

70149-5

70149-5

NO. 70149-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN AKRE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Richard T. Okrent, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in reversing its decision to declare a mistrial after a prosecution witness violated a pretrial ruling excluding any reference to polygraph exams.

Issue Pertaining to Assignment of Error

Did the trial court err by reversing its decision to declare a mistrial after a prosecution witness violated a pretrial ruling excluding any reference to polygraph exams, when the evidence submitted after the violation allowed jurors to infer it was appellant who took the polygraph and failed, and therefore was more likely guilty of the charged offense?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor charged appellant Jonathan Akre with one count of second degree assault of a child. CP 78-79. The prosecutor asserted it was an aggravated assault because it was committed against a family member and within the sight or sound of a minor family member, and that it was committed with deliberate cruelty. Id. The State alleged that on January 24, 2012, Akre intentionally assaulted his seven-year old stepdaughter, M.S., by kicking a brush handle into her vagina, thereby causing substantial bodily injury. CP 78, 104-06.

A jury trial was held March 4-15, 2013, before the Honorable Richard T. Okrent. 3RP-4RP.¹ Akre was found guilty, but the deliberate cruelty claim was rejected. CP 40-43. An aggravated exceptional sentence of 72 months was imposed, and Akre appeals. CP 1-32.

2. Substantive Facts

In January 2012, Akre lived in the basement of his parents' house in Lynnwood with his wife Kayla and her two daughters, M.S. (d.o.b. 1/27/05) and K.S. (d.o.b. 12/29/06), who were both developmentally delayed. 3RP 446-48, 513. At the time, Kayla was pregnant with their daughter, J.S., who was born March 2, 2012. 3RP 447-48.

According Kayla, she left M.S. and K.S. at home with Akre on Tuesday, January 24, 2012, to attend prenatal appointment in Seattle. 3RP 453-54. Afterwards, Kayla went grocery shopping. 3RP 455-57.

While shopping, Kayla received a call from Akre informing her after he returned from tending to the dogs, he found M.S. standing in a doorway dripping blood from her vagina. 3RP 455, 531. Akre assured Kayla that he had things under control and was in the process of cleaning M.S. up and not to worry, so Kayla completed her shopping. 3RP 456.

¹ There are thirteen volumes of verbatim report of proceedings referenced as follows: **1RP** - February 22, 2013; **2RP** - February 25, 2013; **3RP** - eight-volume consecutively paginated set for the dates of March, 4-8, 11-15, & 29, 2013; and **4RP** - three-volume consecutively paginated set for the dates of March 4-6, 2013. As the reader will note, there are overlapping dates for **3RP** and **4RP**.

When Kayla got home she found M.S. cuddling with Akre. 3RP 457. Kayla put away the groceries and then traded places with Akre while he went up stairs to cook dinner. 3RP 457-59. According to Kayla, M.S. was acting normal and just wanted to cuddle. 3RP 459.

When Kayla asked what happened, Akre explained how he found a brush with blood on the handle and deduced that M.S. and K.S. had been playing doctor, and somehow the brush impaled M.S. 3RP 456, 460. Akre did not think the injury was severe because the bleeding had stopped. 3RP 460. When Kayla tried to look at the injury, M.S. would not let her. Id. When Kayla suggested taking M.S. to an emergency room (ER), Akre's reminded her they had no money and no gas in the car. 3RP 461.

M.S. went to bed at 8:30 p.m. as usual, slept through the night, and took the bus to school the next morning. 3RP 461, 464-65. After M.S. left for school, Kayla made an appointment for her to see her pediatrician the following day, Thursday, January 26, 2012. 3RP 461, 464-65.

M.S.'s teacher called Kayla later on Wednesday informing her blood had been found in M.S.'s underwear, so Kayla told to her how M.S. was injured the day before. 3RP 467. That evening Kayla was able to inspect M.S.'s injury in the shower and did not notice any bleeding. 3RP 468. M.S. went to bed and slept through the night. 3RP 468.

