IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

PULUMATAʻALA ELI, Petitioner/Defendant-Appellant.

NO. SCAP-30420

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(ICA NO. 30420; FC-CR NO. 07-1-0066)

April 13, 2012

ACOBA, DUFFY, AND MCKENNA, JJ.; WITH RECKTENWALD, C.J. CONCURRING AND DISSENTING, WITH WHOM NAKAYAMA, J., JOINS; AND WITH NAKAYAMA, J., DISSENTING, WITH WHOM RECKTENWALD, C.J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold in this case that after arrest the police practice of inviting an arrestee to make a statement and to give his or her "side of the story" or similar entreaties in a "pre-interview" before Miranda warnings are given, violates the defendant's right against self-incrimination, article I, section

10,[1] and right to due process, article I, section 5[2] of the Hawaiʻi Constitution. Further, we hold that under the circumstances of this case the Mirandized statement offered into evidence at trial resulted from the exploitation of the said pre-interview practice. The Miranda warnings subsequently given did not remove the "taint" of such practice. Accordingly, on the grounds set forth herein, we vacate the March 4, 2010 judgment of conviction and sentence filed by the circuit court of the first circuit (the court)[3] adjudging Petitioner/Defendant-Appellant Pulumataʻala Eli (Defendant) guilty of attempted manslaughter, and remand for a new trial.

I.

The following essential matters, some verbatim, are from the record and the submissions of the parties.

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[1] Haw. Const. art I, § 10 provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

[2] Haw. Const. art I, § 5 provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

[3] The Honorable Randal K.O. Lee presided.

Defendant was arrested on October 27, 2007, for assaulting and seriously injuring his seven-month-old daughter on October 24, 2007, while inside a minivan at Ala Moana Beach Park. He was transported to the police station, where he gave a statement about the incident. He was indicted on October 31, 2007, by Respondent/Plaintiff-Appellee State of Hawaiʻi (the prosecution or the State) for attempted murder in the second degree, with the special circumstance that his daughter was eight years of age or younger, Hawaiʻi Revised Statutes (HRS) §§ 705-500 (1993),[4] 707-701.5 (1993),[5] and 706-656 (Supp. 2007).[6]

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[4] HRS § 705-500 provides in its entirety as follows.

> **§ 705-500. Criminal attempt.** (1) A person is guilty of an attempt to commit a crime if the person:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[5] HRS § 707-701.5 provides in its entirety as follows.

> **§ 707-701.5. Murder in the second degree.** (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.
>
> (2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided

On June 9, 2009, the prosecution filed a "Motion to Determine Voluntariness of Defendant's Statement," so that Defendant's statement could be used at trial. The prosecution's motion stated, inter alia, that "[a] defendant's statement may not be received into evidence until the prosecution shows that the defendant was warned of his Miranda rights, that the defendant waived these rights, and that the statement was voluntarily made." (Citing State v. Kreps, 4 Haw. App. 72, 76-77, 661 P.2d 711, 714-15 (1983).)[7] A hearing was held on June 12, 2009, in which the interviewing Detective (Detective) of the Honolulu Police Department (HPD) testified, as follows, about the circumstances in which Defendant gave his statement.

Defendant had agreed to turn himself in on October 26, 2007, but, instead of doing so, left a message with Detective, stating that he would turn himself in the next afternoon at

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in section 706-656.

[6] HRS § 706-656 provides in relevant part as follows.

> **§ 706-656. Terms of imprisonment for first and second degree murder and attempted first and second degree murder.** . . . .
>
> (2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

[7] Defendant did not file a motion to suppress the statement.

Kapiolani Hospital.[8] Defendant was met at the hospital the next day by the police, arrested, and brought to the main police station.

At the station, Detective met Defendant in an interview room at the central receiving desk and explained to him that he was under arrest for assaulting his daughter. Detective testified that during this encounter he asked Defendant if he wanted to give a statement and "may have mentioned to him that, you know, it's a chance to give me his side of the story." Detective stated that he did not imply to Defendant that by hearing his side of the story things might change. Apparently, Defendant agreed to make a statement at this point.

Detective then activated his tape recorder and used an HPD-81 form to advise Defendant of his constitutional rights. Defendant had a copy of the form in front of him as Detective read it out loud. Detective testified that he informed Defendant of his right to remain silent, his right to terminate the interview at any time, his right to stop answering questions, his right to an attorney, his right to have an attorney appointed by the court if he could not afford one, his right to consult with an attorney and have an attorney present during the questioning, and that anything he said could be used against him at trial. According to Detective's testimony, Defendant responded to the

[8] Defendant's daughter was apparently hospitalized at Kapiolani Hospital.

questions asked and did not seem to have any problem understanding what was occurring. Detective stated that he asked Defendant if he wanted an attorney, to which Defendant responded, "No, not now[.]" Defendant filled out the HPD-81 form and waived his Miranda rights.

Detective then began questioning Defendant, and obtained a taped statement from Defendant. In the taped statement, Defendant told Detective that on the day of the incident, he had been "trying to work things out" with his girlfriend in their minivan at Ala Moana Beach Park. Defendant said he was frustrated at the time, and that his daughter, who was sitting in the back seat, would not stop crying. He stated that he hit his daughter on the feet and slapped her on the head four times. Defendant then told Detective that he took his daughter out of her car seat and dropped her by accident. He subsequently admitted to throwing his daughter on the car seat "[f]ace first" two times.

