NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	No. 219 WDA 2015
	:	
RYAN SIGAFOES	:	

Appeal from the Order, January 16, 2015,
in the Court of Common Pleas of Potter County
Criminal Division at No. CP-53-CR-0000098-2013

BEFORE: FORD ELLIOTT, P.J.E., BENDER, P.J.E., AND SHOGAN, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 24, 2016**

The Commonwealth appeals from the order of January 16, 2015, granting defendant/appellee, Ryan Sigafoes, a new trial.[1] We affirm.

Following a jury trial held April 29-30, 2014, appellee was found guilty of rape by forcible compulsion, sexual assault, aggravated indecent assault, and two counts of indecent assault. The charges were brought in connection with an incident in late January 2010, in which appellee allegedly raped the victim in her home. Appellee and the victim knew each other and went to high school together. In a statement to investigators, appellee denied any

[1] On January 15, 2015, the trial court filed an Order and Opinion granting appellee's post-sentence motion for a new trial. (Docket #57.) The following day, January 16, 2015, the trial court entered an Amended Order vacating the judgment of sentence and reinstating bail. (Docket #59.)

sexual contact with the victim; however, DNA analysis of semen found on the victim's bedsheets revealed it to be appellee's.

On September 30, 2014, appellee received an aggregate sentence of 48 to 120 months' imprisonment. Appellee filed timely post-sentence motions, which were granted on January 16, 2015. The trial court determined that the cumulative effect of various errors, including repeated references to appellee's pre-arrest silence and purported lack of cooperation with investigators, deprived appellee of a fair and impartial trial. This timely appeal followed on January 27, 2015. On February 4, 2015, the Commonwealth was directed to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) within 21 days; the Commonwealth timely complied on February 19, 2015. (Docket #66.) On February 25, 2015, the trial court issued a Rule 1925(a) opinion, relying on its previous Opinion and Order filed January 15, 2015. (Docket #67.)

The Commonwealth has raised the following issues for this court's review:

> I. Whether the trial court committed an abuse of discretion or error of law in ***sua sponte*** concluding that the cumulative effect of waived errors in a post sentence motion constituted grounds for a new trial, where that decision was arbitrary and not in the interests of justice[?]
>
> II. Whether the trial court committed an abuse of discretion or error of law where it concluded that the alleged cumulative error[s] did not result in harmless error, as any prejudice to

> the defendant was ***de minimus***, erroneously admitted evidence was cumulative of other untainted evidence, and/or where the evidence of guilt was so overwhelming that any prejudicial effect of the cumulative errors was insignificant[?]

Commonwealth's brief at 5.

> "A trial court has an 'immemorial right to grant a new trial, whenever, in its opinion, the justice of the particular case so requires.'" ***Commonwealth v. Powell***, 527 Pa. 288, 590 A.2d 1240, 1242 (1991). Thus, the "interest of justice" is a historically recognized basis for the award of a new trial. ***Id.*** Moreover, the court may grant a new trial ***sua sponte***. ***Id.*** On appeal, our standard for reviewing such a ruling is abuse of discretion. ***Id.*** at 1243. An abuse of discretion is not a mere error in judgment but, rather, involves bias, ill will, manifest unreasonableness, misapplication of law, partiality, and/or prejudice. ***Commonwealth v. Hacker***, 959 A.2d 380, 392 (Pa.Super. 2008).

Commonwealth v. Dorm, 971 A.2d 1284, 1288-1289 (Pa.Super. 2009).

> Where, as here, the trial court determines that the cumulative effect of errors during trial deprived the defendant of a fair and impartial trial, the trial court is within its discretion in ordering a new trial. The trial court was in the best position to determine whether the trial was fair.

Commonwealth v. Kramer, 566 A.2d 882, 883 (Pa.Super. 1989).

The trial court determined that a new trial was necessary to rectify certain prejudicial errors apparent on the record. Several of these issues were not objected to at trial and, therefore, waived. (Trial court opinion, 1/15/15 at 1-2.) However, as stated above, a new trial may be granted

sua sponte in the interest of justice, and an issue may be considered despite waiver of that issue. (***Id.*** at 2.)

