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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Appellant,) NO. 38923
)
 v.)
)
 JOSE L. VALERO,) RESPONDENT'S BRIEF
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

COPY

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF PAYETTE

HONORABLE SUSAN E. WIEBE
District Judge

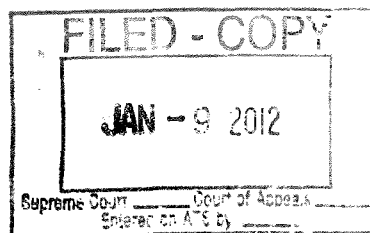
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STATEMENT OF THE CASE

Nature of the Case

The State of Idaho timely appealed from the district court's Order on Motion to Suppress asserting that the district court erred in finding that Jose Valero's incriminating statements were involuntary. Mr. Valero asserts that the district court correctly found that his statements to police were involuntary and, thus, gathered in violation of his right to due process of law, and the district court properly suppressed those statements. Mr. Valero requests that this Court affirm the district court's order granting his motion to suppress.

Statement of the Facts and Course of Proceedings

The State alleged through a criminal complaint that Jose Valero committed one count of sexual abuse of a child under the age of sixteen, and one count of lewd conduct with a child under the age of sixteen, naming 15-year-old L.M. as the alleged victim. (R., pp.6-7.) A preliminary hearing was held, Mr. Valero was bound over into the district court, and an Information was filed charging him with the above crimes. (R., pp.17-21.)

Mr. Valero filed a Motion to Suppress "evidence unlawfully gathered by law enforcement in violation of Defendant's 4th, 5th, 6th Amendments, 14th Amendment and Defendant's right to due process." (R., p.36.) Furthermore, Mr. Valero specifically alleged in his motion that,

[d]uring an interview following a polygraph, law enforcement coerced, intimidated and caused Defendant to make statements. That coercion was of such a manner that it violated Defendant's rights and he was unable to make a voluntary and knowing waiver of rights.

(R., p.36.) The State filed a written Objection to Motion to Suppress (R., pp.39-47), and a hearing was held on Mr. Valero's motion (R., pp.48-50; Tr. 3/17/11).

The State's first witness was Cy Armstrong, captain of the Fruitland Police Department.¹ (Tr. 3/17/11, p.28, L.15 – p.29, L.3.) Captain Armstrong testified that Mr. Valero was alleged to have "touched a young lady [who was in his foster care] inappropriately." (Tr. 3/17/11, p.29, L.23 – p.30, L.14.) Mr. Valero voluntarily met with Captain Armstrong, denied any inappropriate touching during the one and one-half to two hour interview, and agreed to take a polygraph - "He actually seemed relieved and rather excited about it, and said he would be more than willing to do it." (Tr. 3/17/11, p.30, L.15 – p.31, L.18.) The State's next witness was Steven Bartlett, detective with the Ada County Sheriff's Office, who testified that he is a polygrapher who has been to over ten interview schools in his career, "probably the most well known is the Reid school of interview and interrogation techniques," and that he administered a polygraph to Mr. Valero. (Tr. 3/17/11, p.35, L.19 – p.44, L.9.) The district court agreed to review State's Exhibit A, a DVD containing video and audio of the pre-polygraph interview, the polygraph itself, and the post-polygraph interview, after the hearing. (Tr. 3/17/11, p.43, L.4 – p.44, L.6.)

After reviewing the contents of the DVD, the district court issued a preliminary Order on Motion to Suppress. (R., pp.51-59.) The district court noted that Mr. Valero

¹ Prior to Captain Armstrong testifying, Mr. Valero called Floyd Skeesuck, Mr. Valero's former teacher, to testify about the educational difficulties that Mr. Valero had during his school years. (Tr. 3/17/11, p.6, L.6 – p.28, L.12.) The last witness called during the hearing was Delores Valero, Mr. Valero's mother, who also testified about Mr. Valero's learning difficulties and cognitive deficits. (Tr. 3/17/11, p. 60, L.1 – p. 66, L.12.) The district court ultimately found that despite some difficulties such as "comprehending complex documents," Mr. Valero "speaks English fluently." (R., pp.53-54.)