The following morning Akre and Kayla took M.S. to her pediatrician, Dr. Jack Stephens. 3RP 330, 334, 336, 361, 469. Dr. Stephens was told how Akre discovered M.S. with blood dripping from her vagina and how he had deduced she was probably injured by a "Barbie Brush" handle while she and her younger sister "had been engaged in some sort of sexual play" or "sexually exploring her body." 3RP 338-39, 361-62. When Dr. Stephens tried to examine M.S., however, she was uncooperative, so he never got "a very detailed or extensive look." 3RP 339-40. What his examination did reveal were two lacerations, one at the top of her vaginal opening, and another at the bottom, each less than a centimeter long. 3RP 340, 342, 348. They were not bleeding, appeared to be healing, and M.S. did not seem to be in pain, so Dr. Stephens advised Akre and Kayla to watch for any "worsening symptoms" and to contact him if there were. 3RP 344, 348-49, 472.

Dr. Stephens also told Akre and Kayla that the nature of the injuries required him to report them to Child Protective Services (CPS), which he did in their presence. 3RP 344, 371. In reporting the incident, Dr. Stephens told CPS that M.S.'s injuries were consistent with what Akre and Kayla had told him had probably happened. 3RP 360.

M.S. returned to school after her appointment, returning home on the bus at about 3:30 p.m. 3RP 472, 474. Kayla checking M.S.'s underwear for blood when she got home and found none. 3RP 474.

The following morning, M.S.'s eight birthday, she got up, was not bleeding, and took the bus to school. 3RP 475. At some point the school called, however, and reported M.S. was bleeding enough to require an underwear change. 3RP 476. Kayla arranged for Akre to pick up M.S. from school and then called and spoke to a nurse at Dr. Stephens' office, who told her "to keep an eye on it and if it had stopped, not to worry about it, but if it gets worse, to bring her in." 3RP 476-77.

At some point Akre called Kayla to explain he had been delayed at school because M.S.'s teacher and school principal had reported him to CPS because of the incident, and that a CPS investigator was going to visit their home that day. 3RP 477-78. The investigator, Megan McGuire, showed up and interview Kayla, Akre, and the girls, although she did not get much information from M.S. because she was too easily sidetracked to stay focused on McGuire's questions. 3RP 479-80.

As with Kayla and Dr. Stephens, Akre told McGuire about discovering Kayla bleeding and coming to the conclusion she had injured herself with a hairbrush while engaged in sexual exploration. 3RP 480-81. After Akre's explanation, McGuire told them she would keep in touch, but

she saw no reason to remove either child from their care. 3RP 481. After McGuire left, Akre, Kayla, M.S. and K.S went to a "Chuck E. Cheese" to celebrate M.S.'s eighth birthday where the children played on the jungle gym for at least an hour. 3RP 481-84, 488-89. There was no blood in M.S.'s underwear when Kayla checked before putting her to bed that evening. 3RP 489.

The following morning, Saturday, January 28th, Kayla woke to M.S. screaming and crying at the side of the bed, and looking "really ghost pale." 3RP 490. When Kayla checked the pull-up M.S. wore to bed, it was soaked with blood. Kayla also noticed M.S. "had really huge blood clots coming out." 3RP 490. When M.S. appeared to be losing consciousness, they took her to the Children's Hospital ER in Seattle. 3RP 492-93. At the hospital, Akre explained to various hospital staff and a Detective from Snohomish County, Det. Sean Gillebo, how he discovered M.S.'s injuries while Kayla was away, and how he suspected it occurred as a result of exploring her vagina with the brush handle. 3RP 158, 174, 195, 392-93, 778, 943; see Ex. 35.²

To conduct a thorough examination of M.S. at Children's, she was taken to an operating room and anesthetized. 3RP 392, 394, 397, 403. That examination revealed a laceration far more severe than reported by

² Ex. 35 is a transcript of Det. Gillebo's interview of Akre's at Children's on January 28, 2012.

