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# *State v. Eskew*: "This is just like on TV" – Evaluating a Real-Life *Miranda* Warning

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# PRECAP; *State v. Eskew*: "This is just like on TV" – Evaluating a Real-Life *Miranda* Warning

**Hannah Wilson**

## I. QUESTIONS PRESENTED

(1) Did police officers' downplaying of their *Miranda* warning render Ms. Eskew's resulting waiver involuntary?

(2) Did the totality of the interrogation circumstances, including officers' misrepresentations, psychological pressure, and guilt assumption techniques, render Ms. Eskew's confession involuntary?

(3) Did the District Court err in precluding educational expert testimony regarding false confessions?[1]

## II. INTRODUCTION

The test for determining whether a confession is voluntary is "whether the suspect's will was overborne by the circumstances surrounding the giving of the confession."[2] The Montana Supreme Court has held that "the use of the guilt assumption technique, without more, does not constitute such physical or psychological coercion, deception, threats, or promises sufficient to tip the totality of the circumstances test in [the defendant's] favor."[3] This case balances these competing interests through the appeal of Jasmine Eskew, which raises three issues concerning the constitutionality of forced confessions. The outcome of this case will provide a more conclusive framework for determining the point at which a confession becomes voluntary as well as addressing the issue of expert testimony regarding false confessions.

## III. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Jasmine Eskew called 911 on September 18, 2012 to report her daughter Brooklynn was unresponsive and having trouble breathing.[4] Eskew stated that Brooklynn started "screaming and shaking," and that she proceeded to rock Brooklynn to calm her down.[5] Medical

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[1] Brief of Appellant at 1, *State v. Eskew*, https://supremecourtdocket.mt.gov/view/DA%2014-0445%20Appellant's%20Opening%20--%20Brief?id={F0061154-0000-C616-BF3B-BE03A2E42E2E} (Mont. April 13, 2016) (No. DA 14-0445).

[2] *Id.* at 18; State v. Morrisey, 214 P.3d 708, 719 (Mont. 2009) (citing Dickerson v. United States, 530 U.S. 428, 433–34 (2000)).

[3] State v. Jones, 142 P.3d 851, 856 (Mont. 2006).

[4] Brief of Appellee at 1-2, *State v. Eskew*, https://supremecourtdocket.mt.gov/view/DA%2014-0445%20Appellee's%20Response%20--%20Brief?id={F071E756-0000-C52F-87DC-4AC3804F81DD} (Mont. Sept. 1, 2016) (No. DA 14-0445).

[5] *Id*. at 6.

personnel at the hospital in Great Falls ultimately determined that Brooklyn had a traumatic skull injury, likely caused by child abuse, because "children of that age cannot cause brain injuries on their own and Eskew did not indicate that Brooklynn had suffered a traumatic accident."[6] Medical staff reported this to Detective Scott of the Great Falls Police Department, and a nurse practitioner also shared that it appeared to him that Brooklynn had been shaken shortly after her arrival at the hospital.[7] Brooklyn was transported to Spokane for additional medical care where she was declared brain dead within a few days.[8] CT scan and MRI results indicated that Brooklynn's injury was actually consistent with "nonaccidental head trauma," rather than shaking.[9]

Meanwhile, two and a half hours after the 911 call, while Brooklynn underwent medical examination, Eskew was questioned in a police interrogation room.[10] The officers assured her that her statement would be passed on to the doctors to assist them at the hospital and that *Miranda* warnings were merely a formality "anytime that you're talking with detectives in the police station."[11] She subsequently waived her rights, and the officers explained that Brooklynn's injuries were not consistent with Eskew's story and suggested that Eskew was "rougher than she had described when she was rocking Brooklynn."[12] Eskew agreed that she was the only person that could have caused Brooklynn's injuries and that she was present when the injuries occurred.[13] The officers claimed that they knew that she had been shaking Brooklynn, and insisted that she agree that she had misrepresented her attempts to console Brooklynn by "rocking" and "bouncing" her.[14] They instructed her to "stop lying to them."[15] They "eventually became frustrated" that Eskew's account was inconsistent with Brooklynn's injuries.[16]

Ultimately, "the interrogation resulted in Eskew stating that 'I did shake her' and demonstrating forceful shaking."[17] Eskew was held in the interview room at the police department from 6:56 PM until 10:43 PM, when she was arrested and charged with assault on a minor and deliberate homicide.[18]

A jury convicted Eskew of assault on her infant daughter Brooklynn, but acquitted her of deliberate homicide.[19] Eskew wanted to