voluntarily agreed to take the polygraph, was not under arrest and was free to leave, and was *Mirandized*², and made the following relevant findings of fact:

The total length of the questioning was just over 3 hours. The pretest interview lasted about 87 minutes. During that time, Bartlett emphasized that the reason the polygraph was requested is that Health and Welfare was involved and they needed to find out the truth. Bartlett went over the allegations, making sure to clarify Defendant's position that he never touched the child's breast. Bartlett made statements that included: the issues in this case are minor, nothing serious; the minor issues in this case are ones that "you and I" can get resolved today'[sic]; the accusations are not "big deals" criminally. When referring to accusations that [Mr.] Valero fondled the victim's butt, Bartlett stated the accusations were even "more minor on the minor scale" and told [Mr.] Valero the polygraph would include questions about that. Bartlett then reassured [Mr.] Valero that the accusations "were not a big deal and really had no bearing on anything except if [Mr.] Valero was being truthful" about the incident.

Later, Bartlett said if you lie about them, Bartlett would testify against [Mr.] Valero in a court of law, and the victim does not want to see [Mr.] Valero prosecuted.

The two then moved to a smaller room where Defendant was made to sit in a chair with armrests and face into a corner while Bartlett remained somewhere behind him, off-screen, asking the polygraph questions.

After the test, the two went back into the interview room. Bartlett informed [Mr.] Valero that his responses convinced Bartlett that [Mr.] Valero had touched the girl's breast. [Mr.] Valero still denied it. Bartlett then stated that he knew [Mr.] Valero must be scared, that Bartlett could testify 100% that [Mr.] Valero's hand touched the victim's breast, that touching the breast is "not the end of the world, but what is getting you toward the end of the world and getting you in a bad spot right now is the crime of lying to the police." [Mr.] Valero once again denied it, but upon Bartlett's insistence, he agreed that if the polygraph machine said he did it, then he did it. Bartlett then suggested themes and [Mr.] Valero made specific statements of why he did it.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

(R., pp.52-53.) The court indicated that it was “inclined to conclude” that Detective Bartlett’s tactic of telling of Mr. Valero that he could testify to 100% certainty that he lied, that the allegations were minor in nature, and that the legal consequences of the crime of lying to the police are worse than the consequences of the crimes for which he was accused, “was sufficient to overbear [Mr.] Valero’s will.” (R., p.56.) However, the court concluded that “this precise issue was not argued or briefed ... making this as a tentative ruling.” (R., p.58.) The court gave the state an opportunity to address the issue in order to “meet its burden to demonstrate that the statement was constitutionally voluntary” due to the tactics used by Detective Bartlett, “or that if impermissible, it did not, under the totality of the circumstances, overbear the defendant’s will.” (R., p.58.)

The State provided a Supplemental Brief in Support of Objection to Motion to Suppress and Mr. Valero filed a Brief in Support of Motion to Suppress. (R., pp.61-67, 70-76.) The district court found that the State’s additional arguments were unavailing and concluded the following:

In this case, the defendant maintained his denial of criminal conduct after being advised that he had failed the polygraph. It was only after Bartlett made a statement to the defendant that in effect he would be in worse trouble for maintaining the untruthful denial of the crime than if he admitted engaging in the conduct which had been represented to be no big deal legally.

Bartlett’s representations were clearly linked to the defendant’s willingness to talk, and that’s what overbore the defendant’s will. Bartlett’s message was the defendant was going to be in big trouble unless he confessed.

Under the totality of the circumstances, the Court finds that this is a forbidden tactic and that it undermined the defendant’s free will. Therefore, the Court stands by its earlier ruling and orders that the prior order of this Court is the final order which granted the motion to suppress.

(Tr. 6/2/11, p.3, L.8 – p.5, L.22.) The district court entered a second Order on Motion to Suppress stating that Mr. Valero's "statements were not voluntary under the totality of the circumstances due to law enforcement[']s use of coercion and deceit in obtaining the statements." (R., pp.78-79.) The State filed a timely Notice of Appeal. (R., pp.80-83.)

