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IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff,

v.

DAVID JAMES AGUON
Defendant;

ELIZABETH WEINTRAUB,
Intervenor-Appellant.

Supreme Court No. 2017-SCC-0007-CRM
Superior Court Number 16-0025-CR

OPINION

Cite as: 2019 MP 1

Decided March 29, 2019

Joseph E. Horey, Saipan, MP for Intervenor–Appellant.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLOÑA, Associate Justice; PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 Intervenor-Appellant, former Assistant Attorney General for the Commonwealth of the Northern Mariana Islands Elizabeth Weintraub ("Weintraub"), appeals the trial court's finding that she committed prosecutorial misconduct when she elicited allegedly improper testimony from a witness. For the following reasons, we VACATE the finding of prosecutorial misconduct.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Defendant David James Aguon ("Defendant") was tried for Aggravated Assault and Battery in connection with an incident at a bar in Saipan. Detective Flora Aguon ("Det. Aguon") witnessed this incident, testifying at trial that she saw Defendant punching a patron at the bar. During cross-examination, she further testified that in the investigation, she identified Defendant as the assailant from a single photograph.

¶ 3 Upon the defense's objection, the court determined the photograph unduly suggested Defendant as the assailant. As a result, the court suppressed Det. Aguon's photograph identification and the identification from the bar. Notwithstanding the suppression order, and over the Commonwealth's objections, the court permitted the defense to test Det. Aguon's credibility by asking questions about the assailant's height and weight.[1] Det. Aguon was subsequently instructed and ordered to refrain from identifying and naming the person she identified from the photograph and the bar. The court, however, permitted her to testify as to the assailant's weight and size.[2]

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[1] Weintraub objected, claiming that if the jurors were instructed to disregard the identifications of Defendant, then the defense should also be prohibited to ask questions related to Defendant's identification. Weintraub further expressed concerns about being able to rehabilitate Det. Aguon's credibility without being able to identify Defendant as the perpetrator.

[2] Specifically, the court told Det. Aguon: "[Y]ou are instructed or ordered not to say that-as to the identification of the person on that night . . . the name of the identification of the person on the [photo on the] phone that was shown to you . . . [The attorneys] can ask you to weight and size and all those other questions . . . ." Tr. 221.

The court then called the jurors back into session and instructed them to disregard and place no weight or consideration to the identification of Defendant at the bar or the identification of Defendant from the photograph:

> [Y]ou heard [Det. Aguon] testify as to the identification, the name of the person at the bar . . . as well as . . . a day or so later she was shown a photograph . . . . I'm going to instruct you to strike, okay, or exclude the name that was given to you on the testimony of [Det. Aguon]. . . . The attorneys will ask additional questions but as to the name, when you are

¶ 4 After the court gave its instruction, the defense attempted to discredit Det. Aguon's estimation of the assailant's height and weight, with Weintraub redirecting as follows:

> [Weintraub]: When you were asked on cross-examination . . . how tall the person was who hit the victim and you responded that in your statement you indicated he was 5'6" to 5'8"?
>
> [Det. Aguon]: Correct.
>
> [Weintraub]: Do you still believe that's accurate?
>
> [Det. Aguon]: I gave that number because I'm not accurate as well. I don't know his height, so I based it on that how I saw it and how I observed.
>
> [Weintraub]: Were you giving his actual height or were you giving an estimate?
>
> [Det. Aguon]: I was giving about an estimate.
>
> [Weintraub]: And the person who you see seated here at the table . . . third from the left . . . . how heavy would you say that person is?
>
> . . . .
>
> [Det. Aguon]: Probably he's about 165 to 190.[3]
>
> . . . .
>
> [Weintraub]: I just need to state for the record that the person who I had [Det. Aguon] estimate the weight, let the record reflect that was the [D]efendant.

Tr. 255–57.

¶ 5 The defense moved for a mistrial and sanctions against Weintraub based on prosecutorial misconduct. Specifically, the defense argued that Weintraub skirted and violated the court's suppression order insofar as the parties were not permitted to identify Defendant. In response to counsel's arguments, the court stated:

> The court issued an order . . . informing the parties not to touch upon the identification in regards to the witness, [Det. Aguon] . . . . [I]f the idea was to get a read on [Det.] Aguon's ability to estimate people's weight any number of various people in the

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> deliberating the case, you know, be reminded that you are not to give any weight or consideration to the name that was testified to, okay?

Tr. 223.

