 5:00 p.m., Dierks told him she was not able to wake Henry. Stacy held Henry for a short period of time, tickling his feet and moving him around in another attempt to wake him.

Shortly thereafter, Henry's father, Steve Johnson, arrived to pick up Henry. Dierks informed Steve she was unable to get Henry to wake or eat¹. Steve then took Henry to the mall, where Henry's mother, Marissa Johnson, was working. Steve and Marissa decided Henry should go to Acute Care, where it was later determined Henry needed to go to the hospital. Henry was taken by ambulance from Acute Care to Sanford Hospital, where he arrived at 6:44 p.m. Henry was apparently suffering from inter-cranial injuries and was non-responsive.

Shortly before midnight on November 12, 2007, detectives called Dierks and asked her to come to the Law Enforcement Center (LEC)². While there, Dierks was asked to take a polygraph, which she agreed to do. Detective Fessler told Dierks she would contact her with a possible time for taking the polygraph.

At 7:30 a.m. the next day, Detective Fessler called and informed Dierks there was an opening to take a polygraph at 1:30 p.m. that day. Later that day, Detective Schaeffer stopped by Dierks' home, obtained information regarding the daycare and asked Dierks to come and take the polygraph.

Dierks went to the LEC to take the polygraph. Dierks was at the LEC from 1:20 p.m. until approximately 4:45 p.m. Detective Toft was to administer the polygraph. Before doing so, he advised Dierks she did not have to take the polygraph, she was not in custody or under arrest, she was free to leave or discontinue the test, and she could decline to answer any of the individual questions. Detective Toft did not give Dierks *Miranda* warnings. Most of the interaction between Detective Toft and Dierks was recorded on videotape with Dierks' knowledge.

The recorded interactions took place in a small room at the LEC containing three chairs and a desk with a laptop computer on it. The chair behind the desk is where Detective Toft sat while he administered the polygraph; Dierks sat in a chair next to the desk and closest to the door; and the other chair, which faced Dierks' chair, was where Detective Toft sat when he was questioning Dierks before and after administering the polygraph.

¹ According to Dierks' facts, Steve then made a motion like he was shaking a baby.

² During that same time, Detective Schaeffer went to the residence to speak with Stacy and was there for approximately thirty minutes.

The prosecution seeks to use Dierks' statements from the interview and post-polygraph questioning as well as a letter Dierks wrote during the questioning as evidence. Dierks has moved to suppress this evidence, claiming a *Miranda* violation and/or that the statements were involuntary.

II. LAW AND ANALYSIS

1. Whether Dierks' *Miranda* rights were violated.

In general, the *Miranda* procedure should be followed, since "[t]he procedure is so simple that there is no excuse for not following it." *Satter v. Solem*, 434 N.W.2d 725, 727 (S.D. 1989). However, the police are not required to give *Miranda* warnings unless a suspect is being questioned in police custody. *State v. Hoadley*, 2002 SD 109, ¶24, 651 N.W.2d 249, 255 ("Fifth Amendment rights are implicated when an individual is subjected to a custodial interrogation.") (citations omitted). "Miranda warnings are required when an individual is being interrogated 'in custody at the station or otherwise deprived of his freedom of action in any significant way.'" *Id.* (quoting *State v. Hamm*, 234 N.W.2d 60, 64 (S.D. 1975)). However, *Miranda* warnings are not

to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'

State v. Darby, 1996 SD 127, ¶25, 556 N.W.2d 311, 318-19 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, (1977)).

To determine whether someone is in police custody, the court looks to "how a reasonable man in the suspect's position would have understood his situation." *Hoadley*, 2002 SD 109, ¶24, 651 N.W.2d at 256 (quoting *State v. Anderson*, 2000 SD 45, ¶79, 608 N.W.2d 644, 666). The Court examines all of the circumstances surrounding the interview and "whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Hoadley*, 2002 SD 109, ¶24, 651 N.W.2d at 256 (citations omitted).

The proper test for ascertaining whether a person is in custody for purposes of the *Miranda* warnings is a two part inquiry:

[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

State v. Johnson, 2007 SD 86, ¶ 22, 739 N.W.2d 1, 9 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004) (further citation omitted)).

