NO. CAAP-13-0001412

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee,
v.
JOHN JAMES ARRUDA, JR., Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 10-1-0044)

MEMORANDUM OPINION
(By: Nakamura, Chief Judge, and Foley and Leonard, JJ.)

Plaintiff-Appellee State of Hawaiʻi (State) charged Defendant-Appellant John James Arruda, Jr. (Arruda) by indictment with four counts of sexual assault in the first degree and one count of sexual assault in the third degree. The alleged victim and complaining witness (CW) was a child who was living with Arruda as part of his family. The CW was six years old to eight years old during the period that the alleged sexual assaults occurred.

The indictment charged that during a period spanning thirty months, Arruda, as the parent, guardian, or other person having legal or physical custody of the CW, committed first-degree sexual assault by knowingly engaging in sexual penetration with the CW, who was less than fourteen years old, by inserting his penis into her mouth (Count 1); inserting his penis into her genital opening (Count 2); inserting his penis into her anal opening (Count 3); and inserting his finger into her genital opening (Court 4). Arruda was also charged with committing

third-degree sexual assault during this period by knowingly subjecting the CW to sexual contact or causing the CW to have sexual contact with Arruda by placing her hand on his penis.

After Arruda was arrested, he waived his Miranda rights[1] and agreed to answer questions posed by Detective Brandon Nakasone (Detective Nakasone). During the course of his first interview with Detective Nakasone, Arruda stated that he was willing to take a polygraph test. The following day, Detective Nakasone asked Arruda if he was still willing to take the polygraph test, and Arruda said he was. Arruda signed a polygraph waiver form and was then re-Mirandized by a polygraph examiner, Detective Michael Doole (Detective Doole), before the test was administered. Arruda subsequently confessed to Detective Doole and then confessed again to Detective Nakasone after receiving a third set of Miranda warnings.

The Family Court of the First Circuit (Family Court)[2] denied Arruda's motion to suppress his confessions to Detective Doole and Detective Nakasone. After a jury trial, Arruda was found guilty as charged on all counts. He was sentenced to concurrent terms of imprisonment of twenty years on Counts 1 through 4 and five years on Count 5.

On appeal, Arruda argues that the Family Court erred in: (1) denying his motion to suppress his confessions because he claims that the failure of Detective Nakasone to re-Mirandize him after the first interview and before Detective Nakasone asked whether he still wanted to take the polygraph test invalidated his subsequent confessions; (2) denying his motion for mistrial after the CW's therapist was observed in the gallery attempting to catch the CW's attention with a stuffed animal and appeared to be mouthing words; and (3) failing to instruct the jury with respect to Counts 2 and 4 on the lesser-included offense of third-degree sexual assault. We affirm.

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[1]Miranda v. Arizona, 384 U.S. 436 (1966).

[2]The Honorable Glenn J. Kim presided.

BACKGROUND

I.

The CW was born in 2002. The CW and her brother, who was a year older, were placed in foster care in New Mexico at an early age due to abuse and neglect by their biological parents and other family members. When the CW was three years old, Arruda's wife, who is related to the CW and her brother, gained foster custody of the two children. The CW and her brother moved to Hawaiʻi and lived together with Arruda, his wife, and their son in their home in Waianae. Arruda essentially became and served the role of the CW's father.

Arruda's wife worked for a bank in Honolulu and commuted from Waianae to work. Arruda worked in construction. During periods where construction work was not available, Arruda was responsible for picking up the children after school and taking care of them until his wife returned home from work.

When the CW was eight years old, she disclosed to a school counselor that she had been subjected to sexual abuse by Arruda. The CW and her brother were taken to the Children's Justice Center and interviewed separately by a forensic interviewer. The children were temporarily and then permanently removed from Arruda's household and placed in protective custody. After Arruda was arrested, he confessed to sexually assaulting the CW. Arruda was indicted and charged with committing multiple acts of sexual abuse against the CW.

II.

Prior to trial, Arruda moved to suppress the confessions he made to the police. The Family Court held a hearing on Arruda's motion, and the following evidence was presented.

A.

Detective Nakasone of the Honolulu Police Department (HPD) arrested Arruda at about 1:00 in the afternoon while executing a search warrant on Arruda's residence. Later that evening, at about 9:21, Detective Nakasone interviewed Arruda at

the main police station. Prior to asking Arruda questions about the investigation, Detective Nakasone advised Arruda of his Miranda rights, using the HPD's waiver of rights form. Arruda acknowledged understanding his rights, waived his rights, and signed the waiver form.

The State introduced a DVD containing the audio and visual recording of Detective Nakasone's interview with Arruda as well as a transcript of the interview.[3] During the first portion of the interview, Arruda denied having sex with the CW. When asked why he would not do what the CW said he did, Arruda replied that having sex with someone that small would be "totally wrong." When asked what should happen to someone who had sex with a child that age, Arruda stated that the person should "[j]ust go to jail" and should not be given a second chance."

Detective Nakasone then asked Arruda whether he would be willing to take a polygraph or "lie detector" test, and Arruda said he would do so:

> Q Okay, John, if it's -- if it's necessary, would you be -- be willing to take a polygraph? You know what a polygraph test is?
>
> A Yes.
>
> Q It's also called a lie detector test.
>
> A Lie detector test, yes.
>
> Q Would you take one --
>
> A Yes.
>
> Q -- just to verify what you told me is true?
>
> A Yes, I'll take one, I mean I don't do good in tests, but I'll take one.
>
> Q And how -- how do you think you would do if you were take a test?
>
> A I -- I -- I think I would do good. I would like to hope so.

[3]The quoted material in this section is taken from the transcript of this interview.

Detective Nakasone next asked Arruda if there was any reason why "another person would tell me on tape that they know that you've been having sex with [the CW]?" Arruda replied, "No." At that point, Detective Nakasone left the interview room and Arruda was left alone for a few minutes.

When Detective Nakasone returned, he told Arruda: "I have the file here" and that the results of the police's investigation "clearly" show "that you had sex with her." After twice responding "What?" to Detective Nakasone's statements, Arruda covered his face with his hands and began sobbing and crying. Detective Nakasone proceeded to made statements to Arruda, such as "you didn't mean to do any harm, right?"; this was "completely out of character" for you; it "wasn't planned" or "premeditated"; and it was a "spur-of-the-moment kind of thing." Arruda continued to sob and cry and said over and over, "Oh God" and "Oh my God" while Detective Nakasone made these statements.[4]

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[4]For example, the transcript of the interview reveals the following:

Q -- you didn't mean to do any harm, right?

A (sobbing)

Q Am I right, John?

