DISSENTING OPINION BY FOLEY, J.

I respectfully dissent.

Statements procured from the custodial interrogation of a defendant are not admissible unless the prosecution demonstrates the use of procedural safeguards that secure the defendant's privilege against self-incrimination. See State v. Naititi, 104 Hawai'i 224, 235, 87 P.3d 893, 904 (2004). To determine whether a custodial interrogation occurred, the totality of the circumstances are considered, including the police officer's conduct, the nature of the question, and any other relevant circumstance. See id. at 236, 87 P.3d at 905. The ultimate question of this analysis is: should the police officer have known that the their words or actions were reasonably likely to elicit an incriminating response from the person in custody? See id.

Kazanas contends that while Avilla's general questions about how Kazanas' Halloween went may not have been intended to elicit an incriminating response, Avilla should have known her words or actions were reasonably likely to elicit an incriminating response from Kazanas. I agree and conclude Kazanas' statement was obtained as a result of a custodial interrogation[1] because Avilla was aware of the circumstances of Kazanas' detention, and Avilla asked an open-ended question, the subject matter of which was the same as that for which Kazanas was detained.

In State v. Ikaika, 67 Haw. 563, 698 P.2d 281 (1985), the defendant-in-custody requested an attorney and police questioning ceased. Ikaika, 67 Haw. at 565, 698 P.2d at 283. While waiting in a processing room, the defendant approached a police officer with whom he was acquainted. Id. The police officer, later describing the question as a pleasantry, asked: "What's happening? Must be heavy stuff for two detectives to bring you down here?" Id. The defendant responded that he was picked up for questioning about a murder, and without further comment by the police officer, the defendant stated: "you've done

[1] No party disputes the fact that Kazanas was in police custody when the statement was made.

a lot for me and you have been to nice to me. I shot the haole." Ikaika held the police officer could not have reasonably foreseen that his words or actions would elicit an incriminating response because (1) the police officer was unaware of the circumstances of the defendant's detention and did not initiate any questioning until the defendant approached him, and (2) his remarks were intended as a greeting. Id. at 567, 698 P.2d 284-85 ("At most, [the police officer] could have expected that the [d]efendant respond to his pleasantry by informing him of the reasons for the [d]efendant's being booked and the case he was involved in."). Ikaika concluded the defendant's confession was an unsolicited, spontaneous statement made in the absence of police questioning and was admissible.

The instant case is distinguishable because Avilla was familiar with Kazanas' case, the two were not previously acquainted, and Kazanas' statement, unlike the defendant's in Ikaika, was responsive to the police officer's question. While Avilla testified she asked the question to calm Kazanas after he began making rude comments, "to the extent that an [police] officer knows, or reasonably should know, that his or her question is likely to elicit an incriminating response, his or her later assertion that the question was asked for a seemingly innocuous purpose proffers nothing more than a post hoc rationalization for asking the question." State v. Ketchum, 97 Hawai'i 107, 119 34 P.3d 1006, 1018 (2001) (emphasis omitted).

In Ketchum, the questioning police officer knew the defendant was suspected and detained for drug-related offenses. Ketchum, 97 Hawai'i at 128, 34 P.3d at 1027. The circuit court in Ketchum concluded the defendant was in custody at the time of questioning and thus asked whether the questioning police officer should have known that asking the defendant for his home address was likely to elicit an incriminating response. Id. at 126-28, 34 P.3d at 1025-27. That court held that because the police officer knew the circumstances of the suspects' detention, he should have known that asking for the suspects' address was "likely to elicit an incriminating response, to wit, that [the suspect] resided in the residence identified in the search

warrant[,]" and in which drugs had just been found by the police. Id. at 128, 34 P.3d at 1027.

I conclude, based on Ikaika and Ketchum, that Avilla should have known her question was reasonably likely to elicit an incriminating response from Kazanas. The State's contention that Kazanas' statement was spontaneously uttered rather than responding to the question is unavailing. Avilla asked a question which was reasonably likely to prompt a response that related to the events underlying Kazanas' arrest. In other words, since Avilla knew the events of Halloween night led to Kazanas' arrest, asking how his night went invited Kazanas to describe events underlying his arrest.

Since Kazanas' statement was the product of a custodial interrogation, it triggered the prosecution's burden to establish the existence of certain procedural safeguards. To satisfy this burden, the State must show the accused was warned that he or she had a right to remain silent, that anything said could be used against him or her, that he or she had a right to the presence of an attorney, and that if he or she could not afford an attorney one would be appointed for him or her. See Ketchum, 97 Hawai'i at 116, 34 P.3d at 1015. And "unless these protective measures are taken, statements made by the accused may not be used . . . ." See id. (citing State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971) (brackets omitted)). At the hearing on the voluntariness of Kazanas' statement, Avilla testified she did not inform Kazanas of his right to remain silent.

In reviewing a conviction on appeal, this court must determine whether the errors committed at trial were harmless beyond a reasonable doubt. See State v. Perez, 64 Haw. 232, 234, 638 P.2d 335, 337 (1981). The question is whether there is a reasonable possibility the error might have contributed to the conviction. See State v. Huihui, 62 Haw. 142, 145, 612 P.2d 115, 117 (1980). "Where there is a wealth of overwhelming and compelling evidence tending to show the defendant guilty beyond a reasonable doubt, errors in the admission or exclusion of evidence are deemed harmless." State v. Rivera, 62 Haw. 120, 128, 612 P.2d 526, 532 (1980).

Kazanas presented witness testimony contradicting the testimony of the key witnesses for the State. The jury weighed the conflicting evidence, and essentially made credibility determinations when it rendered a conviction. As such, there is a reasonable possibility the admission of Kazanas' statement contributed to his conviction and the error was not harmless beyond a reasonable doubt.

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