The trial court identified four specific issues: 1) infringement upon appellee's right to remain silent; 2) an impermissible reference to a polygraph exam; 3) statements indicating that appellee fled the jurisdiction, which were contradicted by the evidence; and 4) unqualified expert testimony explaining why sexual assault victims sometimes delay in reporting. The trial court found that the cumulative effect of these meritorious errors warranted a new trial. We shall address each of these issues ***seriatim***.

As the trial court observed, "The Commonwealth cannot reference a defendant's pre-arrest silence in response to police questioning as substantive evidence of guilt." (Trial court opinion, 1/15/15 at 5, citing ***Commonwealth v. Molina***, 33 A.3d 51 (Pa.Super. 2011) (***en banc***), ***affirmed***, 104 A.3d 430 (Pa. 2014).) ***See id.*** at 62 ("the Commonwealth cannot use a non-testifying defendant's pre-arrest silence to support its contention that the defendant is guilty of the crime charged as such use infringes on a defendant's right to be free from self-incrimination.") (citations omitted); ***cf. Commonwealth v. DiNicola***, 866 A.2d 329 (Pa. 2005) (pre-arrest silence permissible in fair response to a testifying defendant's defense that police did not investigate thoroughly). Instantly, appellee did not testify, nor did defense counsel attempt to argue that the

police investigation was shoddy or incomplete; therefore, the prosecution could not elicit appellee's pre-arrest silence for the purpose of fair response. Nevertheless, the record is replete with references to appellee's pre-arrest silence, including his purported lack of cooperation with law enforcement authorities.

During the Commonwealth's opening statement, for example, the district attorney remarked,

> In July of 2011, Trooper [Glenn] Drake finally made contact with Mr. Sigafoes and he generally told him about the allegations and asked him to come up here for an interview. Mr. Sigafoes refused, he refused to cooperate. In response, Trooper Drake had no choice but to contact the state police barracks down where he was living, PSP Greensburg, and ask a fellow trooper, Trooper [William] Bigelow, to go interview him at his residence in Derry, Pennsylvania.

Notes of testimony, 4/29-30/14 at 22.[2]

[2] In fact, Trooper Drake testified regarding appellee's unwillingness to drive to Potter County for an interview:

> He lived in Greensburg, he worked there, he didn't have occasion to come up here, it's probably 4 hours away. I didn't take it as being uncooperative I just took it as in not that big of a deal, that I would contact a Trooper where he lived to do the the [sic] interview for me.

Notes of testimony, 4/29-30/14 at 177.

Also during the Commonwealth's opening statement, the district attorney argued that appellee refused to cooperate with Trooper Drake's request for a buccal swab:

> It's a simple test, basically, where they take a bit of [a] swipe from your mouth to get someone's DNA that is sent to the lab and analyzed to see if it matches the semen on the bed sheet. Mr. Sigafoes refuses to cooperate. Trooper Drake then is forced to draw up a search warrant . . . .

Id. at 23. Similarly, during the Commonwealth's direct examination of Corporal Michael Murray, there was testimony that appellee did not voluntarily submit to a DNA test:

> Q[.] Can you tell us, first of all, did Trooper Drake attempt to make contact with Mr. Sigafoes to voluntarily submit for a buchal [sic]?
>
> A[.] Yes, Trooper Drake completed a report stating that he contacted Mr. Sigafoes via phone relative to obtaining his DNA from a buchal [sic] swab.
>
> Q[.] Did Trooper Drake receive Mr. Sigafoes' cooperation?
>
> A[.] No. Trooper Drake had to complete a search warrant which was then sent for modification to Trooper Bigelow who was going to be the affiant on the search warrant and swear to it in front of a judge in Greensburg, at which point I got in contact with Mr. Sigafoes and they collected his buchal [sic] swab.

Id. at 101.

The Commonwealth raised the issue of appellee's lack of cooperation with investigators again during questioning of Trooper Bigelow:

> Q. And if you know why was it necessary to prepare a search warrant to get a DNA sample from the defendant?
>
> A. It's evasive [sic] procedure that collection of saliva from his mouth you just can't go by having consent from that person to do so in a case like this so [a] search warrant is necessary.
>
> Q. Do you know if Mr. Sigafoes ever gave his consent to the DNA swab?
>
> A. I don't believe so.

Id. at 129.