A (sobbing)

Q John . . .

A (sobbing)

Q John, look at me . . .

A Oh God. (sobbing) Oh God.

Q Come on, John, you didn't mean to hurt her at all, right, John?

A (No audible response.)

Q I know that I talked to you.

A Oh God.

Q This is not your nature typically. John, this just happened one time and . . .

A (sobbing)

(continued...)

After this went on for a while, Detective Nakasone referred to finding "fluids" during the execution of the search warrant. Toward the end of the interview, Detective Nakasone told Arruda that Arruda's neighbors had sought out the detective and had volunteered information to him. In response, Arruda

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[4](...continued)

Q Am I right, John?

A Oh God . . . (sobbing)

. . . .

Q This is a one-time thing that happened, and now --

A Oh God. (sobbing)

Q -- you wish you could take it back?

A Oh God. (sobbing)

Q John?

A (inaudible)

Q Wasn't planned, wasn't premeditated, was --

A (sobbing)

Q -- spur-of-the-moment kind of thing, yeah?

A (sobbing)

. . . .

Q . . . And it's just something else out of character for you. And you didn't plan to hurt anyone, right, John?

A No. (sobbing)

Q John . . .

A Oh my God. (inaudible)

. . . .

Q You weren't trying to hurt anybody, right, John?

A (sobbing)

Q You weren't trying to hurt anyone. This is something out of character for you, completely out of character.

A (sobbing) Oh my God.

asked, "My neighbors?"[5] Detective Nakasone concluded the interview by confirming Arruda's willingness take a polygraph test:

> Q Well, the polygraph test then, can we move onto that, John?
>
> A (crying)
>
> Q We'll go onto the next step, you'll do the polygraph then? Are you willing to do that?
>
> A Yeah.
>
> Q Okay, I'll conclude the interview. Time now is 2244 hours.

B.

The next day, at about 4:25 p.m., Detective Nakasone went to the cell block and escorted Arruda to the polygraph examination room. While escorting Arruda, Detective Nakasone asked Arruda if he was still willing to take the polygraph test, and Arruda said he was.

The polygraph examination was conducted by HPD Detective Doole. Pursuant to the HPD's practice, the first thing Detective Doole did was to present Arruda with a "Polygraph Waiver/Information Form" (Polygraph Waiver Form) and review the form with him. The Polygraph Waiver Form contained the following statement:

> I am taking this polygraph examination without any promise of reward or hope of immunity. I have not been forced, coerced, or threatened into taking this polygraph examination. I am taking this examination of my own free will and realize that the results will be given to me at the end of this examination. The results will also be given to the investigator and other persons whose official duties require them to have this information.

In reviewing the Polygraph Waiver Form with Arruda, Detective Doole did not ask Arruda any questions about the case or attempt

[5]Detective Nakasone's references to finding "fluids" during the execution of the search warrant, apparently to create the impression that DNA analysis could be performed, and to receiving incriminating information from Arruda's neighbors were false. The police did not recover fluids that could be used to perform DNA analysis and Arruda's neighbors had not provided incriminating information to Detective Nakasone.

to elicit any incriminating information from him. Arruda signed the Polygraph Waiver Form at 4:35 p.m.

Immediately after Arruda signed the Polygraph Waiver Form, Detective Doole advised Arruda of his Miranda rights through the use of the HPD's waiver of rights form. Arruda waived his Miranda rights and signed the waiver of rights form at 4:40 p.m.

A polygraph examination consists of three phases: pre-test, in-test, and post-test. After obtaining Arruda's waiver of his Miranda rights and as part of the pre-test phase of the polygraph examination, Detective Doole discussed the specific allegations of sexual assault that the CW had made against Arruda. Arruda denied the CW's allegations.

During the in-test phase of the polygraph examination, Arruda was asked the following three relevant questions, and he gave the following responses:

> Q: SINCE THIS MONTH BEGAN, HAVE YOU HAD ANY SEXUAL CONTACT WITH [THE CW] THAT I REVIEWED WITH YOU TODAY?
>
> R: "NO"
>
> Q: HAVE YOU HAD ANY SEXUAL CONTACT WITH [THE CW] THAT ENDED WITH YOU EJACULATING?
>
> R: "NO"
>
> Q: HAVE YOU EVER TOLD [THE CW] NOT TO TELL HER MOTHER ABOUT ANY SEX THE TWO OF YOU HAVE ENGAGED IN?
>
> R: "NO"

Detective Doole determined that "the result of the examination was **DECEPTION INDICATED**, regarding [Arruda's] responses to the relevant questions." (Emphasis in original.)

In the post-test phase, Detective Doole informed Arruda of, and gave Arruda the opportunity to explain, the "deception indicated" results of the polygraph examination. Arruda admitted to Detective Doole that the CW had told the truth about Arruda's penis having been inside her mouth and genital opening. Arruda also admitted that his finger had been inside the CW's genital

opening, but denied that his penis had ever been inside the CW's anus. Finally, Arruda admitted that the CW had told the truth about him ejaculating in her presence.

Detective Doole then drew an outline a hand on a piece of paper and asked Arruda to draw a line to indicate what finger Arruda had inserted into the CW's genital opening and how far the finger had gone inside. Arruda drew a line through the middle finger of the hand about one inch from the tip of the finger. Detective Doole also drew a figure representing a penis and asked Arruda to draw two lines, one indicting how far he had inserted his penis into the CW's genital opening and the other indicating how far he had inserted his penis into the CW's mouth. Arruda drew a line about a quarter inch from the tip of the penis to show how far he had inserted his penis into the CW's genital opening and a line a little over one inch from the tip of the penis to show how far he had inserted his penis into the CW's mouth. Arruda told Detective Doole that the CW did not like his penis in her mouth and "so he stopped." Arruda initialed the lines he had drawn on the figures representing his hand and penis.

In Arruda's presence, Detective Doole informed Detective Nakasone of the results of the polygraph examination, including Arruda's statements during the post-test phase. Detective Doole also showed Detective Nakasone the paper containing the figures of the hand and penis and the lines Arruda had drawn to show how far he had inserted his penis into the CW's genital opening and mouth and his finger into her genital opening.

C.

Detective Nakasone then conducted his second interview with Arruda. Detective Nakasone again advised Arruda of his Miranda rights using the HPD's waiver of rights form. Arruda waived his rights and signed the form. An audio recording of

Detective Nakasone's second interview and a transcript of the second interview were introduced at the suppression hearing.[6]

During the second interview, Arruda made a tracing of his own hand and marked the portion of his middle finger that he had inserted into the CW's "punani."[7] Arruda also drew a representation of his penis and made markings indicating how far he had inserted it into the CW's mouth and "punani." Arruda stated that when he put his penis in the CW's mouth, "[s]he didn't like it" so he stopped.