After hearing Detective's testimony, the court determined Defendant's statement was "voluntarily, intelligently, and knowingly made," rendering Defendant's statement admissible at trial. Following the voluntariness hearing, Defendant's jury trial began.

On June 19, 2009, during the proceedings, defense counsel notified the court that there was a second HPD-81 form completed on October 28, 2007, the day after Detective first

interviewed Defendant, in which Defendant refused to waive his Miranda rights.[9] Defense counsel asked the deputy prosecuting attorney (DPA) for a recording of the event on October 28, 2007, but the DPA informed defense counsel that no recording existed. The court excused the jury and held a hearing to allow defense counsel to question Detective, in court, about the second HPD-81 form.

Detective again testified that, on October 27, 2007, prior to obtaining the taped statement referred to supra, he had a conversation with Defendant before giving Defendant his Miranda warnings. During that conversation, "[Detective] asked [Defendant] if he wanted to give [Detective] a statement[,]" and Defendant "agreed to give [Detective] a statement[.]" When asked by Defendant's counsel, "But the whole purpose of giving the Miranda warning is so that he can decide whether he wants to give you a statement or not[,]" Detective replied that he "didn't ask [Defendant] any questions about the case." Detective acknowledged that on October 27 he had explained to Defendant that it was "[Defendant's] chance to give his side of the story."

Also, Detective agreed he had obtained "a waiver" before administering the Miranda warnings. The relevant testimony is as follows:

> [DEFENSE COUNSEL:] Did you have any conversation with

[9] Defense counsel appears to have had received the HPD-81 form in discovery, but "didn't pick up on the fact" that it was a different one from that which Defendant had filled out on October 27, 2007.

> [Defendant] prior to turning on the tape recorder on the statement that you took between 1825 hours to 1900 hours on the 27th or did you ask him whether he was willing to give a statement before you turned on the tape recorder?
> [DETECTIVE:] Yes. Yes.
> [DEFENSE COUNSEL:] And he said yes?
> [DETECTIVE:] Yes, he was willing to give a statement.
> [DEFENSE COUNSEL:] Why do you not tape that part of this? So he agreed basically prior to the time you ever warned him of his right to remain silent.
> [DETECTIVE:] He agreed to give me a statement when I asked him if he wanted to give me a statement after I informed him why he was here, why he was under arrest.
> [DEFENSE COUNSEL:] But the whole purpose of giving the Miranda warning is so that he can decide whether he wants to give you a statement or not.
> [DETECTIVE:] I didn't ask him any questions about the case.
> [DEFENSE COUNSEL:] Now, let's go back to the night before. You got him to agree to give you a statement before you ever gave him the warnings of his right to remain silent?
> [DETECTIVE:] I asked him if he wanted to give a statement. It's his chance to give his side of the story.
> [DEFENSE COUNSEL:] Is that what you told him?
> [DETECTIVE:] Yes, I think -- I believe so.
> [DEFENSE COUNSEL:] And so at that time you gave him the Miranda warnings, you had already got an answer out of him, a waiver that he was going to give a statement?
> [DETECTIVE:] Yes.

(Emphases added.)

Detective stated that subsequently, on October 28, 2007, he saw Defendant about injuries discovered on his daughter. "Prior to any questioning" and without activating his tape recorder, Detective advised Defendant of his Miranda rights. At that point, Defendant "elected not to give a statement." Defendant then executed an HPD-81 form reflecting his refusal to answer any questions. Although Detective also testified that it is HPD standard procedure to tape record the Miranda warnings given to suspects in a felony investigation, he did not tape record the October 28 "follow-up interview" because he had "asked [Defendant] if he was willing to give . . . a statement[,]" and "[Defendant] elected not to give a statement."

After Detective testified, Defendant moved to exclude the October 27 Miranda statement on the ground that Detective "obtained the waiver of his right to remain silent prior to giving the Miranda warning[,]" and moved for a mistrial, arguing that this evidence had not been disclosed. According to Defendant, Detective "obtained [Defendant's] waiver of [his] right to remain silent without ever providing Miranda warnings[,]" and that mandated that the October 27 statements be suppressed.

In Defendant's view, "the whole purpose of giving the Miranda warning[s is] so that [the defendant] can decide whether he wants to give . . . a statement[.]" Thus, according to Defendant, a waiver of silence before being apprised of the Miranda rights cannot be a knowing and voluntary waiver of the right to remain silent. The court denied Defendant's motion for exclusion of the evidence and for a mistrial, determining that "[D]efendant knew he could make a statement or not make a statement[,]" and the court had "already determined that the statement was made voluntarily."

On June 22, 2009, before Defendant's taped statement was played to the jury, Defendant again moved to suppress the October 27 statement and moved for a mistrial. According to defense counsel, the Miranda warning could not "undo the taint" of the pre-Miranda waiver because Detective "got the mind set of [D]efendant . . . to talk rather than not to talk." These

motions were denied in the following ruling by the court:

> [Defendant] clearly understood he was arrested for a crime. The detective identified himself, indicated why he was talking to the defendant, namely, he was arrested, and merely asked, would you like to tell me your side of the story? . . . [T]his was not securing a waiver of . . . his Miranda [rights], but merely asking the defendant whether or not he wanted to make a statement or not.

(Emphasis added). The taped recording of Defendant's statement was then played to the jury.

