

**[J-95-2012]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

**CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 13 MAP 2012
	:	.
Appellant	:	Appeal from the Order of the Superior
	:	Court entered 09-09-2010 at No. 2460 EDA
	:	2009 which Reversed/Remanded the
v.	:	Judgment of Sentence of Monroe County
	:	Court of Common Pleas, Criminal Division,
	:	entered 07-24-2009 at No.
JACK W. FORTENBAUGH, II,	:	CP-45-CR-56-2009.
	:	.
Appellee	:	SUBMITTED: September 7, 2012

**OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: June 17, 2013**

The Superior Court erred in this case when it overturned the jury verdict and vacated the judgment of sentence based on two references at trial to requests that the defendant take a polygraph test. Because we find the references were not prejudicial, we reverse the Superior Court's order and remand for reinstatement of the trial court's judgment of sentence.

Jack W. Fortenbaugh, II was charged with rape and other related offenses for incidents involving the sexual abuse of his stepdaughter. Fortenbaugh first abused her when she was approximately 12 years old, and again in 2005 and 2006, when she was approximately 16 years old. At trial, victim testified to the abuse; the Commonwealth also called a friend of the victim, who stated she was also abused by Fortenbaugh. Following this testimony, the Commonwealth played for the jury a CD recording of an interview of Fortenbaugh conducted by Detective John Bohrman; the jury heard Detective

Bohrman asking if Fortenbaugh would take a polygraph test. Counsel for Fortenbaugh immediately objected. A side-bar discussion ensued, after which the trial court directed the jury to disregard any reference to the polygraph test.

The trial court ordered the Commonwealth to redact or skip over any further mention of the polygraph test when playing the CD, but when the CD resumed, a second reference to a polygraph test was heard.<sup>1</sup> Fortenbaugh's counsel objected again. The trial court issued the same cautionary instruction. The Commonwealth resumed playing the CD, and no other polygraph references were made. The redacted CD contained, however, two obvious gaps in the recording. Subsequently, Fortenbaugh's counsel moved for a mistrial, but the trial court denied the request. The jury found Fortenbaugh guilty of rape and other related charges.

On appeal to the Superior Court, Fortenbaugh argued the trial court abused its discretion in not granting his mistrial motion based on the two direct polygraph references and the two obvious gaps in the recording, which suggested further discussion about the test. The Superior Court agreed, finding the instant case "more closely mirror[ed]" Commonwealth v. Watkins, 750 A.2d 308 (Pa. Super. 2000), because here, as in Watkins, there were multiple direct and indirect references to the polygraph test, and the references were not inadvertent. Commonwealth v. Fortenbaugh, No. 2460 EDA 2009, unpublished memorandum at 14-15 (Pa. Super. filed September 9, 2010). The Superior Court also noted "similar[] to Watkins, the sequence of the polygraph references in [Fortenbaugh]'s case allowed the jury to infer [Fortenbaugh]'s guilt." Id., at 15.

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<sup>1</sup> It is unclear what exactly the jury heard, and the trial transcript does not shed any light on this matter. See N.T. Trial, 5/6/09, at 57. Both parties described this as a second "reference to a polygraph." Appellee's Brief, at 5, 9; Appellant's Brief, at 6, 9. The trial court characterized it as "another mention of [Fortenbaugh]'s ability to take a polygraph test." Trial Court Opinion, 1/26/10, at 8.

Specifically, the two direct references to the test “suggested that [Fortenbaugh] refused to take the test the first time he was asked[,]” and “the two redacted portions of the recording permitted the jury to speculate that [Fortenbaugh] either repeatedly refused to take the test, or that it was in fact administered and the redacted portions were the discussion of the results of that test.” Id., at 15-16. The Superior Court concluded “the references and redacted portions of the recording, taken as whole, raised an inference concerning [Fortenbaugh]’s guilt and caused him prejudice to such a degree that the [trial] court’s curative instruction, albeit thorough, was insufficient to remedy it.” Id., at 16-17. Accordingly, the Superior Court reversed and remanded for a new trial. The Commonwealth sought allowance of appeal, which we granted.

We find the Superior Court failed to properly apply the standard of review for denial of a mistrial motion, and further distinguish this case from Watkins. “A trial court is required to grant a mistrial only where the alleged prejudicial event may reasonably be said to have deprived the defendant of a fair and impartial trial.” Commonwealth v. Brinkley, 480 A.2d 980, 986 (Pa. 1984) (citation omitted). In Commonwealth v. Chamberlain, 30 A.3d 381 (Pa. 2011), this Court held:

It is well-settled that the review of a trial court’s denial of a motion for a mistrial is limited to determining whether the trial court abused its discretion. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will . . . discretion is abused. A trial court may grant a mistrial only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict. A mistrial is not necessary where cautionary instructions are adequate to overcome prejudice.

Id., at 422 (internal quotation marks and citations omitted).

In determining whether a testimonial reference to a polygraph test warrants a mistrial, three factors are generally considered: (1) whether the Commonwealth prompted

the reference to the polygraph test; (2) whether the reference suggested the results of the polygraph; and (3) whether the trial court issued prompt and adequate instructions regarding the unreliability and inadmissibility of polygraph tests. See Commonwealth v. Miller, 439 A.2d 1167, 1171 (Pa. 1982). After consideration of these three factors, courts must assess the resulting prejudice to the defendant, an evaluation which turns on whether such reference, considered in light of the circumstances of the case, causes an inference to arise as to the defendant's guilt or innocence. Id., at 1170.