Arruda described three specific incidents of sexual assault that he had committed against the CW: (1) inserting his finger in her "punani" when she was taking a shower; (2) inserting his penis in her mouth in a bedroom; and (3) inserting his penis in her "punani" in her bedroom. With respect to the shower incident, Arruda stated that while the CW was taking a shower, he helped her shampoo her hair and he "just played with her punani that's it." In describing where he had placed his finger, Arruda stated:

> Q And the finger one about how . . .
>
> A Only right there, was just right by her clitoris and stuff, right there.
>
> Q Did she say anything to you while all this was happening?
>
> A No, I mean she just was standing there.

Arruda further described the shower incident as follows:

> Q Just so that I have it clear, the first time was when she was taking a shower.
>
> A Yes, you know, I just put my finger here.
>
> Q It was -- 'cause she was -- she had her hair soaped and then . . .
>
> A And then I was holding her hair and then . . .

[6]The quoted material in this section is taken from the transcript of the second interview.

[7]During his interview, Arruda used the slang words "punani" to refer to female genitalia and "boto" to refer to penis.

Q Just got a little aroused by it.

A Yeah.

Q And then, okay.

A I just (inaudible).

Q Okay, that was real quick then?

A Yeah.

Q Okay, and it didn't go inside, right, you said-

A No.

Q -- was just on the outside.

A No, no, no.

With respect to incident in the bedroom during which he inserted his penis in the CW's mouth, Arruda stated that the CW was staring at his penis through his clothes, he was standing up, he removed his shorts, and then "she put her -- my [penis] in her mouth and that was it." Arruda elaborated:

Q Okay, and then she didn't like the taste. What did -- what did she say?

A She said, yuck (phonetic), and then that was it.

With respect to the incident in the bedroom during which he inserted his penis into the CW's "punani," Arruda stated that while the CW was in her bedroom changing her clothes, he took off his shorts, and he put his penis in the CW's "punani" while she was lying on the bed facing him.

During his first interview with Detective Nakasone, Arruda related that he was impotent, had erectile disfunction, and could not get an erection. Detective Nakasone asked Arruda about his ability to ejaculate during the sexual assaults:

Q I know you have erectile dysfunction, but any of these times that I don't know -- I don't know too much about E D, but were you able to -- were you able to ejaculate?

A I mean, really, I mean I couldn't -- I -- maybe had some come out maybe, but other than that, I really couldn't ejaculate, I mean . . .

Q Excuse me, like I said, I don't know anything about E D, so . . .

A I mean I would play -- play -- play, get some feeling, and then only maybe whatever was inside.

Q Just wet -- little bit wet?

A Yeah.

Q And then how far when you're . . . How . . . I know you showed on your finger, but, so if you -- if, let's say this was the -- this was the -- the lips of the vagina, like how, can you show me how . . .

A Just like right there.

Q Okay.

A It didn't --

Q Didn't go all the way.

A -- didn't get anything, it didn't go through, it was just right there.

Q And that was with the penis, right?

A Yes.

Arruda denied the CW's allegation that he had inserted his penis into her anal opening. During the interview, Arruda admitted that he had lied to his wife about the sexual assaults, stated that he was willing to seek help, and expressed remorse for his actions:

A And my wife asked me and I didn't tell her I lied to her. I -- I know it's going to break her heart and make her feel shame. And she's going to be (inaudible).

Q Nobody knows about it.

A Everybody knows about the situation. Everybody knows what happened.

Q But tell me honestly, you willing to -- you willing to see some kind -- get some kind of help for this?

A Yes, yes.

Q I know you, just from talking to you, I know.

A Yes. (sobbing)

. . . .

Q Then you are willing to -- to get help?

A Yes, yes. Oh God.

Q Is there anything else you want to add?

A (No audible response.)

Q And this is only the three times, right?

A. Yes.

Q And when -- when this is all happening it's not like you're videotaping her, right?

A No, I mean it just happened -- it just something that happened. And I regret it now.

D.

In arguing his suppression motion, Arruda conceded that he was not challenging the admissibility of his first recorded interview with Detective Nakasone. However, relying on State v. Eli, 126 Hawaiʻi 510 (2012), Arruda argued that his statements to Detective Doole and his second recorded interview with Detective Nakasone should be suppressed. The Family Court distinguished Eli, rejected Arruda's arguments, and denied his suppression motion. The case proceeded to trial.

III.

A.

At trial, the CW, who was then ten years old, testified that she was subjected to sexual abuse by Arruda while she was between the ages of six and eight years old. The CW testified that Arruda "put his private into my punani."[8] This happened at their home while Arruda's wife was at work and the CW's brother and Arruda's son were not there. Arruda was in the bathroom with the CW and told her to lay on the floor. Arruda then "put his private into . . . [the CW's] punani." It felt "[s]ore," and Arruda's "private" was "[h]ard." "White stuff" came out of Arruda's "private" and went onto the floor and the CW's body. The CW wiped off the "white stuff" from her body. This happened "[m]ore than one time."

[8]The prosecutor asked the CW if she had another word that she used for "punani" and the CW responded, "[p]rivate." The prosecutor also showed the CW a diagram of a girl and asked her to color in the area she was calling the "punani." The CW colored in the genital area of the girl on the diagram. The prosecutor also showed the CW a diagram of a man and asked her to color in the area the CW was calling "his private." The CW colored in the penis of the man on the diagram.

Also in the bathroom, Arruda would tell the CW to lean over the bathtub and he would put his "private" into her "[w]here the doo-doo comes out." The CW called that part of her body her "butt hole." It was "[s]ore" when Arruda put his "private" into the CW's "butt hole," and it made her cry. Arruda did this to her on more than one occasion.

Arruda told the CW "to suck his private . . . like a lollipop." The CW did not want to do that, but she obeyed Arruda because she was afraid of him and because he "would give [her] lickens" if she refused. Arruda told the CW to sit on her knees and to suck his "private" while he sat on the toilet. Arruda put his penis in the CW's mouth and "[w]hite stuff" came out in her mouth and also dripped on the ground. The CW spit it out in the sink and washed her mouth. This happened more than once.

Arruda told the CW to hold and rub his "private," which he referred to as his "dick," with her hand. The CW told Arruda that she did not want to do these things, but he did not listen to her, and she complied with Arruda's instructions. Arruda also put his finger inside the CW's "punani" and "[h]e rubbed it up and down." The CW described how this made her feel as "[h]urtful." There were times in which Arruda put lotion on the CW's "punani" before putting his "private" or finger inside. In addition to sexually assaulting the CW in the bathroom, Arruda also sexually assaulted her in his bedroom, the kids' bedroom, the livingroom, and the kitchen.