As part of this analysis, the question is “not whether the investigation has focused on any particular suspect, but rather, whether the person being questioned is in custody or deprived of his or her freedom to leave.” *Johnson*, 2007 SD ¶ 22, 739 N.W.2d at 9 (quoting *State v. Carothers*, 2006 SD 100, ¶ 20, 724 N.W.2d 610, 619) (further citations omitted). The determination of whether a person is in custody is analyzed from the “objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” *State v. Thompson*, 1997 SD 15, ¶ 25, 560 N.W.2d 535, 540 (quoting *Stansbury v. California*, 511 U.S. 318, 323 (1994)). Criteria considered include:

probable cause to arrest, subjective intent of police, subjective belief of defendant, and focus of the investigation. Although none of such factors is alone determinative, the most compelling is whether the focus of investigation has finally centered on the defendant. *Brown v. Beto*, 468 F.2d 1284 (5th Cir. 1972). Some of the factors to be considered are (1) nature of the interrogator; (2) nature of the suspect; (3) time and place of interrogation; (4) nature of interrogation; and (5) progress of the investigation. Annotation, 31 A.L.R.3d 565 (1970).

In the Matter of M.J.B., 284 N.W.2d 874 (S.D. 1979).

First, the court must consider the circumstances surrounding the interrogation. Dierks acknowledges she voluntarily agreed to take the polygraph at the LEC. Further, Dierks concedes before she took the polygraph, she was advised she was not in custody or under arrest, she was free to leave or discontinue the test, and she could decline to answer any of the individual questions. After the test was administered, the detective again informed Dierks she was free to leave. Dierks states the door to the interrogation room was shut and the detectives never showed the door was unlocked. However, “a closed or even locked door, does not, in and of itself, create a custodial interrogation.” *Carothers*, 2006 SD 100, ¶ 22, 724 N.W.2d at 619 (quoting *Thompson*, 1997 SD 15, ¶ 28, 560 N.W.2d at 541).

Dierks never asked to leave, nor did her actions imply she desired to leave. She was seated closest to the door, but she never went to the door in an attempt to leave. Although the questioning and polygraph were clearly an unpleasant situation for Dierks, there is no indication she was in custody or believed she was unable to leave.

With regard to some of the other factors, it appears the police investigation had centered on Dierks, and it is likely the polygraph test was a police tactic used to get Dierks to the LEC for questioning. However, Detective Toft repeatedly made it

clear Dierks could discontinue questioning and leave at any time. In addition, the questioning took place in the middle of the afternoon in a cordial manner.

Upon voluntarily arriving at a police station and answering questions after being told he or she could leave at any time, a reasonable person would not feel he or she was in custody. A reasonable person who wanted to leave that situation would have asked to leave or at least moved toward the door. Dierks did neither of these things.

Miranda rights are triggered only when a suspect is in police custody being interrogated. Although Dierks was being interrogated at the Law Enforcement Center by Detective Toft, she was not in police custody. Therefore, her *Miranda* rights were never triggered and accordingly, could not be violated.

2. Whether Dierks' statements were voluntarily made.

Dierks further claims her statements were not made voluntarily. "The State must establish the voluntariness of a confessor's admission by a preponderance of the evidence." *State v. Tuttle*, 2002 SD 94, ¶21, 650 N.W.2d 20, 30 (citations omitted). "The factual inquiry centers on (1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *Id.* (citation omitted). In determining whether a confession is voluntary, "the trial court must consider the effect the totality of the circumstances had upon the will of the defendant" and the "question in each case is whether the defendant's will was overborne." *State v. Darby*, 1996 SD 127, ¶28, 556 N.W.2d 311, 319 (citation omitted). The following factors may be considered in making a determination of voluntariness: "(1) the defendant's age; (2) the defendant's lack of education or low intelligence; (3) the absence of any advice to the defendant of [his or her] constitutional rights; (4) the length of detention; (5) the repeated and prolonged nature of questioning; (6) the use of physical punishment such as deprivation of food or sleep; and (7) Defendant's previous experience with law enforcement." *State v. Johnson*, 2007 SD 86, ¶ 29, 739 N.W.2d 1, 11 (quoting *Carothers*, 2006 SD 100, ¶ 23-24, 724 N.W.2d at 619-20).