[3] After Weintraub's re-direct examination, the defense proceeded to re-cross Det. Aguon. It was not until all examination of Det. Aguon had finished that Weintraub moved to let the record reflect that the witness had described Defendant's weight and size.

> courtroom could have maybe suffice[d] but the government singled out the [D]efendant . . . . The closeness on time leads the court to think the government was skirting the court's initial instructions. . . . [Det. Aguon] is not to testify in regards to the identification of the person at the nightclub as well as the identification of the person in the cellphone . . . . *don't draw-try to have the jurors draw inferences from it.*

Tr. 286-87 (emphasis added). After the court instructed the jury, it emphasized that the jurors would be instructed to "disregard the identification *or any inference of the identification* . . . ." Tr. 288 (emphasis added).

¶ 6 In discussing the appropriate sanction for Weintraub's conduct, Weintraub asked "[t]he appropriate sanction for what? Is the court making a finding that I committed prosecutorial misconduct?" Tr. 295. The court responded:

> [T]he court found . . . that the government . . . *drew an inference* in front of the jury that the defendant who's wearing a black shirt and to his weight based on the report of the witness who said that the person on the night at the bar weighed . . . 160 to 180 pounds.
>
> . . . .
>
> The government . . . intentionally tried to link between the defendant and the person on the night on referring to the identification of that night, okay.

Tr. 295-96 (emphasis added). It further dismissed Weintraub's argument that the court had not previously instructed that inferences were impermissible, adding that it was past a finding that Weintraub had violated the suppression order, focusing instead on the appropriate sanction.

¶ 7 After considering counsel's arguments, the court denied the Commonwealth's motion to reconsider its findings that Weintraub violated the suppression order. It subsequently issued its Order Striking In-Court Identification of Defendant as Prosecutor Violated Court Order (Prosecutorial Misconduct), and concluded that: (1) Weintraub committed prosecutorial misconduct; (2) it would not strike Det. Aguon's entire testimony; and (3) it would strike Det. Aguon's in court identification of the Defendant using his weight. *Commonwealth v. Aguon*, No. 16–0025–CR (NMI Super. Ct. Mar. 29, 2017) (hereinafter "Order") (Order at 10). The Order found that Weintraub

> improperly asked Det. Aguon to identify the Defendant. By asking Det. Aguon to estimate the Defendant's weight . . . Weintraub was asking the jury to make a circumstantial identification of the Defendant based on the weight listed in Det. Aguon's report, which was in violation of this Court's suppression order.

Order at 6. The Order additionally found that Weintraub "deliberately conducted her line of questioning in violation of the [c]ourt's order," *id*. at 6, and

"committed prosecutorial misconduct by deliberately disobeying" it. *Id*. at 7.

¶ 8 Following the Order, the court granted the Commonwealth's motion to dismiss all charges against Defendant. Weintraub appeals the Order.

II. JURISDICTION

¶ 9 We have jurisdiction over final judgments and orders of the Superior Court. NMI CONST. art. IV, § 3.

¶ 10 Findings of misconduct are final, appealable orders. *See Matsunaga v. Matsunaga*, 2001 MP 11 ¶ 14 ("[W]ith respect to sanctions imposed for what amounts to professional misconduct, we see no basis for departing from a long line of cases treating these orders as final for purposes of an appeal."). In the Order, Weintraub's actions were found to be tantamount to prosecutorial misconduct. Because Weintraub was sanctioned by the court in the course of litigation, she may appeal the Order. As a final, appealable order, we have jurisdiction to review it.

III. STANDARDS OF REVIEW

¶ 11 We review a court's decision to impose sanctions, and the appropriateness of such sanctions, for abuse of discretion. *See Matsunaga*, 2001 MP 11 ¶ 3.

IV. DISCUSSION

¶ 12 Weintraub makes two arguments. First, she asserts she did not violate the suppression order when she inquired into Defendant's height and weight. Specifically, she asserts the court did not demonstrate any intention to suppress inferences that Defendant "had been—or even *might* have been—the assailant." Opening Br. 14–15. Furthermore, Weintraub argues the record is clear that the court did not order the suppression of inferences until after Det. Aguon completed her testimony. She concludes the suppression order, as communicated to the parties, was not as broad as the court later claimed it to be. Second, Weintraub claims she reasonably believed that the elicited testimony was not an improper identification of Defendant. She argues a direct identification is not the same as providing circumstantial evidence of identity, and thus should be treated differently.