B.

The CW's brother, who was eleven years old at the time of trial, testified that he would see Arruda and the CW go into the bathroom, and the door would be closed. The CW's brother would hear his sister screaming and Arruda telling her to be quiet. The CW's brother heard these things while doing chores outside, picking up rubbish near the bathroom. The CW told him that she screamed because Arruda "raped her." The CW's brother heard the CW screaming in the bathroom "a lot," and he did not know what to do. At some point, the CW's brother told his

teacher and his friends. After he and the CW were initially removed from Arruda's residence, they were allowed to return home. At that time, Arruda's wife told the CW's brother that "[t]here's not going to be any Halloween or Christmas until [Arruda] comes back." Arruda's wife also told the CW to tell the prosecutors that what the CW said about Arruda raping her was a lie.

Detective Nakasone subsequently learned about the statements made by Arruda's wife to the CW and her brother, and they were again removed from Arruda's residence and placed in foster care.

Both Detective Nakasone and Detective Doole testified at trial. The Family Court precluded any mention of Arruda's polygraph examination but otherwise permitted Detective Nakasone and Detective Doole to testify about the statements that Arruda had made to them.[9] The Family Court admitted into evidence the DVD of Arruda's first interview with Detective Nakasone and the audio recording of Arruda's second interview with Detective Nakasone, which were redacted to remove the references to the polygraph examination. The redacted DVD and audio recording of Detective Nakasone's interviews with Arruda were played for the jury at trial. The Family Court also admitted into evidence the drawings prepared during the interviews with the detectives on which Arruda had marked how far he had inserted his penis and finger into the CW's genital opening and his penis into the CW's mouth. Aside from the references to the polygraph examination, the evidence presented at trial regarding Arruda's statements to Detective Nakasone and Detective Doole and Arruda's markings on the drawings prepared during the interviews with the detectives

[9]Detective Doole testified that Arruda admitted that the CW had told the truth about Arruda inserting his penis into the CW's genital opening and her mouth and about Arruda's finger being inside the CW's genital opening. Detective Doole also testified that Arruda had marked on a drawing of a hand and penis how far Arruda had inserted his finger into the CW's genital opening and his penis into the CW's genital opening and mouth.

was basically the same as the previously discussed evidence presented at the suppression hearing.[10]

Dr. Stanton Michels, M.D., a pediatrician who worked with the Sexual Abuse Treatment Center, examined the CW after the allegations of sexual abuse came to light. Dr. Michels did not attempt to collect DNA from the CW because the CW said that she had bathed and gone swimming, and because of the amount of time that had passed, since the last time the CW said that Arruda had sexually abused her, which made it unlikely that any evidence would have been preserved.[11] Dr. Michels' examination of the CW's genitalia and anus showed "no physical findings," which Dr. Michels opined was consistent with the CW's report of sexual penetration and also consistent with "no penetration."

C.

Arruda testified in his own defense at trial. Arruda testified that he has erectile disfunction and cannot get an erection or ejaculate. He stated that he did not seek medical help for his condition because he was embarrassed. Arruda maintained that he confessed to Detective Doole and Detective Nakasone because Detective Nakasone told him that if he told the truth and admitted the allegations, he could go home. According to Arruda, Detective Nakasone made this statement while taking Arruda to see Detective Doole.[12] Arruda specifically denied ever putting his penis in the CW's mouth, putting his penis in the CW's "punani," putting his penis in the CW's anus, putting his finger in the CW's "punani," and putting the CW's hand on his penis.

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[10]With respect to Arruda's use of slang words while Detective Nakasone was interviewing him, Detective Nakasone testified that based on his experience as a sex crimes detective, "punani" refers to female genitalia and "boto" refers to male genitalia or the penis. During his testimony, Detective Nakasone also referred to Arruda's use of "punani" as synonymous with "vagina."

[11]Dr. Michels also stated that obtaining a sample would cause physical discomfort and he did not want to further traumatize the CW.

[12]Detective Nakasone denied making a statement of this nature when he testified at trial.

IV.

The jury found Arruda guilty as charged on all counts. Arruda was sentenced to concurrent terms of imprisonment on all counts, resulting in his being sentenced to twenty years of incarceration. The Family Court entered its Judgment on April 17, 2013.

DISCUSSION

I.

A.

Arruda argues that the Family Court erred in denying his motion to suppress his confession to Detective Doole and his confession to Detective Nakasone during their second recorded interview. Arruda does not dispute that he was properly advised of, and validly waived, his Miranda rights in his first recorded interview with Detective Nakasone. Arruda, however, claims that Detective Nakasone's first interrogation had ceased by the time Detective Nakasone came to Arruda's cell block the following day to escort him to Detective Doole for the polygraph examination. Arruda argues that the police were required to re-Mirandize him before Detective Nakasone asked him whether he was still willing to take the polygraph test (while escorting him to the polygraph room) and before Detective Doole presented him with the Polygraph Waiver Form. Arruda contends that the police's failure to do so requires that his statements to Detective Doole and his second recorded interview with Detective Nakasone be suppressed. We disagree.

We conclude that asking Arruda whether he still wanted to take the polygraph test and memorializing his consent to take the test by obtaining his signature on the Polygraph Waiver Form did not constitute interrogation for purposes of Miranda. See State v. Naititi, 104 Hawaiʻi 224, 87 P.3d 893 (2004); State v. Rippe, 119 Hawaiʻi 15, 193 P.3d 1215 (App. 2008). Accordingly, the police were not required to re-Mirandize Arruda before asking whether he still wanted to take the polygraph test and obtaining his written consent to take the test.

In Naititi, before providing Miranda warnings to Naititi, who had been arrested on sexual assault charges, Detective Lavarias asked Naititi "if he wanted to make a statement to me today." Id. at 229, 87 P.3d at 898.[13] When Naititi responded, "I'm sorry. I'm sorry." Detective Lavarias asked Naititi if he wanted an attorney at that time. Id. Naititi replied, "I'm sorry . . . . I only touched her vagina." Id.