Dr. Stephens. Rather than two less-than-a-centimeter long lacerations, doctors found a five to six plus centimeter long deep laceration of the perineum that extended internally past the cervix and into the uterus. 3RP 162, 418-19. Several of the doctors who treated M.S. agreed her injuries could be the result of an accident. 3RP 182, 191, 275-76, 281, 285, 377.

M.S.'s injuries required surgical repair. 3RP 167-68. She was discharged from Children's three days after surgery and joined her sister, K.S., in the care of their biological father. 3RP 502-03.

Given the nature of M.S.'s injury, which were described as "highly concerning . . . for inflicted trauma," law enforcement was contacted and a forensic examination conducted in an effort to document any indication of sexual abuse. 3RP 226. The forensic examination failed to reveal any telltale signs of sexually abused, such as semen, saliva or male DNA in any of the samples taken from M.S.'s injuries. 3RP 587, 591, 595.

Because the prosecutor had not charged Akre with a sexual offense, the trial court made a pretrial ruling precluding any doctor from stating M.S.'s injuries were consistent with a sexual assault. 3RP 146. The trial court also directed counsel to advise their witnesses what they were not allowed to testify about. 3RP 5-9.

Despite this pretrial ruling, a pediatric sexual assault specialist Dr. Rebecca Wiester opined at trial that M.S.'s injuries are the kind "we see in

children who have been sexual[ly] assaulted or had inflicted trauma." 3RP 211-13, 223, 254. Defense counsel's objection was sustained and the jury was instructed to disregard the "sexually assaulted" reference. 3RP 259.

Det. Gillebo, who interviewed Akre and Kayla at Children's, was assigned to further investigate M.S.'s injuries. 3RP 938. Gillebo arranged to interview Akre at the Lynnwood Police Department on March 6, 2012. 3RP 966. Prior to his interview with Gillebo, however, Akre agreed to engage in a polygraph exam with Officer Elizabeth Post. 1RP 108.

Akre showed up and completed the polygraph exam with Post. 1RP 116. During the exam Akre explained returning from tending to the dogs to find M.S. and K.S. standing side by side and M.S. bleeding from her vagina, with a brush with a bloody handle on the floor. 3RP 836. The exam indicated deception about how the injuries occurred. 1RP 128, 130.

In a post-exam interview with Post and Gillebo, Akre, when confronted with the polygraph results and other information, first admitted that he actually found M.S. sitting on the floor with her pants down around her ankles and the handle of the brush protruding slightly into her vagina, which made him upset, and in approaching M.S. and bending down to pick her up he accidentally kicking the brush into her vagina. 1RP 66; 3RP 840, 903-05, 976-77. Akre went on to explain that he had chastised both girls earlier in the day for playing doctor and walking around naked,

and that he had become very frustrated with their behavior. 3RP 841. According to Post, when pressed, Akre eventually admitted he had intentionally kicked the brush out of anger. 3RP 842, 868.

Like the pretrial ruling precluding any sexual assault references, the court also ruled pretrial that there should be no reference to Akre's polygraph exam. 3RP 79. Unfortunately, that ruling was also violated, approximately 45 minutes³ into the eighth day of a twelve-day trial, during the prosecutor examination of CPS investigator McGuire. During a discussion about McGuire's efforts to remove newborn J.S. from her parents' care, the following exchange occurred:

A. ...I signed the [dependency] petition [for J.S.] on the 5th of March, and it was signed [by a judge] later that afternoon.

Q. And when -- was the child picked up on the 5th, or did that happen later?

A. The next day.

Q. Do you know approximately when?

A. Sometime in the morning. Eight. It was early morning.

Q. And did you have contact with Detective Gillebo about that process.

A. Yes.

³ This time estimate is based on the time-stamps provided on the right margin of the verbatim report of proceedings, which indicate proceeding commenced at 9:12 a.m., and defense counsel's objection was made at 9:55 a.m. 3RP 643, 666.

Q. And what was the reason for contacting him?

A. I contacted him because a polygraph had been scheduled.

[DEFENSE COUNSEL]: Objection,
Your Honor. I have a motion.

