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.

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SCWC-16-0000115

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

JUNE 18, 2020

CONCURRING AND DISSENTING OPINION BY RECKTENWALD, C.J.

## I. INTRODUCTION

I agree with the majority that under the totality of the circumstances, the police's misrepresentation that they had DNA evidence that Mustafa Baker "cannot deny" was unduly coercive. I would hold that any statements made after this misrepresentation should have been suppressed because, by

conveying to Baker that the police possessed evidence he "cannot deny," the interrogation became "likely to produce an untrustworthy confession or [was] of such a nature as to transform the investigative process into an 'inquisition.'" State v. Kelekolio, 74 Haw. 479, 506, 849 P.2d 58, 71 (1993) (citation omitted).

However, I agree with the dissent that the other aspects of the interrogation were not so coercive as to require that the resulting statements be suppressed. Thus, statements made by Baker prior to the misrepresentations about DNA evidence – including his initial admission to vaginally raping the complaining witness (CW) – were properly admitted.

Finally, I would hold that the circuit court's error in admitting the statements made by Baker after the DNA misrepresentations was harmless beyond a reasonable doubt with regard to Count 1, which charged Baker with sexual assault in the first degree for penetration of the genital opening of the CW. I would therefore affirm his conviction on that count, although I would vacate his conviction on Count 2, anal penetration, and remand for a new trial.

## II. DISCUSSION

### A. Lying about DNA Evidence is an Intrinsic Falsehood that must be Evaluated Under the Totality of the Circumstances.

The fifth amendment to the United States Constitution and article I, section 10 of the Hawai'i Constitution provide that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." "The constitutional right against self-incrimination prevents the prosecution's use of a defendant's extrajudicial admissions of guilt where such admissions are the product of coercion." Kelekolio, 74 Haw. at 502, 849 P.2d at 69 (citing State v. Wakinekona, 53 Haw. 574, 576, 499 P.2d 678, 680 (1972)). Confessions obtained by means that cross the line from persuasive to coercive must be suppressed. In State v. Kelekolio, this court established the framework for evaluating when a confession obtained by deception rises to the level of coercion:

> [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 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 circumstances" analysis of voluntariness.

74 Haw. at 511, 849 P.2d at 73 (emphases omitted).

Although the line between an "intrinsic" and "extrinsic" falsehood is imprecise, Kelekolio furnished several examples:

> [I]ntrinsic falsehoods would include such misrepresentations regarding the existence of incriminating evidence as (1) placement of the defendant's vehicle at the crime scene, . . . (2) physical evidence linked to the victim found in the defendant's car, . . . (3) discovery of the murder weapon, . . . (4) a claim that the murder victim is still alive, . . . (5) presence of the defendant's fingerprints on the getaway car or at the crime scene, . . . (6) positive identification of the defendant by reliable witnesses, . . . and (7) discovery of a nonexistent witness[.]

Id. at 511-12, 849 P.2d at 74 (citations omitted).

Extrinsic falsehoods include, for instance, "assurances of divine salvation upon confession" and "misrepresentations of legal principles." Id. In State v. Matsumoto, we held that deception regarding "the test results of a scientific instrument that was avowed to accurately determine whether the subject of the test was telling the truth" constituted an extrinsic falsehood and was coercive per se. 145 Hawai'i 313, 325, 452 P.3d 310, 322 (2019).

Subterfuge regarding DNA evidence is an intrinsic falsehood. DNA evidence is physical evidence, a category that Kelekolio explicitly addressed, and it is directly related to the facts of the offense. 74 Haw. at 511, 849 P.2d at 73. Accordingly, I agree with the majority that deception involving

DNA evidence is not coercive per se.[1] Interrogations involving intrinsic falsehoods must be evaluated under the totality of the circumstances. Id.

**B. The Interrogating Officer's Emphasis on the Undeniability of the False Evidence Rendered the Interrogation Unduly Coercive Under the Circumstances of this Case.**

During the interrogation, Detective Brian Tokita told Baker, "That's why I know there's physical evidence that you

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[1] I disagree with the majority, however, that "there is no meaningful difference in the impact to an accused between a forgery, as used in [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),] and oral misrepresentations as used in . . . this case." Majority at 46-47. While I concur that deception used in this case was improper, I agree with the Cayward court that the fabrication of documentary evidence poses more dire concerns (separate and apart from the risk of inadvertent use of the fabricated documents at trial, Majority at 47 n.23):

> It may well be that a suspect is more impressed and thereby more easily induced to confess when presented with tangible, official-looking reports as opposed to merely being told that some tests have implicated him. If one perceives such a difference, it probably originates in the notion that a document which purports to be authoritative impresses one as being inherently more permanent and facially reliable than a simple verbal statement.
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> We think . . . that both the suspect's and the public's expectations concerning the built-in adversariness of police interrogations do not encompass the notion that the police will knowingly fabricate tangible documentation or physical evidence against an individual. Such an idea brings to mind the horrors of less advanced centuries in our civilization when magistrates at times schemed with sovereigns to frame political rivals. This is precisely one of the parade of horrors civics teachers have long taught their pupils that our modern judicial system was designed to correct. Thus we think the manufacturing of false documents by police officials offends our traditional notions of due process of law under both the federal and state constitutions.

Cayward, 552 So. 2d at 974.

guys cannot deny because there's DNA in there, and you know that DNA's one of [a] kind." I conclude that under the circumstances of this case, where the interrogating officer lied about the existence of "one-of-a-kind" DNA evidence and conveyed to the suspect that he "can't deny" that evidence, Baker's subsequent statements should be suppressed.