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[6] *Id*. at 2.
[7] *Id*. at 3–4.
[8] *Id*. at 3.
[9] *Id*. at 3–4.
[10] *Id*. at 4.
[11] Brief of Appellant, *supra* note 1, at 4.
[12] Brief of Appellee, *supra* note 4, at 6–7
[13] *Id*. at 7.
[14] Brief of Appellant, *supra* note 1, at 5; Brief of Appellee, *supra* note 4, at 8.
[15] Brief of Appellee, *supra* note 4, at 7.
[16] *Id*. at 7
[17] Brief of Appellant, *supra* note 1, at 5.
[18] Brief of Appellee, *supra* note 4, at 9; *Id*. at 1.
[19] *Id*. at 1.

suppress her admission of shaking because she claimed that the police interrogation was aggressive, the officers failed to provide a meaningful *Miranda* warning, and the totality of the circumstances rendered her admission (and physical demonstration of shaking a police-provided doll) involuntary.[20] Additionally, the defense was prohibited from presenting expert testimony to educate the jury about the counterintuitive effects of false confessions, which Eskew argues would have explained that similar police interrogation techniques correlate with "innocent people confessing to crimes they did not commit."[21] Eskew appeals her conviction for assault on a minor, challenging the District Court's denial of her motion to suppress her pretrial statements and the exclusion of expert testimony on false confessions.[22]

## IV. SUMMARY OF ARGUMENTS

### *A. Appellant Jasmine Eskew*

#### *1. Eskew's* Miranda *Waiver Was Involuntary*

Eskew claims first and foremost that her waiver of her *Miranda* rights was involuntary.[23] Eskew argues that the officers presented her *Miranda* warning as a mere formality; that they were "questioning her only for medical, diagnostic purposes"[24] and the *Miranda* form was simply a routine, "just like on TV."[25] They assured her that their reason for questioning was for medical purposes to pass along information to the doctors.[26] The District Court found this to be a misrepresentation because the true purpose of the interrogation was a criminal investigation.[27]

Eskew argues that the *Miranda* warning was constitutionally insufficient and therefore "the burden is on the State to prove the sufficiency of the *Miranda* warning and the voluntariness of any waiver."[28] The officers sought to "check off the requirement" of informing the suspect of their *Miranda* rights while minimizing Eskew's chance of actually invoking them.[29] Eskew argues that there is a reasonable possibility that "the tainted evidence *might* have contributed to the conviction," a high bar that the State cannot meet.[30] Eskew further contends that the standard for determining whether there has been

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[20] *Id*.
[21] Brief of Appellant, *supra* note 1, at 6.
[22] Appellee's Response at 1.
[23] Brief of Appellant, *supra* note 1, at 9.
[24] *Id*. at 7.
[25] *Id*. at 11.
[26] *Id*. at 12.
[27] *Id*. at 12.
[28] *Id*. at 10.
[29] *Id*. at 12.
[30] *Id*. at 13.

voluntary *Miranda* waiver cannot be distilled to simply whether the officers "contradicted" the *Miranda* warnings.[31] Even if the *Miranda* warnings were read word-for-word, if the warnings were downplayed to the extent that they become "mere lip service" a waiver can still be involuntary.[32]

*2. Eskew's Confession Was Involuntary*

The test for voluntariness requires an examination of the totality of all of the surrounding circumstances and relevant factors.[33] Eskew also argues that considering the totality of the circumstances, the statements she made and her physical demonstration of shaking the police doll during the interrogation amounted to an involuntary confession.[34] She contends that the officers interviewing her preyed on her distressed state, employed psychological pressure tactics, and misrepresented the reasons for the interview.[35] Eskew asserts that it is the State's burden to prove the voluntariness of a confession[36] and that an involuntary confession is "inadmissible for any purpose."[37]

Additionally, Eskew argues that the officers used coercive interrogation techniques, including the Reid interrogation technique (also called the guilt association technique), which presumed her guilt.[38] The interrogation was premised in such a way that the she "could not effectively deny that the incident occurred."[39] Eskew was 21 years old, had no prior criminal history, her interrogation lasted nearly four hours, and she was in a state of distress because her baby was still unconscious at the hospital.[40] At the time of the interrogation, Eskew claims that the police officers believed that Brooklynn had been hospitalized as a result of shaking (though the subsequent autopsy would reveal her injuries to be attributable to a single blow to the head)[41] and produced a confession from Eskew aligned with their mistaken belief.[42]

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[31] Reply Brief of Appellant at 2, *State v. Eskew*, https://supremecourtdocket.mt.gov/view/DA%2014-0445%20Appellant%20Reply%20--%20Brief?id={00B72957-0000-C439-87C3-4698D21E61C9} (Mont. Sept. 14, 2016) (No. DA 14-0445).
[32] *Id*.; *see* State v. Grimestad, 598 P.2d 198, 203 (Mont. 1979).