THE COURT: Yes. Let's have the jury take
a brief recess.

3RP 666.

Noting McGuire's "polygraph" reference violated the court's pretrial ruling, defense counsel moved for a mistrial, arguing there was no effective way to "un-ring the bell" that sounded as a result. 3RP 666-68. Counsel further noted the jury would hear testimony regarding Akre's interviews with Post and Gillebo on the day J.S. was "picked up", March 6th, and would likely connect McGuire's "polygraph" reference to those interviews, and ultimately conclude he failed the exam. 3RP 668, 675.

The prosecution objected to a mistrial, arguing the "polygraph" reference was inadvertent, did not indicate who it was for or what the results were, and that an instruction to disregard the comment would suffice to eliminate any potential prejudice. 3RP 667, 669, 672, 677-78.

Following almost an hour of debate the court stated:

So the question is, will these jurors, now that the polygraph information has been revealed, be able to fairly discount it? Will they in their minds want to know what

the results of that polygraph is [sic], one way or the other? I'm being asked to determine whether they will or will not do that, and I have the burden of deciding what is fair to this defendant.

We have all invested a lot of time into this complex case. Unfortunately, when I deal with the issue of fairness, while time is a factor, it's not the deciding factor.

I just don't think that there is a way that I can sanitize that statement to the point that no juror will not [sic] speculate upon the result. And I'm really sorry about that. And as a result, I'm going to grant the mistrial. . . .

I'm just stuck in a situation where I have to guarantee the fairness, and if there is one juror who speculates about that polygraph, regardless of the best efforts I can make, then the defendant gets no fair trial. I'll grant the mistrial.

3RP 682-83.

In response, the prosecutor requested the court withhold discharging the jury until he could determine whether to seek "emergency review" of the ruling. 3RP 683. The court granted the request and recessed the proceeding until the following day. 3RP 684.

When they reconvened, the prosecutor had filed a motion for reconsideration of the mistrial ruling. Supp CP __ (sub no. 53, State's Motion for Reconsideration of Ruling Granting Mistrial, 3/12/12); 3RP 688-95. The prosecutor argued the court should reverse its earlier ruling because there was no basis for the jury to infer the results of the polygraph

were prejudicial towards Akre, or even that he was the one who took the polygraph. Id.; 3RP 689-90, 692-93.

Defense counsel urged the court to deny the motion, noting the "polygraph" comment was the second violation by prosecution witnesses, and argued the prosecutor's attempt to compartmentalize the evidence in such a way as to make it appear it had no possible prejudicial effect was disingenuous. 3RP 695. Counsel also noted that Akre was the only suspect ever pursued by law enforcement. As such, the only logical inference for the jurors was that it was Akre who the polygraph exam was scheduled for, and that at least part of the basis for Post and Gillebo challenging Akre about his original story was because he had failed the exam. 3RP 696-98.

In granting the motion to reconsider, the trial court concluded:

On reflection, and having heard the argument, the record's been made, I'm going to reverse myself. I'm going to have the jury come back out. I'm going to instruct them to disregard the testimony of the social worker in its entirety with respect to that statement regarding the polygraph, and we will push on with the trial at this point.

3RP 704.

Response to a request for further clarification from defense counsel, the court stated:

Upon reflection, the court has determined that the statement that a polygraph has been scheduled does not -- is not

supported by any evidence that Mr. Akre actually attended a scheduled polygraph, was the person who attended the scheduled polygraph, or actually took the polygraph.

The court is also confident that a curative instruction can be given to the jury, and that because it's presumed that juries will follow my instructions, the court is confident that the issue can be resolved by the jury by simply ignoring the answer.

3RP 705-06.

When the jury returned after a 25-hour recess, it was instructed:

Before we continue with cross [sic] examination of Ms. McGuire, I need to tell you something. I'm going to instruct you to disregard the last answers made by Ms. McGuire to questions asked of her when we last left. Her final answers are to be disregarded and you're to take no note of it [sic].

3RP 710.