The above factors can be summarized as follows: (1) Dierks was eight days away from her 28th birthday at the time of the interrogation. As such, she was of an age to understand the implications of her statements; (2) Dierks is a college graduate with normal intelligence and was able to coherently communicate her thoughts and observations; (3) Dierks had received no advice on her constitutional rights at the interrogation. Dierks was not informed of her right against self-incrimination or her right to have an attorney present, although Detective Toft did tell her she could discontinue the questioning; (4) Dierks was at the LEC for 3-4 hours, neither a particularly lengthy nor insignificant amount of time; (5) Detective Toft repeated his questions many times throughout the interrogation, consistently rejecting Dierks' denials; (6) There was no physical punishment; and (7) Dierks had no previous experience with law enforcement.

Some of these factors may weigh on the determination of voluntariness in one way or another, but some are benign facts that lend no insight into the totality of the circumstances which produced the defendant's allegedly incriminating statements. To understand the totality of the circumstances, the details of the interrogation must be thoroughly examined. In addition to the Court's own examination of the video and transcript, the report and testimony of Defendant's expert witness shall be considered as well.

At the August 29, 2008 hearing, the defense called Dr. Scott Bresler, a forensic psychologist with extensive experience in evaluating potentially coerced confessions. He was asked to assess Dierks' mental state at the time of the polygraph and interrogation and determine whether Dierks may have been vulnerable to police coercion. *Bresler Testimony Transcript (Bresler)*, p. 5. Bresler summed up his findings by saying Dierks "had some characteristics of an individual who might be susceptible to interrogative pressure." *Id.* at 19. In Dr. Bresler's opinion, the defendant's interaction with Detective Toft looked "like an interrogation with a polygraph tucked into it." *Id.* at 22.

Pre-polygraph Interrogation

Before the questioning began, Dierks stated she was tired and only had a few hours of sleep. She also indicated she had not had much to eat and was feeling light-headed. However, Dierks indicated she was able to proceed with the polygraph, so Detective Toft began to ask Dierks about what happened on November 12, 2007, the day Henry was hurt. *Amy Dierks Polygraph Interview at LEC (Exhibit C)*, p. 5-6.

During this preliminary questioning, Detective Toft begins to talk about mistakes or accidents. He says to Dierks,

I've done some things I'm really not very proud of when I was younger [...]. What I learned over the years is that good people make mistakes and you don't have to be involved with something like this to be a bad person for it to happen, 'cause I know accidents happen, too.

Id. at 8.

Detective Toft continues to talk about mistakes and describes how people can lose their tempers, saying:

I, as a dad and as a grandpa, realize I've lost my temper with my kids before [...] Was there anytime when I've been in a situation where I spanked my kids and said, oh gosh, you shouldn't have done that, yep I have. Where I said or done some things where I might even think, God, oh, did I hurt 'em. I'm telling you right now I've done it and I

understand that. Did I ever try to hurt my own kids or somebody else's kids, no. [...] All I'm telling you is someone who would give their life for their kids can also really make a mistake just by a slip, you know, it could be a total accident. [...] All of a sudden somebody's hurt and it just gets carried away because you don't want to say that you did it even if it was an accident. [...] if there's any way that you were involved in an accident with Henry let me help you explain it because I'll do it. [...] I can explain an accident, and that's all it is.

Id. at 9-10.

Detective Toft asks Dierks to think of anything that might be in the back of her head that is bothering her. Dierks responds:

I'm going over it in my head a dozen times and the only thing that I've kinda come up with is, and this is after he was leg (trying to say lethargic – but can't) non-responsive, and I didn't shake him hard, you know, like this, but I did kinda, you know, stir him a little bit to get a response from him [...] and I guess one question that has really been bothering me now, did you shake him, and, you know, in my mind going like this (motions with hand) yeah.

Id. at 10-11.

Detective Toft discusses a story of another day care provider, stating "that situation was very similar to what mighta happened here is that the baby's not responsive or something and you give 'em a shake and sometimes shake too hard." He goes on to say, "do I believe that you intentionally hurt Henry? No. Is there a possibility that you shook him (inaudible – 'awake?') and maybe something jarred loose? You can't look inside and know what's happened." *Id.* at 11.