On June 30, 2009, the court issued its "Findings of Fact, Conclusions of Law, and Order Finding Voluntariness of Defendant's Statement." The court made the following relevant findings:

> 3. Based on the police investigation, Detective arranged to have [Defendant] surrender himself to [HPD] on October 26, 2007.
>
> 4. On October 26, 2007, [Defendant] failed to appear as scheduled and instead, left a phone message to the detective indicating that he would turn himself in on October 27, 2007.
>
> 5. On October 27, 2007, [Defendant] was arrested by [HPD] . . . and transported to the main police station.
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> 6. [Defendant] was met by [Detective] who identified himself, informed [Defendant] that he was arrested for the assault on his seven-month-old daughter, . . . and may have asked [Defendant] whether he would like to speak to him and tell his side of the story.
>
> 7. [Detective] testified that [Defendant] stated that he wanted to speak to him and that he brought [Defendant] to an interview room[.]
>
> . . . .
>
> 11. [Detective] proceeded to warn [Defendant] of his Miranda rights using HPD 81 form.

The court made the following relevant conclusions:

> 2. [Defendant] claims that the statement was not voluntarily, intelligently or knowingly made since [Detective] failed to read [Defendant] his constitutional rights under Miranda prior to asking [Defendant] whether he would like to speak to him and tell him his side of the story.
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> . . . .
>
> 5. . . . [A]n individual being subjected to custodial interrogation must not be asked any questions without being given Miranda warnings. . . .
>
> . . . .

8. The test to determine if a custodial interrogation has taken place, for purposes of determining whether Miranda warnings are required, is whether the investigating officer should have known that his or her words or conduct were reasonably likely to evoke an incriminating response. . . .

. . . .

11. Here, [Defendant] contends that his statement to [Detective] was involuntarily made and should not be allowed into evidence. Specifically, [Defendant] claims that, [Detective]'s failure to advise [Defendant] of his constitutional rights under Miranda prior to asking [Defendant] if he wanted to speak to him and tell his side of the story, rendered the recorded statement inadmissible.

12. In State v. Luton, 83 [Hawai'i] 443, 927 P.2d 844 (1996), the Hawai'i Supreme Court addressed a similar type of issue presented in this case.

13. In Luton,[], the defendant waived his constitutional rights under *Miranda*, and made a statement to the police after the detective advised the defendant that it would be in his best interest to give a statement.

14. Following the reasoning in State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993), and Commonwealth v. Meehan, . . . 387 N.E.2d 527 (Mass. 1979), the Hawaii Supreme Court in Kelekolio, [74 Haw. at 505, 849 P.2d at 70,] found that the "'[m]ere advice from the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.'" [(quoting State v. Amaya-Ruiz, 800 P.2d 1260, 1273 (Ariz. 1990)].

15. Finding that there were no coercive threats, promises used to extract a confession from the defendant, the Hawaii Supreme Court held that the statements made by the defendant were not obtained in violation of the defendant's constitutional rights.

16. Applying the reasoning expressed in Luton, [] to the evidence in this case, the [c]ourt finds and concludes that [Detective]'s statement where he asked [Defendant] if he wanted to speak to him and tell his side of the story did not rise to the level of advising, threatening and/or promising the Defendant anything in order to obtain his statement.

. . . .

18. The [c]ourt finds and concludes that [Detective] never asked [Defendant] anything about the alleged offense and his conduct was not designed to elicit a spontaneous incriminating statement from [Defendant].

19. The [c]ourt finds that [Detective]'s conduct was preliminary in nature and was made merely to inform [Defendant] why he was arrested, identify himself and explain why he was meeting with [Defendant]. Obviously, since [Defendant] and his girlfriend . . . were the only two people in the van that could possibly have injured the infant, [Detective] merely asked [Defendant] if he wanted to speak to him about the events surrounding the alleged crime. [Detective] never advised [Defendant] that he should make a statement, never coerced, threatened or promised [Defendant] anything for his statement and [Defendant] could have chosen not to make a statement.

. . . .

23. [Defendant] was read his Miranda rights through the use of a HPD 81 form, he initial [sic] each statement on

> the HPD 81 form indicating that his rights were explained to him, he understood his rights, and that he elected to waive his rights and make a statement. [Defendant] indicated he understood his rights, did not want an attorney, and wanted to tell [Detective] what happened.
>
> 24. The [c]ourt further finds and concludes that since [Defendant] had effectively waived his constitutional rights, his statements were made voluntarily, intelligently, and knowingly.

(Some emphasis in original and some emphasis added.)

The jury found Defendant guilty of attempted manslaughter. The jury also answered affirmatively two special interrogatories inquiring whether it found Defendant inflicted serious bodily injury on a person eight years or younger, and whether Defendant knew or should have known that the person was eight years or younger. An amended judgment of conviction and sentence was entered on March 4, 2010.

II.

Notice of appeal to the ICA was filed by Defendant on April 5, 2010. Defendant filed his opening brief on November 30, 2010. In connection with Defendant's statement to Detective, the following point of error was raised:

> A. The. . . court committed prejudicial error by ignoring the suppression of the Miranda violation, by refusing to allow further proceedings on voluntariness,[10] and by denying

[10] Defendant maintains that the court "refus[ed]" to allow further proceedings on voluntariness. However, neither Defendant nor the prosecution point to where in the record Defendant asked for further proceedings on voluntariness, or argued that the court should conduct additional proceedings. A review of the record indicates that Defendant did not seek further proceedings, but argued that the October 27 statement should have been suppressed due to a Miranda violation, and moved for a mistrial. Additionally, the opening brief focuses on the court's error as denying suppression, and, other than the question, does not address any refusal by the court to conduct additional proceedings. Insofar as Defendant did not object to the failure to conduct further proceedings, and Defendant does not argue in his opening brief that the court's refusal to allow further proceedings on voluntariness was error, this assertion is not addressed further.

a mistrial.[11]

(Capitalizations ommitted.)