¶ 13 "Prosecutorial misconduct implicates due process concerns." *Foy v. Donnelly*, 959 F.2d 1307, 1316 (5th Cir. 1992). In evaluating prosecutorial misconduct, we must first ascertain the alleged impropriety. *Commonwealth v. Xiao*, 2013 MP 12 ¶ 18. Then, we determine "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id*. (citing *Parker v. Matthews*, 132 S. Ct. 2148, 2153 (2012)); *see also Smith v. Phillips*, 455 U.S. 209, 220 (1982) ("The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."); *Lamar v. Houk*, 798 F.3d 405, 430 (6th Cir. 2015) (concluding that misconduct must be reviewed for whether it was "so egregious as to deny the defendant a fundamentally fair trial."). Put differently, we look to see whether the defendant suffered prejudice as a result of the prosecutor's impropriety. Here, Defendant suffered no prejudice because the

Commonwealth dismissed all charges against him. Even if we find that Weintraub conducted herself improperly, we cannot say it rose to the level of prosecutorial misconduct such that it denied Defendant a fair trial. The focus in this case is not whether Weintraub violated Defendant's due process rights if she committed prosecutorial misconduct; rather, it is whether the court committed error in finding that prosecutorial misconduct occurred.

¶ 14 Commonwealth courts have the inherent authority and duty "to regulate the practice of law," *Matsunaga*, 2001 MP 11 ¶ 19, which may include a range of sanctions such as "a fine or a reprimand from the court." *Milne v. Po Tin*, 2001 MP 16 ¶¶ 25–26. While "mere judicial criticism," may not be sufficient to constitute a sanction, a court's formal findings and legal conclusions constitute a sanction per se. *See United States v. Talao*, 222 F.3d 1133, 1137–38 (9th Cir. 2000) (explaining that if a "formal finding is permitted to stand, it is likely to stigmatize [the attorney] among her colleagues and potentially could have a serious detrimental effect on her career"). Here, the Order publishes a formal and conclusive finding of Weintraub's conduct at trial and suggests such conduct constituted bad faith. *See* Order at 6–7 (finding Weintraub "*deliberately* conducted her line of questioning in violation of the Court's [suppression] order," and had "*deliberately* disobey[ed]," it (emphases added)). The court also acknowledged its "admonish[ment] [of] the Commonwealth," Order at 6, and stated it would "decline to impose *further sanctions* on the Commonwealth." Order at 7 (emphasis added). Such a published admonishment went beyond "mere judicial criticism." *Talao*, 222 F.3d at 1137. We thus find Weintraub's appeal to be one regarding an imposition of a sanction and will proceed to analyze the court's findings accordingly.

¶ 15 We review the imposition of sanctions, and the appropriateness of such sanctions, for abuse of discretion. *See Matsunaga*, 2001 MP 11 ¶ 3. "An abuse of discretion exists if the court base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Commonwealth v. Taitano*, 2017 MP 19 ¶ 35 (quoting *Commonwealth v. Campbell*, 4 NMI 11, 16 (1993)). Furthermore, a court's factual findings, are reviewed for clear error. *In re Estate of Olopai*, 2015 MP 3 ¶ 13; *see also Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (holding that findings of bad faith are reviewed for clear error). "We do not reverse trial court findings of fact unless we have a firm and definite conviction that a mistake has been made." *Matsunaga v. Matsunaga*, 2006 MP 25 ¶ 32.

¶ 16 We recently articulated the standards concerning the inherent authority to impose sanctions in *Commonwealth v. Murphy*, 2018 MP 16. There, the court imposed monetary sanctions against the prosecutor for lack of diligence and dilatory tactics. *See id*. Specifically, the prosecutor requested multiple continuances and extensions of trial dates and discovery deadlines. The court found the prosecutor's conduct would prejudice the defendant, and therefore the "numerous continuances and lack of thoroughness . . . justif[ied] imposing sanctions." *Id*. ¶ 7. In imposing sanctions, the court made no findings of bad faith.