McGuire's "polygraph" comment occurred prior to Officer Post and Det. Gillebo testifying about their interactions with Akre on March 6, 2012. Shortly before Post's testimony, the parties discussed the danger of another "polygraph" reference. 3RP 819-24. The trial court noted any further polygraph reference would be "devastating." 3RP 820.

Neither Post nor Gillebo specifically referred to the polygraph exam during their testimony. See 3RP 826-43, 868-932 (Post); 3RP 932-1066 (Gillebo). Post did, however, testify that she and Gillebo "challenged" Akre on March 6th, claiming they had "information to

indicate" the injury to M.S. was not the result of actions by her and her sister, as Akre inferred in his "version of events." 3RP 903-04. When pressed, Post stated the challenge to Akre was based on Gillebo's investigation, the medical evidence and Akre's behavior. 3RP 904-05.

Similarly, when asked about his interactions with Akre on March 6th, Gillebo testified he "first wanted [Akre] to meet with Officer Post. She has some training in this area and has worked more cases like this and [he] wanted her to have an opportunity to talk with [Akre]." 3RP 966. To some extent, this testimony was corroborated by Post initial testimony, which focused on her extensive training in interviewing. 3RP 828-32.

Gillebo was the final witness at trial. Following his testimony, there was a colloquy regarding whether any further curative instruction was going to be given with regard to the "polygraph" comment. 3RP 1073-74. The prosecution comment that the defense seemed to have made a tactical decision not to request any further curative instruction. 3RP 1073. In reply, defense counsel stated his position remained the same as before; no instruction could cure the unfair prejudice to Akre arising from the violation. 3RP 1073-74. The court stated it believed the issue was preserved for appeal, and also that the prosecution could not "force the defense to make a tactical decision as to what jury instruction they will propose." 3RP 1074.

C. ARGUMENT

REFERENCE TO THE POLYGRAPH EXAM PREJUDICED AKRE, COULD NOT BE CURED BY INSTRUCTION, AND THEREFORE THE TRIAL COURT ERRED IN REVERSING ITS MISTRIAL DECLARATION.

The rule is well established: absent a stipulation, polygraph evidence is inadmissible because it has not achieved general acceptance in the scientific community. State v. Sutherland, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980); State v. Descoteaux, 94 Wn.2d 31, 38, 614 P.2d 179 (1980), overruled on other grounds, State v. Danforth, 97 Wn.2d 255, 257, 643 P.2d 882 (1982); State v. Ahlfinger, 50 Wn. App. 466, 468-69, 749 P.2d 190 (1988). Absent a stipulation, reference to a polygraph exam is reversible error if there is an inference arises that the results of the exam are prejudicial to the defendant. State v. Terrovona, 105 Wn.2d 632, 652, 716 P.2d 295 (1986); Descoteaux, 94 Wn. 2d at 38.

A prejudicial inference makes “mere mention of the polygraph tests impermissible.” Sutherland, 94 Wn.2d at 530. As the court noted in State v. Agren, 28 Wn. App. 1, 7, 622 P.2d 388 (1980), “Quite obviously, except under precisely circumscribed circumstances . . . , all trial lawyers should studiously evade references to polygraph tests to avoid any strong implication to a jury that a particular witness is a proven liar.”

Even when not directly stated, testimony which strongly infers there was a failed polygraph exam is inadmissible. Sutherland, 94 Wn.2d at 530. In Sutherland, the results of the exam were not stated directly, but were “strongly implicated.” Id. In Sutherland, the police officer was questioned about his investigation, and testified he administered two polygraph exams to the State’s principal witness. Id. at 528-29. The witness had initially been the prime suspect and became the State’s principal witness. Under these circumstances, the court concluded that although the officer did not testify directly as to the results of the exams, his testimony “by strong implication” gave the jury the results. Id. at 530.

Even isolated references to polygraph tests should be eliminated. State v. Lavaris, 99 Wn.2d 851, 664 P.2d 1234 (1983). Under the circumstances, the Lavaris court held the isolated reference to a witness’s willingness to take a polygraph exam was not reversible error, nonetheless the court went out of its way to condemn the error. Id. at 860 (noting the court need not reach the issue). “[T]he better practice would have been to eliminate the reference [to the polygraph exam] in light of the inherent difficulties associated with *any* kind of reference to a polygraph test.” Id. at 860-61.

