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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

MUSTAFA BAKER,
Petitioner/Defendant-Appellant.

SCWC-16-0000115

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000115; CR. NO. 13-1-0078)

JUNE 18, 2020

DISSENTING OPINION BY NAKAYAMA, J.

This case arose out of the beating and sexual assault of the minor complaining witness (CW), who was a runaway girl, on New Year's Eve 2012.

The sexual assault in this case was brutal and callous. During the attack CW suffered severe physical injuries, for which she was hospitalized for one month. She

sustained many substantial lacerations to her face and head. CW's "eyelids were . . . heavily lacerated" and "a piece of her [right] eyelid was actually hanging down . . . over her eye." The laceration on CW's upper lip was so deep that a responding police officer "could see [CW's] upper teeth through the wound in her . . . upper lip." CW's jaw was broken in two places and she had serious contusions, abrasions, and bruises on her eyes, hips, knees, and elbows.

CW identified Mustafa Baker (Baker) as one of her two assailants and testified that Baker had repeatedly kicked and punched her in the stomach and face. CW also testified that after she was knocked unconscious when a glass bottle was smashed on her head, she awoke to find herself naked with Baker on top of her, sexually assaulting her. She testified that Baker assaulted her vaginally and anally and that Baker "was dragging [her] all over" the men's public park bathroom floor facedown while he assaulted her anally. Each time CW tried to fight back, Baker punched and kicked her more. CW related that, despite the fact that she was crying and that she told Baker to stop, Baker "didn't really care what [she] said" and "just kept going." Following the assault, Baker left CW, who was naked and bleeding from head-to-toe, alone by a park bathroom.

In addition to her other serious injuries, CW's sexual assault examination showed that CW sustained "multiple shallow

lacerations" on her external genitalia and multiple small tears near the edge of her anus, which indicated that CW had suffered trauma to those areas.

The record reflects that Baker, an adult, took advantage of a vulnerable teenage runaway. He aggressively beat and repeatedly sexually assaulted her then left her alone, with severe injuries, so that he could catch the bus.

Following his arrest, Baker gave an audio-recorded statement to the police in which he admitted to shoving CW to the ground and having sex with her against her will. However, Baker denied beating her and stated that his cousin, GK, had beaten her. At a voluntariness hearing the circuit court determined that "the bulk of" Baker's confession was voluntary.

Baker was charged with two counts of sexual assault in the first degree. Following a four-day trial, the jury found Baker guilty of both counts. Baker was sentenced to twenty years' imprisonment on each count, to run consecutively. On appeal, the ICA affirmed Baker's convictions and sentence.

The Majority concludes that "the tactics used by the interrogating police officer were so coercive that they rendered the defendant's statement involuntary" and holds that the statement therefore should not have been admitted at trial. Majority at 2. The Majority then identifies seven "improperly coercive interrogation techniques" all but one of which it

concludes "made an implied promise to Baker that he would benefit if he confessed and suffer adverse consequences if he did not." Majority at 53. Consequently, the Majority holds that, under the totality of the circumstances, "Baker's confession was not voluntarily obtained" because the use of "multiple coercive interrogation tactics and their use in conjunction rendered Baker's confession involuntary." Majority at 56.

I disagree. It is clear to me from the audio recording of Baker's confession that Detective Tokita did not coerce Baker's confession and that it was voluntarily given. Moreover, I disagree with the Majority's characterization that each of Detective Tokita's supposedly improper comments constituted an "implied threat or promise" and note that none of the "tactics" employed by Detective Tokita render a confession per se involuntary under Hawai'i law. The Majority's apparent expectation of how a police detective should interview a suspect distorts the reality of human conversation. If applied broadly, the Majority's conclusion as to each supposed interrogation tactic will render law enforcement entirely unable to question suspects where, as here, the victim has already identified the suspect as the perpetrator.

I dissent.

I. BACKGROUND

On the afternoon of December 31, 2012, CW, a minor, and her friend KK, who were both runaways, went to Kailua District Park to celebrate New Year's Eve. There, KK and CW met up with several other people, including: GK, KK's younger brother who was fifteen years old at the time; Baker, KK's and GK's cousin, who was twenty-three years old at the time; LKG, GK's friend; and JKG, LKG's younger brother. While at the park, CW and the others drank hard liquor, smoked marijuana, and may have used acid and methamphetamine.

Later that afternoon, Honolulu Police Department (HPD) Officer Gaynor Minton (Officer Minton) approached the group in a marked police vehicle while she was patrolling the area. Upon seeing the police vehicle coming towards them, CW ran to the men's park restroom and hid inside. KK was taken into custody after Officer Minton determined that she was a runaway.

CW testified that Baker entered the men's restroom and informed her that KK had been arrested. As she was leaving the men's restroom, she saw Baker and GK walking towards her; one of them was carrying a bottle behind his back. CW attested that when she tried to run away, Baker and GK knocked her to the ground and began kicking and punching her in her stomach and face. CW specifically recalled that Baker punched her in the eyes. Eventually, CW lost consciousness when one of them,

though she could not remember who, smashed her on the head with a glass bottle.

CW testified that when she came to, she was on the ground, lying on her back by the bathrooms at Kailua District Park. She testified that all of her clothes, including her shirt, bra, pants, underwear, socks, and shoes, had been "ripped off," leaving her completely naked. Because she had been rendered unconscious by the blow with the bottle, she did not know how she had become naked or what had happened to her before she awakened. CW stated that Baker was on top of her, sexually assaulting her vaginally. She explained that she cried while Baker assaulted her and that when she "tried to fight back," Baker and GK punched her and kicked her.

CW testified that she heard GK "saying he wants to try," and that GK then assaulted her vaginally. After GK ejaculated, Baker "turned [CW] around" and assaulted her anally. CW related that she "was telling him to stop, because it hurts," but that Baker "didn't really care what [she] said" and "just kept going."

CW testified that as Baker was assaulting her, he was "dragging [her] all over" the cement floor of the public bathroom, facedown, and that she was "bleeding from head to toe." CW stated that she had cuts on her eyes and face, that she had "blood in her eyes" and all over her face, and that she

had injuries all over her body as a result of being beaten and dragged on the ground.

CW testified that after Baker finished assaulting her, she heard either GK or Baker say, "[c]ome on. We got to go. The bus is here." CW stated that she did not see where Baker and GK went after they left. Subsequently, CW put her clothes back on and looked for help. CW related that she eventually saw a girl, later determined to be LKG, whom she approached and asked to call 911. CW stated that LKG took her to an apartment building, where LKG called the police. An ambulance took CW to Queen's Medical Center, where she was hospitalized for approximately one month due to the extent of her injuries.

A. Baker's Tape-Recorded Police Interview

Baker was arrested on January 8, 2013. Later that day, HPD Detective Brian Tokita (Detective Tokita) interviewed Baker. The tape-recorded interview lasted less than one hour.

