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5TH CIRCUIT COURT
STATE OF HAWAII
CLERK Doreena Olivas Brun

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAII vs. STEVEN WESTERMAN, Defendant.	CR. NO. 12-1-0441 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION FOR MISTRIAL HEARING DATE: MAY 19, 2014 JUDGE: RANDAL G. B. VALENCIANO

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING MOTION FOR MISTRIAL

Defendant STEVEN WESTERMAN (hereinafter "Defendant"), by and through his counsel, Craig A. De Costa, having orally moved for a Mistrial on May 16, 2014 and the Court having considered the record, having the benefit of memoranda in support and in opposition, and hearing arguments of counsel, makes the following Findings of Fact, Conclusions of Law and Order Granting Motion for Mistrial:

FINDINGS OF FACT

1. Defendant was Indicted for six counts of Sexual Assault in the First Degree on October 25, 2012.

2. Trial commenced on May 12, 2014 and on May 16, 2014, the fourth day of Jury Trial, Deputy Prosecuting Attorney Lisa Arin began her cross-examination of the last Defense

witness by asking: "Dr. Acklin, isn't it true that your own son is currently charged with sexually assaulting a child?"

3. The Office of the Prosecuting Attorney possessed this information including "publicly accessible" documents relating to Dr. Acklin's son's pending case which was never disclosed to the Defendant or the Court.

4. Defendant's Counsel promptly objected, counsels were asked to approach the bench, and after a brief discussion the Court took a recess.

5. Court reconvened without the presence of the jury and heard arguments of counsel. Briefing was ordered and a hearing was set for Monday, May 19, 2014 at 8:30 a.m. The jury was then sent home and ordered to report back on Monday morning without any curative instruction.

CONCLUSIONS OF LAW

1. Even relevant evidence may be excluded pursuant to Hawaii Rules of Evidence (hereinafter "HRE"), Rule 403.

2. The nature of the question asked by Deputy Prosecuting Attorney Lisa Arin was a highly charged personal attack on the witness and should have been disclosed to Defendant so that Defendant may file the appropriate motion and the Court may conduct an analysis pursuant to HRE Rule 403 or Defendant could have chosen not to call Dr. Acklin as his expert witness.

3. By not disclosing this information and materials and allowing the HRE Rule 403 analysis to be made prior to the jury receiving the information, the Deputy Prosecutor's conduct infringed on Defendant's right to a fair trial.

4. The "prosecution has a duty to seek justice, exercise the highest good faith in the interest of the public and to avoid even the appearance of unfair advantage over the accused." *State v. Rogan*, 91 Hawaii 405, 412, 984 P.2d 1231, 1238 (Hawaii, 1999).

5. The failure to disclose was prosecutorial misconduct, which affected Defendant's right to a fair trial and a mistrial is appropriate. See *State v. Rogan*, 91 Hawaii 405, 984 P.2d 1231 (Hawaii, 1999).

6. A curative instruction to the jury could have been given. However, in weighing the strength or lack of strength of the evidence—this being a case that rests almost entirely on the credibility of the complaining witness with no direct corroborating evidence—and the nature of the misconduct, a mistrial is appropriate.

ORDER GRANTING MOTION FOR MISTRIAL

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED AND DECREED that Defendant's Motion for Mistrial made orally on May 16, 2014 is GRANTED.

IT IS FURTHER ORDERED that this matter is hereby reset for Trial on August 17, 2015 at 8:00 a.m. and a Pre-Trial Conference is scheduled for July 23, 2015 at 2:30 p.m.

DATED: Lihue, Hawai'i, 7-29-15.

SE

RANDAL G.B. VALENCIANO
Judge of the Above-entitled Court

APPROVED AS TO FORM:

Refused

LISA R. ARIN
Deputy Prosecuting Attorney

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