In Watkins, the Superior Court, relying upon Miller and other decisions which applied the Miller analysis, determined the defendant was prejudiced by references to a polygraph test when the trial court permitted the Commonwealth to reveal the defendant abruptly changed his story and admitted to the crime when police stated a polygraph test could be administered. Additionally, the trial court in Watkins did not issue a cautionary instruction. While the results of the polygraph were not discussed, the Superior Court concluded the jury could easily have inferred the defendant failed the test due to the abrupt change in his story.

The Superior Court's reliance on Watkins was misplaced. In Watkins, there were multiple, deliberate references to the polygraph test. "[T]he Commonwealth directly referenced the polygraph test in its opening argument, on direct examination and in its closing argument." Watkins, at 317. Additionally, "the Commonwealth fully intended to and later accomplished making numerous direct references to [the defendant's] offer to take a polygraph test." Id., at 318. The circumstances creating prejudice in Watkins are simply not present here. It is clear disclosure of the references on the CD was not intentional. The trial court determined: "Based on the specific facts of the case, we find that there has been no showing of any intent on the part of the Commonwealth to prejudice [Fortenbaugh] to the point of denial of a fair trial or any bad faith on the part of

the Commonwealth in playing the CD.” Trial Court Opinion, 1/26/10, at 8. Our review of the record does not disclose anything to disturb this conclusion. Additionally, it is clear the references were not as extensive or numerous as in Watkins; there were only two short, direct references to a polygraph test, which fails to establish intent to prejudice by the Commonwealth.

In Watkins, the jury learned the defendant offered to take a polygraph test and that one was indeed performed. Watkins, at 319. Additionally, the jury learned the defendant abruptly changed his story once the officer told him a polygraph test could be performed if he wished. Id. In the instant case, there was no mention in the recording whether a test was administered or what happened after the request to Fortenbaugh was made. See Trial Court Opinion, 1/26/10, at 8 (“[T]he jury did not hear whether [Fortenbaugh] took the polygraph test or, if he did, what the results of that test were.”).

Finally, and equally important, in Watkins, the trial court “did not instruct the jury in any manner concerning the references made to the polygraph tests.” Watkins, at 317. Conversely, in this case, the trial court issued a cautionary instruction to the jury. After the jury heard the first reference to the test, a side-bar discussion ensued, following which the trial court instructed the jury:

Ladies and gentlemen, I just want to let you know what’s going on so you understand. On this CD, audio, you heard -- on this CD, you heard Detective Bohrman mention the ability of Mr. Fortenbaugh -- requested him to take a polygraph. We all know that.

So that you understand, just the asking of that question is completely irrelevant to these proceedings and is not evidence in this case that is worth anything whatsoever.

You’re not going to know whether he took one or whether he didn’t and if he did what the results are. And the reason for that is that polygraphs are highly unreliable and are not good evidence.

So whether he agreed to take one or not and, if he did, what the results are, are completely irrelevant and are not whatsoever to be considered by any of

you with respect to your deliberations and to be used as evidence in this case, okay. Are we all clear on that?

That's why they're not admissible, nor is whether -- I mean, it's just irrelevant. It is an investigative tool that's used in some situations. It's nothing that is compelling under the law in terms of someone charged with a crime.

Having to take one or -- you know, it doesn't matter, and it's not to be considered by you as evidence. So you're not going to know whether Mr. Fortenbaugh took one or not and, if he did, what the results are, and you can't use that as any evidence against him, the mere fact that he was asked that question by Detective Bohrman, okay. You may continue the audio.

N.T. Trial, 5/6/09, at 55-57. After the instruction, the Commonwealth resumed playing the recording. Upon the jury hearing the second reference, the trial court stated: "Same caution to the jury, please." Id., at 57.

In its Pa.R.A.P. 1925(a) opinion, the trial court stated: "[O]ur instruction, read in its entirety, was sufficient to communicate to the jury that they could draw no inference, adverse or favorable, from the CD's indication that [Fortenbaugh] was offered a polygraph test." Trial Court Opinion, 1/26/10, at 8. We agree. The instruction unambiguously and correctly stated polygraph tests are not only inadmissible at trial, but are so because they are unreliable, thus belittling them and lessening the danger of the jury assigning any weight to the matter. See, e.g., Miller, at 1170-71; Commonwealth v. Camm, 277 A.2d 325, 333-34 (Pa. 1971).

Considering the circumstances of this case as Miller requires, we do not believe the references were such that they deprived Fortenbaugh of a fair and impartial trial.<sup>2</sup>

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<sup>2</sup> Construing the two redacted portions of the recording as disguising references to a polygraph test is a leap; we disagree with the Superior Court's further leap that these omissions "permitted the jury to speculate that [Fortenbaugh] either repeatedly refused to take the test, or that it was in fact administered and the redacted portions were the discussion of the results of that test." Fortenbaugh, at 16. This conclusion seems not only tenuous, but erroneously assumes the jury disregarded the trial court's clear instructions on the subject. Commonwealth v. Baker, 614 A.2d 663, 672 (Pa. 1992) (continued...)

While the references were improper and must lie at the feet of the Commonwealth, they were nonetheless not intentional. No indication if testing occurred is suggested; a fortiori, no results were suggested. The mentions were not thereafter utilized, and the trial court promptly and adequately instructed the jury at some length to disregard any references to the test and not to draw any inference from them.

Not every mention of a polygraph is prejudicial or worthy of a mistrial. Considering the circumstances above described, we conclude the Superior Court erred in finding Fortenbaugh was prejudiced by the references to the polygraph test. Accordingly, the Superior Court's order is reversed, and the case is remanded for reinstatement of the trial court's judgment of sentence.

Order reversed; case remanded. Jurisdiction relinquished.

Mr. Chief Justice Castille, Mr. Justice Baer and Madame Justice Todd join the opinion.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice McCaffery files a concurring opinion.

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(...continued)

("The presumption in our law is that the jury has followed [the] instructions [of the trial court].").