> Q. During your interview with Mr. Sigafoes, did you encourage him to make contact with Trooper Drake?
>
> A. I did.
>
> Q. And why was that?
>
> A. To help himself with this investigation and all parties involved with the rape, with the investigation that was going on.
>
> Q. So to your knowledge did he ever do so?
>
> A. I don't believe that he did.

Id. at 132.

During the Commonwealth's direct examination of Trooper Drake, when discussing the results of the DNA testing, the district attorney asked,

> To this day has Mr. Sigafoes ever provided any explanation whatsoever as to how his semen --

> [DEFENSE COUNSEL]: Objection, Your Honor, Mr. Sigafoes has [the] right to remain silent. He doesn't have to offer explanations.
>
> THE COURT: He has [the] right to remain silent. Counsel want to approach for a moment off the record.
>
> (Off the record discussion)
>
> THE COURT: Objection sustained.

Id. at 181-182.

Finally, during the Commonwealth's closing, the district attorney argued to the jury that appellee's silence and refusal to cooperate was substantive evidence of guilt:

> When we get the information of semen on the sheet Trooper Drake contacts the defendant and said, hey look there's semen on the sheet this is your chance to clear your name. All we want to do is take a buccal swab very simple, very quick. I would respectfully disagree with [defense counsel] there is no requirements [sic] for [a] search warrant, a person can consent, they do it all the time to buccal swab. The [defendant's] mom is on the other end flips out says no worry [sic] not going to cooperate.[3] The defendant refused to cooperate, no problem. So we get a search warrant. We get [a] buccal swab by Corporal and it's amazing to me that a person would not say hey, yeah, I'll cooperate I'll cooperate, I have nothing to hide, clear my name why not. But instead after that interview with Bigelow he refuses to follow the interview and he refuses to cooperate with the state police whatsoever.

[3] Appellee's mother, Denise White, testified that appellee declined to voluntarily provide a DNA sample pursuant to advice from their attorney. (***Id.*** at 202.)

> [DEFENSE COUNSEL]: Your Honor, I'm going to object to this line of arguing as we talked about yesterday he did not, he has no legal obligation to answer questions from the police. He has no legal obligation to.
>
> THE COURT: I understand. The Court will give instructions. The points that both counsel are making you may consider. In terms there is no obligation to answer questions there is no obligation to do anything. However, I don't know that it warrants [an] objection being sustained. I'll just ask [the] Commonwealth to be cognizant of those issues. Commonwealth may proceed.
>
> [DISTRICT ATTORNEY]: Yes. Your Honor. I already told the jury that again the defendant has no obligation to testify or come forward whatsoever. The point being though that when Trooper Drake told him this new information, no cooperation at all whatsoever.

Id. at 233-234.

Throughout the trial, the Commonwealth repeatedly referenced appellee's pre-arrest silence in violation of his Fifth Amendment right to remain silent. The testimony that police obtained a search warrant for the buccal swab, and that Trooper Bigelow conducted the interview of appellee in Derry, was admissible to explain the extent of the investigation. (Trial court opinion, 1/15/15 at 5-6.) However, the Commonwealth repeatedly elicited testimony to the effect that appellee was uncooperative and must have had something to hide because he refused to drive four hours to Potter County to be interviewed, declined to submit to DNA testing, failed to provide an explanation for how his semen came to be deposited on the

victim's bedsheets, ***etc.*** The Commonwealth argued that appellee's silence in the face of the victim's accusations should be construed by the jury as evidence of his guilt. This is impermissible. As the trial court remarked, "The effect of the argument was to raise an inference of guilt in the mind of the jurors based on the Defendant's failure to respond to the allegation his semen was on the Victim's bed sheets." (***Id.*** at 7.)

Next, we turn to the reference to a polygraph exam. It is well established that polygraph results are inadmissible in Pennsylvania. "[T]he results of lie detector tests are inadmissible at trial due to their unreliable nature. Therefore, any reference to a lie detector test which raises an inference concerning the guilt or innocence of a defendant is inadmissible." ***Commonwealth v. Sneeringer***, 668 A.2d 1167, 1174 (Pa.Super. 1995), ***appeal denied***, 680 A.2d 1161 (Pa. 1996) (citations omitted). ***See also Commonwealth v. Gee***, 354 A.2d 875, 883-884 (Pa. 1976) ("the results of a polygraph examination are inadmissible for any purpose in Pennsylvania because the scientific reliability of such tests has not been sufficiently established") (citations omitted). "The mere mention of a lie detector test, however, does not constitute reversible error." ***Commonwealth v. Stanley***, 629 A.2d 940, 942 (Pa.Super. 1993).