On March 14, 2011, Defendant applied for mandatory and discretionary transfer of his appeal from the ICA to this court. Transfer was accepted on April 15, 2011.

III.

In connection with the first point of error,[12] Defendant contends that his statement to Detective must be excluded because (1) it was obtained after an unrecorded waiver when recording was feasible, and (2) he was subjected to interrogation during a "pre-interview" without being advised of his Miranda rights.[13] The prosecution answers that Defendant's statement is admissible because it was knowingly, intelligently, and voluntarily made, as concluded by the court.

In relation to his first contention, Defendant argues (1) that Detective was required by (a) State v. Kekona, 77

[11] Although the denial of a mistrial is one of Defendant's stated points of error, Defendant does not directly support it in his argument. Instead, Defendant makes the contentions set out in the analysis provided herein.

[12] Defendant raised three other questions with respect to his extended term sentence. The disposition herein moots those questions.

[13] Defendant also contends, in the argument section of the opening brief, that Defendant was denied a full and fair hearing due to "prosecutorial misconduct[.] He appears to refer to the prosecution's purportedly "questionable compliance" with Hawaiʻi Rules of Penal Procedure (HRPP) Rule 16 (2007), and Detective's purported "evasive" answers to Defendant's questions during the June 12 hearing. To the extent that Defendant refers to the October 28 HPD form in connection with any HRPP Rule 16 violation, Defendant's counsel stated that he had received the HPD form in discovery, but did not recognize that it was different from the one Defendant filled out on October 27. Thus, it is unclear how the prosecution "questionabl[y]] compli[ed]" with HRPP Rule 16. As to Detective's purported "evasive" answers, inasmuch as a finding of "evasiveness" or credibility is not for this court to make, this argument is not addressed further.

Hawaiʻi 403, 886 P.2d 740 (1994), and (b) HPD policy, to record the encounter with Defendant on October 27, 2007 through which he allegedly obtained an unrecorded waiver of Defendant's constitutional rights, and (2) that as a matter of public policy, any statements obtained after an unrecorded waiver should be per se inadmissible where recording was feasible.

Defendant relies on Kekona to argue that recording of custodial interrogations is required by due process. Kekona held that the due process clause of the Hawaiʻi Constitution does not require the recording of custodial interrogations. Id. at 408-09, 886 P.2d at 745-46. This court stated that "whether the failure of the police to create a record of the defendant's confession undermines its accuracy and detracts from the credibility of later testimony is an issue uniquely left to the sound discretion of the trier of fact." Id. at 409, 886 P.2d at 746. In the present case, the court did not find that Detective's failure to record his pre-Miranda conversation with Defendant undermined the accuracy of Defendant's statement or detracted from the credibility of later testimony.

In light of Kekona, we must reject Defendant's assertion that a violation of the HPD policy on recording renders a statement inadmissible[14] and that this court should, as a matter of public policy, exclude statements obtained after an

[14] The specific HPD policy on recording is not reproduced by the parties or reflected in the record.

unrecorded waiver. As noted in Kekona, defendants have the opportunity to cross-examine the police officers who conducted their interrogations, and to set forth their own account of events through testimony. Id. After utilizing these tools, "[i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact." State v. Eastman, 81 Hawaiʻi 131, 139, 913 P.2d 57, 65 (1996) (citing Lono v. State, 63 Haw. 470, 473, 629 P.2d 630, 633 (1981)). Kekona also concluded that even if this court were to adopt an exclusionary rule for statements obtained after an unrecorded waiver, the problems with reliability and deception asserted by Defendant would not be resolved.[15]

IV.

In connection with his second contention, Defendant argues that his statement must be excluded because he was questioned prior to being advised of his Miranda rights. Defendant maintains that without being so advised, it cannot be determined whether Defendant's initial agreement to make a statement was knowing, therefore tainting his subsequent

[15] This court stated in Kekona:

> [E]ven if we were to hold that the due process clause mandates the recording of station house interrogations, there would still be a "hush all over the [state] tonight." This time, however, the silence in the station houses would come from the new police policy of conducting all interrogations out in the field where, the minority apparently concedes, the due process clause does not require that interrogations be recorded.

77 Hawaiʻi at 409, 886 P.2d at 746 (emphasis in original).

Mirandized statement. According to Defendant, Detective bifurcated his interrogations, "effecting a pre-Miranda and then a post-Miranda process of interrogation[,]" which constitutes "evasive pre-interviews recently condemned in State v. Joseph, 109 Hawaiʻi 482, 128 P.3d 795 (2006)."

A.

Article I, section 10 of the Hawaiʻi Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." State v. Pauʻu, 72 Haw. 505, 509, 824 P.2d 833, 835 (1992) (quoting article 1, section 10). It is established that "[w]hen a confession or other evidence is obtained in violation of [this right], the prosecution will not be permitted to use it to secure a defendant's criminal conviction." Id. (citing State v. Russo, 67 Haw. 126, 681 P.2d 553 (1984)).

