

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL JAY JENSEN,

Defendant-Appellant.

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UNPUBLISHED

June 25, 2009

No. 283510

Montcalm Circuit Court

LC No. 07-009100-FH

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct involving penetration, MCL 750.520d(1)(b). Defendant was sentenced to 30 months to 15 years' imprisonment. We affirm.

Defendant argues that the trial court erred in denying his motion for a mistrial and subsequent motion for a new trial because the prosecutor mentioned the word polygraph and inherently prejudiced the defense. Defendant contends that the cautionary jury instruction provided by the trial court to disregard the prosecutor's statement was insufficient to insure that defendant received a fair trial. We disagree.

"[This Court reviews] a trial court's decision to grant or deny a mistrial [for an] abuse of discretion." *People v Ortiz-Kehoe*, 237 Mich App 508, 513-514; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003); *Ortiz-Kehoe, supra* at 513-514. An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *People v Smith*, 482 Mich 292, 327; 754 NW2d 284 (2008), citing *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

This Court may consider the following factors in determining whether the trial court erred in denying a defendant's motion for a mistrial when a witness has mentioned a polygraph examination in the presence of the jury: (1) whether the defendant objected and/or sought a cautionary instruction, (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had

been conducted. *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000); *Ortiz-Kehoe*, *supra* at 514.

At trial the prosecutor elicited evidence that Lieutenant Edwards was a polygraph examiner, and defense counsel immediately objected. Outside of the jury's presence, defense counsel made a verbal motion for a mistrial because mention of Lieutenant Edwards's capacity as a polygraph examiner was inadmissible and should have never been mentioned in front of the jury. Defense counsel further stated:

The witness himself has been very clear and deliberate not to mention the word polygraph, that he [is] a forensic scientist and does examinations, however the prosecutor in his questions asked specifically how long have you been conducting polygraphs. Again, this is clear[ly] prejudicial. [ ]The prosecutor certainly - - - [ ] is [not] some[one who is] new out of law school. This is a prosecutor with clearly [25 to 30] years [of] experience. This is something that again was deliberately mentioned in front of this jury to taint this jury.

Again, the polygraph is not admissible. It certainly is prejudicial to mention it and certainly it [has] been found to be grounds for a mistrial at other cases where it [has] been mentioned before the jury in terms of a potential polygraph examination having been conducted . . .

[B]ased upon the prosecutor's question in reference to a polygraph, I think it clearly is a basis for a mistrial and we [would] ask the [c]ourt to grant [defendant's motion].

The prosecutor responded that his reference did not result in prejudice to defendant because no polygraph examination was ever conducted, and therefore, there were no polygraph results. The prosecutor stated, "We see no prejudice to the defendant by . . . having testimony introduced regarding Lieutenant Edwards's capacity. Polygraph is not at issue because there was no polygraph." Ultimately, the trial court denied defendant's motion for a mistrial, concluding that a curative instruction would be sufficient in this case. The trial court informed the prosecutor to avoid future mention of the word polygraph. There were no additional references to the word polygraph and obviously no test was admitted into evidence.

We conclude that the mention of the word "polygraph" did not bolster or undermine the credibility of any witness. Defendant argues that identifying Lieutenant Edwards as a polygraph operator bolstered his credibility significantly, however, Lieutenant Edwards's testimony did not in any way undermine defendant's credibility. In fact, Lieutenant Edwards conveyed to the jury statements made by defendant that he believed were true. Further, the trial court issued the following cautionary instruction.