Detective Tokita opened the interview by asking Baker information about his personal history and background. Baker stated that he was well enough to give a statement.

Detective Tokita then reviewed Baker's constitutional rights with him. Detective Tokita reviewed an HPD-81 form with Baker and informed him that: (1) before he asked Baker any questions, Baker had to understand his constitutional rights; (2) Baker had the right to remain silent and he had the right to

not say anything to Detective Tokita or answer any of his questions; (3) anything Baker said could be used against him at trial; (4) Baker had the right to have an attorney present while he spoke with Detective Tokita and that if he could not afford an attorney, an attorney could be appointed for him prior to any questioning; and (5) if Baker decided to speak with Detective Tokita without a lawyer present, he had the right to stop answering at any time. Baker stated that he did not want an attorney, and that he wanted to tell Detective Tokita what happened. He also signed and dated the HPD-81 form, indicating that he understood his rights and that he did not wish for an attorney to be present.

In relating the events that took place on December 31, 2012, Baker initially denied having sex with or otherwise being involved with CW. Baker stated that he was hanging out with LKG and JKG when GK and CW "went and did something." According to Baker, GK subsequently returned to the group and told Baker that he had had sex with CW. Baker further related that soon thereafter, he saw GK "getting ready to fight with this boy," who was CW's boyfriend.

Detective Tokita told Baker that he knew that his story was not true and encouraged Baker tell the truth:

[Detective Tokita:] That didn't happen, [Baker]. To be honest with you, I'm being straight with you. I know that didn't happen. Like I said I've been investigating this case for a long time.

[Baker:] Yes, I know.
[Detective Tokita:] And I know what happened. You know what I mean, I'm just giving you a chance to see if you going to tell me what happened.

In response, Baker acknowledged that his story was not true.

Baker then offered a different account of what took place on New Year's Eve 2012. Baker stated that while he was sitting with his friends by a fence near the bathrooms at Kailua District Park, GK and CW "did something" by bathrooms. Baker related that he "wasn't right by them," and he "couldn't do anything." Baker averred that when GK returned to where the rest of the group was sitting, GK "was bloody." On the bus, after Baker helped GK clean up, GK told him what had happened with CW.

Detective Tokita responded that he knew that Baker's revised account of what happened was not true. Detective Tokita told Baker that he believed that Baker was a "pretty straight up guy" who had "a bad error in judgment due to alcohol and whatever drugs [he was] doing at the time." Detective Tokita stated that he knew that Baker, likely under the influence of drugs and alcohol, "beat the shit out of [CW]," put his penis into CW's vagina, allowed GK to have sex with CW, and then had sex with her a second time. After sharing these thoughts, Detective Tokita again reassured Baker that he did not think that Baker was an inherently violent person and that he wanted to give Baker a chance to "own[] up" and tell the truth:

[Detective Tokita:] Even movie stars, right? We all get busted. This is how our brains are wired. You know what I mean? Now you put that brain on alcohol and drugs, now you're all fucked up and you're thinking all screwed up at that point. You know what I'm saying? So I know what happened [Baker]. You know, I'm giving you a shot by telling me and this is how you . . . how you want to be remembered, dude?

[Baker:] No.

[Detective Tokita:] You know what I mean?

[Baker:] I don't.

[Detective Tokita:] You don't want to be going down like this.

[Baker:] I know.

[Detective Tokita:] Remembered like this. Let me tell you what it sounds like on the outside. The girl's a minor. So she's not an adult.

[Baker:] Yeah.

[Detective Tokita:] Okay, so in . . . in people's minds, you know, if this hits the media, it would be . . .

[Baker:] I know.

[Detective Tokita:] . . . twenty-three year old boy rapes a fucking juvenile and how does that sound?

[Baker:] That's not me.

[Detective Tokita:] Exactly. Cause when people hear that, what they going think that juvenile, how . . . how that juvenile is, you think?

[Baker:] Probably think like she's . . . juvenile period, under eighteen.

[Detective Tokita:] Kid.

[Baker:] It wouldn't matter, that's a baby.

[Detective Tokita:] That's what I'm saying.

[Baker:] And I'm not like that.

[Detective Tokita:] I know you're not like that. I'm being straight with you cause you haven't had a record. Your juvie record is like petty to me compared to you know most hard core criminals. You just drank too much, dude. You drank too much. You smoked too much. Bad error in judgment. But it's time to come clean. You got . . . you got to [take] responsibility for what you did, you know what I'm saying?

[Baker:] Right.

[Detective Tokita:] When you go to court, you think people want to hear somebody that's going to fucking deny, deny when the evidence is like insurmountable against them, but they're just going to deny, deny to the bitter end . . .

[Baker:] No.

[Detective Tokita:] . . . or you think they're be . . . they want to hear somebody that's you know, what, fuck, I made a mistake, period. I made a mistake, that's . . . that's not me, but I made a fucking mistake, I did and I'm sorry. What do you think they want to hear?

[Baker:] The truth.

Detective Tokita then told Baker several times that he had physical evidence, in the form of DNA evidence, proving that Baker had sex with CW. Baker subsequently admitted that CW did not want to have sex with him, but that he had sex with her anyway because he "was all fucked up" from drinking alcohol and smoking marijuana. Baker specifically admitted that he assaulted CW vaginally and, after some pressing by Detective Tokita, also admitted to having assaulted CW anally:

[Baker:] I'm just . . . I swear, I only humped her twice.
[Detective Tokita:] Okay, so the first time you fucker [sic] her, penis in vagina?
[Baker:] Yes and . . .
[Detective Tokita:] Second time you fucked her, was penis in anus, okay?
[Baker:] Okay.
[Detective Tokita:] You tell me, am I right or am I wrong?
[Baker:] I don't know.
[Detective Tokita:] What you mean you don't know?

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[Baker:] Must have been a mistake.
[Detective Tokita:] You know what I mean? We're just talking about owning up.
[Baker:] Yes.
[Detective Tokita:] And you . . . and you sounded like you're about to own up.
[Baker:] I . . . I am.
[Detective Tokita:] Are you going to own up?
[Baker:] Yes. I ain't going to argue with you no more.
[Detective Tokita:] Oh, you tell me . . .
[Baker:] I'm sorry.
[Detective Tokita:] . . . I want to hear from you.
[Baker:] Yes.
[Detective Tokita:] Yes, what?
[Baker:] It happened.
[Detective Tokita:] Okay, so . . . so I got this straight for the record . . .

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[Detective Tokita:] . . . you had penis in vagina, then your [cousin] took his turn. [GK] took his turn, penis in vagina. You flipped her over. You went penis in anus and you took your . . . your penis out and you put it back in her vagina, yeah and that's when you ejaculated?
[Baker:] Yes.