The Hawaiʻi Supreme Court held that Detective Lavarias's questions did not constitute interrogation and that Naititi's statements were not the product of interrogation as envisioned by Miranda. Id. at 235, 237, 87 P.3d at 904, 906. The supreme court stated:

> Detective Lavarias asked Naititi whether he wished to make a statement and be afforded the assistance of an attorney. By no stretch of the imagination could these preliminary "yes-or-no" questions be construed as the type that Detective Lavarias "should have known were reasonably likely to elicit an incriminating response" from Naititi. See [State v.] Ketchum, 97 Hawaiʻi [107,] 121, 34 P.3d [1006,] 1020 [2001]; [State v.] Ikaika, 67 Haw. [563,] 567, 698 P.2d [281,] 284 [1985].

Id. at 237, 87 P.3d at 906 (emphasis added; ellipsis points omitted). The supreme court vacated the trial court's ruling which had suppressed Naititi statements, in part, on Miranda grounds. Id. at 238, 87 P.3d at 907.

Here, as in Naititi, asking Arruda whether he still wanted to take the polygraph test and whether he would memorialize his consent to take the test by signing the Polygraph Waiver Form did not constitute interrogation for Miranda purposes. "By no stretch of the imagination" were such preliminary "yes-or-no" questions the type of questions that Detective Nakasone or Detective Doole "should have known were reasonably likely to elicit an incriminating response" from Arruda. See Id. at 237, 87 P.3d at 906; Rippe, 119 Hawaiʻi at

[13]Naititi was deaf and mute, and the questions posed by Detective Lavarias and the answers given by Naititi were made through an interpreter.

22-24, 193 P.3d at 1222-24 (joining the vast majority of courts in holding that a request for consent to search does not constitute interrogation for Miranda purposes). Indeed, Arruda did not make any incriminating statements in response to the preliminary questions asked by Detective Nakasone and Detective Doole, which Arruda claims violated Miranda. Moreover, Detective Doole re-Mirandized Arruda and obtained his waiver of rights before asking any questions in the in-test and post-test phases of the polygraph examination and before Arruda confessed to Detective Doole. Detective Nakasone gave Arruda a third set of Miranda warnings and obtained his waiver of rights at the beginning part of their second recorded interview. Under these circumstances, we conclude that Arruda's statements to Detective Doole and the statements he made during the second recorded interview with Detective Nakasone were properly obtained and were not obtained in violation of Miranda.[14]

B.

Arruda relies on Eli in support of his argument. However, we conclude that Eli is distinguishable and does not control our decision in this case.

In Eli, before advising Eli of his Miranda rights, a detective told Eli that he was under arrest for assaulting his daughter (who was in the hospital), and then "'asked [Eli] if he wanted to give a statement,' as it was 'his chance to give his

[14]Because we conclude that the actions of Detective Nakasone and Detective Doole challenged by Arruda did not constitute interrogation, we need not decide whether the Miranda warnings provided by Detective Nakasone in connection with his first interview had become stale by the time Detective Nakasone retrieved Arruda from the cell block the following day and escorted Arruda to the polygraph examination. We simply note that the approximately nineteen-hour time span between Detective Nakasone's original Miranda warnings and his retrieving Arruda from the cell block and escorting Arruda to the polygraph examination did not necessarily render the original Miranda warnings stale. See State v. Kong, 77 Hawai i 264, 269, 883 P.2d 686, 691 (App. 1994) (citing authority that renewed Miranda warnings are not required when a prior adequate warning was given "within a reasonably contemporaneous period of time" and that the passage of several days could be acceptable under some circumstances); United State v. Pruden, 398 F.3d 241, 246-47 (3d Cir. 2005) (concluding that an estimated twenty-hour time lapse did not render prior Miranda warnings stale).

side of the story.'" Eli, 126 Hawaiʻi at 522, 273 P.3d at 1208 (brackets omitted). By doing so, the detective implied that the other side of the story supported Eli's arrest for assault and thereby invited Eli to respond to that other side. Id. Under these circumstances, the supreme court held that the detective's actions in inviting Eli to tell his side of the story and obtaining Eli's commitment to give a statement before informing Eli of his rights violated Miranda and rendered invalid Eli's subsequent waiver of his Miranda rights. Id. at 522-23, 126 Hawaiʻi at 1208-09.

We agree with the Family Court that Eli is distinguishable because the police in this case did not seek or obtain Arruda's commitment to take the polygraph examination before advising him of his Miranda rights.[15] Arruda agreed to take a polygraph examination during the middle of his first interview with Detective Nakasone after Arruda had been advised of and waived his Miranda rights, and Arruda confirmed his willingness to take the polygraph test at the end of the first interview. Accordingly, a key basis for the supreme court's decision in Eli -- the failure of the police to inform Eli of his Miranda rights before inducing him to commit to telling his side of the story -- is absent from this case. For this reason, Eli is inapposite.

In addition, Eli did not overrule Naititi. As previously discussed, asking Arruda whether he still wanted to take the polygraph test and obtaining his written consent to take the test involved yes-or-no type questions that were not reasonably likely to elicit an incriminating response and thus did not constitute interrogation. Unlike in Eli, the actions of the police in seeking to reconfirm and memorialize Arruda's prior

[15]In denying Arruda's motion to suppress evidence, the Family Court concluded that: "There is no violation of State v. Eli, 126 Haw. 510 (2012). Eli, supra, is distinguishable as Detective Brandon Nakasone did not seek Defendant Arruda's commitment to take the polygraph examination until after the first set of Miranda warnings were given.

consent to take the polygraph examination did not involve invitations and entreaties to tell his side of the story. We conclude that Naititi, and not Eli, is the relevant precedent for this case.

II.

Arruda contends that the Family Court erred in denying his motion for a mistrial after the CW's therapist was observed in the gallery attempting to catch the CW's attention with a stuffed animal and appeared to be mouthing words. The Family Court, with Arruda's concurrence, excused Juror F who believed he had witnessed the therapist's actions and indicated he could no longer be fair and impartial. At trial, Arruda moved for a mistrial on the sole ground that the Family Court's actions in excusing Juror F would cause the remaining jurors to speculate about the reason Juror F was excused, which may influence the jury in some unknown manner. However, on appeal, Arruda raises a completely different ground, one that he did not argue at trial, in contending that the Family Court erred in failing to grant a mistrial. On appeal, Arruda argues that the Family Court should have granted a mistrial because the therapist's actions could have influenced and tainted the CW's testimony.

We conclude that Arruda waived this argument by failing to raise it in the Family Court. Arruda had the opportunity to address any prejudice resulting from the therapist's actions during the trial. Having failed to pursue or take advantage of such opportunities at trial, Arruda is not entitled to relief on the new claim he raises on appeal.

A.

The factual background for Arruda's mistrial motion is as follows.