In State v. Santiago, 53 Hawaiʻi 254, 266, 492 P.2d 657, 664 (1971), this court held that "the protections which the United States Supreme Court enumerated in Miranda have an independent source in the Hawaiʻi Constitution's privilege against self incrimination."[16] Article I, section 10 of the

[16] As the United States Supreme Court has said, "[u]nder [Michigan v. Long, 463 U.S. 1032 (1983)], state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." Arizona v. Evans, 514 U.S. 1, 8 (1995). "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Long, 436 U.S. at 1041. Thus, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and

Hawaiʻi Constitution requires that,

> before reference is made at trial to statements made by the accused during custodial interrogation, the prosecutor must first demonstrate that certain safeguards were taken before the accused was questioned. . . . [T]he prosecutor must show that each accused was warned that he had a right to remain silent, that anything said could be used against him, that he had a right to the presence of an attorney, and that if he could no[t] afford an attorney one would be appointed for him.

Id. (emphasis added). Thus, under article I, section 10, the Miranda rule, "a constitutionally prescribed rule of evidence[,]" "requires the prosecution to lay a sufficient foundation" being "that the requisite warnings were administered and validly waived" "before it may adduce evidence of a defendant's custodial statements that stem from interrogation during his or her criminal trial." State v. Ketchum, 97 Hawaiʻi 107, 117, 34 P.3d 1006, 1016 (2001).[17] If there has been a Miranda violation, "statements made by the accused may not be used either as direct evidence . . . or to impeach the defendant's credibility during

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independent grounds, [the decision will not be reviewed by the Court.]" Id. The decision in this case rests on "bona fide separate, adequate, and independent state [constitutional] grounds." See id. Federal law is being used only for the purpose of guidance, and does not compel the result that this court has reached. See id. Rather, the Hawaiʻi Constitution and the case law thereunder are the bases for this decision.

[17] It must be emphasized that the Miranda requirement, based on article 1, section 10 of the Hawaiʻi Constitution, requires warnings to be given prior to questioning in a custodial setting, while constitutional due process, based on article 1, section 5 of the Hawaiʻi Constitution, requires a statement to be "voluntary" in order to be admissible. See Ketchum, 97 Hawaiʻi at 117 n.18, 34 P.3d at 1016 n.18. "Put differently, if a defendant's Miranda rights against self-incrimination have been violated, then any resulting statement will be inadmissible at trial as a per se matter, obviating the need for any [voluntary] due process inquiry into whether the defendant's confession has been coerced[.]" State v. Naititi, 104 Hawaiʻi 224, 237, 87 P.3d 893, 906 (2004). "Correlatively, having been properly Mirandized, if a defendant who is subjected to custodial interrogation makes a statement, then, depending on the circumstances, an inquiry into whether the defendant's right to due process of law has been violated via coercion, . . . may be warranted." Id.

rebuttal or cross-examination." Id. at 116, 34 P.3d at 1015. Indeed, "[i]t is a fundamental tenet of criminal law that 'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.'" State v. Wallace, 105 Hawaiʻi 131, 137, 94 P.3d 1275, 1281 (2004) (quoting Naititi, 104 Hawaiʻi at 235, 87 P.3d at 904). Therefore, absent Miranda warnings, any statements made in the course of custodial interrogation without a valid waiver are inadmissible at trial. Id.

To reiterate, Defendant argued before the court that Defendant's October 27 Mirandized statement must be suppressed because Defendant's agreement to make that statement was obtained after Detective's inquiry but before any Miranda warnings were given. In evaluating Defendant's Miranda claim, however, the court determined that Detective's pre-Miranda question was "preliminary" and "was not designed to elicit a spontaneous incriminating statement" from Defendant. It appears that the court was wrong, as explained infra, and, thus, Miranda warnings were required before Detective asked Defendant if he wanted to relate his side of the story.

B.

Under Miranda, warnings must be provided when a defendant is (1) in custody, and (2) under interrogation. State

v. Ah Loo, 94 Hawaiʻi 207, 210, 10 P.3d 728, 731 (2000). At the outset, it must be noted that the court erred in characterizing Detective's question and statement as "preliminary" in determining that Defendant's statement was admissible.[18] Whether a question is or is not "preliminary" is not determinative of whether Miranda warnings were required. Cf. Naititi, 104 Hawaiʻi at 237, 87 P.3d at 906 (noting that, "[b]y no stretch of the imagination could . . . preliminary 'yes-or-no'" questions of whether the defendant wished to make a statement and be afforded the assistance of an attorney be construed as the type that were "reasonably likely to elicit an incriminating response");[19] See

[18] To reiterate, the court determined that "[Detective]'s conduct was preliminary in nature and was made merely to inform [] Defendant that he was arrested, identify himself and explain why he was meeting with [] Defendant." The court did not support its statement with any case law, and did not explain how, or why, a statement responding to a "preliminary" question, if that question constituted interrogation, is admissible in the absence of Miranda warnings.

[19] In Naititi, the defendant, who was deaf and mute, was taken to an interview room and an interpreter was provided. The interpreter testified that, before the defendant was asked any questions, in sign language, the defendant stated that he was "sorry". The interpreter testified that when the detective told the defendant that he was going to ask the defendant some questions, and explained that the defendant had a right to a lawyer, the defendant "continued to talk as if he just was not responding to what . . . the detective was saying to him." Naititi, 104 Hawaiʻi at 228, 87 P.3d at 897 (emphasis added). The interpreter explained that the defendant "did not understand [the interpreter's] gestures and signs and that [the defendant] was definitely not responsive." Id. at 228, 87 P.2d at 897. The detective stopped the interview. This court determined that the defendant's statements were "volunteered[.]" Id. at 238, 87 P.2d at 907 (emphasis added). According to this court, if the defendant could not understand the questions posed to him, then he could not have intended his statements to be responsive to them. Id. at 238, 87 P.2d at 907.