Detective Toft repeatedly relays stories involving himself and his own family, attempting to draw comparisons between his daughter and Henry. He says to Dierks:

My daughter had colic[...] I don't know if Henry was like that or anything, but she'd just stiffen up and scream for an hour. I love my daughter. I, you know, I almost wanted to cry just thinking about it because, but did I grab her and say, quit it, this quick, yep. And I looked at myself, could I have hurt her? Yes, I could have. In just one stupid instant. Now, did I want to hurt her, would that have been an accident? Absolutely it would have been an accident. Can something like this have happened with Henry, he's sick, doing things like that? It sounds like it. All right.

Id. at 11-12. Dierks continues to deny having any knowledge of how Henry was hurt. She recalls Henry was not waking up from his nap:

At the time when I was trying to wake him, I wasn't getting any response at all from him, he wasn't crying. He woke up and I changed his diaper and then, um a parent came so I laid him down on the floor and he was crying then. I went to go get his bottle and he fell back to sleep. And then I tried to wake him up to feed him and he would not wake up. So I, you know, I did not did it the hard a shake (motions) [...] I picked him up, I laid him on the floor, I put him on his saucer, you know, moving him around to get him to wake up, but I don't think I shook him hard.

Id. at 12. Dierks goes on to say Henry's parents had told her Henry is a hard sleeper, so she knew not to shake him.

In response to Detective Toft's question, "Is that when you shook him?," Dierks replied,

Possibly, yeah, when I, you know, had him in different spots and just kinda it was out here (motion – shows arms straight) like a gentle kind of rock kind of thing just to see. And he didn't always hold his head up, so I believe I was supporting his head, but – (shrugs shoulders).

Id. at 14. Then Detective Toft asks, "Is it possible that it whipped a little bit?," to which Dierks replies, "It's possible, yes." She goes on to explain if his head did whip back, it happened after he was already non-responsive.

Detective Toft explained the polygraph process to Dierks, indicating Dierks needed to be certain of her answers to the polygraph questions. He tells Dierks he is going to try to clarify whether she thinks there is a possibility she caused the harm to Henry. He tells her, "if you're not sure, you're not gonna pass." He goes on to tell Dierks how the polygraph can show the truth:

the science and so forth that goes behind it, and the psychology, they're very fascinating stuff but we don't need to spend hours going through that stuff. What I can tell you is that it gives a very unique signal and we're able to tell pretty good depending on how things are.

Id. at 23. Detective Toft goes on to back up this statement by doing a preliminary test in which Dierks is to respond "no" to every question. Detective Toft gave Dierks a playing card, asked her several questions about the card to which Dierks responded negatively each time, and then Detective Toft correctly guessed what card Dierks had based upon her polygraph results.

Dierks contends the lie detector test was a “psychological rubber hose” used to pressure her into making incriminating statements. The South Dakota Supreme Court has recognized:

The situation a lie detector test presents can best be described as a psychological rubber hose. A defendant, when suddenly faced with the impersonal accuracy of a machine, may believe it is safer to confess and place himself at the mercy of the law rather than lie to the examiner and sacrifice any possibility of leniency. Under circumstances such as this we find it difficult to believe that a confession is voluntary unless it can be shown the defendant knows his constitutional rights and knows that his interests cannot be harmed by exercising those rights. When asked the right questions a defendant may confess if he believes he can be convicted by his own silence.

State v. Faller, 227 N.W.2d 433, 435 (S.D. 1975).

Dr. Bresler gave his opinion on the use of the polygraph in the present case when he testified:

So, she up front is stating to this police officer that she is not even sure herself whether or not she may have done something or something might have happened at the daycare. [...] And she said it no less than five times. [...] Polygraphers know all too well that you spend time up front coming up with very specific questions and if the person cannot answer that question definitively, you don't hook up psychophysiological assessment tools to them, tell them they have to be certain and expect them to pass a polygraph. That's exactly what [Detective Toft] does. That's exactly what he does. And then when she fails that polygraph, Your Honor, he comes back in and he tells Ms. Dierks you failed the polygraph. Your body knows you did it. Now think again what really happened here. And that leads, I believe, to a cascading down in a sense of her feeling pressured and more pressured. And then ultimately, I believe, it led her to give an inculpatory statement, an incriminating statement.

Bresler, p. 25-26.