However, despite Detective Tokita's numerous suggestions to the contrary, Baker repeatedly denied beating CW or hitting her over the head with a bottle. Though he conceded that he threw CW to the ground, he maintained that he did not beat her and that GK had smashed a bottle on her head. Baker stated that he did not tell the truth initially because he "was scared."

Baker related that after he had sex with CW, CW put her clothes back on and tried to walk away, but fell down. Baker stated that he asked CW whether she was all right, cleaned her up, laid her on her side, and asked LKG to watch her until someone else came to help.

Detective Tokita suggested that Baker may have acted the way he did on December 31, 2012 because his ADHD, which he had when he was younger, caused him to "snap." Upon being asked why he hit CW, Baker stated that he "was scared" and "didn't want to remember what happened." Baker remarked that he was "still fuckin' scared and shit."

Towards the end of the interview, Detective Tokita and Baker talked about Baker's drug use habits and how Baker wanted to stop using drugs. Baker stated that other people have told

him to stop using drugs and remarked that he "was just smoking [c]rack two days ago." Detective Tokita commented that Baker's use of "crack" may have also facilitated his aggressive behavior on December 31, 2012 and suggested that Baker may not have acted that way had he been sober: "That's what fucked you up, too. You got to get off that stuff because you told me right now, how you are right now, dead sober, I know you're sober because you took an intox downstairs . . . several hours ago." Baker agreed that he needed to stop using drugs, but was struggling to do so, stating:

I know. I understand. I do know I got to stop, but I can't. I feel I can't. Officer, I don't know what to do. Well, maybe the Crack and stuff, but all day today, all I wanted to do was smoke a joint, smoke a cigarette. I want to drink something. Was trying to sleep the whole time. I can't sleep for shit cause I want something to my body.

Finally, Detective Tokita and Baker discussed whether Baker told GK to hit CW over the head with a bottle. During the course of this discussion, Detective Tokita asked Baker whether he "love[d] him like a brother." Baker answered that he did, and that he was "try[ing] to protect him."

After finishing their discussion of the events that took place on December 31, 2012, Baker asked Detective Tokita what was going to happen next. Detective Tokita explained that Baker would be held in custody until he eventually went to court. Baker stated several times that he was "scared."

At the close of the interview, Baker stated that he was not coerced or forced into giving his statement to the police. Baker also stated that he gave his statement out of his own free will and that he was not promised anything in exchange for his statement.

B. Circuit Court Proceedings

On January 16, 2013, Baker was charged with, inter alia, two counts of sexual assault in the first degree in violation of Hawai'i Revised Statutes (HRS) § 707-730(1)(a).¹

1. Determination of Voluntariness of Baker's Statement

On March 25, 2015, the State filed "Prosecution's Motion to Determine Voluntariness of Defendant's Statement to Law Enforcement" (Voluntariness Motion). Therein, the State asserted that although Baker's statement was taken in the context of a custodial interrogation, Baker was informed of his Miranda rights, which indicated that he understood the nature of his rights and knowingly, voluntarily, and intelligently waived those rights. The State also emphasized that Baker stated during the interview that he had not been coerced or forced into making a statement to the police. Thus, the State requested that the circuit court determine that Baker's January 8, 2013

¹ HRS § 707-730(1)(a) provides that a person commits the offense of sexual assault in the first degree if "[t]he person knowingly subjects another person to an act of sexual penetration by strong compulsion."

statement to Detective Tokita was voluntarily made and freely admissible at trial, subject to authentication.

The circuit court² held a hearing on the State's Voluntariness Motion on March 31, 2015. Three exhibits were stipulated into evidence for purposes of the hearing on the State's Voluntariness Motion: (1) the HPD-81 form that Baker signed; (2) the transcript of the interview recording; and (3) the audio recording of the interview.

The State called Detective Tokita as a witness. Detective Tokita conceded that although he told Baker that he had DNA evidence tying Baker to CW's sexual assault during the interview, he did not actually possess such evidence at the time because "the DNA hadn't been run yet."

After Detective Tokita testified, defense counsel argued that it was important for the circuit court to listen to the audio recording of the interview because, in his view: "I think there's a lot of cajoling, and there's some pretty clear denials, and then there's a lot of intimidation by this officer, that if you listen to it, you can hear it in terms of him raising his voice and the way he conducted himself." Defense counsel also argued that despite the fact that Baker repeatedly denied beating CW, Detective Tokita improperly

² The Honorable Karen S.S. Ahn presided.

continued to press him on the point and suggest that Baker played a role in causing CW's injuries.

The prosecutor responded that pursuant to State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993), police officers are allowed to reject a defendant's initial denials and to misrepresent whether physical evidence of the defendant's involvement existed during the course of an interrogation. The prosecutor also asserted that the audio recording of the interview illustrated that "[Baker] was very lucid and certainly able, at least in the very beginning, to pedal [sic] the account that he wanted until Detective Tokita pushed him further." The circuit court took the matter under advisement so that it could review the audio recording of the interview.

By a minute order filed on April 1, 2015, the circuit court granted in part and denied in part the State's Voluntariness Motion and issued the following findings and conclusions:

1. Before providing any substantive statement, the defendant was administered his Miranda rights and thereafter elected to waive those rights and provide a statement to police.
2. Although the defendant only completed the 8th grade, the [audio recording] demonstrates that he answered police questions readily and responsively, unless he reasonably wanted to think about the question and his answer. He displayed no signs of any inability to understand questions or to respond appropriately to any given question.
3. Defendant initially opted to deny any participation in the salient events at issue. But then admitted that he had been a participant.

4. During the interview, Honolulu Police Detective Brian Tokita engaged in apparently deceptive assertions regarding intrinsic facts and urged defendant to tell the truth, sometimes using an insistent tone, but did not use deliberate falsehoods extrinsic to the facts of the alleged offenses that were of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt. State v. Kelekolio, 74 Haw. 479, 511 (1993). Where the defendant wanted to deny certain allegations, he did so.

5. Considering the totality of the evidence, the court concludes that the State has proven by a preponderance of the evidence that defendant gave a bulk of his January 8, 2013 statement voluntarily, knowingly, and intelligently. Under the totality of the circumstances, devices used by the detective did not amount to mental coercion and did not cause defendant's will to be overborne.

6. However, the court will deny the motion as to page 39 through 43 in the transcript, wherein the detective sought to get the defendant to admit that he directed [GK] to hit and assault the complaining witness, which [GK] did not want to do. Furthermore, the State will redact the pronoun "she" in questions inasmuch as that suggests that the detective is reciting material from the complaining witness' statements.