In contrast to Naititi, in the instant case, asking Defendant if he wanted to give a statement was combined with Detective's explanation that in doing so it was Defendant's chance to give his side of the story and that in doing so the detective obtained "a waiver" for the Mirandized statement before the Miranda warnings were given. This could not be considered anything but interrogation, and objectively was designed to elicit an incriminating response from Defendant after his arrest, i.e., an explanation of his side of the story with respect to the incident. Furthermore, Defendant's statements

Ketchum, 97 Hawaiʻi at 121 n.21, 34 P.3d at 1020 n.21 (declining to adopt, as an exception to the required warnings, that if an officer expressly asks an arrestee for biographical data, the arrestee's response is not suppressable, and instead noting that the better rule is "requiring police to preface all interrogation of a suspect with Miranda warnings if they want his or her responses to be admissible at trial") (internal quotation marks and citation omitted) (emphasis added). If a defendant was in custody and subjected to interrogation without having been advised of his Miranda rights, statements from that person "are inadmissible in a subsequent criminal proceeding brought against that person." Joseph, 109 Hawaiʻi at 498, 128 P.3d at 811. Thus, in the instant case, the issue is whether Defendant was in custody and whether the question and statement constituted interrogation. See State v. Amorin, 61 Haw. 356, 362, 604 P.2d 45, 49 (1979) ("[B]efore any questions are asked of an in-custody suspect, the required warnings must be given and unless and until such warnings are proven by the prosecution, no statements obtained as a result of custodial interrogation may be used.").

V.

A.

As to custody, it has been established that this element is satisfied if the defendant has been "taken into

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were not unresponsive or "volunteered[,]" id. insofar as they were given in direct response to Detective's questions, and Defendant clearly understood the question posed by Detective. Thus, Naititi is inapplicable.

custody or otherwise deprived of his freedom . . . in any significant way." State v. Hoey, 77 Hawaiʻi 17, 33, 881 P.2d 504, 520 (1994) (internal quotation marks omitted). This was plainly the case here. Defendant was in custody when Detective asked whether Defendant wished to make a statement. Defendant had been placed under arrest, and therefore was deprived of his freedom in a significant way.

B.

As to interrogation, this court has held that it "involves any practice reasonably likely to invoke an incriminating response without regard to objective evidence of the intent of the police[.]" Joseph, 109 Hawaiʻi at 495, 128 P.3d at 808. The interrogation element depends on "'whether the police officer should have known that his or her words or actions were reasonably likely to elicit an incriminating response' from the person in custody." Ketchum, 97 Hawaiʻi at 119, 34 P.3d at 1018 (quoting State v. Ikaika, 67 Haw. 563, 698 P.2d 281 (1985)). As stated before, an "incriminating response" "refers to both inculpatory and exculpatory responses." Joseph, 109 Hawaiʻi at 495, 128 P.3d at 808.

In Joseph, a Miranda violation was found during a recorded pre-interview between the defendant and police where the defendant had not yet been informed of his Miranda rights. Id. at 496, 128 P.3d at 809. Due to his arrest and detainment, we concluded that the defendant was in custody at the time of the

pre-interview. Id. It was also decided that the following pre-interview exchange included interrogation:

> MR. JOSEPH: The car was into the bluff like this, and the door was open like this.
> [DEFENSE COUNSEL]: Right, right, you shooting up the bluff or —
> MR. JOSEPH: No, I'm leaning my back into the vehicle.
> [DETECTIVE]: So, he's leaning with his back against the bluff.
> MR. JOSEPH: Yeah, yeah.

Id. (emphases in original). In Joseph, the detective's statement about the defendant leaning his back against the bluff "sought confirmation of Joseph's previous statement and was intended to illicit [sic] a response." Id. As a result, it was concluded that the detective should have known that his statement was reasonably likely to elicit an incriminating response. Id.

State v. Pebria, 85 Hawaiʻi 171, 174, 938 P.2d 1190, 1193 (App. 1997), is also instructive. There, the defendant was seated in the lobby area of Queen's Medical Center with two security guards standing by him, and a female was speaking to a police officer in the lobby area. Id. at 173, 938 P.2d at 1192. The officer who was speaking to the female pointed to the defendant, identified him as "the other person involved in the incident," and asked Officer Rodriguez, who had just arrived after being dispatched to investigate an initial report of assault, to obtain the defendant's information. Id.

Officer Rodriguez then asked the defendant, "Do you know why you're being detained?" to which the defendant responded, "I went grab the girl." Id. After being told that he

was now a suspect in a kidnapping case, the defendant informed the officer that he "like rape" the victim. Id. The ICA determined that the officer's initial question to the suspect, "Do you know why you're being detained?" constituted a statement "reasonably likely to elicit an incriminating response" insofar as the question "in essence asked [the defendant], 'Do you know that you are being detained because the woman talking to [another police officer] is accusing you of assaulting her?'" Id. at 174, 938 P.2d at 1193. Thus, the defendant's answer was ruled inadmissible at trial.

As related, Detective explained that Defendant was under arrest for assaulting Defendant's daughter, and then "asked [Defendant] if he wanted to give a statement[,]" as it was "his chance to give his side of the story." By asking for Defendant's "side" of the story, Detective implied that the other "side" of the story supported Defendant's arrest for assault and that Defendant was invited to respond to it.