Members of the jury, before we pick back up the direct examination, there was mention of a polygraph. I am instructing you at this point, that has no relevancy to this case and should not be considered by you. The only possible relevancy is that it goes to show as to why [Lieutenant] Edwards was meeting with [defendant] but there was no polygraph given, there was none refused. It just - - - it [is] a non-issue. And the reason why I even mention this . . . is because of the word

polygraph, you [are] going to use that in some way against one party or another and I [am] specially telling you no. It [is] like one of those things we talked about in jury selection that you cannot use [] in deciding the case. This is a prime example. Its only possible relevancy is to show why [Lieutenant] Edwards was meeting with [defendant] but again there was no polygraph, there was none refused. It [is] just simply a non-issue and you should not hold that against either party and obviously you should not hold that against [defendant] in any way because there was [no polygraph examination administered] or because . . . you must think there must be something and we [are] not telling you about it, all those type of things. It is simply a non-issue. It [is] one of the reason[s] why in most cases, we do [not] even use the word polygraph just because we are always concerned that you [are] going to attach some kind of significance to that because of what you see in the newspaper, TV or whatever.

The word came out so I am telling you it is a non-issue. I [am] even going a [step further] to tell you that there was not any polygraph here. There was none given, there was none refused, it only tells you why [] [Lieutenant] Edwards met with [defendant]. So it has maybe, maybe a little relevancy that way. We probably could have told you something else instead but just going around that because it did come out that [is] why the two were meeting. But other [than] that again, please, it has no relevancy, should not be considered and absolutely not held against [defendant] by any means. You [cannot] say because there was [no polygraph examination administered], he must have done something wrong or that there was one and we [are] just not being truthful with you, I [am] telling as the Judge there was not a polygraph and it was not because anybody refused one or because they could [not] work out he details, whatever, there simply was not a polygraph and it should not be held against either party. Very, very specifically not against [defendant]. I do [not] want that to be a factor in any way in your decision making process.

In sum we cannot conclude that the trial court erred in denying defendant's motion for new trial. Merely mentioning that Lieutenant Edwards had experience in conducting polygraph examinations does not suggest that defendant lacks credibility. Given the above cautionary instruction, defendant cannot establish sufficient harm stemming from this incident to constitute error requiring reversal.

Moreover, it is not "more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Although the complainant's testimony was diametrically opposed to defendant's account of events, the jury was free to decide which witness or witnesses it chose to believe. Pursuant to MCL 750.520h, "[t]he testimony of a victim need not be corroborated in prosecutions [involving criminal sexual conduct] under [MCL 750.520b to 520g]." *People v Lemmon*, 456 Mich 625, 632; 576 NW2d 129 (1998). As the trier of fact, the jury must assess witness credibility. *Lemmon, supra* at 646. In light of the extensive cautionary instruction read to the jury immediately following the

prosecutor's mention of the word polygraph, where no polygraph examination was administered, the trial court did not abuse its discretion in denying defendant's motion for a mistrial and subsequent motion for a new trial.

Affirmed.

/s/ Brian K. Zahra

/s/ William C. Whitbeck

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M. J. KELLY, J. (*concurring*).

I concur with the majority opinion affirming defendant’s conviction. However, I write separately to comment on what I believe was the clear and deliberate attempt by the prosecutor to insert prejudicial information into the trial.

In his opening statement, the prosecutor told the jury that defendant “later consented to Trooper Ryan’s offer of a polygraph examination regarding the case” but that the examination was never conducted and that he made a “verbal admission” to the “polygraph operator.” Then, after Lt. Edwards testified that his expertise was in “conducting interviews in a forensic science capacity,” the prosecutor asked him, “How long have you been a forensic scientist assigned to do polygraph examinations?”

The references to the polygraph were clearly inappropriate and it is plain to me that they were made to bolster Lt. Edwards’ credibility or to suggest that defendant must be guilty because, when faced with a polygraph examination, defendant broke down and confessed to the examiner. Fortunately, defendant’s trial counsel made a timely objection and the trial judge crafted a very thorough curative instruction that overcame the prejudice occasioned by these remarks. Nevertheless, I feel compelled to write separately to emphasize that this Court does not condone the use of such tactics; these tactics serve no useful purpose—they only taint the trial and undermine the public’s confidence in the fairness and integrity of our criminal justice system. And, although it did not warrant relief under the facts of this case, under different circumstances, this sort of gamesmanship could easily have resulted in a new trial. These tactics should not be employed in the future.

/s/ Michael J. Kelly