[33] Brief of Appellant, *supra* note 1, at 18; *Morrisey*, 214 P.3d at 717.
[34] Brief of Appellant, *supra* note 1, at 17.
[35] *Id*. at 7.
[36] Mont. Code. Ann § 46–13–301 (2015).
[37] Brief of Appellant, *supra* note 1, at 17–18 (citing *Morrisey*, 214 P.3d at 719; Mont. Code Ann. § 46–13–301(4)).
[38] Brief of Appellant, *supra* note 1, at 19.
[39] *Id*.
[40] *Id*.
[41] *Id*. at 2.
[42] *Id*. at 20.

*3. The District Court Erred in Excluding Eskew's Expert from Testifying*

Finally, Eskew argues that the exclusion of her expert testimony about false confessions was error.[43] Because her expert was excluded, Eskew claims she was denied necessary evidence to rebut the State's intuitive argument to the jury that "it is unreasonable to believe that an innocent person would confess to hurting her own child."[44] The District Court held that the study of false confessions is "novel," while Eskew argues that it has long been a topic of research and the subject of expert testimony in court.[45] Eskew explains that her expert need only (and does) satisfy the two prongs of Rule 702: that (1) the subject matter is one that requires expert testimony; and (2) that the expert has either special training or education and has adequate knowledge on which to base an opinion.[46]

Furthermore, even if the study of false confessions is novel, Eskew argues the expert's testimony met the "helpful, not definitive" test used to assess the reliability of novel scientific evidence under *Daubert*.[47] The *Daubert* factors laid out by the United States Supreme Court include:

> (a) whether the theory/technique can be and has been tested; (b) whether the theory/technique has been subjected to peer review/publication; (c) whether the theory/technique has a known/potential rate of error and whether there are standards controlling the technique's operation; and (d) whether the theory/technique has been generally accepted or rejected in the particular scientific field.[48]

Eskew argues that the expert testimony would be helpful to a jury, therefore "false confession testimony is sufficiently reliable to satisfy a *Daubert* analysis.[49] *Eskew* argues further that Rule 403 does not bar her expert's testimony because a court favors the admissibility of relevant evidence, and the expert testimony would not "invade the jury's role in determining witness credibility."[50] Eskew points to studies about false

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[43] *Id*. at 25.
[44] *Id*. at 8.
[45] *Id*. at 28.
[46] *Id*. at 32; State v. Southern, 980 P.2d 3, 14 (Mont. 1999).
[47] Brief of Appellant, *supra* note 1, at 35; Hulse v. State, Dep't of Justice, Motor Vehicle Div., 961 P.2d 75, 91 (Mont. 1998); Kumho Tire v. Carmichael, 526 U.S. 137, 151 (1999).
[48] *Id.* at 35; Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 593–94 (1993).
[49] Brief of Appellant, *supra* note 1, at 35.
[50] *Id*. at 38.

confessions, which are not "so unreliable to warrant judicial exclusion."[51] Under the relevant standard, even "shaky" expert testimony should be admitted for the jury to examine.[52] Therefore, the expert testimony Eskew sought to present was relevant and valuable and should have been admitted as evidence in the District Court.[53]

### *B. Appellee State of Montana*

#### *1. Eskew Knowingly and Voluntarily Waived Her* Miranda *Rights.*

The State maintains that the district court's findings that Eskew received adequate *Miranda* warnings and that her statements were voluntary are not erroneous.[54] Eskew fully read her *Miranda* rights, and the video recording of the interrogation depicted her pausing to review her rights before signing the waiver.[55] Additionally, it argues that statements by the officers prior to the signing of the waiver did not negate the constitutionality of the waiver because they did not contradict *Miranda* warning language or "indicate that Eskew would not face criminal liability if she had harmed Brooklynn."[56]

According to the State, even if the pre-*Miranda* statements about the reasons for conducting the interview could be characterized as misleading, they did not undermine the warning itself.[57] The State argues that the "downplaying the *Miranda* warnings, by itself" does not render the *Miranda* readings constitutionally insufficient.[58] The State argues the warnings were not minimized by the officers and Eskew "made a knowing, voluntary, and intelligent waiver of her *Miranda* rights and elected to submit herself to the interview."[59]