Given that Defendant was advised he was under arrest for assault, and his child was in the hospital allegedly due to his acts, Detective should have known that asking Defendant for his side of the story and indicating that it was his chance to give that story was "reasonably likely" to elicit an incriminating response; in other words, it was reasonably likely that the detective's question and statement solicited Defendant to speak about the circumstances of the case that had resulted in

his arrest. Similar to Joseph, the detective's pre-interview invitation to Defendant to give his "side of the story" was a "practice reasonably likely to invoke an incriminating response [even] without regard to . . . the intent of the police[.]" Joseph, 109 Hawaiʻi at 495, 128 P.3d at 808. Moreover, in this case the detective concurred that by his prior questions he had already obtained an answer from Defendant--a "waiver" that he was going to "give a statement," although Defendant had yet to be informed of his Miranda rights. Hence, under the circumstances, "it is evident that Miranda warnings, as independently grounded in the Hawaiʻi Constitution, [were] required prior to [this] pre-interview." Id. at 495, 128 P.3d at 808.

C.

The police's custodial solicitation of Defendant's side of the story without first informing Defendant that he had the right to remain silent is prohibited under Miranda. It must be reemphasized that "Miranda recognizes a waiver of rights only if those rights are known to the defendant[,]" and "[n]othing but mischief would flow from a rule that would permit a defendant to waive the right to be informed of the rights embodied in the Miranda warnings." Id. at 497, 128 P.3d at 810 (internal quotation marks and citation omitted) (emphases added).

By asking Defendant if he wanted to give his side of the story without first stating the Miranda warnings, Detective violated Defendant's right to be informed of his right to remain

silent before making the decision and commitment to give a statement. In inviting Defendant to speak and in obtaining his commitment to do so before Miranda warnings were given, the police elicited statements without informing Defendant of the consequences of his waiving his right to remain silent and the entire panoply of rights such a commitment involved. In effect, in getting Defendant to agree to give a statement before being informed of his rights, the police invoked a practice that would permit a defendant to waive the right to be informed of his Miranda rights when Miranda recognizes a waiver of rights only if those rights are known to the defendant. See id. Accordingly, in this case there could be no valid waiver of Defendant's right to remain silent.

In similar circumstances, this court has said, "[T]he due process clause [Haw. Const. Art I, sec. 5] serves to 'protect the right of the accused in a criminal case to a fundamentally fair trial.' Implicit in a 'fundamentally fair trial' is a right to make a meaningful choice between confessing and remaining silent." Id. at 494, 128 P.3d at 807 (quoting State v. Bowe, 77 Hawaiʻi 51, 59, 881 P.3d 538, 546 (1994)). In the absence of the Miranda warnings, no meaningful choice could be made by Defendant to remain silent or to agree to make a statement. Thus, in violation of Defendant's due process right to a fair trial, the court also erred in determining that the question and statement by the detective were merely "preliminary."

VI.

The remaining issue is whether Defendant's Mirandized statement is admissible at trial because Miranda warnings were given before the statement was taken. In that regard, "the fruit of the poisonous tree doctrine prohibits the use of [a statement] at trial which [has] come [] to light as a result of the exploitation of a previous illegal act of the police." Joseph, 109 Hawaiʻi at 498, 128 P.3d at 811 (internal quotation marks and citations omitted).

Luton and Joseph are instructive in this regard. In Luton, the defendant was arrested and thought to be involved in a stabbing. Luton, 83 Hawaiʻi at 446, 927 P.2d at 847. Shortly thereafter, before the defendant was informed of his rights, an officer heard the defendant say, "I needed the money," and that he "didn't do it, it was someone else." Id. The day after his arrest, two detectives advised the defendant of his constitutional rights. Id. The defendant "indicated that he understood his rights, and agreed to waive them and to make a videotaped statement[,]" wherein he admitted being in the victim's hotel room at the time of the stabbing. Id. Following the interview, the defendant was again advised of his Miranda rights, and, after waiving his rights, the defendant "made several incriminating statements[.]" Id. at 447, 927 P.2d at 848.

After he was charged with murder in the second degree and burglary in the second degree, the defendant filed a motion to suppress the pre-Miranda statements to the officer that the defendant "needed the money" and that he "didn't do it," as well as the post-Miranda statements, arguing that they were not voluntary and were made in violation of his Fifth and Sixth Amendment rights. The circuit court suppressed the statements. Id. at 449, 927 P.2d at 850. Inasmuch as the State did not appeal the circuit court's determination that the pre-Miranda statements had to be suppressed, the issue on appeal was whether the defendant's post-Miranda statements were admissible.

This court rejected the defendant's argument that his waivers were "the fruit of prior police illegality" because statements elicited "from him during his arrest, but before reading him his Miranda rights[,]" "tainted" his subsequent confessions. Id. at 454-55, 927 P.2d at 855-56. According to this court, the defendant's "waiver was not predicated on the [pre-Miranda] statements" inasmuch as "there [wa]s no indication in the record that HPD detectives exploited [the defendant's] illegally obtained statements[,]" "[n]or [wa]s there evidence to support a claim that officers used those statements to induce [the defendant] into making a confession[,]" and the transcripts and the videotaped interview of the defendant were "devoid of any mention" of the defendant's previous admissions. Id. at 455, 927 P.2d at 856.

Contrastingly, it is apparent that Defendant's purported "waiver" of his right to remain silent, made after Miranda warnings, was directly "predicated" on his agreement, pre-Miranda, to make a statement. That commitment was preceded by the inquiry and statement from Detective before Defendant was informed of his right to remain silent. In light of Detective's pre-Miranda question and statement, the Miranda warnings given thereafter became merely an interlude between the un-Mirandized solicitation for Defendant's side of the story and the post-Miranda statement, that Defendant had already agreed to make. Inasmuch as Defendant had already waived his right to remain silent by agreeing to make a statement, as indicated by the circumstances in the record and the testimony of Detective, the recitation of rights that followed the pre-interview was only a formality.