Post-polygraph Interrogation

After the polygraph test, Detective Toft re-enters the interrogation room to tell Dierks, “I’ve come back with some concerns. I think you know that. I think you could feel it. When I looked at the charts there were some, there was some problem.” *Exhibit C*, p. 37. He goes on to say:

What I can tell from this polygraph examination is that you're a very good person. I know that because some of those questions would not bother some folks. Some of those questions about people who love and trusted you and things like that, there was some there was some reaction there. Now, no doubt about it. And it wasn't because you're bad. That's really not it. It's because a good person has got a conscious [sic] and thinks of little things. But when I asked you that question about Henry you reacted pretty strong and I know you had to feel it. Um, and you and I talked about it, you know, before we started. It's one of the things I kept asking you. Are you sure? Because not being sure makes it difficult, you know what I mean [...]

I keep getting this recurring thought in my head, I've, when I've been involved with my own kids and accidentally - - it was an accident. Um, that's just a freak thing when something like this happens. I've never heard anything bad about you at all, ever. Which is great. But when I asked you that question, the doubts in your head are true and hard.

Id. at 37-38.

Detective Toft insinuates he can definitively determine Dierks had something to do with Henry's injury. He indicates to her there is something in her mind and her body telling him she did something to Henry. He says her doubts about what happened are appearing on the polygraph results. He says:

Your conscious [sic] is so big that if you've got doubts in your head, it's showing up here. [...] There's something a little more than what you told me. I'm not saying much, I'm just saying a little more than you told me, that's sitting, sitting in the back of your head and it's bugging you, it's bothering you. I can see it in your eyes.

Id. at 38-39.

Dierks again denies doing anything to Henry. She indicates she has searched her memory and does not remember doing anything to him. Detective Toft reiterates what the polygraph test "told" him:

All I know is there's something in your head, there's a question in your head. There's something there. I'm not saying you shook him and hurt him on purpose for sure. That I know. That I know of. But from two causes, you didn't try to hurt him. Now, what I can say is that the test is telling me it's possible you did. Only because of an accident. That's what it's telling me. You don't have an intentional bone in your body. You wouldn't try to hurt Henry or anybody and I believe that a hundred percent. Now, what I do believe also is that there's something in the back of your head that says maybe I did, I'm not sure.

(Dierks): Yeah, and I've had that question like that there cuz I cannot, I can't figure it out. I don't know. I don't think so. I deal with babies all the time. I, you know, maybe I didn't support his head one time, maybe he jerked back. I don't know –

Id. at 39-40.

At this time, Detective Toft encourages Dierks to continue to think of any possibilities of what could have happened to Henry. He tells her not to hold back from telling him anything because “an accident is all that it is.” *Id.* at 41. Detective Toft leaves the room to speak with Detective Fessler and tells Dierks to “see if [she] can think of anything that [...] might, might fit.” *Id.*

When Detective Toft re-enters the interrogation room, the following exchange occurs:

(Dierks): I thought of one thing, but I don't know if it happened or not. But I wrapped him up like a cocoon cuz that's the way he sleeps – all wrapped up and I don't know when I maybe picked him up I did not hold his head well enough or something, because he does sometimes move his head back, and so that's the one thing – [...]

(Toft): What'd he hit?

(Dierks): Nothing.

(Toft): Maybe he kicked his head –

(Dierks): Unless he hit the floor when I picked him up off the floor. That could be a possibility.

Id. at 42. Upon that statement, Detective Toft tells Dierks that he wants her to “get past” whether she “knew or not. Your body, your mind is telling me that you know. That's what it's telling me. That's why it's reacting like this. Is it something that you're afraid of and concerned about? Absolutely.” *Id.* at 42-43.

Dierks says she “was up most of the night thinking about it and [she doesn't] want to just make something up.” *Id.* at 43. Detective Toft keeps pushing forward, telling Dierks “the thought in [her] head is more than a thought.” He tells her, “you talked about maybe hitting his head on the floor” and “babies don't maybe hit their heads on the floor. They do or they don't.” Upon Dierks' reply of “yeah,” Detective Toft goes forward with that notion and says, “Okay. So he hit his head on the floor.” He then proceeds to speculate:

Maybe when you tried to wake him up or something was going on and he hit his head, you know. It didn't have to be anything that you meant to do because I don't think you ever did. I really don't. In fact, there's things I know and that's one thing I know. That you never meant to hurt Henry one bit. And at this point (inaudible) from what

the instrument is very clear on, you know, when I asked you about did you cause that injury, you know you did.