Shortly after defense counsel began his cross-examination of the CW, the Family Court abruptly stopped the proceedings, held a short bench conference, and called a recess because it had just observed a person in the gallery pull out and brandish a stuffed animal. After the Family Court excused the

jury for lunch, the Family Court questioned the person who disclosed that her name was Natalia Lopez (Lopez) and that she was the CW's therapist with Catholic Charities Hawaii. When asked why she had been brandishing a stuffed animal, Lopez replied, "Comfort." The Family Court told Lopez to step outside the courtroom. The Family Court informed counsel: "All right. Counsel did not see it, but I saw it. She brought it out, she was waiving it in an attempt to show it to the witness. It lasted about 30 seconds, I believe. It was fairly brief." The Family Court banned Lopez from the proceedings, informed counsel that it planned to individually voir dire the jurors to see if any of them saw what happened, and then recessed for lunch.

When the proceedings resumed after lunch, the Family Court made the following statements on the record concerning the incident:

> Please be seated. Let the record reflect the presence of counsel and the defendant without the jury. All right. I want to put on record exactly what I saw before I begin speaking to the jurors 'cause I'm in the funny position of being the only eyewitness to this, it seems.
>
> The woman, I forget her name now, at issue though was sitting in the second row on the right side of the courtroom as I look out at the gallery. So I guess that would be the left side looking at me. She was sitting right next to the aisle. And she was there for most, if not all, of the witness's testimony.
>
> About no longer than a minute before I stopped the proceedings, I saw her pull out of -- either she had it next to her or she pulled it out of a bag. I'm not sure. But I didn't see it prior to that and then I saw it. And I wasn't even sure what it was at first except that it was very colorful. And at first she sort of just held it in her lap. And then shortly thereafter she held it in one hand and was extending it into the aisle in what seemed to me an obvious attempt to catch the attention of the witness. And at that time I also saw clearly that it was some kind of stuffed animal. And that's when I stopped the proceedings. So that's the record as far as what I saw. All right?

The Family Court conducted an individual voir dire of each juror. Most of the jurors stated that they either did not look out into the gallery during the CW's testimony or, if they did, they did not notice anything unusual or noteworthy. The Family Court instructed each juror not to speculate on or think

about the questions asked or discuss them with their fellow jurors.

Four jurors observed the incident to varying degrees. Juror R stated that he looked into the gallery because the CW appeared to be looking at someone in the gallery, but did not see anything in the gallery.

Juror V stated that when the Family Court stopped the proceedings, he looked into the gallery and believed that he saw a woman briefly take out a piece of cloth or fabric, "like a little flag or something." Juror V stated that the incident did not raise any thoughts in his mind and did not affect his ability to be a fair and impartial juror.

Juror K stated that when the Family Court stopped the proceedings, he looked in the gallery and saw someone holding a doll or a stuffed animal. Juror K speculated that this person was trying to get the CW's attention and "showing some kind of support for the little girl." Juror K stated that he believed that the person's actions were foolish and were not part of the normal decorum of a courtroom. Juror K further stated that his observations would have no bearing on his job as a juror in evaluating the CW's credibility and that he had no doubt he could remain a fair and impartial juror in the case.

Juror F informed the Family Court that "[r]ight before when [the Family Court] called everybody up front," he looked out into the gallery. This was "pretty much" the only time he observed the gallery during the CW's testimony. Juror F stated that "just on a fast glance" he saw a lady sitting near the aisle, "[l]ike kind of talking like, but silently. . . . Like kind of coaching or something, I guess. I don't know." Although Juror F was not sure because his observations were based on a fast glance "on the side of [his] eyesight," he thought the lady was mouthing words to the CW.[16] He did not see anything in the

[16]Later, Juror F stated that he noticed the person in the gallery mouthing words after the Family Court called counsel to the bench and did not (continued...)

lady's hands. Based on his observations, Juror F thought that "maybe" the person could have been coaching the witness on "the yes or no questions," but was "not really sure." He stated that he had doubts about the CW's answers on the yes-no questions and that he "probably" may not be fair and impartial.

When it completed voir dire, the Family Court noted that Juror F's statements had "refreshed my recollection that in fact [Lopez] was mouthing words also . . . when I was watching her. She had that thing in her hand and she was mouthing words." The Family Court advised the parties that Juror F would be excused. The State moved to excuse Juror K, and Arruda objected.

Arruda moved for a mistrial on the ground that the removal of Juror F would cause the remaining jurors to speculate about the reason Juror F was excused, which may influence the jury in some unknown manner. Arruda stated the basis for his mistrial motion as follows:

> [Defense counsel]: I'm moving for a mistrial at this point based on what has happened. I know that Your Honor has --
>
> THE COURT: Again, flesh that our for me. Why do I have to mistry the case?
>
> [Defense counsel]: I know that Your Honor has voir dired each of the jurors, but to the extent that [Juror F is] going to be gone and they all have an idea something transpired, they don't know what, they've been told not to speculate about it, but they're going to see a juror's now gone. And I don't know what type of influence that's going to have in their minds. They are at least aware something occurred. Most of them didn't see anything, so they're not going to know what. But they're aware that something must have transpired, something suspicious happened, and now one of the jurors is out. And I think it does call into question the credibility of the process itself.

The Family Court denied Arruda's motion for a mistrial, ruling that it did not believe that a mistrial was "anywhere remotely necessary." The Family Court also denied the State's motion to excuse Juror K, and it noted that an alternate juror would be

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[16](...continued)
notice anything before the Family Court called counsel to the bench.

seated in place of Juror F. The Family Court asked both parties whether they wanted to make any other record or request regarding its rulings, and both parties said no.

When it recalled the jury, and before resuming the trial, the Family Court made the following announcement:

> And one more time, ladies and gentlemen. Let me tell you don't speculate as to why [Juror F] is not going to be with us any longer. It doesn't concern you and it's not a matter that you should speculate about or that should play any role in your consideration of this case. All right?

The trial then proceeded with defense counsel continuing his cross-examination of the CW.

B.

On appeal, Arruda contends that the Family Court "erred in denying [his] motion for mistrial because the unknowable extent to which [the CW's] testimony had been influenced by her therapist mouthing words to her during her testimony irreparably tainted her entire testimony[.]" (Formatting altered.) Arruda did not raise this argument as a basis for his motion for a mistrial in the Family Court.[17] We conclude that Arruda waived this argument by failing to present it to the Family Court. See State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) ("Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal."); State v. Ildefonso, 72 Haw. 573, 584, 827 P.2d 648, 655 (1992) ("Our review of the record reveals that [the defendant] did not raise this argument at trial, and thus it is deemed to have been waived."); State v. Moses, 102 Hawaiʻi 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal[.]"); State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904

[17]As noted, at trial, the sole argument that Arruda raised in support of his motion for a mistrial was that the Family Court's actions in excusing Juror F would cause the remaining jurors to speculate about the reason Juror F was excused and thereby influence the jury in some unknown manner. Arruda has apparently abandoned his trial argument, and he does not contend on appeal that the Family Court erred in rejecting his trial argument in denying his motion for a mistrial.