Under these circumstances, the Mirandized statement was obtained by exploiting the illegality of the pre-interview procedure. Similarly, there were no intervening circumstances from which it can reasonably be said that the taint from the pre-interview violation had dissipated preceding the Miranda statement. As noted, Detective's testimony confirms this, inasmuch as he indicated that at the time he gave Defendant the Miranda warnings, he had already obtained an alleged waiver of Defendant's Miranda rights, since Defendant had agreed to make a statement.

In Joseph, this court concluded that the post-Miranda statements had to be suppressed. There, the defendant, before being given Miranda warnings, told police officers that he was in his vehicle shooting at the "Pali Golf Course" clubhouse. 109 Hawaiʻi at 485, 128 P.3d at 798. Subsequent to the pre-interview, "a formal interview was conducted, (the post-Miranda interview)," where, after being advised of his rights, the defendant gave a statement. Id. The circuit court suppressed the post-Miranda statement, and this court affirmed the suppression. Id. at 491, 128 P.3d at 804. We said, "The pre-interview statements were exploited in that [the defendant] was subsequently questioned on the same matter in order that he would repeat his earlier statement." Id. at 499, 128 P.3d at 812. Additionally, the defendant's post-Miranda statement was not sufficiently attenuated from the pre-interview Miranda violation because "[t]he post-interview was conducted by the same two detectives in the same interrogation room with no lapse in time between it and the pre-interview." Id.

Likewise, Defendant's pre-Miranda statement was "exploited" in that Defendant "was subsequently questioned" on the same matter he had agreed to talk about before being informed of his Miranda rights. Both the pre-interview and post-Miranda interview were conducted by the same detective, and the statement was obtained after the pre-interview. The statement was the product of the un-Mirandized pre-interview inquiry and statement

by the detective. The taint of the pre-interview violation, then, had not dissipated at the time of the statement.

In the instant case, the State has not demonstrated that Defendant's post-Miranda statement was obtained without exploiting the Miranda violation, and that the statement was sufficiently attenuated from the Miranda violation to dissipate the taint of the violation. Inasmuch as the incriminating statement given by Defendant on October 27 was obtained in violation of the Miranda rule, the statement should not have been admitted in evidence and must be excluded.

VII.

For the reasons stated, we vacate the (1) June 30, 2009 Findings of Fact, Conclusions of Law, and Order Finding Voluntariness of Defendant's Statement" of the court; and (2) the March 4, 2010 judgment of conviction and sentence.[20] We instruct

[20] It is well established that, "[w]here there exists a reasonable possibility that a constitutional error of the trial court contributed to the conviction of the defendant, the error necessitates reversal." Amorin, 61 Haw. at 362, 604 P.2d at 49-50. In other words, if the error "raised the reasonable possibility of having contributed to the conviction below[,]" it cannot be "harmless beyond a reasonable doubt." Id. Defendant was charged with attempted murder in the second degree which required proof that Defendant "intentionally engage[d] in conduct" that would constitute murder. His statement that he struck and threw the baby out of frustration and that he was angry because the baby would not stop crying is evidence of his conduct and of his state of mind.

Thus, the error in admitting the statements "raised the reasonable possibility of having contributed to the conviction[,]" id., inasmuch as the statement indicated his act and intent at the relevant time. See id. at 358, 362, 604 P.2d at 47, 50 (determining that the circuit court's admission of the defendant's statement, in violation of Miranda, that he stole the car in defendant's trial for unauthorized control of a propelled vehicle "raised the reasonable possibility of having contributed to the conviction below" and this court could not "say that it was harmless beyond a reasonable doubt"). Hence, in the instant case, it cannot be said that the court's error in admitting Defendant's statement was harmless beyond a reasonable doubt.

the court to enter an order suppressing the October 27, 2007 statement of Defendant, and remand the case to the court for a new trial.[21]

David Glenn Bettencourt, for petitioner/ defendant-appellant.

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.

Donn Fudo, Deputy Prosecuting Attorney, for respondent/ plaintiff-appellee.

/s/ Sabrina S. McKenna

[21] As noted, Defendant was charged with attempted murder in the second degree, with the special circumstance that his daughter was eight years of age or younger, HRS §§ 705-500 (1993), 707-701.5 (1993), and 706-656 (Supp. 2007). However, he was found guilty of attempted manslaughter under HRS §§ 705-500 and 707-702(2). HRS § 707-702(2) (1993) provides in relevant part that:

> (2) In a prosecution for murder or attempted murder in the first and second degrees it is an affirmative defense, which reduces the offense to manslaughter or attempted manslaughter, that the defendant was, at the time the defendant caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. . . . .

Because Defendant was found guilty of attempted manslaughter, he was impliedly acquitted of attempted murder in the second degree, and double jeopardy bars retrial for that offense. See State v. Kalaola, 124 Hawaiʻi 43, 52, 237 P.3d 1109, 1118 (2010) ("Consistent with the prohibition against reprosecution following an acquittal, double jeopardy presents an absolute bar to retrial where, inter alia, the defendant has been acquitted, whether expressly or impliedly, notwithstanding a subsequent reversal of the judgment on appeal[.]") (internal citation and quotation marks omitted).