ISSUE

Did the district court correctly grant Mr. Valero's motion to suppress as his statements were involuntary and obtained in violation of his right to due process of law?

ARGUMENT

The District Court Correctly Granted Mr. Valero's Motion To Suppress As His Statements Were Involuntary And Obtained In Violation Of His Right To Due Process Of Law

A. Introduction

After Mr. Valero had repeatedly denied any inappropriate touching of L.M., before, during, and after the polygraph, Detective Bartlett told Mr. Valero that he could testify with 100% certainty that Mr. Valero was lying, and that the “crime of lying to the police” was more serious than the crimes of lewd conduct and sexual abuse that he had been accused of. Essentially, Detective Bartlett told Mr. Valero that he could prove to 100% certainty that he had committed a worse crime than the crime that he was alleged to have committed, and that the only way to avoid the consequences of the “crime of lying to police” was to admit to committing crimes against L.M. The district court correctly found, under the totality of the circumstances, that Detective Bartlett’s coercion overbore Mr. Valero’s will and that his inculpatory statements were constitutionally involuntary and taken in violation of his right to due process of law.

B. Relevant Jurisprudence And Standard Of Review

The United States Supreme Court “has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.” *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (citing *Brown v. Mississippi*, 297 U.S. 278 (1936)). Confessions that are secured through constitutionally invalid means are described as “involuntary.” *Id.* (citing *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960)). “The doctrine disallowing

the use of involuntary confessions ... is grounded in the Due Process Clause of the Fourteenth Amendment, and it applies to any confession that was the product of police coercion, either physical or psychological, or that was otherwise obtained by methods offensive to due process.” *State v. Doe*, 130 Idaho 811, 814-815 (citing *Miller, supra*; *Oregon v. Elstad*, 470 U.S. 298, 304 (1985); *Haynes v. Washington*, 373 U.S. 503, 514–515 (1963)). “[C]oercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.” *Blackburn* 361 U.S. at 206 (citing *Chambers v. Florida*, 309 U.S. 227 (1940)). The proper inquiry is to determine, from the totality of the circumstances, whether the incriminating statements were the product of the defendant’s will being overborne by police coercion. *Arizona v. Fulminante*, 499 U.S. 279, 285-288 (1991).

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact which were supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561 (Ct. App. 1996). The ultimate question of whether a confession was involuntary is a legal question subject to *de novo* review. *Fulminante*, 499 U.S. at 287.

C. Mr. Valero’s Inculpatory Statements Were The Product Of Detective Bartlett’s Coercion And, Thus, Were Involuntary

Mr. Valero’s inculpatory statements were involuntary, as they were the product of police coercion. The district court correctly recognized that after repeated denials, Mr. Valero's will was overborne by Detective Bartlett telling him that he would testify with 100% certainty that he was lying to the police and that the crime of lying to the police was more serious than the crimes for which he was being investigated.

1. After Being Told By Detective Bartlett That He Could Testify To 100% Certainty That Mr. Valero Lied On His Polygraph, And After Being Told That The Crime Of "Lying To The Police" Was More Serious Than The Crimes He Was Alleged To Have Committed, Mr. Valero Made Incriminating Statements

The district court correctly recognized that during the pre-polygraph interview, Detective Bartlett minimized the seriousness of the allegations and told Mr. Valero that if he lied about those allegations, he would testify against Mr. Valero. (R., pp.52-53.) Detective Bartlett began the pre-polygraph interview by explaining the process to Mr. Valero. (Exh.A. Title 1: approx. 0:00 – 2:00.) He then told Mr. Valero that it does not matter what he previously told the police or health and welfare personnel – “What matters today is, when you and I discuss the facts and figures of today’s interview, is what you tell me truthful?” (Exh.A. Title 1: approx. 2:00 – 2:47.)³ Detective Bartlett stated that if Mr. Valero is only 99.9% truthful, he will fail the polygraph. (Exh.A. Title 1: approx. 5:00 – 5:25.) He then told Mr. Valero that he does not have a “dog in this fight” and that he does not work for Mr. Valero, Health and Welfare, the Fruitland Police Department, or the prosecutor’s office. (Exh.A. Title 1: approx. 7:30 - 8:00.)