¶ 17 On review, we held that a finding of bad faith is a prerequisite to imposing sanctions when the prosecutor's conduct falls within the normal course of litigation. *Id*. ¶ 12. "Conduct occurring in the normal course of litigation . . . includes trial preparation or lack thereof, filing motions, conducting direct and cross examination of witnesses, and delivering closing arguments." *Id*. ¶ 13. Bad faith may "encompass[] a wide array of unwanted conduct and can include committing fraud upon the court, delaying litigation, willfully disobeying a court order, or presenting frivolous, meritless arguments. In essence, bad faith is intentional unprofessional conduct and/or unethical conduct." *Id*. ¶ 14 (citations omitted). In *Murphy*, we found the sanctions were based on the prosecutor's case management, which fell within the normal course of litigation. But we also concluded that the court did not render any specific finding of bad faith, as required. *See id.* ¶ 18. Specifically, because the court did not discern the prosecutor's motives, it could not have found the attorney acted with bad faith: "[s]ince it sanctioned [the prosecutor] for conduct done in the normal course of litigation via its inherent authority, [the prosecutor's] motives are paramount; the court was required to find that [the prosecutor] acted with bad faith." *Id*. We concluded that the court abused its discretion-imposing sanctions based on an erroneous view of the law.

¶ 18 Similarly, the Tenth Circuit in *United States v. Kamahele* reviewed whether the lower court wrongly denied the defendant's request for a mistrial based on, among other things, prosecutorial misconduct. There, the defendant objected to the witness's description of a piece of evidence during examination by the prosecutor, arguing that the elicited testimony was improper and prejudiced him. 748 F.3d 984, 1015–16 (10th Cir. 2014). The Tenth Circuit engaged in a three-part inquiry to determine whether the prosecutor's questions resulted in misconduct. Of particular relevance is the first inquiry, "whether the prosecutor acted in bad faith." *Id*. at 1017 (quoting *United States v. Meridyth*, 364 F.3d 1181, 1183 (10th Cir. 2004)). *Kamahele* did not find the prosecutor conducted herself in bad faith because the mistake "appear[ed] to be innocent." *Id*. The court ultimately found no impropriety or prosecutorial misconduct.

¶ 19 We first determine whether Weintraub's conduct occurred within the normal course of litigation. Here, the conduct objected to occurred during trial while examining a witness. Such conduct clearly falls within the normal scope of litigation, as explicitly outlined by *Murphy*. *See id*. ¶ 12.

¶ 20 Because Weintraub's conduct falls within the normal course of litigation, we next determine whether the court made a finding of bad faith. We find that the court did so—it found that Weintraub "*deliberately* conducted her line of questioning in violation of the Court's [suppression] order," and had "*deliberately* disobey[ed]," it. Order at 6–7 (emphases added). As stated in *Murphy*, "willfully disobeying a court order" constitutes a finding of bad faith. *See Murphy*, 2018 MP 16 ¶ 14. When the Order found that Weintraub "deliberately disobeyed" its suppression order, it essentially rendered a finding of bad faith. We next ascertain whether this finding was appropriate.

¶ 21 We do not find that Weintraub willfully disobeyed the suppression order. Over the Commonwealth's objections, Det. Aguon was expressly permitted to testify to the assailant's "height, weight and *all those other things*." Tr. 220 (emphasis added). These were the boundaries of the suppression order. The court granted the defense leeway to question and impeach Det. Aguon's credibility based on the assailant's characteristics. Likewise, Weintraub used that same flexibility to rehabilitate the same witness based on those characteristics. When Weintraub continued inquiring into the assailant's height and weight—which had been initiated by the defense—she was doing so within the permissible scope of examination. Just as the court found in *Kamahele*, we do not perceive that Weintraub engaged in any impropriety and she engaged in appropriate witness examination. Weintraub, therefore, did not conduct herself in bad faith.

¶ 22 Objections to Weintraub's conduct occurred some time *after* Det. Aguon completed her testimony. Throughout her testimony—the direct examination, cross examination, redirect and recross examination—neither the court nor the defense objected to questions on Defendant's height and weight. No objection was raised until Weintraub requested that the record reflect whose weight and height Det. Aguon described in court. The examination did not reach beyond the scope of permissible questioning, and did not violate the court's suppression order. The court erroneously found otherwise. We cannot say that merely completing the record, especially some time after the alleged misconduct occurred, reflects bad faith tantamount to prosecutorial misconduct.

¶ 23 Weintraub's conduct was not so deliberate and reckless as to amount to bad faith. Rather, the finding of prosecutorial misconduct was based on an erroneous assessment of her conduct and constitutes clear error. As such, we find the court abused its discretion.

V. CONCLUSION

¶ 24 For the foregoing reasons, we VACATE the court's finding of prosecutorial misconduct.

SO ORDERED this 29th day of March, 2019

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice