

**[J-95-2012][M.O. – Eakin, J.]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 13 MAP 2012
	:	
Appellant	:	Appeal from the Superior Court entered
	:	on 9/9/10 at No. 2460 EDA 2009 which
v.	:	reversed/remanded the judgment of
	:	sentence of Monroe County Court of
	:	Common Pleas, Criminal Division,
	:	entered on 7/24/09 at No. CP-45-CR-
	:	56-2009
JACK W. FORTENBAUGH, II,	:	
	:	
Appellee	:	SUBMITTED: September 7, 2012

**CONCURRING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: June 17, 2013**

I concur in the result reached by the majority and write further to clarify that, in my view, the touchstone for determining when a testimonial reference to a polygraph test warrants a mistrial should focus on an assessment of the resulting prejudice to the defendant, an evaluation that turns on whether such reference, considered in light of the circumstances of the case, raises an inference as to the defendant's guilt or innocence. See Commonwealth v. Miller, 497 Pa. 257, 264, 439 A.2d 1167, 1170 (1982). In this regard, the majority's three-factor analysis, see Majority Opinion, slip op. at 4, represents a particularized review of the circumstances at issue in Miller rather than a standard generalizable to all cases. Indeed, as the Superior Court has recognized, "[w]hether a reference to a polygraph test constitutes reversible error depends upon the circumstances of each individual case and, more importantly, whether the defendant was prejudiced by such a reference," Commonwealth v. Watkins, 750 A.2d 308, 317 (Pa. Super. 2000).

Assessing prejudice here, I view the facts as presenting a closer question than the majority. As the Superior Court observed, “the case essentially centered on [the victim’s] word against [Appellee’s],” Commonwealth v. Fortenbaugh, 13 A.3d 976 (Pa. Super. 2010) (table), No. 2460 EDA 2009, slip op. at 16, which elevates the potential impact of inferences stemming from testimony referencing a polygraph test that Appellee may or may not have taken. However, on balance, I do not believe that such references, even in combination with the “two obvious gaps in the recording,” Majority Opinion, slip op. at 2, raised an inference as to his guilt or innocence such that a mistrial was warranted, particularly given that there was no indication that the jury knew whether a polygraph test was administered or, if so, what the results revealed, see id. at 7.

As a final note, I am troubled by the lack of consequence assigned to the Commonwealth’s carelessness, especially in light of the fact that the trial court issued several admonitions to the prosecutor to ensure that the references to the polygraph test were correctly redacted. See id. at 2. In my view, it would not be inappropriate for a trial judge, evaluating a motion for a mistrial, to give weight to the prosecution’s conduct concerning the prohibited disclosure of the defendant’s potential submission to a polygraph test.