2. Jury Trial

Baker's four-day trial began on April 2, 2015. The relevant witness testimony and other proceedings that took place at trial are summarized below.

a. HPD Officer Alan Ibrao's (Officer Ibrao) Testimony

Officer Ibrao testified that on December 31, 2012, he was sent to Queen's Medical Center at about 11:15 p.m. for "a sexual assault type case." Officer Ibrao testified that upon meeting CW, who was being treated by hospital personnel, he observed that CW had "multiple facial lacerations, covered in

dry blood" as well as "actively bleeding wounds." Officer Ibrao related that CW's "eyelids were . . . heavily lacerated" and that "a piece of her [right] eyelid was actually hanging down . . . over her eye." He further stated that CW had lacerations on her cheek, nostrils, and her upper and lower lip. Officer Ibrao testified that the laceration on CW's upper lip was so deep that he "could see [CW's] upper teeth through the wound in her . . . upper lip."

b. Detective Tokita's Testimony and Presentation of Redacted Audio Recording of Baker's Interview

Detective Tokita testified that he met with CW on January 1 and January 5, 2013, at Queen's Medical Center. Based upon a photograph of CW's injuries as of January 1, 2013, which was received into evidence, Detective Tokita testified that CW had "numerous lacerations" on her face and that CW's "face was swollen . . . when [he] saw her." Relying upon a photograph of CW's injuries as of January 5, 2013, which was received into evidence, Detective Tokita stated that "the bruising [in CW's face was] more evident at [that] time, especially to the eyes."

Detective Tokita also testified about his interview with Baker. On this point, his testimony was essentially the same as his testimony at the hearing on the State's Voluntariness motion. Subsequently, the redacted audio recording of the interview was accepted into evidence and played

for the jury in open court.

c. Officer Christopher Wong's (Officer Wong's) Testimony

Officer Wong testified that on December 31, 2012, he was sent to "an address on Kihapai Place for a sexual assault type case." Upon arrival, he met CW. Officer Wong testified that CW had blood on her face and shirt, that her eyes and cheeks were swollen, and that her "[h]air was a mess." Officer Wong stated that he took a photograph documenting the state of CW's injuries as of December 31, 2012, which was accepted into evidence. He also testified that CW "was [] throwing up blood."

d. LKG's Testimony

LKG testified that she was "drinking[] and having fun" with JKG, CW, Baker, and GK near the bathrooms at Kailua District Park on December 31, 2012. At some point, LKG related, she and JKG left the area near the bathrooms and went to another part of the park. According to LKG, the rest of the group, including CW, Baker, and GK, stayed near the bathroom area. LKG testified that she and JKG returned to the area near the bathrooms approximately thirty minutes later.

Upon returning to the bathroom area, LKG saw CW "sitting down in the corner, all bloody." She testified that she did not initially recognize CW because CW "was covered in blood from head to toe." LKG related that CW was "all by

herself" when she found her. She testified that she did not see Baker cleaning CW up and that Baker did not ask her to watch CW until an ambulance or the police arrived.

After discovering CW, LKG took CW to her cousin's house "to shower her" because "she was drenched in blood." LKG related that subsequently, CW "wanted to lay down" because "[s]he couldn't breathe." When she "got up" from lying down on the bed, CW "puked out globs of blood on the carpet." LKG testified that at that point, her cousin called 911.

e. JKG's Testimony

JKG testified that on December 31, 2012, he was spending time with LKG, Baker, CW, and GK near the bathrooms at Kailua District Park. JKG related that he eventually left the bathroom area with LKG to meet a friend on the other side of the park. About fifteen to twenty minutes later, he came back to the bathroom area, where he saw CW sitting by herself, looking like "[s]he was beaten up." JKG stated that he was certain that Baker was not around when he found CW near the bathrooms.

f. Dr. Wayne Lee's (Dr. Lee) Testimony

Dr. Lee testified that he is a physician who works for the Sex Abuse Treatment Center and that he examined CW on January 1, 2013 at about 11:30 p.m. at Queen's Medical Center. Dr. Lee testified that he observed that "there was redness and swelling in the area of [CW's] external genitalia" as well as

"multiple shallow lacerations" in the area; such observations are "consistent with trauma." Dr. Lee further testified that there were multiple small tears near the edge of CW's anus.

g. Dr. Gregory Soares's (Dr. Soares) Testimony

Dr. Soares attested that he is an emergency medicine doctor at Queen's Medical Center and that he diagnosed and treated CW's injuries on January 1, 2013. Dr. Soares testified that when CW was admitted to the emergency room, "[s]he had multiple lacerations to her head, scalp and face," as well as "multiple abrasions and contusions on her body, including her hips and knees." Dr. Soares attested that a CT scan revealed that CW "had a broken jaw in two places."

Photographs of CW's injuries as they appeared when she was being treated in the emergency room were accepted into evidence. Based upon these photographs, Dr. Soares testified that CW had lacerations to both of her eyelids, as well as to her upper and lower lips, all of which required suturing.

Dr. Soares further testified that CW sustained a laceration to the head, which needed to be closed by surgical staples, as well as contusions and bruises to her eyes, hips, knees, and elbows.

h. CW's testimony

CW testified extensively about the events that took place on December 31, 2012, as discussed in the beginning of

section I, supra.

i. GK's Testimony

Baker called GK to testify on his behalf. GK testified that on December 31, 2012, he was partying with LKG, JKG, Baker, and CW, among "a lot of other people" at Kailua District Park. He stated that he heard that his sister, KK, had been arrested before he arrived. GK testified that while he was at the park, he did acid, drank hard liquor, and smoked marijuana.

GK related that he saw Baker and CW kissing while CW sat on Baker's lap. GK testified that after he saw CW and Baker kissing, the two of them went to the bathroom to have sex. GK stated that he did not hear CW or anyone else yelling or screaming from the bathroom, nor did he hear any sounds indicating that someone was being hit or kicked. GK also stated that he did not see Baker hit or kick CW at any time.

GK testified that after CW returned to the group, he "tried to go flirt with [her]." GK stated that eventually, he "tried to have sex" with CW, but that "she didn't want to . . . [s]o [he] hit her with the Bacardi bottle . . . [and] [s]tarted beating her." GK attested that he beat, kicked, and had sex with CW. GK stated that before having sex with CW, he ripped off all of her clothes.

According to GK, Baker was not around or near the

bathroom area while GK was beating CW and having sex with her. GK testified that Baker did not "force himself" on CW, hit CW in the face, or hit CW with a bottle or any other object on her face or head. Moreover, GK stated that he, not Baker, caused CW's injuries as depicted in the photographs that had previously been admitted into evidence.³

GK attested that after having sex with CW, he saw Baker near the bathrooms and asked "if he could help [him]." GK did not see LKG or JKG near the bathrooms. GK stated that he and Baker left CW alone and took the bus home together.

3. Verdict and Sentencing

On April 10, 2015, the jury found Baker guilty on both counts of sexual assault in the first degree. On January 29, 2016, the circuit court entered its judgment of conviction and sentence. The circuit court sentenced Baker to two consecutive twenty-year terms of imprisonment.