During questioning of Trooper Bigelow, on redirect examination, there was testimony that appellee had refused a police request to sit for a polygraph exam:

> Q. [Defense counsel] had asked you about a follow up interview with a Corporal Laurie Bernard[.] I'll show you a copy of [a] supplemental report from Corporal Bernard who told Mr. Sigafoes not to attend [the] follow[-]up interview?
>
> A. I'm not sure if there was someone specific that told him that. She just indicated that he refused to come in for [a] polygraph exam.
>
> Q. Referencing Line 3 was there a specific person who told him not to cooperate?
>
> A. Okay it says here polygraph examiner's report that his mother told him not to.
>
> THE COURT: Excuse me. Ladies and gentlemen of the jury, the word polygraph has been mentioned here. Polygraphs have nothing whatsoever to do with the case and are inadmissible for any purpose in Pennsylvania. Please disregard all references to polygraphs, it has nothing whatsoever to do with this case and I'll instruct the witness to refrain from discussing that.

Notes of testimony, 4/29-30/14 at 136-137. Subsequently, appellee's mother, Ms. White, also testified that police wanted appellee to take a polygraph test. (***Id.*** at 199.) The trial court again issued an immediate curative instruction. (***Id.***)

Appellee did not actually take the polygraph test, so there were no test results. Apparently, the Commonwealth wanted to elicit testimony that appellee had refused the investigators' request to take the test. This was yet another example of the Commonwealth using appellee's pre-arrest silence as substantive evidence of guilt, consistent with the Commonwealth's

overriding theme throughout the trial that appellee had something to hide. (Trial court opinion, 1/15/15 at 4.)

The trial court gave the jury immediate curative instructions. ***See Commonwealth v. Brown***, 786 A.2d 961, 971 (Pa. 2001) ("The law presumes that the jury will follow the instructions of the court."), ***cert. denied***, 537 U.S. 1187 (2003) (citations omitted). Nevertheless, the testimony that appellee refused to take a polygraph test was highly prejudicial and completely irrelevant. Appellee had no duty to acquiesce to an interview or sit for a polygraph examination.

Next, we examine the Commonwealth's references to appellee "fleeing" the jurisdiction, which were not supported by the evidence of record. Of course, it is well established that flight can be probative of consciousness of guilt:

> It is a well-settled rule of law that if a person has reason to know he is wanted in connection with a crime, and proceeds to flee or conceal himself from the law enforcement authorities, such evasive conduct is evidence of guilt and may form a basis, in connection with other proof, from which guilt may be inferred.

Commonwealth v. Harvey, 526 A.2d 330, 334 (Pa. 1987) (citations omitted).

During the Commonwealth's opening statement, the district attorney told the jury, "Shortly after that, Mr. Sigafoes fled Potter County and went to his mom's address in Derry, Pennsylvania, and could not be contacted for a

very, very long time. In July of 2011, Trooper Drake finally made contact with Mr. Sigafoes . . . ." (Notes of testimony, 4/29-30/14 at 22.) In fact, there was no evidence that appellee "fled" Potter County because he was wanted in connection with a crime; rather, the record reflects that appellee moved to Derry to live with his mother and work as a plumber with his uncle. (***Id.*** at 198.)

Furthermore, police made contact with appellee regarding this incident long before July 2011. Corporal Murray testified that the victim was not interviewed until March 2, 2010. (***Id.*** at 114.) Appellee was in contact with state police regarding the rape allegations on April 3, 2010, one month later. (***Id.*** at 117.) For whatever reason, there was nothing done with this case between June 2010 and June 2011; Corporal Murray testified that they "dropped the ball with this case." (***Id.***) In June 2011, Corporal Murray assigned the matter to Trooper Drake, and he promptly arranged for Trooper Bigelow at the Greensburg barracks to interview appellee. (***Id.*** at 117, 176.) Trooper Drake testified that when he received the file in June 2011, appellee's cell phone number and address were in the file. (***Id.*** at 175.) Therefore, the Commonwealth's assertion that appellee "fled" the jurisdiction and could not be located until July 2011 is squarely contradicted by the evidence adduced at trial. In addition, there was no curative instruction presented to the jury on this issue. (Trial court opinion, 1/15/15 at 9.)