Detective Bartlett told Mr. Valero that “polygraphs are admissible in court,” meaning that they are “able to be used in court ... so the results of this polygraph – the police department and the court can bring that out in court.”⁴ (Exh.A. Title 1: approx.

³ Quotations from State’s Exhibit A are approximate based upon undersigned counsel’s interpretation of what was said. Additionally, words spoken by Mr. Valero that appeared to be said in anticipation of the statements/allegations/accusations Detective Bartlett was making or was about to make, were purposefully omitted in this Brief.

⁴ This statement is demonstrably false as polygraphs are only admissible in front of a jury in the unlikely case of a stipulation by both parties, and they are never admissible to vouch for the credibility of a witness. See *State v. Fain*, 116 Idaho 82 (1989); *State v. Perry*, 139 Idaho 520 (2003). However, it is not clear whether Detective Bartlett’s statements were made out of a desire to deceive Mr. Valero or unjustifiable ignorance of

8:25 - 9:05.) Detective Bartlett explained that law enforcement provides a report to the prosecutor “who makes the decision of whether they will prosecute you depending upon your – their findings, or your truthfulness.” (Exh.A. Title 1: approx. 10:30-10:50.) Detective Bartlett then minimized the allegations against Mr. Valero - describing them as “minor touching and issues of insignificant value” - but told him that they have to investigate it because health and welfare is involved, and that the most important thing is to tell the court that “Jose was truthful.” (Exh.A. Title 1: approx. 11:30 – 13:30.) Detective Bartlett continued to minimize the allegations by telling Mr. Valero that the court system is more concerned with whether he is lying, or whether he is sorry for some of the things he has done, and told him that his job was to determine whether Mr. Valero was telling the truth and he would give his findings to the court. (Exh.A. Title 1: approx. 13:30 – 21:15.) He stated, “if you lie about today’s proceedings, no matter if it’s about the smallest thing that you and I talk about, I will testify against you in a court of law.” (Exh.A. Title 1: approx. 21:15 – 21:45.)

After going over his *Miranda* rights, explaining that he was free to leave at any time, and getting some biographical and contact information, Detective Bartlett began asking Mr. Valero about his history with L.M. and the allegations, again stressing that they were minor in nature. (Exh.A. Title 1: approx. 23:00 – 41:10.) Detective Bartlett stated that he would make a list of things that did happen and things that did not happen

the law. Detective Bartlett testified during the motion to suppress hearing that polygraphs are admissible “beyond objection,” that he has testified to the “validity, reliability of polygraphs before a jury trial,” that he was being truthful when he told Mr. Valero that he could testify “with 100 percent certainty” whether or not he was telling the truth, and that “we use the polygraph in Ada County on a regular basis.” (Tr. 3/17/11, p.46, L.2 – p.50, L.2.) Although the district court could have easily found Detective Bartlett’s testimony to be not credible due to well-established legal precedent, such a finding was not necessary as the entire polygraph process was caught on video.

and that, "it's not a big deal. It has no real bearing on anything except for if you're truthful." (Exh.A. Title 1: approx. 41:10 – 41:40.) He then stated that he talked to L.M. to get a read on whether she is someone who would make something up to get Mr. Valero in trouble, and he stated that he did not believe that L.M. was that type of person. (Exh.A. Title 1: approx. 41:40 – 43:00.) Detective Bartlett again stressed that the issues were minor and that Mr. Valero may want to write an apology letter. (Exh.A. Title 1: approx. 43:00 – 45:00.)

Over the next thirty-five minutes, Mr. Valero repeatedly denied any of the allegations including touching L.M.'s butt, lifting up her shirt and touching her breasts, and putting his mouth on her breasts. (Exh.A. Title 1: approx. 45:00 – 1:20:00.) Detective Bartlett went over the test procedures and Mr. Valero went into the small room where the test would proceed, remarking that the room looked like an execution chamber. (Exh.A. Title 1: approx. 1:07:00 – 1:30:00.) During the polygraph, Mr. Valero was asked nine separate questions about whether he touched L.M.'s breasts and he said "no" all nine times. (Exh.A. Title 2.)

