

SUPERIOR COURT
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Deputy Clerk of Court

1 **FOR PUBLICATION**

2
3 **IN THE SUPERIOR COURT**
4 **FOR THE**
5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 **COMMONWEALTH OF THE**
7 **NORTHERN MARIANA ISLANDS,**

8 **Plaintiff,**

9 **v.**

10 **DAVID JAMES AGUON,**

11 **Defendant.**

) **CRIMINAL CASE NO. 16-0025**

)
)
) **ORDER STRIKING IN-COURT**
) **IDENTIFICATION OF DEFENDANT AS**
) **PROSECUTOR VIOLATED COURT**
) **ORDER (PROSECUTORIAL**
) **MISCONDUCT)**

12 **I. INTRODUCTION**

13 The jury trial in this case began on Monday, March 20, 2017. This matter came before the
14 Court on March 27, 2017. The Commonwealth was represented by Assistant Attorney General
15 Elizabeth Weintraub and Assistant Attorney General Jonathan Wilberscheid. The Defendant was
16 present and represented by Attorney Victorino Torres and Attorney Matthew Holley.

17 Based on a review of the filings, oral arguments, and applicable law, the Court makes the
18 following order.

19 **II. BACKGROUND**

20 The jury trial in this case began on Monday, March 20, 2017. This order comes about a
21 week into the jury trial in this case. Since the beginning of the jury trial, the Court has heard
22 multiple motions regarding the testimony of Detective Flora Aguon (“Det. Aguon”), an eyewitness
23 to the alleged incident at the heart of this case.
24

1 **1. The Defendant’s Initial Motion to Suppress Det. Aguon’s Testimony**

2 This case arises out of an alleged fight that occurred at Black and White Bar in Garapan,
3 Saipan, on March 6, 2016. The Defendant was arrested the following day at Tribes Bar. The
4 Defendant was charged with Aggravated Assault and Battery in violation of 6 CMC § 1203(a),
5 Assault and Battery in violation of 6 CMC § 1202(a), and Disturbing the Peace in Violation of 6
6 CMC § 3010(a). Information at 1-2. On March 22, 2017, the Commonwealth dismissed the charges
7 of Assault and Battery and Disturbing the Peace. Amended Information at 1. Aggravated Assault
8 and Battery is the sole remaining charge. *Id.*

9 The jury trial in this case began on March 20, 2017, with the jury sworn in the same day.
10 The first witness to testify in the Commonwealth’s case in chief was Department of Public Safety
11 (“DPS”) Detective Flora Aguon, who was an eyewitness to the alleged incident. During Det.
12 Aguon’s testimony, Det. Aguon stated that she had been shown a photo of the Defendant by DPS
13 Officer Jason Tarkong. Det. Aguon testified that Officer Tarkong showed her the photo on his cell
14 phone, asking Det. Aguon if the individual in the photo was the perpetrator she saw on the night of
15 the alleged incident.

16 The Defendant orally moved to suppress Det. Aguon’s identification of the Defendant. The
17 Court then took up an evidentiary hearing as to the Defendant’s motion. During the evidentiary
18 hearing, the Court heard testimony from both Det. Aguon and Officer Tarkong. Officer Tarkong
19 testified that he did not recall showing Det. Aguon any photos on his phone, but that Department of
20 Public Safety officers sometimes exchange photos relevant to cases via WhatsApp.

21 The Court ordered supplemental briefing from the parties regarding the Defendant’s motion.
22 On March 21, 2017, the Defendant filed his Motion to Strike Officer Flora Aguon’s Testimony
23 Regarding Identification; *Brady* Violations. On March 21, 2017, the Commonwealth also filed its
24 Opposition to Defendant’s Motion to Suppress.