(1976) ("[T]here can be no doubt that the making of an objection upon a specific ground is a waiver of all other objections." (internal quotation marks and citation omitted)).

Our conclusion that Arruda waived his new argument is particularly appropriate under the circumstances of this case. The record indicates that the therapist's actions in brandishing a stuffed animal to attract the CW's attention and apparently mouthing words were very brief and quickly stopped by the Family Court. The Family Court stated that it saw the therapist pull out the stuffed animal "[a]bout no longer than a minute" before it stopped the proceedings and that the period of time during which it observed the therapist waiving the stuffed animal in an attempt to show it to the CW was brief, lasting about thirty seconds. Juror F stated that "[r]ight before" the Family Court stopped the proceedings, he looked out into the gallery and, at a fast glance, saw a lady appear to be mouthing words, which led Juror F to think that maybe the lady could have been coaching the CW on yes or no questions. Although defense counsel's cross-examination, which had just begun, consisted primarily of leading yes or no questions, the CW's direct examination, and in particular her description of the sexual assaults, required the CW to provide details that went beyond answering yes or no to the questions posed. Thus, the record does not indicate that the therapist's actions had any ability to influence the CW's testimony in any meaningful manner.

In addition, although Arruda contends that a mistrial was required because of the "unknowable extent" to which the CW's testimony had been influenced by the therapist's actions, Arruda made no attempt at trial to determine whether the therapist's actions had any influence on the CW's testimony or to address any alleged prejudice resulting from the therapist's actions. If Arruda believed that the therapist had improperly influenced the CW's testimony, he could have asked the Family Court to permit him to interview the therapist to explore this issue. He then could have called the therapist as a witness if he believed the

therapist's testimony would have been helpful. Arruda could have cross-examined the CW on whether the therapist had "coached" the CW or about what influence, if any, the therapist's actions had on the CW's testimony. He also could have sought other means of introducing evidence of the therapist's actions if he believed it would advance his defense. Instead, Arruda did not pursue any of these actions but rather attempts to rely on the "unknowable extent" to which the therapist's actions might have influenced the CW's testimony. We conclude, under the circumstances presented, that Arruda is not entitled to relief on his newly raised argument.[18]

III.

At trial, Arruda objected when the State asked the Family Court to instruct the jury on the lesser-included offense of third-degree sexual assault with respect to Counts 2 and 4.[19] Defense counsel represented to the Family Court that he did not see a basis for the lesser-included offense instruction on these counts, stating: "I don't see it. I don't[,]" and he responded "Yes" when the Family Court asked if he objected to such an instruction. Nevertheless, on appeal, Arruda contends that the Family Court erred in failing to instruct the jury on the lesser-included offense of third-degree sexual assault with respect to Counts 2 and 4.

We conclude that assuming *arguendo* that the Family Court erred in failing to give a lesser-included offense

[18]Arruda's contention that the Family Court erred in excusing Juror F because he had relevant information on which to evaluate the CW's testimony is without merit. Arruda agreed with the Family Court's decision to excuse Juror F. When the Family Court asked counsel whether they had any problem with discharging Juror F, Arruda's counsel responded, "Based on his testimony, it has to happen." Moreover, Juror F's observations of the therapist's actions while the therapist was in the gallery were not part of the evidence admitted at trial. It was not an abuse of discretion for the Family Court to determine that Juror F and the other jurors should limit their consideration to the evidence presented at trial.

[19]The prosecutor stated that there was a basis in Arruda's statements in his second recorded interview with Detective Nakasone for an instruction on the lesser-included offense of third-degree sexual assault with respect to Counts 2 and 4.

instruction on Counts 2 and 4, any such error was harmless beyond a reasonable doubt and did not contribute to Arruda's convictions. Although the tests for giving a lesser-included offense instruction and harmless error are similar, they are not the same. The test for giving a lesser-included offense instruction focuses on whether under "any view of the evidence[,]" there is a rational basis for the jury to acquit on the charged offense and convict on the lesser-included offense. State v. Flores, 131 Hawaiʻi 43, 53, 314 P.3d 120, 130 (2013). On the other hand, the harmless error test focuses on the effect of the error in light of the entire proceedings and the record as a whole in determining whether there is a reasonable possibility that the error in omitting the lesser-included offense instruction may have contributed to the conviction. State v. Rapoza, 95 Hawaiʻi 321, 326, 22 P.3d 968, 973 (2001).

In Flores, the Hawaiʻi Supreme Court overruled the portion of State v. Haanio, 94 Hawaiʻi 405, 16 P.3d 246 (2001), that had previously held that an error in failing to instruct on a lesser-included offense was *always* harmless error when the jury convicted of the charged offense. Flores, 131 Hawaiʻi at 44, 314 P.3d at 121. We assume that the supreme court would have spoken with greater clarity if it intended to change the law from an error in failing to instruct on a lesser-included offense *always* being *harmless* error to *always* being *harmful* error that requires the conviction to be vacated.[20]

[20]We note that in Flores, the supreme court concluded that "[t]he failure to instruct the jury on a lesser included offense for which the evidence provides a rational basis warrants vacation of [Flores's] conviction." Flores, 131 Hawaiʻi at 58, 314 P.3d at 135. However, more recently, in State v. Kaeo, 132 Hawaiʻi 451, 460-61, 323 P.3d 95, 104-05 (2014), the supreme court stated:

> Pursuant to Flores, if assault in the first degree is a lesser included offense of murder in the second degree, and there was a rational basis in the evidence for acquitting [Kaeo] of murder in the second degree and convicting him of the included offense of assault in the first degree, then the court's failure to instruct on the included offense is subject to a harmless beyond a reasonable doubt standard.

(continued...)

A.

We conclude that viewing the Family Court's alleged error in the context of the entire proceedings and the record as a whole, any error in failing to instruct on the lesser-included offense of third-degree sexual assault as to Counts 2 and 4 did not contribute to Arruda's convictions.

Arruda was charged with first-degree sexual assault for inserting his penis (Count 2) and inserting his finger (Count 4) into the CW's genital opening. First-degree sexual assault requires "sexual penetration," which is defined, in relevant part, to mean:

> Vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. As used in this definition, "genital opening" includes the anterior surface of the vulva or labia majora[.]