C. ICA Proceedings

The ICA affirmed the circuit court's judgment of conviction and sentence in a published opinion entered on September 28, 2017.

³ GK, whom CW identified as her other assailant, testified at trial that he was solely responsible for assaulting and beating CW. At the time of the offense, GK was a minor and could not be tried as an adult. At the time of trial, he was beyond the jurisdiction of the Family Court. In other words, GK incurred no criminal liability by testifying that he was solely responsible for the sexual assault and beating.

The ICA held, inter alia, that the circuit court did not err in ruling that Baker's January 8, 2013 statement to Detective Tokita was not the product of coercion. First, the ICA determined that Baker's mental and physical condition did not render his statement involuntary. The ICA noted that Baker did not indicate that he was exhausted or tired during the interview and that although Baker stated he was "scared" several times, the audio recording and transcript did not indicate that such statements were due to impermissible conduct by Detective Tokita.

Next, the ICA determined Baker's statement was not rendered involuntary due to Detective Tokita's interrogation tactics. Relying on Kelekolio, the ICA held that Detective Tokita did not engage in improper interrogation tactics when he refused to accept Baker's initial version of the underlying events, and urged Baker to "come clean" and "own up" without making any threats or promises to Baker. The ICA also rejected Baker's contention that Detective Tokita "raised the threat of media publicity," reasoning that Detective Tokita "never threatened to publicize the details of the assault if Baker did not tell a particular story," and concluding that his questions appropriately advised Baker to take responsibility for his actions rather than to deny the truth. Lastly, the ICA determined that "[p]ursuant to Kelekolio, Detective Tokita's

misrepresentations regarding the existence of physical evidence incriminating Baker were falsehoods intrinsic to the facts of the alleged offense, to be considered as a part of the totality of the circumstances surrounding Baker's statement." On these facts, the ICA held that "Detective Tokita's questioning was not a type that would reasonably induce a false confession," and did not render Baker's statements involuntary.

The ICA entered its judgment on appeal affirming the circuit court's judgment of conviction and sentence on February 2, 2018.

II. DISCUSSION

A. **The circumstances of the interview indicate that Baker's confession was voluntarily given.**

When assessing whether a defendant's confession was elicited through police coercion, we "examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of circumstances surrounding [the defendant's] statement."

Kelekolio, 74 Haw. at 502, 849 P.2d at 69 (internal quotations omitted, brackets in original). Having listened to the audio-recorded interview and reviewed the record in its entirety, it is clear to me that the circumstances surrounding the interview weigh strongly in favor of the determination that Baker's confession was voluntarily given.

First, before beginning the interview, Detective Tokita reviewed Baker's constitutional rights with him both verbally and in writing. Baker stated, both verbally and in writing, that he did not wish to have a lawyer present and that he wanted to tell Detective Tokita what had happened. Though the Majority does not appear to weigh this fact in its totality of the circumstances analysis, that a defendant was warned in advance of the interview of the defendant's constitutional rights is "a circumstance quite relevant to a finding of voluntariness[.]" Kelekolio, 74 Haw. at 507, 849 P.2d at 71 (quoting Frazier v. Cupp, 394 U.S. 731, 739 (1969)); See also Dassey v. Dittmann, 877 F.3d 297, 301 (7th Cir. 2017) (holding that the fact that defendant "spoke with the interrogators freely, after receiving and understanding Miranda warnings" was a factor that pointed toward finding defendant's confession was voluntary).

Next, the audio recording of the interview reflects that, throughout the interview, Detective Tokita spoke in an even, calm tone of voice. Like the detective in Kelekolio, Detective Tokita "never raised his voice or vocalized aggressively." Accord Kelekolio, 74 Haw. at 489, 849 P.2d at 64. In addition, the interview lasted only fifty-one minutes, from 6:45 p.m. to 7:36 p.m. See Frazier, 394 U.S. at 739 (weighing the fact that "[t]he questioning was of short

duration" in favor of the voluntariness of the defendant's confession).

Finally, Baker "was a mature individual of normal intelligence." Id. At age twenty-three, Baker was an adult man well above the legal age of adulthood in Hawai'i. The record indicates that Baker has a family and had a steady job. Nothing in the record indicates that Baker is of below-average intelligence. Moreover, the audio recording demonstrates that, consistent with the circuit court's finding, Baker had no trouble understanding or responding to Detective Tokita's questions. In fact, the recording demonstrates that Baker was lucid and responded promptly, deliberately, and thoughtfully to Detective Tokita's questions. Nevertheless, the Majority attempts to infantilize Baker and states that "Baker had only an eighth-grade education and his level of maturity clearly did not safeguard him from the detective's psychologically coercive techniques." Majority at 55. Because Baker was an adult man with no indication of low intelligence who answered Detective Tokita's questions with ease, I believe that Baker's age and sophistication weigh in favor of Baker's confession having been voluntarily given.

The circumstances surrounding a police interview are critical to the totality of the circumstances analysis we undertake when determining the voluntariness of a confession.

The circumstances in this case weigh strongly in favor of Baker's confession having been voluntarily given.

B. I disagree with the Majority's conclusions with respect to Detective Tokita's supposed interrogation "tactics."

The Majority focuses on seven interrogation tactics that it concludes Detective Tokita employed while interviewing Baker. I recognize the importance of ensuring that confessions are voluntarily given to uphold the standards of our justice system. However, the Majority's exaggeration and misconstrual of the implications of Detective Tokita's statements create the specter of coercion where there is none. Furthermore, the Majority's references to extrajurisdictional and scholarly debate over interrogation techniques does not overcome the obvious problem that many of the "tactics" Detective Tokita supposedly employed have never been prohibited by the courts or the Legislature of this State. I address each "tactic" in turn.

1. Detective Tokita's references to the media and to the court.

The first two "tactics" involve the following exchange:

[Detective Tokita:] . . . You know, I'm giving you a shot by telling me and this is how you . . . how you want to be remembered, dude?

[Baker:] No.

[Detective Tokita:] You know what I mean?

[Baker:] I don't.

[Detective Tokita:] You don't want to be going down like this.

[Baker:] I know.

[Detective Tokita:] Remembered like this. Let me tell you what it sounds like on the outside. The

girl's a minor. So she's not an adult.
[Baker:] Yeah.
[Detective Tokita:] Okay, so in . . . in people's minds, you know, if this hits the media, it would be . . .
[Baker:] I know.
[Detective Tokita:] . . . twenty-three year old boy rapes a fucking juvenile and how does that sound?
[Baker:] That's not me.
[Detective Tokita:] Exactly. Cause when people hear that, what they going think that juvenile, how . . . how that juvenile is, you think?
[Baker:] Probably think like she's . . . juvenile period, under eighteen.
[Detective Tokita:] Kid.
[Baker:] It wouldn't matter, that's a baby.
[Detective Tokita:] That's what I'm saying.
[Baker:] And I'm not like that.
[Detective Tokita:] I know you're not like that. . . . But it's time to come clean. . . .
[Baker:] Right.
[Detective Tokita:] When you go to court, you think people want to hear somebody that's going to fucking deny, deny when the evidence is like insurmountable against them, but they're just going to deny, deny to the bitter end . . .
[Baker:] No.
[Detective Tokita:] . . . or you think they're be . . . they want to hear somebody that's you know what, fuck, I made a mistake, period. I made a mistake, that's . . . that's not me, but I made a fucking mistake, I did and I'm sorry. What do you think they want to hear?
[Baker:] The truth.