Id. at 43-44.

Dierks insists she does not know when she would have hurt Henry, saying “either I don’t remember it myself, [or] that I don’t know when.” *Id.* at 44. Detective Toft then asks her what she thinks happened, to which she replies:

My best guess just going over the time he was at my house yesterday was that he mighta hit his head on the floor. That is my best guess. But like I said, I cannot remember. I know I do not shake him. I do not shake babies. I know what can happen.

[...]

No, no, I didn’t drop him, he didn’t slip. There’s one time I went out to the kitchen when I was making his bottle and he was out on the living room floor with other kids. I don’t think there [were] any other kids that went over there by him, but since I was out of the room, I don’t know for sure.

Id. at 45.

Detective Toft then expresses his sympathy for how difficult this experience is for Dierks. He asks her “Do you want me to put [Henry’s] mom through this? Cuz that’s what’s coming next.” *Id.* Dierks continues to relay her confusion about the situation saying she “cannot figure out one particular point where something happened.” *Id.* at 46. She goes on to say “But, yeah, in the back of my mind it’s like, okay, did I do something wrong? I don’t know. I don’t think so, but did I lose my temper and do something that I don’t remember doing it [sic]?” *Id.*

Detective Toft grabs a hold of the theory of Dierks losing her temper and blacking out. He tells her:

(Toft): That was real because I’ve seen it more than once where somebody will lose their temper here, or their temper and they basically almost black out because of the - the one [polygraph] question that really bothered you a lot was, have you been so mad you hurt someone who loved or trusted you. It doesn’t say did you purposely do it. It just says did you. And you did, because you just tore that off the meter where that question bothered you. So at this point that actually probably makes more sense because and I know I’ve been so mad that I just see white sometimes.

(Dierks): Um-hum.

(Toft): You know what I mean? You too?

(Dierks): There’s times. I try to keep my cool with the kids and –

(Toft). And there’s a difference between, you’re a human being.

(Dierks): Um-hum.

(Toft). I mean you're a human being and sometimes human beings need help with things. They need help with dealing with flash of anger (inaudible) things going wrong. Sometimes you need help with those things, too. I still don't believe, you know, I can get angry and there's a flash of anger and, you know, all it takes is one, you know what I mean, and have I done that? I told you, when I looked in the mirror, you know. Do I, do I remember when and how those things happen with me? No, not really. But do I know I did it? Yes, I do. You know. If that's something you're concerned about, hey, talk to me about it. Get it through cuz we can explain that, and I'm gonna be the one that's gonna say, listen, Amy is a good person. She needs some help dealing with anger, and that she didn't mean to hurt him at all, but that's what happened and she'll work with – she's more than willing to work with anybody to try and get it squared away.

(Dierks): Yeah.

Id. at 46-47. Detective Toft adds to the temper theory and changes a possible loss of temper to a black-out inducing “flash of anger.” Dierks continues to discuss other possibilities, saying she may have “laid him down a little hard” on the floor. *Id.* at 47. Detective Toft adds in the “flash of anger” language again and asks what Henry was doing when Dierks laid him down. She said he was crying and mentions he has acid reflux. *Id.* at 48.

Dierks then indicates when Detective Toft said “just a little jerk could do it” that it was a possibility Henry was hurt when she laid him on the floor, but claims she just laid him flat on the floor once. Upon this comment, Detective Toft adds his own detail, saying Dierks “felt the thunk when his head hit.” *Id.* Dierks neither confirms nor denies that detail, but says Henry was already crying at that time and she picked him up right away after laying him down hard. *Id.*

The Letter

At this time in the interrogation, Detective Toft asks Dierks to write a letter to Henry's mother, saying she is sorry, it was an accident, she is going to get help for anger, and sorry is not always good enough. Detective Toft goes on to imply the state's attorney will go easier on her if they know what happened to Henry was a mistake and Dierks wants help with anger. *Id.* at 49.