#### *2. Eskew's Confession Was Voluntary.*

The State contends that Eskew received a timely and complete *Miranda* warning; therefore her confession was voluntary.[60] A confession is not necessarily involuntary when officers make false statements to the suspect if the false statement is not about the existence of incriminating

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[51] *Id*. at 8.
[52] *Id*. at 9.
[53] *Id*. at 32.
[54] Brief of Appellee, *supra* note 4, at 18.
[55] *Id*. at 21.
[56] *Id*. at 22.
[57] *Id*.
[58] *Id*. at 24; State v. Old-Horn, 328 P.3d 638 (Mont. 2014), State v. Grey, 907 P.2d 951, 955 (Mont. 1995), *Grimestad*, 598 P.2d at 200–02.
[59] Brief of Appellee, *supra* note 4, at 25.
[60] *Id*. at 26 (citing State v. Reavley, 79 P.3d 270, 298 (Mont. 2003)).

evidence.[61] The facts/record/video footage show[s] that Eskew was educated, employed, and a competent adult.[62] Although she was sobbing at the beginning of the interrogation she was "progressively more composed as the interview proceeded."[63] The interrogation lasted four hours, and considering the totality of the circumstances, the District Court found that it was was "not unduly or unfairly coercive, deceptive, or manipulative."[64] Additionally, the State argues it is possible to find that a defendant's statements may still be voluntary even when the guilt assumption technique is used during interrogation.[65] Ultimately, the State argues that Eskew simply would not have confessed to a crime she did not commit, even if the guilt assumption technique was employed.[66]

*3. The District Court Properly Excluded the Defense's Expert Testimony*

False confession testimony is a novel area of testimony because it is controversial and is "not consistently admitted in other jurisdictions."[67] The State counters Eskew's argument, stating the "amount of time the technique or theory has been used in the scientific community" does not provide a definitive standard for whether the testimony is novel or not.[68] The testimony was therefore not admissible under *Daubert*, and its probative value was limited because the jurors, who had viewed the video recording of the interview, had all of the information they needed to determine whether the interrogation was coercive.[69] The introduction of the testimony is tethered to the dangers of unfair prejudice and confusion of the issues.[70]

Furthermore, the State argues that Eskew's expert "failed to provide evidentiary support for his theory that the Reid interrogation method leads to false confessions and acknowledged there was no way to know how often that occurs."[71] The State cites the District Court's conclusion that there was "no theory or methodology that could be tested regarding the link between interrogation methods and false confessions."[72] Accordingly, the expert's theory and opinion on the issue of false confessions would be unreliable and therefore inadmissible.[73] Finally,

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[61] *Id*. at 27 (citing *Reavley*, 79 P.3d at 298).

[62] Brief of Appellee, *supra* note 4, at 27.
[63] *Id*. at 27.
[64] *Id*. at 28.
[65] *Id*. at 30; *Jones*, 142 P.3d at 858.
[66] Brief of Appellee, *supra* note 4, at 29.
[67] Reply Brief of Appellant, *supra* note 2, at 7.
[68] Brief of Appellee, *supra* note 4, at 35.
[69] *Id*.
[70] *Id*. at 20.
[71] *Id*. at 38.
[72] *Id*. at 36.
[73] *Id*.

even if the District Court erred in excluding the expert testimony, the State argues the error was harmless because the District Court adequately instructed the jury that false confessions do occur and the expert's testimony cannot reasonably have been the reason that Eskew was convicted.[74]

## V. ANALYSIS

Eskew's allegedly involuntary *Miranda* waiver is a threshold question for the court. If Eskew can prove that she involuntarily waived her *Miranda* rights, she would be able to prove that her subsequent confession was similarly involuntary. The issues are axiomatically connected. If Eskew's waiver of her *Miranda* rights was found to be involuntary, it should follow that her subsequent confession would be inadmissible and should have been excluded at the district court. The Court's determination ought to begin with the voluntariness of Eskew's *Miranda* waiver, because the outcome of that particular issue would put to rest the question of whether her confession itself was voluntary.

Eskew argues she was repeatedly instructed to tell her story in the officers' words by parroting their terms and mimicking their movements; attempts to deviate from their proscribed conduct, Eskew argues, were classified as lies.[75] Montana has a low bar for determining voluntariness. Any "psychological pressure exerted upon a defendant to procure a confession renders the confession involuntary."[76] Eskew further alleges that she felt pressured to agree to the officer's assertions that she had shaken Brooklynn through direct instructions to demonstrate making a police dummy doll's head rock back and forth.[77] The officers explicitly assumed her guilt and accused her of being a sociopath who faked her tears.[78] The officers produced a statement that was consistent with their belief that Brooklynn had been shaken, though in reality no shaking injuries actually existed.[79] Essentially the confession obtained was a confession to an injury that did not occur, according to the medical professionals treating Brooklynn.[80] This raises questions about the trustworthiness and reliability of the confession. If the Court is willing to construe the *Hermes* voluntariness analysis liberally, the facts and circumstances surrounding Eskew's interrogation could easily be interpreted as "psychological pressure," which could explain an inconsistent confession.