1 In the Commonwealth's Opposition, the Commonwealth stated: "The Commonwealth
2 discovered this morning that there *was* in fact a photograph of the Defendant—likely taken at
3 Tribes Bar on March 6, 2016—but that the photo was deleted or lost." Opp. to Mot. to Suppress at 1
4 (emphasis added). The Commonwealth further stated: "After the hearing, the Commonwealth
5 investigated the matter and discovered this morning that there was a photograph of the Defendant at
6 the time of his arrest at Tribes bar on March 6, 2016." Opp. at 2. The Commonwealth claimed that
7 it was "unaware of exactly the nature of the photograph, or what it showed." *Id.*

8 At the March 21, 2017 continuation of the evidentiary hearing, the Commonwealth stated
9 that their office uncovered a photo that was sent via a messaging app by a witness to Assistant
10 Attorney General Barbara Cepeda ("AAG Cepeda"). The Commonwealth informed the Court that
11 AAG Cepeda was screened off from the case since she is close with the alleged victim. The
12 Commonwealth informed the Court that the messaging app used by the witness and AAG Cepeda
13 deletes the photograph if the recipient does not save it. The Commonwealth also stated that it still
14 does not know if the photograph sent to AAG Cepeda was the same as the one shown to Det.
15 Aguon, and that either way the Commonwealth attorneys handling this case do not know what
16 either photo looks like.

17 The Court then ordered additional supplemental briefing, as to whether this case presents an
18 issue under *Youngblood* and *Trombetta*. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *California*
19 *v. Trombetta*, 467 U.S. 479, 479 (1984). The Court continued the evidentiary hearing to 4:00 p.m.
20 on March 21, 2017. At the 4:00 p.m. continuation of the evidentiary hearing, the Commonwealth
21 informed the Court that they located the photo that had been sent to AAG Cepeda. The Court then
22 heard testimony from Det. Aguon and AAG Cepeda.

23 Det. Aguon testified that the photo sent to AAG Cepeda was not the photo that she was
24 shown by Officer Tarkong. Det. Aguon also testified that she witnessed the fight in Black and

1 White Bar from about 12 and a half feet away, and that she could see both the Defendant and the
2 victim clearly for a split-second. She testified that the bar was crowded and dark, with strobe lights
3 and loud music. She also testified that she is 5'2" tall and that there were several people between
4 herself and the incident. She testified that the Defendant was being held back by onlookers and was
5 thus leaning back.

6 AAG Cepeda testified that she was sent the photo on Viber, and that she deleted Viber
7 sometime in 2016 without backing up the photo. She testified that she was sent the photo by
8 Josephine Togawa, a cousin, and that she thought that the photo was just gossip. AAG Cepeda was
9 on Guam when she received the photo. AAG Cepeda testified that she thought she was being sent
10 the photo as a cousin. AAG Cepeda also testified that she was screened off the case because she is
11 close friends with the alleged victim, Chris Broome.

12 Based on this testimony, the Court ruled from the bench on March 22, 2017, suppressing
13 both Det. Aguon's identification of the Defendant, as well as any photo shown by Officer Tarkong
14 to Det. Aguon. In particular, the Court found a *Youngblood* violation as to the photo shown to Det.
15 Aguon by Officer Tarkong. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *California v.*
16 *Trombetta*, 467 U.S. 479, 479 (1984).¹ The Court also found the identification procedure used by
17 Officer Tarkong to be unduly suggestive. *See Commonwealth v. Crisostomo*, Crim. No. 13-0049
18 (NMI Super. Ct. Sep. 12, 2013) (Order Denying Defendant's Motion to Suppress Identification at
19 2-3) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). The Court also found Officer Tarkong's
20 identification to be in violation of DPS procedures as to a proper photo line-up.

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22 ¹ This Court has addressed suppression under *Youngblood* and *Trombetta* twice recently. *See Commonwealth v. Koichi*
23 *Lemei*, Crim. No. 16-0062 (NMI Super. Ct. Jan 10, 2017) (Order Denying Defendant's Motion to Dismiss for
24 Destruction of Evidence as the Defendant Failed to Establish All Three Factors Required Under *Youngblood* and
Trombetta); *Commonwealth v. Barcinas*, Crim. No. 15-0206 (NMI Super. Ct. Aug 8, 2016) (Order Denying
Defendant's Motion to Dismiss for Destruction of Evidence as Defendant Failed to Show that the Evidence was
Destroyed in Bat Faith, that the Evidence Possessed an Apparent Exculpatory Nature Before It Was Destroyed, and that
the Defendant Would Be Unable to Obtain Comparable Evidence by Other Reasonably Available Means).