The letter Dierks produced is substantially a mirror image of what Detective Toft told her to write. “The beginning of the letter she inculcates into the apology letter the exact language that Officer Toft actually says to her prior to her writing the letter.” *Bresler*, p. 59. There does not appear to be any distinct information which came from Dierks herself. At the suppression hearing, the prosecution argued that because Dierks addressed the letter to both of Henry's parents instead of just his mother as Detective Toft suggested, the letter was penned by Dierks' free

will. The Court does not find this argument to be persuasive when all substantive parts of the letter were Detective Toft's thoughts. Dierks added no details to the letter. In all relevant respects, Detective Toft was the author of the letter.

Post-Letter Interrogation

After Detective Toft reviews the letter, he asks Dierks to clarify how things happened. Dierks' responses are still unclear as to what exactly happened and when. She says Henry was crying shortly after being dropped off, and "that was the only time [Dierks] could think cuz he was only there from 12:30 to 5:30 so and after he woke up from his nap is when he wasn't really responding too much." *Exhibit C* at 52. Detective Toft asks what time Dierks thought it was when she "shook him?" Dierks answers it was about 1:45 – 2:00, Henry was on a blanket on the floor of her bedroom, but that is as far as that line of questioning goes. *Id.* at 53. It is never made clear whether Dierks is referring to when she laid Henry down "hard" or if this is a separate act of shaking Detective Toft thinks Dierks has admitted to.

Dr. Bressler criticized Detective Toft's failure to ask detailed questions and bring out a more complete and convincing account of what happened. He says, "research in this area is very clear. What's the most important thing about an incriminating statement from an interrogator's standpoint? It's the post-admission interview. There is no post-admission interview here." *Bresler* at 26. Dr. Bresler later discusses the proper technique for post-admission interviews:

I would ask very specific questions. She wrote the apology letter and she states that she did something and she is sorry for doing it. It seems like she did it, not clear if it's accidental but something happened. I would say wait a second, let's step through this. Take me through everything that happened here. Go through the day. You actually remember that, etc., etc. Very, very specific question. What was his response when you laid him down, etc., etc. There wasn't a lot of time spent on that at all.

Id. at 66-67.

Soon after the letter was written, Detective Toft brings Dierks' husband, Stacy, into the interrogation room. Detective Toft begins by telling Stacy he believes Dierks is a good person, but says it was "just one stupid little mistake and I know that she wants to get it squared away [...] and get some help for anger." *Exhibit C* at 56. He goes on to say Dierks is sorry and didn't mean to do anything, and encourages her to tell her husband what happened. Dierks says, "(inaudible – bedroom...crying...). I just, I lost my temper and (inaudible – dumped, thunked, thumped) him on the floor (inaudible...hit his head)." *Id.* at 57.

After this muffled and inaudible statement from Dierks, Detective Toft leaves Stacy and Dierks to speak alone, warning them their conversation will be videotaped. The relevant part of their conversation is as follows:

(Dierks): (Inaudible) I don't remember doing it. (Inaudible)
(Stacy): You don't remember even doing it? Then how can you say that you did?
(Dierks): Cuz something happened to Henry...(inaudible)...the damage...
(Stacy): Then you go along with that because the detective...(inaudible) I don't understand. I'm not saying – no, no, you don't need to explain.
(Dierks): (Inaudible) I didn't do that. I do not remember. (Inaudible) he started talking about it.
(Stacy): And that brought it out? Do you remember doing it now?
(Dierks): Kinda yeah, but I guess I didn't think it was that –
(Stacy): That much force. Okay.

These statements by Dierks are an example of the effect Detective Toft's questioning had on her. "It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect." *State v. Dickey*, 459 N.W.2d 445, 447. "These ploys may play a part in the suspect's decision to confess, but, so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." *State v. Johnson*, 2007 SD 86, ¶ 29, 739 N.W.2d 1, 11 (quoting *Carothers*, 2006 SD 100, ¶ 23-24, 724 N.W.2d at 619-20). Dr. Bresler observed "there are elements of Ms. Dierks' personality and there are aspects of the way that the interrogation was carried out by Officer Toft that brought to the forefront what I would say are significant issues suggesting vulnerability to a coerced confession [...] *Bresler* at 32. The Court agrees with Dr. Bressler's opinion that it does not appear Dierks' incriminating statements were a product of balancing considerations, but rather were a product of her susceptibility to coercion and Detective Toft's tactical pressure.