The Majority construes Detective Tokita's statement "in people's minds . . . you know, if this hits the media, it would be . . . twenty-three year old boy rapes a fucking juvenile and how does that sound?" as "[e]ffectively . . . an implied promise that Baker would receive a benefit if he chose to confess and consequences if he did not." Majority at 29.

The Majority then concludes that Detective Tokita's questions about how Baker wanted to be perceived in court "[are] of a type that [are] reasonably likely to procure an untrue

statement or to influence an accused to make an involuntary confession." Majority at 31 (citing Kelekolio, 74 Haw. at 511-12, 849 P.2d at 73).

In Kelekolio, the defendant was convicted of one count of sexual assault in the second degree and one count of kidnapping when he, a "Handi-van" driver, allegedly kidnapped his passenger, drove his van into a parking lot, and sexually assaulted her. 74 Haw. at 486-87, 849 P.2d at 63. On appeal, the defendant argued, inter alia, that his audio-taped statement to the police was not voluntarily given because the police detective did not accept his initial account of the underlying events and "repeatedly exhorted him to tell the 'whole story.'" Id. at 501, 849 P.2d at 69.

This court held that the police detective did not engage in improper conduct by "repeatedly challeng[ing] the completeness of [the defendant's] account and enjoin[ing] him to tell 'the whole story' until he finally admitted to sexual penetration." Id. at 504, 849 P.2d at 70. Specifically, this court held that police exhortations to tell the truth and mere advice from the police that it would be better for the accused to tell the truth, when unaccompanied by threats or promises, do not per se render a statement involuntary. Id. at 505, 849 P.2d at 70. In support of this conclusion, this court explained:

[T]he proposition that a police interrogator's unwillingness to accept a suspect's initial version

of events at face value amounts to "coercion" per se is not only naive and disingenuous, but falls of its own weight; were we to accept it, the legitimate right of law enforcement agencies to seek voluntary confessions would be rendered nugatory.

Id.

With respect to Detective Tokita's comments, the Majority removes Detective Tokita's remarks from the context in which they were made. When read in context, Detective Tokita did not expressly or impliedly threaten to publicize the details of Baker's involvement in CW's sexual assault if Baker did not admit to certain facts. Instead, the record reflects that Detective Tokita's line of questioning suggested to Baker that he would be able to salvage his reputation and improve his chances in court if he took responsibility for his actions and told the truth instead of vehemently denying his involvement in CW's sexual assault, which was supported by ample other evidence. Viewed in this light, Detective Tokita's line of questioning suggested to Baker that it was in his interest to tell the truth. Thus, Detective Tokita's line of questioning was permissible under Kelekolio as "[m]ere advice from the police that it would be better for the accused to tell the truth," which was "unaccompanied by either a threat or promise." See Kelekolio, 74 Haw. at 505, 849 P.2d at 70.

The Majority's construal of each of Detective Tokita's statements as either an implied promise or an implied threat

conveys a strong disapproval for police interrogation in general. Pursuant to the Majority's analysis, any comment that alludes to positive outcomes for the defendant is an implied promise and any comment that alludes to negative outcomes for the defendant is an implied threat.

In crafting the rule set forth by Kelekolio, we assessed those situations in which an accused was promised "the hope of some benefit . . . available to him only if he confessed." Kelekolio, 74 Haw. at 509, 849 P.2d at 72 (quoting Admissibility of Confession as Affected by Its Inducement through Artifice, Deception, Trickery, or Fraud, 99 A.L.R.2d 772, 777-78 (1965 and Supp. 1992)). We acknowledged that the promise of some benefit could render a confession involuntary and cited the following cases:

State v. Nelson, 69 Haw. 461, 470-71, 748 P.2d 365, 371 (1987) (confession extracted from defendant through "prayer[] and exorcism" and reference by police to biblical suggestion that "confession can save one from the wrath of God" made it "difficult to determine where . . . the police officer ended and the . . . savior be[gan]"; confession held involuntary and inadmissible) and People v. Hogan, 31 Cal.3d 815, 183 Cal.Rptr. 817, 647 P.2d 93 (1982) (confession held involuntary and inadmissible, not on account of false statements by police purporting to establish guilt, but because of promise of mental health treatment if defendant confessed).

Id. at 510, 849 P.2d at 72-73. These examples are considerably more extreme than the unexpressed promises that the Majority reads into Detective Tokita's statements to Baker. Even construing Detective Tokita's statements in the exaggerated way that the Majority proposes, the implications of those statements

are minor compared to the clear collateral inducements that this court envisioned the Kelekolio rule to prohibit.

Because the Majority's conception of what constitutes an impermissible collateral inducement broadens the parameters envisioned by Kelekolio, the Majority's reasoning runs afoul of Kelekolio's holding that police exhortations to tell the truth and mere advice from the police that it would be better for the accused to tell the truth, when unaccompanied by threats or promises, do not per se render a statement involuntary. Kelekolio at 505, 849 P.2d at 70. Indeed, as enunciated by the Kelekolio court, such a proposition is "naive and disingenuous." Id. at 505, 849 P.2d at 70. The broad application of the Majority's position would render police officers wholly unable to question suspects.

2. "Minimization" and Gender-Based Discrimination

The Majority next takes issue with both Detective Tokita's suggestion that Baker only attacked CW because he was intoxicated and he made an error in judgment and Detective Tokita's statement that

[w]omen are a lot more promiscuous, you know. They flirt more, you know when they're on alcohol . . . cause [sic] they lose their inhibitions . . . Guys are programmed to procreate.

Majority at 32. Baker never challenged this portion of the interview so it has never been briefed or argued by any party. The Majority refers to these statements as a tactic called

"minimization" and again avers that the statements "make[] an implied promise that if the suspect adopts this minimized version of events, the crimes will be seen as less egregious." Majority at 33. In support of this conclusion, the Majority cites two cases from other jurisdictions, in which the supreme courts of Massachusetts and Utah held that minimization techniques are "strong evidence that the defendant's confession was coerced" but are not, on their own, enough to render a confession involuntary. Majority at 35 (citing Commonwealth v. DiGiambattista, 813 N.E.2d 516, 526 (Mass. 2004) and State v. Rettenberger, 984 P.2d 1009, 1018 (Utah 1999)).