1 **2. The Court's Suppression Order**

2 When the Court suppressed Det. Aguon's identification, the Court ordered that any
3 testimony regarding Det. Aguon's identification be struck from the record. The attorneys were
4 instructed not to question Det. Aguon as to the identity of the perpetrator at the Black and White
5 Bar on the night of the incident, as well as the identification of the person in the photo shown to
6 Det. Aguon by Officer Tarkong. Defense counsel asked whether they could question Det. Aguon as
7 to the height and weight of the attacker at the Black and White Bar. The Court informed the
8 attorneys that they could question about the height and weight of the attacker, but not link this to
9 the Defendant. In essence, the parties could not use Det. Aguon's testimony to identify the
10 Defendant as the individual she saw at the Black and White Bar.

11 Det. Aguon was also ordered by the Court not to answer any questions as to the
12 identification of the perpetrator on the night of the incident as well as the name of the person in the
13 photo shown to her by Officer Tarkong. The Court also instructed the jury to disregard Detective
14 Aguon's testimony as to the identity of the perpetrator on the night of the incident, as well as the
15 identity of the individual in the photo shown to Det. Aguon by Officer Tarkong.

16 **3. The Continuation of Det. Aguon's Testimony**

17 On March 22, 2017, the Court resumed the jury trial and Defense Attorney Victorino Torres
18 resumed his cross-examination of Det. Aguon. Attorney Torres asked Det. Aguon some questions
19 regarding height and weight, but did not link this testimony to the Defendant. During re-direct
20 examination, AAG Weintraub asked Det. Aguon about Det. Aguon's report about the incident. Det.
21 Aguon's report states that the attacker was 160-180 lbs. AAG Weintraub then singled out
22 Defendant David Aguon in the Courtroom and asked Det. Aguon to estimate his weight. Then,
23 AAG Weintraub, over Attorney Torres's objection, asked that the record reflect that Det. Aguon
24 had estimated the Defendant's weight. This sequence of events happened in front of the jury.

1 **4. The Court’s Finding of Prosecutorial Misconduct**

2 Outside of the presence of the jury, the Defendant made an oral motion to dismiss for
3 prosecutorial misconduct. The Defendant argued AAG Weintraub impermissibly linked Det.
4 Aguon’s testimony about the attacker’s weight in the report to an identification of the Defendant in
5 the courtroom. This was done when AAG Weintraub asked Det. Aguon about the attacker’s weight
6 in her report, asked Det. Aguon to estimate the Defendant’s weight in court, and then asked the
7 record to reflect that Det. Aguon had estimated the Defendant’s weight.

8 The Court found that AAG Weintraub improperly asked Det. Aguon to identify the
9 Defendant. By asking Det. Aguon to estimate the Defendant’s weight, AAG Weintraub was asking
10 the jury to make a circumstantial identification of the Defendant based on the weight listed in Det.
11 Aguon’s report, which was in violation of this Court’s suppression order.²

12 Even after the Court made its ruling suppressing Det. Aguon’s identification of the
13 Defendant, AAG Weintraub deliberately conducted her line of questioning in violation of the
14 Court’s order. In determining whether AAG Weintraub had violated the Court’s order, the Court
15 listened to the audio of that portion of the trial.

16 The Court then declined to dismiss the case and admonished the Commonwealth. The
17 Defendant then asked that, instead of dismissal, if the Court would instead suppress all of Det.
18 Aguon’s testimony. The Court ordered supplemental briefing on the issue.

19 The Defendant filed his Motion to Strike Testimony of Detective Flora Aguon and
20 Memorandum in Support Thereof; Declaration of Victorino DLG Torres on March 23, 2017. The
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24 ² The jury received jury instructions at the start of trial about direct and circumstantial evidence.

1 Commonwealth filed its Response in Opposition to Defendant’s Motion to Strike Testimony of Det.
2 Flora Aguon on March 27, 2017.³ The Court heard arguments March 27, 2017.⁴

3 **III. DISCUSSION**

4 On March 22, 2017, the Court made the finding from the bench that AAG Weintraub had
5 committed prosecutorial misconduct by deliberately disobeying the Court’s suppression order.
6 Specifically, the Court found that, by asking Det. Aguon about the weight of the attacker listed in
7 her report, then asking Det. Aguon to estimate the Defendant’s weight, and then asking that the
8 record reflect that the individual pointed out was the Defendant, that AAG had circumvented the
9 Court’s suppression order to have Det. Aguon identify the Defendant as the attacker.