HRS § 707-700 (2014) (emphasis added). Third-degree sexual assault requires "sexual contact," which is defined, in relevant part, to mean "any touching, other than acts of 'sexual penetration', of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person[.]" Id.

In this case, the evidence that Arruda had engaged in "any penetration, however slight," of the CW's genital opening with his penis and finger as respectively charged in Counts 2 and 4 was strong and compelling. The CW testified that while in the bathroom, with the door closed, Arruda "put his private into my punani"; that this felt "[s]ore"; that Arruda's "private" was "[h]ard"; and that "[w]hite stuff" came out of Arruda's "private" and went onto the floor and the CW's body. To show what she meant by "punani," the CW colored in the genital area of a diagram of a girl. To show what she meant by "his private," the

[20](...continued)
(Emphasis added.) Kaeo indicates that standards for giving a lesser-included offense instruction and for harmless error are different.

CW colored in the penis of a diagram of a man. The CW testified that Arruda put his finger inside her "punani" and "[h]e rubbed it up and down," which made her feel "[h]urtful."

The CW also testified that Arruda put his "private" into her "butt hole," which made her feel "[s]ore" and made her cry, that Arruda made her suck on his "private" "like a lollipop," and that "white stuff" came out, which she spit out in the sink and then washed her mouth. The CW testified that the sexual assaults happened multiple times and occurred in the bathroom, Arruda's bedroom, the kids' bedroom, the livingroom, and the kitchen.

The CW's brother corroborated the CW's testimony. The CW's brother testified that he would see Arruda and the CW go into the bathroom, and the door would be closed. He heard his sister screaming in the bathroom on many occasions, and he could also hear Arruda telling her to be quiet. The CW's brother testified that the CW told him that Arruda "raped her."

In addition, Arruda's statements and confessions to the police provided powerful corroboration and confirmation of the CW's testimony. The jury saw the DVD of Arruda's first interview with Detective Nakasone. While Arruda did not explicitly admit the sexual assaults during this interview, his reaction to Detective Nakasone's statements provided dramatic evidence of his consciousness of guilt. In response to Detective Nakasone telling Arruda that the investigation clearly showed that he had sex with the CW, Arruda covered his face with his hands, began sobbing and crying, and repeatedly moaned, "Oh God" and "Oh my God."

Arruda also explicitly admitted the CW's allegations of sexual assault and sexual penetration to Detective Doole and separately to Detective Nakasone in the second recorded interview. Arruda confessed to Detective Doole that the CW had told the truth about Arruda putting his penis inside the CW's mouth and genital opening, putting his finger inside the CW's genital opening, and ejaculating in her presence. In his second

recorded interview with Detective Nakasone, Arruda described the circumstances surrounding three separate acts of sexual penetration: inserting his finger in the CW's genital opening in the shower; inserting his penis in the CW's mouth in a bedroom; and inserting his penis in the CW's genital opening in her bedroom. The State also introduced compelling evidence of Arruda's sexual penetration through Arruda's own markings on drawings of a hand and penis made during his interviews with Detective Doole and Detective Nakasone. Through these markings, Arruda showed how far he admitted to inserting his penis into the CW's genital opening and mouth and how far he admitted to inserting his finger into the CW's genital opening.

In the face of this evidence, Arruda theory of defense was not that he engaged in sexual contact short of penetration, but rather Arruda strongly denied the CW's allegations of sexual assault. His theory was that the CW fabricated the allegations because she was jealous of the greater attention that Arruda and his wife were paying to the CW's brother and their son. Arruda testified that his confessions to Detective Doole and Detective Nakasone were false and that he falsely confessed because he just wanted to go home. In his testimony, Arruda also denied the specific allegation of sexual assault set forth in each count of the indictment. After the close of the evidence, Arruda's counsel represented to the Family Court that he did not see any basis in the evidence for a lesser-included offense instruction on Counts 2 and 4, and in closing argument, defense counsel argued that Arruda "never touched [the CW] in a sexual manner."

B.

Arruda's claim of instructional error is based on two short excerpts from his second recorded interview with Detective Nakasone. In the first excerpt, Arruda argues that he is saying that his finger and penis were "right there," that is, not inside

the CW's genital opening.[21] In the second excerpt, Arruda asserts that he is telling Detective Nakasone that his finger "didn't go inside" the CW's genital opening.[22]

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[21]The first excerpt referenced by Arruda contains the following statements:

Q And then how far when you're . . . How . . . I know you showed on your finger, but, so if you -- if, let's say this was the -- this was the -- the lips of the vagina, like how, can you show me how . . .

A Just like right there.

Q Okay.

A It didn't --

Q Didn't go all the way.

A -- didn't get anything, it didn't go through, it was just right there.

Q And that was with the penis, right?

A Yes.

Q And the finger one about how . . .

A Only right there, was just right by her clitoris and stuff, right there.

[22]The second excerpt referenced by Arruda contains the following statements:

Q Just so that I have it clear, the first time was when she was taking a shower.

A Yes, you know, I just put my finger here.

Q It was -- 'cause she was -- she had her hair soaped and then . . .

A And then I was holding her hair and then . . .

Q Just got a little aroused by it.

A Yeah.

Q And then, okay.

A I just (inaudible).

Q Okay, that was real quick then?

(continued...)

We conclude that these two brief excerpts pale in comparison to the strong and compelling evidence of penetration presented at trial. Given the powerful evidence of Arruda's guilt, including his separate confessions to two HPD detectives, his recorded interviews, and his own markings on drawings showing the extent to which his penis and finger penetrated the CW's genital opening, and the nature of Arruda's defense, we conclude that any error in the Family Court's failure to give a lesser-included offense instruction with respect to Counts 2 and 4 was harmless beyond a reasonable doubt. There is no reasonable possibility that any error by the Family Court in failing to give a lesser-included offense instruction on third-degree sexual assault may have contributed to Arruda's convictions on these counts.

CONCLUSION

For the foregoing reasons, we affirm the Family Court's Judgment.

DATED: Honolulu, Hawaiʻi, May 4, 2016.

On the briefs:

Phyllis J. Hironaka
Deputy Public Defender
for Defendant-Appellant

Chief Judge

Brian R. Vincent
Deputy Prosecuting Attorney
City and County of Honolulu
for Plaintiff-Appellee

Associate Judge

Associate Judge

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[22](...continued)

A Yeah.

Q Okay, and it didn't go inside, right, you said --

A No.

Q -- was just on the outside.

A No, no, no.

Although Arruda is repeatedly saying "no" at the end of this passage, it appears upon listening to the recording that he is agreeing with Detective Nakasone's statement that "it didn't go inside[.]"