Similar to Sutherland, CPS investigator McGuire's reference to a polygraph, when considered in light of the other evidence presented at trial,

gave the jury the results of Akre's polygraph exam "by strong implication." Sutherland, 94 Wn.2d at 530; 4RP 278, 324, 360-62. As Akre's counsel noted in arguing for a mistrial, McGuire's violation told the jury there was a polygraph scheduled for March 6th, the same day Akre was interviewed by Post, and then both Post and Gillebo. 3RP 667-68. Similar to the violation in Sutherland, which allowed the jury to infer the State's witness was telling the truth and therefore the defendant was more likely guilty, the violation here allowed the jury to infer Akre took a polygraph exam and failed, and therefore was more likely guilty. 94 Wn.2d at 530. This was precisely defense counsel's argument, and one that at least initially convinced the trial court a mistrial was warranted. 3RP 675, 682-83.

Unfortunately, the trial court reversed itself the following day, apparently convinced by the prosecutor's argument that because there was no evidence yet before the jury from which it could infer Akre took a polygraph on March 6th, the violation would not prejudice Akre, and simply instructing the jury to ignore the violation would suffice. Supp CP __ (no. 53, supra); 3RP 688-95, 705-06.

As defense counsel correctly noted, however, the prosecutor's analytical approach artificially compartmentalized the violation by wrongly assuming the impact of it would be unaffected by the evidence yet to be admitted. 3RP 695-96. Counsel noted that once there was testimony about

Akre's police interviews on the same day the polygraph exam was scheduled, a significant probability existed that jurors would infer the polygraph exam was for Akre, and that given the outcome of those interviews (Akre was arrested and charged with assault), Akre must have failed. 3RP 697-98.

Defense counsel was right, evidence admitted after the violation provided a clear path for jurors to infer it was Akre who had the "polygraph scheduled" and that he had failed. For example, Gillebo testified Akre was always a suspect because he was the only adult present when the injuries occurred. 3RP 1057. From this alone, it is reasonable to infer it was Akre for whom the polygraph was scheduled because it is a common understanding that polygraph are given to suspects, not just anybody. See e.g., Sutherland supra (polygraph given to prime suspects).

The same is true of Gillebo's testimony that he had Post meet with Akre first on March 6th because "[s]he has some training in this area and has worked more cases like this" and so he "wanted her to have an opportunity to talk with [Akre]." 3RP 966. Although not a direct statement that it was Post who administered the polygraph exam, when considered in light of Post's testimony about confronting Akre after her initial interview of him, claiming they had reason to suspect he was lying based at least in part on his behavior, would have provided the links necessary for a reasonable juror to conclude Post's "training in the area" was in administering polygraph exams, and

Akre's behavioral tells of dishonesty are what registered during the polygraph exam. 3RP 904-05.

That Akre was the only suspect, coupled with the testimony about Post's special training and Akre's behavioral tells provide a "strong implication" that it was Akre who took the scheduled polygraph and failed. Sutherland, 94 Wn.2d at 530. The trial court seemed to understand this when it correctly granted the defense motion for a mistrial. 3RP 680-83. It was precisely this link between the "scheduled polygraph" and Akre's contact with Gillebo on March 6th that defense counsel argued made the violation prejudicial to Akre. 3RP 679.

Unfortunately, the trial court seemed to forget this reasoning by the following day, and instead accepted the prosecution's myopic characterization of the violation as an isolated event that could have no unfair or adverse consequences for Akre. 3RP 704-06. Interestingly, shortly after reversing its mistrial declaration, the trial court, in a discussion about how Post could be questioned about the information Akre provided during the polygraph exam without revealing there was a polygraph exam, noted any further reference to a polygraph exam would be "devastating." 3RP 820.