10 Since the Court has already made a finding of prosecutorial misconduct, the Court must now
11 determine the proper remedy. The Defendant argues that the Court should strike Det. Aguon’s
12 entire testimony. Mot. to Strike Testimony of Flora Aguon at 6-9. The Commonwealth argues that
13 the Court’s earlier curative instruction that the jury should not consider Det. Aguon’s identification
14 of the defendant, and the admonition given to the Commonwealth’s attorneys on March 22, 2017,
15 were sufficient sanctions. Opp. to Mot. to Strike at 2. The Commonwealth also argues that the
16 Defendant “failed to sufficiently develop the legal basis for his motion.” *Id.* at 2.

17 Thus, the Court has several options. First, the Court could simply decline to impose further
18 sanctions on the Commonwealth. Second, the Court could instruct the jury a second time to
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21 ³ The Commonwealth filed its Motion to Reconsider Court’s Finding that it Violated the Court’s Suppression Order on
22 March 27, 2017. The Commonwealth also filed its Objection and Motion to Strike Declaration on March 27, 2017. The
23 Court will address those motions separately. This order is solely as to the Defendant’s Motion to Strike Testimony of
24 Detective Flora Aguon.

⁴ Although the Court will not directly address this incident in this order, as the attorneys have already been reminded to
maintain civility with each other, the Court notes that tensions have been running high in this case. In particular,
Attorney Torres accused AAG Weintraub of calling him a “cocksucker” inside the courtroom. The Court has already
reminded the attorneys to maintain civility; however, the Court is mentioning this incident as an illustration of the
current tone of the case.

1 disregard Det. Aguon's identification of the Defendant. Third, the Court could strike Det. Aguon's
2 testimony in its entirety.

3 In his Motion to Strike Testimony of Flora Aguon, the Defendant argues that a second jury
4 instruction on the issue of identification would not cure the prejudicial effect of Det. Aguon's
5 second identification. Mot. to Strike Testimony of Flora Aguon at 6-7.⁵ The Court is not persuaded
6 by the Defendant's arguments. The first curative jury instruction was given on Wednesday, March
7 22, 2017. A second curative jury instruction, instructing the jury to disregard Det. Aguon's in court
8 identification, would be given on Wednesday, March 29, 2017. A full week has elapsed, and the
9 Court is not persuaded that a second curative instruction would only serve to highlight the
10 identification, given the time that has elapsed.

11 The Defendant cites to *Commonwealth v. Taitano* for the proposition that striking a
12 witness's testimony is the proper remedy for prosecutorial misconduct. Mot. to Strike Testimony of
13 Flora Aguon at 9 (citing *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct. 23,
14 2014) (Order Granting Exclusion of Cathy Manglona's Testimony Due to Spill Over-Effects of
15 Prosecutorial Misconduct) ("Cathy Manglona Order"). The underlying facts in *Taitano* are different
16 from those in the present case. The October 23, 2014 suppression order cited by the Defendant
17 involves the suppression of Cathy Manglona, the mother of the alleged victim in the *Taitano* case.

18 ⁵ The Commonwealth brought to the Court's attention that a portion of the Defendant's arguments regarding the
19 efficacy of a second jury instruction were copied from a California Appellate Defense Counsel outline, as well as from
20 "Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions
21 to Disregard Pretrial Publicity and Other Inadmissible Evidence," an article published in *Psychology, Public Policy, and
22 Law*. Opp. to Mot. to Strike Testimony of Flora Aguon at 3 n.3. The Commonwealth Supreme Court has held that
23 plagiarism is "totally unacceptable conduct. Plagiarism—a form of misrepresentation—violates ABA Model Rules of
24 Professional Responsibility 8.4, which states that "[i]t is professional misconduct for a lawyer to...engage in conduct
involving dishonesty, fraud, deceit or misrepresentation." *Premier Insurance Co., Inc. v. Commonwealth Department
of Labor*, 2012 MP 16 ¶ 13 n.7 (citing Model Rules of Prof'l Conduct R. 8.4(c)). See also *Commonwealth v. Duan
Sheng Hong*, 2013 MP 19 ¶ 8 n.5. The Court notes, however, that copying multiple paragraphs verbatim from
attributable sources such as scholarly articles or websites without a proper attribution is a far cry from misplacing a
quotation mark or the common legal practice of repurposing briefs—alleging plagiarism does not "empower the court
to play a 'gotcha' game with lawyers who merely fail to use adequate citation methods." *Iowa Supreme Court Atty.
Disciplinary Board v. Cannon*, 789 N.W.2d 756, 760 (Iowa 2010). The Court acknowledges the short deadlines and
short turnaround time in briefing for this case, but encourages counsel to cite their attributable sources.