Finally, we turn to the issue of Corporal Murray giving unqualified expert testimony.

> "The admission of expert testimony is a matter of discretion [for] the trial court and will not be remanded, overruled or disturbed unless there was a clear abuse of discretion." ***Blicha v. Jacks***, 864 A.2d 1214, 1218 (Pa.Super. 2004). "Expert testimony is permitted as an aid to the jury when the subject matter is distinctly related to a science, skill, or occupation beyond the knowledge or experience of the average layman." ***Commonwealth v. Lopez***, 578 Pa. 545, 854 A.2d 465, 470 (2004), quoting ***Commonwealth v. Auker***, 545 Pa. 521, 681 A.2d 1305, 1317 (1996). "Conversely, expert testimony is not admissible where the issue involves a matter of common knowledge." ***Commonwealth v. Minerd***, 562 Pa. 46, 753 A.2d 225, 230 (2000) (citation omitted).

Commonwealth v. Carter, 111 A.3d 1221, 1222 (Pa.Super. 2015).

42 Pa.C.S.A. § 5920 provides as follows:

> **§ 5920. Expert testimony in certain criminal proceedings**
>
> **(a) Scope.—**This section applies to all of the following:
>
> (1) A criminal proceeding for an offense for which registration is required under Subchapter H of Chapter 97 (relating to registration of sexual offenders).
>
> (2) A criminal proceeding for an offense under 18 Pa.C.S. Ch. 31 (relating to sexual offenses).

(b) Qualifications and use of experts.—

(1) In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.

(2) If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.

(3) The witness's opinion regarding the credibility of any other

> witness, including the victim, shall not be admissible.
>
> (4) A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.

42 Pa.C.S.A. § 5920 (footnote omitted).[Footnote 1]

[Footnote 1] "Section 2 of 2012, June 29, P.L. 656, No. 75, effective in 60 days [Aug. 28, 2012], provides that '[t]he addition of 42 Pa.C.S. § 5920 shall apply to actions initiated on or after the effective date of this section.'" ***Id.***, historical and statutory notes. The criminal complaint in this case was filed on [March 7, 2013]. Therefore, Section 5920 applies.

Id. at 1222-1223.

Instantly, Corporal Murray was never qualified as an expert witness. Nevertheless, Corporal Murray testified regarding the victim's lack of prompt complaint:

> Q. Corporal Murray, you've given a lot of testimony about your background and your experience with rape and other assault victims[.] [I]n your experience of over 16 years is it uncommon for a rape victim to delay in reporting?
>
> A. No, it's not.

> Q. And what are some of the grounds or rationales that a rape victim may not immediately report things that occurred?
>
> A. There's [sic] multiple ones, there's psychological damage, such as PTSD, there's the embarrassment and shame that they associate with the incident, the fear of people not believing their report. The fear of not believing report of a rape, but it would vary by individuals and each one individual's reason would be, could be different.
>
> Q. And [the] majority of the cases like this that you've investigated have there been prompt reports?
>
> A. No, I can I would [sic] say it's probably about 50/50 when you're talking about adult sexual offense versus.
>
> Q. Did you find [the victim's] reason for delaying to be typical of a normal rape victim?
>
> A. Yes.

Notes of testimony, 4/29-30/14 at 114-115. There was no objection to Corporal Murray's testimony, nor was a curative instruction given. The trial court opined that Corporal Murray's testimony had the effect of enhancing the veracity of the victim by explaining her delay in reporting the alleged rape. (Trial court opinion, 1/15/15 at 11.) The trial court determined that Corporal Murray's testimony should not have been admitted into evidence. (***Id.***)

Section 5920 requires that the witness be qualified by the court in order to testify to facts and opinions regarding specific types of victim

responses and victim behaviors. Certainly, Corporal Murray's testimony that the victim's reason for delaying her report was "typical of a normal rape victim" constituted unqualified expert testimony and was excludable.