I reject the Majority's contention that these statements contain an implied promise. It strains credulity to detect any hint of a promise in those statements, which appear designed to make Baker feel more comfortable around and understood by Detective Tokita and to build rapport. Moreover, while I recognize that other jurisdictions have indicated that they construe "minimization" to be an improperly coercive technique, we have never identified "minimization" as a technique that is coercive or impermissible in this state. Our detailed analysis in Kelekolio as to which techniques may be permissible and which are per se coercive, in which we parsed the difference between intrinsic and extrinsic falsehoods, demonstrates our awareness of the important and often subtle

distinctions among jurisdictions as to permissible interrogation technique. Here, the Majority retroactively holds police officers to a standard that we have never expressed.⁴ The Majority errs in viewing these statements as an implied promise and considering them to be a "tactic" that carries weight in the totality of the circumstances analysis.

The Majority then complains, regarding another matter that Baker never raised and was therefore neither briefed nor argued, that "Det. Tokita's use of gender stereotypes was . . . manifestly inappropriate gender-based discrimination." Majority at 35. The Majority inexplicably transitions from characterizing the statement as "inappropriate" to "unlawful" and even goes so far as to intimate that Detective Tokita broke the law by making those statements. Majority at 36-37, 38 (citing State v. Matsumoto, 145 Hawai'i 313, 324, 452 P.3d 310, 321). After comparing Detective Tokita's statements to several incomparable situations including when a prosecutor appealed to the racial prejudices of a jury during closing arguments (Majority at 37 (citing State v. Rogan, 91 Hawai'i 405, 984 P.2d 1231 (1999))) and where the admission of evidence obtained in another jurisdiction would violate this state's constitution

⁴ That Baker never challenged this portion of the interview supports my observation that there is no basis under Hawai'i law on which to challenge the use of the "minimization" technique.

(Majority at 37 (citing State v. Torres, 125 Hawai'i 382, 262 P.3d 1006 (2011))), the Majority creates a bizarre new rule wherein, "interrogation techniques that rely on stereotyping protected classes of persons are inherently coercive, and strongly weigh against any subsequent statement being voluntary." Majority at 38.

I dissent from this holding. First, Detective Tokita's statements, made in the context of building a rapport with a suspect of a sexual assault during a police interrogation, do not constitute unlawful gender-based discrimination. Though the Majority avers that they constitute state action, these statements are clearly not the position of the State. We have never before policed the language used by officers who are interrogating defendants by a state action standard. For example, officers frequently use expletives during interrogation, which we do not construe as the State endorsing the use of such words in official government proceedings. Further, just as we do not construe Detective Tokita's statement, "I know you was drinking. I know you was smoking weed Everyone gets blasted on New Year's Eve and that's where I think everything went wrong because you just made an error in judgment[,]" as an official state position that sexual assault is justifiable if the perpetrator is intoxicated, here it is absurd to conclude that Detective Tokita's

stereotypical statements constitute an official state position discriminating against women. The Majority's position here sanitizes police interrogations to the point that they are largely useless. While I agree that the sentiments expressed by Detective Tokita reflect unfortunate generalizations about how men and women behave, I do not agree that Detective Tokita erred by employing them in an attempt to put Baker at ease and encourage Baker to tell the truth about what happened.

Moreover, even assuming for argument's sake that Detective Tokita's statements were impermissible in this context, the use of a discriminatory statement in no way relates to the voluntariness of Baker's confession. In determining voluntariness, the controlling inquiry is "whether the totality of the circumstances indicates that a defendant's will was overborne." Kelekolio, 74 Haw. at 508, 849 P.2d at 72 (quoting Frazier, 394 U.S. at 737-38). The Majority fails to connect the use of discriminatory language about women to the overbearance of Baker's free will in any plausible way. We have never held, nor, it appears, has any other jurisdiction held, that this connection exists. The Majority's vacatur of the convictions of a man who brutalized and sexually assaulted a runaway teenage girl based, in part, on a detective's statement stereotyping women makes a mockery of the actual struggles women face in our

society.⁵

3. The "False Friend" Tactic

The Majority additionally takes issue with Detective Tokita's attempts to build a rapport with Baker. Citing statements such as "I'm being straight with you cause you haven't had a record" and "I do some fucked up things when I drink," the Majority contends that this attempt to build rapport "is an example of the 'false friend' interrogation technique[,]" the use of which "was reasonably likely to influence Baker to make an involuntary confession." Majority at 40-41. The Majority again fails to provide any Hawai'i authority which frowns upon this technique and relies on a law review article to support its assertion that this technique is coercive. I disagree that Detective Tokita's attempt to build a rapport with Baker caused or contributed to Baker making an involuntary confession. In the Majority's view, police detectives can be

⁵ CW had run away with her friend KK, who was GK's sister and Baker's cousin. CW had spent the better part of the evening with Baker before the assault. CW testified extensively at trial about how Baker brutally beat and sexually assaulted her. The Majority's contention that Baker's confession was the result of coercion and that he admitted to vaginally and anally assaulting CW because Detective Tokita overbore his free will, not because Baker committed the assaults, gives short shrift to the female victim's testimony.

The Majority compares this case to the infamous case of the Central Park Five. Majority at 48-49 n.26. Respectfully, this comparison is inapt. The Central Park case involved a questionable identification of the assailants and subsequent wrongful confessions. Here, CW knew Baker. Moreover, multiple other witnesses who knew Baker placed Baker at the scene and corroborated much of CW's testimony. Finally, Baker is an adult man, not a teenage boy, who was interviewed by one detective for less than an hour.

neither affable nor severe when interviewing suspects; a suspect's will will be overborne if the suspect is addressed like an ordinary person.

4. Detective Tokita's Reference to the Report

The Majority next characterizes the following statement by Detective Tokita as an implied threat: "[T]his is when I know you're not being straight with me. You know what I mean and when I write my report, that's what it's going to reflect. That you weren't being straight with me about that." Majority at 42.

Detective Tokita in no way threatens Baker with any adverse consequences, and is, if anything, insinuating that it would be better for Baker to tell the truth. Such advice is expressly permitted under Kelekolio. 74 Haw. at 505, 849 P.2d at 70. Accordingly, I disagree that this statement "weighs in favor of Baker's statement being involuntary." Contra Majority at 43.

5. Detective Tokita's False Statements About DNA Evidence

Finally, the Majority contends that Detective Tokita procured Baker's statement through the improper use of deception. Majority at 51. The Majority emphasizes that Detective Tokita repeatedly misrepresented to Baker that he possessed physical evidence that tied him to CW's sexual assault and suggests that, considering the totality of the circumstances

in this case, Detective Tokita's use of such falsehoods constituted an overly coercive interrogation tactic. Majority at 47-48.