1 *Taitano*, Crim. No. 13-0111 (Cathy Manglona Order at 2). In *Taitano*, the prosecutor advised the
2 alleged victim, Nukey Manglona, that he should not speak with the defense team, and Nukey
3 Manglona then passed this advice along to his mother. *Id.* at 6. Cathy Manglona then refused to
4 speak with a defense investigator, telling him “I don’t want to talk with you because I don’t wanna
5 jeopardize my case.” *Id.* at 5. In *Taitano*, prosecutorial interference deprived the defense counsel of
6 access to a witness, and in that case the suppression of Cathy Manglona’s testimony was meant to
7 remedy the defendant’s lack of access to that witness. *Id.* at 7.

8 The Court also notes that in *Taitano*, the alleged victim’s testimony was also excluded
9 because the defense team was unable to interview him. *Taitano*, Crim. No. 13-0111 (Aug. 27, 2015)
10 (Order Denying Commonwealth’s Motion to Reconsider the Court’s Order Granting Defendant’s
11 Second Motion to Exclude Testimony of Nukey Manglona Based on Due Process Right to Access
12 Witnesses Without Government Interference) (“Nukey Manglona Order”). In *Taitano*, the alleged
13 victim traveled to Saipan to be interviewed by defense counsel. *Id.* at 7. Before the defense counsel
14 could interview the alleged victim, the prosecutor got into a heated argument with the defense
15 counsel, calling him a “little bitch” in the presence of the alleged victim. *Id.* at 8. The alleged
16 victim, who was already confused, then refused to speak with the defense counsel and later failed to
17 appear at an evidentiary hearing on the incident. *Id.* at 9. In *Taitano*, the prosecutor’s actions
18 effectively deprived the defendant of the opportunity to question a key witness. *Id.* at 20.

19 In the present case, AAG Weintraub’s line of questioning did not go so far as to deprive the
20 Defendant of access to a key eyewitness in preparation for trial, unlike *Taitano*. Here, the
21 Defendant not only had the opportunity to, but indeed did, interview and question the witness in
22 question. At the very least, the damage done in the present case is different from that in *Taitano*,
23 where the defendant was deprived of the opportunity to interview two key witnesses due to a
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1 prosecutor's interference.⁶ While AAG Weintraub's line of questioning went beyond the limits of
2 the Court's instruction, the damage is not tantamount to preventing Defendant's access to a fair
3 trial, unlike *Taitano*. Further, though a curative instruction or other sanction cannot remedy a
4 Defendant's inability to interview and prepare for a key witness before trial, such measures are
5 sufficient for the damage here.

6 Thus, the Court declines to strike Det. Aguon's entire testimony from the record. However,
7 the Court is not persuaded by the Commonwealth's arguments that no further action is needed. Det.
8 Aguon's identification of the Defendant using his weight was made in the presence of the jury, and
9 the jury must again be instructed to disregard this identification.

10 **IV. CONCLUSION**

11 Accordingly, Det. Aguon's in court identification of the Defendant using his weight is
12 stricken. The jury will receive a curative instruction, instructing them to disregard Det. Aguon's in
13 court identifications.

14 **IT IS SO ORDERED** this 29th day of March, 2017.

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17 _____
18 JOSEPH N. CAMACHO
19 Associate Judge
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23 _____
24 ⁶ Access to witnesses is an essential component for a fair trial. *Taitano*, Crim. No. 13-0111 (Nukey Manglona Order at 16).