After careful review, we find the trial court did not abuse its discretion in awarding appellee a new trial where, taken together, the cumulative effect of the errors delineated above deprived him of a fair and impartial trial. We are particularly disturbed by the Commonwealth's unrelenting characterization of appellee as uncooperative and evasive, underpinned by repeated references to appellee's exercise of his constitutional right to remain silent. The trial court did instruct the jury several times on appellee's right to remain silent and also instructed them to disregard any reference to a polygraph exam. However, the trial court decided that, "despite those instructions, when those errors were coupled with the remaining errors which did not receive curative instructions the Court reasons the jury was tainted." (Trial court opinion, 1/15/15 at 12.)

Finally, we address the Commonwealth's claim that any error was ***de minimus*** in light of all the evidence presented at trial, including the presence of appellee's semen on the victim's bedsheets. The Commonwealth states that the DNA evidence was particularly damaging in light of appellee's statement to police that he and the victim had not engaged in any sexual activity. (Commonwealth's brief at 13.) While the Commonwealth concedes that references to appellee's lack of cooperation

were inappropriate, including references to his refusal to be further interviewed and his failure to explain the presence of his semen on the victim's bedsheets, the Commonwealth argues that most of that information would have been known to the jury anyway. (***Id.*** at 12.) The Commonwealth claims that it would have been obvious that appellee did not cooperate because the police testified that appellee did not go to the barracks or give a statement, and appellee's mother also testified that appellee did not voluntarily submit a DNA sample, following the advice of counsel. (***Id.***) Therefore, the Commonwealth contends that, at most, the improperly admitted evidence amounts to harmless error.

> Although it is thus evident that error occurred, Appellant is not entitled to a new trial if the error was harmless. ***See Commonwealth v. Uderra***, 550 Pa. 389, 399, 706 A.2d 334, 339 (1998) (citing ***Schneble v. Florida***, 405 U.S. 427, 430, 92 S.Ct. 1056, 1059, 31 L.Ed.2d 340 (1972)). An error will be deemed harmless if: "(1) the error did not prejudice the defendant or the prejudice was ***de minimus***; [or] (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict." ***Commonwealth v. Young***, 561 Pa. 34, 85, 748 A.2d 166, 193 (1999) (quoting ***Commonwealth v. Robinson***, 554 Pa. 293, 305, 721 A.2d 344, 350 (1998)). The Commonwealth bears the burden to prove harmlessness beyond a reasonable doubt. ***See id.***

Commonwealth v. Markman, 916 A.2d 586, 603 (Pa. 2007).

We agree with the trial court that the cumulative effect of the errors in this case was not harmless or ***de minimus***, as the Commonwealth suggests. As recounted above, not only did the Commonwealth make repeated references to appellee's pre-arrest silence in violation of his Fifth Amendment rights, but the Commonwealth misrepresented the facts of the case when it remarked, during its opening statement to the jury, that appellee "fled" the jurisdiction and could not be found for over one year. The trial court addressed the Commonwealth's harmless error claim as follows, which this court finds persuasive:

> The prejudice caused by the reference to Defendant's refusal to take a polygraph exam, other impermissible references to the Defendant's pre-arrest silence, the Commonwealth's unsupported statement that the Defendant fled, and Corporal Murray's unqualified expert testimony regarding why sexual assault victims delay reporting was not ***de minimis***. This is especially true as the first three errors all build on the same prejudicial idea: the Defendant must be guilty or he would not have refused a polygraph test or fled or refused to explain the presence of his semen or refused to cooperate with the investigation.

Trial court opinion, 1/15/15 at 12-13.

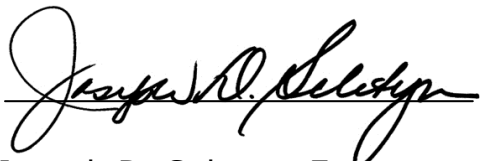
> This Court cannot say there was a river of evidence in this trial such that the above errors could not have affected the jury's decision. Thus, the Court finds that the errors which occurred at trial did not result in harmless error.

Id. at 13.

We agree and determine that the trial court did not abuse its discretion in ***sua sponte*** granting appellee a new trial.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/24/2016