DNA evidence, by its ability to uniquely identify a single person to whom it matches, is different from other kinds of physical evidence. Because of DNA's unique evidentiary character, deceptively claiming that DNA evidence implicates the suspect during an interrogation poses a heightened risk of inducing a false confession.[2] DNA evidence linking a suspect to a crime is perceived as incontrovertible – and in turn, a suspect may conclude denial is futile and conviction inevitable. Under these conditions, "[o]nce a suspect believes that a confession of guilt is inevitable, the individual is cognitively geared to accept, comply with, and even approve of that outcome." Matsumoto, 145 Hawai'i at 326, 452 P.3d at 323 (citations omitted). Like the false polygraph results we

[2] For this reason, Tokita's prior statements that they had "physical evidence and nobody can deny physical evidence" do not pose the same unique concern. Any number of kinds of evidence could be classed as "physical evidence," with varying degrees of probative value. In turn, a generalized lie about the existence of physical evidence does not have the same import as a lie about DNA evidence, which implies a one-to-one, inescapable connection between the suspect and the crime and is imbued with an air of scientific certainty.

addressed in Matsumoto, deception about the existence of "one-of-a-kind" DNA results that the suspect "can't deny" "may psychologically prime an innocent suspect to make a confession." Id.

The message that the DNA evidence against Baker was irrefutable was conveyed in no uncertain terms – a fact which weighs heavily in favor of suppression under the totality of the circumstances. Detective Tokita emphasized that DNA is "one-of-a-kind" that Baker "can't deny." The clear and unmistakable message was that, in the face of DNA evidence that implicated him to a degree of unavoidable certainty, anything besides confessing would be utterly futile. Such a clear and unmistakable message is "of such a nature as to transform the investigative process into an 'inquisition.'" Kelekolio, 74 Haw. at 506, 849 P.2d at 71 (quoting Wakinekona, 53 Haw. at 576, 499 P.2d at 680).

Thus, under the totality of the circumstances - in which the officer used a lie about DNA evidence to send the clear and unmistakable message to the suspect that denying guilt would be futile – the misrepresentations as to the existence of DNA evidence were "of a type that would reasonably induce a false confession." Kelekolio, 74 Haw. at 513, 849 P.2d at 74. I conclude that Baker's statements induced by this technique should have been suppressed.

### C. No Other Aspect of the Interrogation Requires that Baker's Statements be Suppressed, and the Error was Harmless Beyond a Reasonable Doubt as to Count 1.

I agree with the dissent's analysis of the police's tactics in all other respects. No other aspect of the interrogation rises to the level of coercion. Accordingly, the unconstitutional use of subterfuge does not require that all of Baker's statement be suppressed; only statements elicited after the detective's deception as to DNA evidence should have been excluded.[3] Id. (condemning intrinsic misrepresentations that would "reasonably induce a false confession" (emphasis added)).

"Erroneously admitted evidence is evaluated under the harmless beyond a reasonable doubt standard." Matsumoto, 145 Hawai'i at 324, 452 P.3d at 327. I agree with the majority that the admission of statements induced by the improper deception was not harmless as to Count 2. Baker admitted to anal rape

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[3] Baker confessed to vaginal rape before the subterfuge, and in my view, those statements were admissible:

> [Tokita:] Did she want to . . . did she want to fuck? No.
> [Baker:] Not with me.
> [Tokita:] So why did you fuck her then?
> [Baker:] Cause . . . I was all fucked up.
> [Tokita:] You're right.
> [Baker:] I was all fucked up.
> [Tokita:] You wasn't thinking straight.
> [Baker:] We had four bottles of Jack Daniels. Brah, we had . . . I was smoking weed off the chain. I was all fucked up.
> [Tokita:] Okay so . . .
> [Baker:] I did not beat her. Okay, they fucked her, they wanted to. She was all over there, over there. I came in and I mean I just wanted some. That's what happened.

(Ellipses in original.)

only after Tokita's use of deception as to DNA evidence. Thus, there is a "reasonable possibility" that the statements "might have contributed to [the] conviction" as to that count. Id. I accordingly concur in the judgment vacating his conviction as to Count 2.

However, I conclude the admission of the statements was harmless beyond a reasonable doubt with respect to Count 1 and would affirm Baker's conviction of sexual assault in the first degree for penetration of the CW's genital opening. Baker confessed to vaginal rape before the use of subterfuge, and the other evidence against him as to this count was strong. The CW's account of the rape was consistent, and her identification of Baker was unequivocal. It was undisputed that Baker was present in the park on the night of the assault. Indeed, GK - who testified for the defense that it was he, not Baker, who was responsible for the rape and for the CW's injuries – said that Baker and the CW had sex. But the only evidence presented that the sex was consensual was GK's testimony that he did not "hear any yells or screams." And GK's testimony was contradicted by his initial statements to the police, in which he said he and Baker committed the assault together, as the State elicited on cross-examination. There is no reasonable possibility that the jury, presented with this evidence and Baker's admission to vaginal rape, would have acquitted him of Count 1 had they not

heard the rest of his interview with Detective Tokita. The error was therefore harmless beyond a reasonable doubt, and I would affirm Baker's conviction as to Count 1.

## III. CONCLUSION

For the foregoing reasons, I concur in part and dissent in part.

/s/ Mark E. Recktenwald