This court addressed the propriety of law enforcement's use of misrepresentations as an interrogation tactic in Kelekolio. 74 Haw. at 505, 849 P.2d at 71. There, the defendant argued that the police detective's "use of deliberate misrepresentations regarding the existence of incriminating evidence of sexual activity and bruises on the complainant's arms and legs constituted 'coercion' . . . [that] render[ed] his confession involuntary." Id. In evaluating this argument, this court announced the following rule regarding law enforcement's use of deliberate falsehoods during interrogations:

[E]mployment by the police of deliberate falsehoods intrinsic to the facts of the alleged offense in question will be treated as one of the totality of the circumstances surrounding the confession or statement to be considered in assessing its voluntariness; on the other hand, deliberate falsehoods extrinsic to the facts of the alleged offense, which are of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt, will be regarded as coercive per se, thus obviating the need for a "totality of the circumstances" analysis of voluntariness.

Id. at 511, 849 P.2d at 73. Though the Kelekolio court explained that the foregoing rule must be applied on a case-by-case basis, the Kelekolio court also identified "misrepresentations regarding the existence of incriminating

evidence," including "physical evidence linked to the victim found in the defendant's car" as examples of intrinsic falsehoods. Id.

Applying the aforementioned rule to the facts before it, the Kelekolio court first held that the police detective's deliberate misrepresentations "were intrinsic to the facts of the present offenses." Id. at 513, 849 P.2d at 74. This court further reasoned that "the misrepresentations were not of a type that would reasonably induce a false confession," based upon its consideration of the totality of the circumstances surrounding the confession. Id. Based upon these considerations, this court concluded that the police detective's "use of deception did not render Kelekolio's inculpatory statements involuntary." Id.

Here, similar to the police detective in Kelekolio, Detective Tokita misrepresented to Baker that physical evidence existed linking Baker to CW's sexual assault. As we explicitly recognized in Kelekolio, this type of misrepresentation "regarding the existence of incriminating evidence" is "intrinsic to the facts of the alleged offense in question [and] will be treated as one of the totality of circumstances surrounding the confession or statement to be considered in assessing its voluntariness." 74 Haw. at 511, 849 P.2d at 73. Considering this statement in the context of the totality of the

circumstances surrounding Baker's statement, Detective Tokita's misrepresentation was "not of a type that would reasonably induce a false confession," and therefore, Detective Tokita's use of deception did not render Baker's statement involuntary.⁶ See id.

C. Conclusion Based on Totality of the Circumstances

Detective Tokita interviewed Baker for less than one hour, from 6:45 p.m. to 7:36 p.m. Before asking Baker any substantive questions, Detective Tokita reviewed Baker's constitutional rights with him verbally and in writing. Baker stated, both verbally and in writing, that he did not wish for an attorney to be present and that he wanted to tell Detective Tokita what had happened.

The audio recording of the interview reflects that throughout the interview, Detective Tokita spoke in an even, calm tone of voice. Detective Tokita did not threaten Baker or offer him any benefits to induce him to admit to any facts. Furthermore, the recording demonstrates that Baker was lucid and

⁶ Because Kelekolio, Hawai'i's seminal case involving the voluntariness of confessions, tends to support the conclusion that Baker's confession was voluntary, the Majority turns to factually different cases from other jurisdictions. The Majority cites several cases in which courts of other jurisdictions found that the use by police of fabricated evidence was an unduly coercive tactic. Majority at 45-46 (citing State v. Cayward, 552 So.2d 971 (Fla. Dist. Ct. App. 1989) and State v. Patton, 826 A.2d 783 (N.J. Super. Ct. App. Div. 2003)). I agree with the Chief Justice's Concurrence and Dissent that "the fabrication of documentary evidence poses more dire concerns" than reference to evidence that does not exist in a police interrogation. Recktenwald, C.J., Concurrence and Dissent at 5 n.1.

responded promptly, deliberately, and thoughtfully to Detective Tokita's questions. While Baker admitted to some culpable facts, he persistently denied others, despite pressing on Detective Tokita's part. Specifically, although Baker admitted that he had sex with CW even though she did not want to have sex with him, Baker repeatedly and insistently denied beating CW or hitting her over the head with a bottle. This demonstrates that, despite Detective Tokita's supposed coercive tactics, Baker's will was not overborne nor was he forced to, as the Majority states, entirely adopt Detective Tokita's narrative. Dassey, 877 F.3d at 313 (holding that defendant's response to questioning by "modifying his story on some points" but sticking to his story on others "support[ed] the view that [defendant] was not being pushed to provide a false story against his will.").

Furthermore, both the interview transcript and recording illustrate that Baker did not indicate that his ability to think, comprehend Detective Tokita's questions, or participate was impaired, nor did he state or indicate that he wanted to stop the interview at any time. Finally, at the end of the interview, Baker reiterated that he gave his statement of his own free will and that he was not promised anything in exchange for his statement. There is no evidence that Baker's

will was overborne by any actions or words of Detective Tokita.⁷

The foregoing facts, considered in totality, support the conclusion that Baker's January 8, 2013 statement to Detective Tokita was freely and voluntarily given.

IV. CONCLUSION

I respectfully but strongly dissent. I would not vacate Baker's convictions and subject CW to a new trial. In my view, the totality of the circumstances compels the conclusion that Baker's confession was voluntarily given - not the product of coercion. The circumstances surrounding the interview weigh in favor of the voluntariness of Baker's confession. Moreover, I reject the Majority's characterization of Detective Tokita's statements as carrying implicit promises or threats and am unpersuaded by the Majority's attempt to parse Detective Tokita's statements into seven separate "interrogation tactics"

⁷ The Majority appears to disagree with my conception of the standard for determining the voluntariness of a confession - whether the totality of the circumstances indicates that the suspect's will was overborne. Majority at 54 n.30. Respectfully, this is the well-established standard for determining the voluntariness of a confession under the Fifth Amendment. See e.g. Dickerson v. United States, 530 U.S. 428, 434 (2000) ("[Previous Supreme Court cases] refined the test into an inquiry that examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession."). Citing State v. Yong Shik Won, 137 Hawai'i 330, 340, 372 P.3d 1065, 1075 (2015), which contemplates the voluntariness of a person's consent to a warrantless search under the Fourth Amendment, the Majority asserts that "[v]oluntariness means a free and unconstrained choice." Majority at 22, 54 n.30, 61 (internal quotations omitted). While this language has been used in some involuntary confession cases, the controlling inquiry is whether, under the totality of the circumstances, the suspect's will was overborne. It is clear to me that in light of the totality of the circumstances, including the circumstances surrounding the interview and the dialogue of the interview, Baker's will was not overborne and the portion of his confession that the circuit court admitted was voluntarily given.

which have never been prohibited by Hawai'i courts.

I would affirm Baker's convictions and sentence.

/s/ Paula A. Nakayama