The district court described the post-polygraph interview as follows:

After the test, the two went back into the interview room. Bartlett informed [Mr.] Valero that his responses convinced Bartlett that [Mr.] Valero had touched the girl's breast. [Mr.] Valero still denied it. Bartlett then stated that he knew [Mr.] Valero must be scared, that Bartlett could testify 100% that [Mr.] Valero's hand touched the victim's breast, that touching the breast is "not the end of the world, but what is getting you toward the end of the world and getting you in a bad spot right now is the crime of lying to the police." [Mr.] Valero once again denied it, but upon Bartlett's insistence, he agreed that if the polygraph machine said he did it, then he did it. Bartlett then suggested themes and [Mr.] Valero made specific statements of why he did it.

(R., p.53.) Again, the district court's findings are well supported. Detective Bartlett started the post-polygraph interview by asking Mr. Valero how he thought he did on the test – Mr. Valero responded “good.” (Exh.A. Title 3: approx 0:00 – 0:30.) After leaving the room and coming back with the purported test results, Detective Bartlett again asked Mr. Valero how he thought he did on the test – he again responded “good.” (Exh.A. Title 3: approx 0:45 – 6:15.) Detective Bartlett then told Mr. Valero he showed “significant reactions” when answering the questions regarding touching L.M.’s breasts, and further stated,

The issue of you touching her breasts is the thing in your life that's causing you the greatest grief. So, which means one of two things: One, you're deliberately choosing to lie to me about touching her breasts. Alright? Two, there is some contact - touching of her breasts, that you are not being completely forthcoming about with me, but you – I can testify in a court of law, right now, that one-hundred percent, your hands touched her breasts, under her shirt.

So here is what has to happen. I want you to listen to me for about two seconds here. I understand that you may be nervous about this process. I understand that you may be a little bit scared about the entire issue. But again, I'm telling you, touching [L.M.]’s breasts, under her shirt, is not the end of the world. What is getting you to the end of the world and getting you in a bad spot now is the crime of lying to the police. Alright?

So Jose I know that you touched [L.M.]’s breasts. I know that you touched her under her shirt. I don't think that you are some malicious person, which is a good thing. Alright? It's a good thing that I go to the court and I say, 'Court, I sat in a room and talked to Jose for a couple of hours. He's not the kind of person that touched [L.M.]’s breasts because he's some huge sexual deviant. You know some guy who's trying to hurt her.' Right? You weren't trying to hurt her when you touched her breasts, right?

(Exh.A. Title 3: approx 6:15 – 9:45.) Mr. Valero again stated that never touched L.M.’s breasts; in response, Detective Bartlett stated, “well, you did. You did.” (Exh.A. Title 3: approx 9:45 – 10:00.)

Detective Bartlett again accused Mr. Valero of touching L.M.'s breasts and continued, "It's not a matter of what you did because we already know what you did. I want to explain to the court that you're not this horrible, horrible person. You're not, are you?" (Exh.A. Title 3: approx 10:00 – 10:22.) Mr. Valero agreed he was not a horrible person. (Exh.A. Title 3: approx 10:23;) Detective Bartlett continued by stating that he would have to go to court and say "absolutely, one-hundred percent, that Jose touched [L.M.]'s breasts," but he wanted to be able to tell the court that he is not a rapist or a molester, and that he was just "curious" or maybe "horny," and that he touched her breast because she had been rubbing up against him on prior occasions. (Exh.A. Title 3: approx 10:24 – 11:40.) Mr. Valero then said, "that's what happened." (Exh.A. Title 3: approx 11:40 – 12:40.) The interrogation continued with Detective Bartlett repeatedly telling Mr. Valero that he had already been shown to be a person who lies to the police and Mr. Valero made further incriminating statements. (Exh.A. Title 3: approx 12:40 – 1:08:00.)

2. The District Court Correctly Determined That, Under The Totality Of The Circumstances, Mr. Valero's Will Was Overborne By Detective Bartlett's Coercion; Thus, His Inculpatory Statements Were Involuntary

The district court correctly reviewed the totality of the circumstances and concluded the following:

In this case, the defendant maintained his denial of criminal conduct after being advised that he had failed the polygraph. It was only after Bartlett made a statement to the defendant that in effect he would be in worse trouble for maintaining the untruthful denial of the crime than if he admitted engaging in the conduct which had been represented to be no big deal legally.