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[74] *Id*. at 41–42
[75] Brief of Appellant, *supra* note 1, at 22–23.
[76] State v. Hermes, 904 P.2d 587, at 588 (Mont. 1999).
[77] Reply Brief of Appellant, *supra* note 31, at 8.
[78] *Id*. at 23.
[79] *Id.*
[80] *Id*. at 12; Brief of Appellant, *supra* note 1, at 4.

The Reid guilt assumption technique, though still permissible in the federal system, has been outlawed in Montana as an "impermissible police practice."[81] Eskew points out specifically: "this Court has condemned the guilt assumption technique of interrogation as coercive."[82] If the Court finds that the police officers were using the guilt assumption technique (as the District Court did),[83] it would diminish the State's argument that the confession was voluntary. However, as the State points out, a confession is not involuntary simply because it was consistent with a mistaken predisposition—this is not the test for voluntariness. Regardless, there is a strong precedent of a broad definition of "involuntary" confessions in Montana and the Court will likely feel pressure to acquiesce to its prior *Miranda* case holdings[84] in order to protect Montanans from coercive interrogation situations.

It is possible the Court could side with the State, finding that Eskew's progressively stable emotional state throughout the four-hour interrogation is evidence of her capacity to knowingly and voluntarily consent to be interviewed. She eventually became more calm, "composed, articulate, and affirmatively explanatory" when answering questions, arguably with the wherewithal to realize that what she said "can and will be used against her" "just like on TV."[85]

Eskew sought to introduce expert testimony which was essentially a commentary on the interrogation techniques employed by the police officers.[86] Eskew argues simply describing the oppressive interrogation techniques imposed on her was insufficient; there needed to be critical, educational expert allowing the jurors to make an informed decision about the voluntariness of the confession.[87] Though the jury has a video recording of the interrogation and should feel free to make their own judgments and interpretations of the interrogation, the expert would have provided more context for the interview. Whether this injection of context around interrogation techniques would have resulted in substantial probative value for the jury (rather than the jury reminder presented at the district court that sometimes false confessions occur) would be a valuable question to ask during the oral argument. Trial courts are given broad discretion on evidentiary issues, and the Court is unlikely to overrule a trial court.[88]

Unfortunately, there was little discussion by the parties about the constitutionality and policy rationales behind preventing coerced

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[81] *Hermes*, 904 P.2d at 589.

[82] Brief of Appellant, *supra* note 1, at 18–19 (citing *Hermes*, 904 P.2d at 589).
[83] Brief of Appellee, *supra* note 4, at 12.
[84] *Id.*
[85] Brief of Appellant, *supra* note 1, at 11; Brief of Appellee, *supra* note 4, at 12.
[86] Brief of Appellant, *supra* note 1, at 24.
[87] *Id*. at 10.
[88] State ex rel. Sparling v. Hitsman, 44 P.2d 747, 749 (Mont. 1935) (citing Kain, 20 P.2d 1057, 1059 (Mont. 1933)).

confessions. The outcome of this case will have significant implications on Montana's interpretation of due process in criminal interrogation situations, because the Court is continually seeking to balance the search for truth and justice against the assurance of voluntary and willing confessions.

If the Court affirms the District Court, it moves in the direction of applying the literal words of the *Miranda* warning by finding that any mischaracterizations did not undermine Eskew's *Miranda* rights.

If the Court, however, sides with Eskew, this case may be the death-knell for the Reid technique and would add greater protection for police suspects within the context of *Miranda.* If Eskew gets a new trial with her confession suppressed, this case could require police practices throughout the state to undergo substantial training in administering effective *Miranda* warnings. There will be fear of "downplaying" the warnings and more care will be taken in presenting the warnings to suspects. This might require more administrative effort, but because voluntary confessions are deemed to have a higher degree of reliability and trustworthiness, they are integral to the Fifth Amendment right not to incriminate oneself.[89] There should not be too many risks associated with making real-life *Miranda* warnings a little bit more serious than they are presented on TV.

[89] *Hermes*, 904 P.2d at 588.