Dr. Bressler's report, based upon his testing and interviews of Dierks, provides insight into Dierks' mental state at the time of the interrogation.

Why would Mrs. Dierks make statements that could be construed as an admission of guilt? It is plausible that she did so because she is a compliant person who has few skills to stand up to and argue with persons she believes are in authority. When given negative feedback and told to rethink her statements and admit to wrongdoing, she may have in fact done just that; or she may have made incriminating statements to appease Officer Toft, especially in light of the fact that she believed that he was an expert who was able to detect with his polygraph what really happened, something she admitted numerous times that she was unsure of. Testing results show that Mrs. Dierks would be vulnerable to just this sort of behavior. Officer Toft would

push forward as he is taught to do as an interrogator with someone who does not give clear and insistent denials. It is [my] opinion that this case has many elements consistent with what one would expect to find in a false confession case.

Dr. Bresler's Forensic Psychology Evaluation (Exhibit B), p. 12.

"The State must establish the voluntariness of a confessant's admission by a preponderance of the evidence." *State v. Tuttle*, 2002 SD 94, ¶21, 650 N.W.2d 20, 30 (citations omitted). The Court finds the State has not met its burden in this case. "The factual inquiry centers on (1) the conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure." *Id.* (citation omitted). In determining whether incriminating statements were voluntarily given, the court must look to the totality of the circumstances to determine whether the defendant's will was overborne. *Darby*, 1996 SD 127, ¶ 28, 556 N.W.2d 311, 319 (citation omitted).

The totality of the circumstances includes the fact the police not only gave Dierks a polygraph, but also interrogated her without informing her of her constitutional rights. Additionally, Detective Toft exaggerated the reliability of the polygraph results to convince Dierks that whether or not she did hurt Henry, her body and mind were unequivocally telling him she did. The Court finds that Detective Toft's interrogation crossed the line into coercion as it was latent with suggestions of what took place rather than creating an opportunity for Dierks' to express her own rendition as to what happened. In Dr. Bresler's hearing testimony, he stated:

[I]t has all the aspects of what I would call and what the research would call a coerced internalized confession. I think when she gave that confession, she believed that, in fact, that instrument could tell, her body could tell that she did something wrong but for some reason she couldn't remember it.

Bresler at 28.

The Court finds Dr. Bresler's testimony and report reliable, and considers them factors which show Dierks' lack of capacity to resist the coercive pressure applied by law enforcement. The Court also takes into consideration Dierks had little to eat, felt light-headed, and was functioning on little sleep at the time of the interrogation. In addition, Dierks had little, if any, experience with law enforcement.

Although Dierks' statements and/or responses when taken individually or piece-meal appear to be incriminating, the Court, when considering the totality of the circumstances, cannot find Dierks' statements as being the product of her own

volition, but rather, they appear to be coerced regurgitations of Toft's suggestions and/or assertions.

III. CONCLUSION

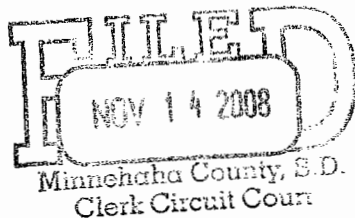
The overarching question of voluntariness is whether the defendant's will was overborne. The Court finds in this case it was. Coercive law enforcement tactics and Dierks' vulnerability to pressure combined to produce involuntary statements.

In addition to Dierks' statements being involuntary, SDCL § 19-12-3 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury [...]." Much of the interrogation involves discussion of the polygraph test and results, which is tantamount to allowing the polygraph results into evidence. In South Dakota, "the results of polygraph examinations are inadmissible in the absence of a stipulation by the defendant and the prosecution." *State v. Watson*, 248 N.W.2d 398, 399 (S.D. 1976). Detective Toft's comments about what the polygraph "told" him would be inadmissible as a part of the polygraph results, and since the polygraph is not recognized as a reliable and/or credible determination of veracity, the results are more prejudicial than probative.

For these reasons, all of Dierks' statements surrounding the polygraph examination, including pre and post polygraph examination interviews, and the letter to the Johnsons, are suppressed in their entirety.

Defendant's Motion to Suppress is **GRANTED**.

Counsel for Defendant shall prepare an order consistent with this decision.



c/c Clerk's File

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley Zell".

Bradley Zell
Circuit Judge