Bartlett's representations were clearly linked to the defendant's willingness to talk, and that's what overbore the defendant's will. Bartlett's

message was the defendant was going to be in big trouble unless he confessed.

Under the totality of the circumstances, the Court finds that this is a forbidden tactic and that it undermined the defendant's free will. Therefore, the Court stands by its earlier ruling and orders that the prior order of this Court is the final order which granted the motion to suppress.

(Tr. 6/2/11, p.5, Ls.4-22.)

The district court's findings and conclusions are well-supported. It is abundantly clear that Mr. Valero continued to deny that he had inappropriately touched L.M. However, Detective Bartlett claimed that, based upon the polygraph results, he could testify, with 100% certainty, that Mr. Valero was lying to the police when he told him that he did not touch L.M. – a separate "crime," according to Detective Bartlett, that is more serious than the crimes he had been accused of. After again denying he had touched L.M. but being told by Detective Bartlett that he could testify to 100% certainty that he touched L.M.'s breasts, Mr. Valero agreed that he touched her breasts. Under the totality of the circumstances, Mr. Valero's will was overborne by Detective Bartlett's coercion.

The State asserts that Detective Bartlett's actions were not coercive. (Appellant's Brief, pp.5-9.) In making its argument, the State relies in part on *Beltz v. State*, 980 P.2d 474 (Alaska Ct. App. 1999), for the proposition that merely downplaying the seriousness of the offense and seeming to befriend the defendant does not make the officer's conduct coercive. (Appellant's Brief, pp.6-7.) Mr. Valero does not disagree with this general proposition. However, the facts of this case are distinguishable from the facts of the *Beltz* case.

First, the district court in this case made a factual/legal finding that Mr. Valero's will was, in fact, overborne by Detective Bartlett's conduct (R., p.78; Tr. 6/2/11, p.5, Ls.4-22), whereas the district court in *Beltz* found that the defendant's claim that his confession was induced by an implicit promise not to prosecute was "'highly suspect' – that it appeared to her that Beltz had contrived his testimony to satisfy the test for involuntariness," a finding the appellate court found was supported by the record. *Beltz*, 980 P.2d at 478-479. Second, the alleged coercive conduct in *Beltz* was limited to merely downplaying the seriousness of the offense leading the defendant to believe he would suffer not consequences. *Id.* at 478. In contrast, Detective Bartlett's actions went beyond merely downplaying the seriousness of the offense. Detective Bartlett did not just suggest to Mr. Valero that a judge would go easier on him if he confessed; rather, Detective Bartlett explicitly told Mr. Valero that the supposed crime of lying to the police was more serious than the alleged crimes of lewd conduct and sexual abuse of a minor. (See *generally* Exh. A.) In essence, Detective Bartlett gave Mr. Valero a choice of either admitting to the "minor offenses" of sexual abuse and lewd conduct, or facing more severe consequences for committing the "crime of lying to the police." Under the totality of the circumstances, Detective Bartlett's conduct went beyond mere implied promises of leniency, and was coercive.

The State also asserts that *Sheriff, Washoe County v. Bessey*, 914 P.2d 618 (Nevada 1996), is "instructive." (Appellant's Brief, pp.7-8.) In *Bessey*, the defendant, accused of engaging in numerous sexual acts against a minor without her consent, made inculpatory statements only after a police officer showed him a false crime lab report purportedly showing the presence of the defendant's semen on a couch where

the acts allegedly occurred. *Bessey*, 914 P.2d at 619. The *Bessey* Court recognized that while police deception is a relevant factor in determining whether the conduct was coercive, “an officer's lie about the strength of the evidence against the defendant is, in itself, insufficient to make the confession involuntary.” *Id.* (citing *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir.1992), cert. denied, 506 U.S. 1082 (1993).) Again, Mr. Valero does not dispute that this general proposition is a correct statement of the law.