Short of a mistrial or excluding the testimony of Post and Gillebo, there was no way to sanitize the violation sufficiently to remove the specter of jurors concluding Akre's took and failed a polygraph. The trial court's

attempt to sanitize the violation by instructing the jury to "disregard the last answers made by Ms. McGuire" was an empty gesture. 3RP 710. The instruction, given more than a full day after the violation, was not specific enough to inform the jury it was the polygraph reference that should be disregarded. Depending on a jurors recall of McGuire's testimony just before they broke, some could have interpreted the admonishment as applying to McGuire's reference to the signing of a dependency petition on March 5th, to the fact that McGuire contacted Gillebo at 8 a.m. on March 6th, or to the polygraph reference, which were the last three answers heard by the jury prior to being sent out. 3RP 666. The court's instruction did nothing to ensure a fair trial for Akre after the violation, even if the assumption that jurors follow the court's instructions⁴ because the instruction was too vague to be effective. Moreover, any further instruction would likely of have served only to call attention to the fact that a polygraph was involved in the investigation into M.S.'s injuries.

A mistrial is required when a defendant is so prejudiced by a trial irregularity that only a new trial will ensure a fair trial. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). This Court determines whether a mistrial should have been granted by considering: (1) the seriousness of the trial

⁴ See State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007)(jurors are assumed to follow the court's instructions).

irregularity; (2) whether the trial irregularity involved cumulative evidence; and (3) whether a proper instruction to disregard cured the prejudice against the defendant. Johnson, 124 Wn.2d at 76; Escalona, 49 Wn. App. at 254.

For the reasons discussed above, McGuire's violation of the pretrial ruling excluding any reference to the polygraph exam was a serious irregularity that did not involve cumulative evidence. The State may argue McGuire's violation was not prejudicial because the Court instructed the jury to disregard McGuire's "last answers" when it returned from the 25-hour recess. 3RP 710. Because a prejudicial polygraph exam bell cannot be unrung, however, the argument should be rejected. See State v. Easter, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996) ("A bell once rung cannot be unrung") (citing State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)).

The trial court's initial decision to declare a mistrial was the correct one. 3RP 682-83. It rightly concluded no instruction could silence the polygraph exam reference. Id. And evidence yet to be admitted was certain to and did lay a clear path to infer it was Akre for whom the exam was scheduled, that he took it and failed, and that this failure provided the basis for Gillebo and Post to challenge and eventually get Akre to admit his initial story was a lie. Having concluded Akre was a scientifically proven liar, jurors would be less likely to accept Akre's defense that M.S.'s injuries were the result of a "horrible, horrible accident" rather than an intentional assault,

as the jury had to find to convict him of second degree assault. CP 51-52 (Instructions 5 & 6, the to-convict for second degree assault and the definition of "assault", respectively); see 3RP 1123-26, 1130-34, 1140 (defense counsel argues in closing that although he initially lied, what Akre ultimately confessed to was accidentally kicking the brush the jury, and that only through the coercive interview methods employed by Post and Gillebo did he ever say it was intentional).

In reversing itself, the trial court failed to consider the evidence yet to come, and how it would render McGuire's violation of the pretrial ruling so toxic that nothing short of a mistrial was needed to ensure Akre got a fair trial. This was error that warrants reversal and remand for a new, fair trial.

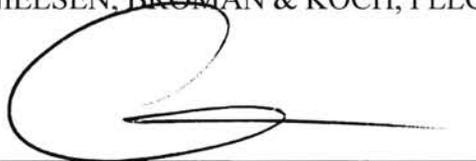
D. CONCLUSION

For the reasons stated, this Court should reverse Akre's judgment and sentence and remand for a new trial.

DATED this 5th day of March 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

CHRISTOPHER H. GIBSON

WSBA No. 25097

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 70149-5-1
)	
JONATHAN AKRE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF MARCH, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] JONATHAN AKRE
DOC NO. 365236
COYOTE RIGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF MARCH, 2014.

x *Patrick Mayovsky*

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STATE OF WASHINGTON
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