The *Bessey* Court went on to quote the following portion of *Holland v. McGinnis*:

Such misrepresentations, of course, may cause a suspect to confess, but causation alone does not constitute coercion; if it did, all confessions following interrogations would be involuntary because “it can almost always be said that the interrogation caused the confession.” *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir.), cert. denied, 479 U.S. 989, 107 S.Ct. 585, 93 L.Ed.2d 587 (1986). **Thus, the issue is not causation, but the degree of improper coercion**, and in this instance the degree was slight. Inflating evidence of Holland's guilt interfered little, if at all, with his “free and deliberate choice” of whether to confess, *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986), for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime. **In other words, the deception did not interject the type of extrinsic considerations that would overcome Holland's will by distorting an otherwise rational choice of whether to confess or remain silent.**

Id. at 325-326 (quoting *Holland*, 963 F.2d at 1051) (emphasis added). Citing to a case from the Supreme Court of Hawaii, *State v. Kelekolio*, 849 P.2d 58, 71-74 (Hawaii 1993), the *Bessey* court differentiated between “intrinsic” falsehoods – falsehoods related to the facts of the alleged crime itself, and “extrinsic” falsehoods – falsehoods that would distort the defendant’s otherwise rational choice to remain silent, and which under *Kelekolio* are regarded as coercive *per se*. *Bessey*, 914 P.2d at 620-621.

Intrinsic falsehoods are those related to the allegations themselves, i.e., the existence of an eye witness or physical evidence, or the confession of a co-defendant. *Id.* On the other hand,

Examples of extrinsic falsehoods of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt would include the following: assurances of divine salvation upon confession, promises of mental health treatment in exchange for confession, assurances of more favorable treatment rather than incarceration in exchange for confession, misrepresenting the consequences of a particular conviction, representation that welfare benefits would be withdrawn or children taken away unless there is a confession or suggestion of harm or benefit to someone.

Id. (citing *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Kelekolio*, 849 P.2d at 73-74.)

In the present case, the falsehoods made by Detective Bartlett involved extrinsic, not merely intrinsic, considerations. Detective Bartlett did not only tell Mr. Valero that he failed the polygraph and that he could testify to 100% certainty that he touched L.M.'s breasts – a falsehood that would be considered intrinsic under the *Bessey* analysis - Detective Bartlett took his lies one step further by telling Mr. Valero that he could testify to 100% certainty that he committed the “crime of lying to the police” – a more serious crime than the crimes for which he was being investigated. (See generally Exh.A.) By doing so, Mr. Valero could no longer make a rational choice as to whether or not to waive his right against self-incrimination. From his perspective, Mr. Valero was facing prosecution either for the “crime of lying to the police” or for the crimes of lewd conduct and sexual abuse of a minor. Believing that the “crime of lying to the police” was the far more serious offense based upon Detective Bartlett's lies, Mr. Valero acquiesced to Detective Bartlett's coercion and made incriminating statements regarding the

supposedly less serious offense. In sum, the *Bessey* opinion, relied upon by the State, supports the district court's finding that Mr. Valero's confession was involuntary.

Additionally, the State relies upon *State v. Wilson*, 126 Idaho 926 (Ct. App. 1995), asserting that it is the "most instructive case." (Appellant's Brief, p.8.) In *Wilson*, the defendant, accused of having intercourse with his step-daughter, made inculpatory statements after being *Mirandized* and while being transported to jail. *Wilson*, 126 Idaho at 927. The defendant filed a motion to suppress claiming that his statements were involuntary due to the officer downplaying the importance of his *Miranda* rights, by being lulled into a false sense of security by the officer's statements, by the officer raising questions about how the incident would affect the defendant's family, and by the officer implying leniency if the defendant cooperated.⁵ *Id.* at 928-929. Rather than being instructive, the *Wilson* Court merely determined that the district court's findings that the statements made by the officer were not sufficient to undermine the defendant's will were not clearly erroneous; thus, the statements were voluntary. *Id.* at 929. The Court in no way held that downplaying the seriousness of the charges, stressing the harm that might come to a defendant's family, or implied promises of leniency, would *always* be insufficient to undermine the defendant's will under the totality of the circumstances. *Id.*

The *Wilson* Court did, however, recognize that, "[i]f the defendant's free will is undermined by threats or through direct or implied promises, then a statement cannot be considered voluntary and is inadmissible." *Id.* In the present case, the district court

⁵ The defendant also claimed that he was not *Mirandized* – a factual finding rejected by the district court and found to not be clearly erroneous on appeal. *Wilson*, 126 Idaho at 928.

made the factual finding that Mr. Valero's free will was overborne, "after Bartlett made a statement to the defendant that in effect he would be in worse trouble for maintaining the untruthful denial of the crime than if he admitted engaging in the conduct which had been represented to be no big deal legally." (Tr. 6/2/11, p.5, Ls.4-22.) Thus, although the lack of analysis engaged in by the *Wilson* Court limits how "instructive" the opinion truly is, it should be read to support the district court's findings of fact and conclusions of law in this case. The State's argument is unavailing.

Additionally, the State claims that the district court failed to apply the totality of the circumstances test. (Appellant's Brief, pp.4, 9-14.) The State's argument is either patently false or misguided.⁶ The State provides its analysis of the totality of the circumstances based upon the factors noted in *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). (Appellant's Brief, pp.9-14.) Those factors include, whether *Miranda* warnings were given, the defendant's age, level of education and intelligence, the length of the detention, the repeated and prolonged nature of the questioning, and deprivation of food and sleep. *Schneckloth*, 412 U.S. at 226; *see also State v. Troy*, 124 Idaho 211, 214 (1993). Indeed, although the *Schneckloth* Court was dealing specifically with the question of what factors should be consider when determining whether *consent to search* was voluntarily given (*Id.* at 223), the *Schneckloth* factors have been recognized as relevant to the determination of whether a confession was voluntary. *See Arizona v.*

⁶ It appears that the State may have inadvertently failed to review the transcript of the June 2, 2011 hearing, in which the district court clearly stated that it found, under the totality of the circumstances, that detective Bartlett's conduct undermined Mr. Valero's free will. (See *generally* Appellant's Brief (referencing the district court's written findings in its initial Order on Motion to Suppress but containing no citation to the transcript of the June 2, 2011 hearing); *see also* Tr. 6/2/11, p.3, L.8 – p.5, L.22.) Mr. Valero believes that the State did not purposefully attempt to mislead this Court.

Fulminante, 499 U.S. 279, 284 (1991); *Troy*, *supra*. However, these factors are not the only factors to consider as the *Schneckloth* Court itself recognized that the listed factors were only “some of the factors” that had been considered in determining voluntariness in the past. *Schneckloth*, 412 U.S. at 226 (citations omitted).

Additionally, a single tactic such as the use or threatened use of violence can be, in and of itself, coercive and render a confession involuntary, regardless of the presence of other non-coercive factors. See *Brown v. State of Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940). A confession is not admissible merely because the defendant is an intelligent, well-fed person, who was out of custody and was read his *Miranda* rights, prior to being beaten by the police. Thus, to the extent that the State suggests that this Court should merely look to the *Schneckloth* factors, make a checklist of those weighing in favor of a finding of voluntariness, with those weighing in favor of a finding of involuntariness, and leave the determination of whether a defendant’s right to due process was deprived to a mathematical formula, this Court should reject such a suggestion.

This Court should affirm the district court’s order granting Mr. Valero’s motion to suppress.

CONCLUSION

Mr. Valero respectfully requests that this Court affirm the district court’s order granting his motion to suppress.

DATED this 9th day of January, 2012.



JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

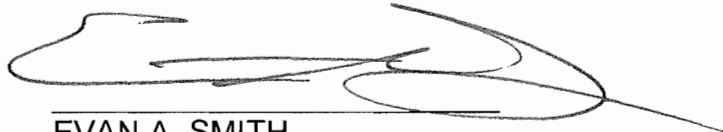
I HEREBY CERTIFY that on this 9th day of January, 2012, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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A handwritten signature in black ink, appearing to read "EVAN A. SMITH", with a long horizontal flourish extending to the right.

EVAN A. SMITH
Administrative Assistant

JCP/eas