

70149-5

70149-5

NO. 70149-5-1

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

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STATE OF WASHINGTON

Respondent

v.

JONATHAN R. AKRE,

Appellant

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BRIEF OF RESPONDENT

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## **I. ISSUES**

Did the trial court abuse its discretion when it denied the defendant's motion for mistrial?

## **II. STATEMENT OF THE CASE**

In January 2012 Jonathan Akre, the defendant, lived with his wife Kayla Williams<sup>1</sup> and her two daughters from a previous relationship, M.S. (DOB 1-27-05) and K.S. (DOB 12-29-06) in Lynnwood, Washington. Ms. Williams was pregnant with their child, J.A., born March 2, 2012. Both M.S. and K.S. were developmentally delayed. M.S. had significant difficulty with verbal communication. 3 RP 446-449, 452, 604-606.<sup>2</sup>

On January 24 Ms. Williams left the defendant with M.S. and K.S. while she went to a prenatal appointment. After her appointment she went grocery shopping. While Ms. Williams was at the store the defendant called her, telling her that there was a problem; he explained that when he returned from letting the dogs outside he saw M.S. standing in the doorway dripping blood. The defendant said he found a hairbrush with blood on it kicked into the corner next to M.S.'s bed. The defendant told Ms. Williams that he

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<sup>1</sup> Ms. Williams had divorced the defendant after the events leading to this charge. 3 RP 447. She resumed using the name Williams by the time of trial.

had things under control, so she finished shopping before coming home. 3 R 454-456.

When she got home M.S. was cuddling with the defendant. The defendant told Ms. Williams that M.S. was okay. The defendant said that the girls had been "playing doctor." He thought the brush had gone inside her. The defendant told Ms. Williams that he had cleaned off the brush before she got home. The defendant did not think that M.S. was severely injured because she had stopped bleeding. Ms. Williams attempted to look at M.S.'s injury but M.S. would not let her do so. Ms. Williams wanted to take M.S. to the emergency room but the defendant resisted, stating their car was out of gas and they did not have any money for gas at that time. 3 RP 457-462.

On January 25 M.S.'s teacher, Ms. Bartell, spoke with Ms. Williams. Ms. Williams told Ms. Bartell that Ms. Williams had walked in on M.S. playing with herself with a brush, and in doing so had injured herself resulting in bleeding. Ms. Williams later admitted to Ms. Bartell that she had not been with M.S. when M.S. was injured. Ms. Williams had lied about that to protect the

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<sup>2</sup> The State adopts the defendant's method for referring to the report of proceedings.

defendant. 3 RP 466-467, 472-473, 606-611.

Ms. Williams and the defendant took M.S. to see her pediatrician, Dr. Stephens, on January 26. The defendant gave the doctor the same history that he had given Ms. Williams. Dr. Stephens did not get a good look at M.S.'s injury because M.S. was so anxious. The doctor did note two lacerations, but no bleeding. Although the doctor thought the injury could have been caused by a hairbrush, he thought it unlikely that a child would cause that kind of injury to herself. For that reason he called Child Protective Services (CPS). The doctor then instructed the defendant and Ms. Williams to call the doctor if there was additional bleeding. 3 RP 336-346, 465, 467-471.

On January 27 Ms. Williams called the defendant to pick M.S. up from school after Ms. Bartell found M.S. was heavily bleeding in her underwear. The defendant told Ms. Bartell the doctor said that although it was unusual, M.S. caused her injury when she was playing with herself with a hairbrush. 3 RP 475-477, 612-615.

After the defendant brought M.S. home Megan McGuire, a CPS social worker, met with the family at their home. Ms. McGuire was investigating a report of neglect for failing to bring M.S. for

medical care when the injury occurred. The defendant provided the majority of the information to Ms. McGuire, repeating the story he had told Ms. Williams. M.S. was unable to communicate with Ms. McGuire, and therefore did not give the social worker any additional information. Ms. McGuire explained to the defendant and Ms. Williams that she would set up additional interviews the following Monday, and notify the biological father about M.S.'s injuries. The defendant and Ms. Williams asked Ms. McGuire not to contact the biological father until the following Monday. 3 RP 655-663.

On January 28 Ms. Williams awoke to hear M.S. screaming and crying. Ms. Williams went to M.S., who appeared "ghost pale." M.S.'s pull up was soaked in blood. M.S. could not stand so she sat in the shower while Ms. Williams cleaned her up. M.S. had huge blood clots coming out of her vagina. Ms. Williams wanted to take M.S. to the emergency room, but the defendant preferred calling the nurse advice line first. When they called that line the nurse told them to bring the child to Children's Hospital. The nurse then called the hospital to alert the staff there that M.S. was on her way there. 3 RP 490-492.

When they got to the hospital M.S. looked like she was going in and out of consciousness. She was immediately taken into the

emergency room. Dr. Paris attempted to examine M.S. but she was reticent. Dr. Paris noted that M.S. had a lot of blood in her underwear; it appeared that she had been bleeding for some time. M.S. was pale; her blood count was so low that she needed a transfusion. In addition she had a fast heart rate. Dr. Paris was not able to obtain a history from M.S. The defendant provided the history, repeating the story that he had found her bleeding after coming back inside from letting the dogs out. The doctors quickly arranged to have M.S. taken into the operating room in order to do a complete examination and repair the laceration. 3 RP 153-156, 493-497, 777-780.

Dr. Joyner, a pediatric surgeon specializing in urology, performed the examination in the operating room. He was not able to visually inspect M.S.'s vagina due to a large blood clot there. The doctor believed the clot kept the blood from seeping out of M.S., but that she had been bleeding for at least several days. Even when the doctor manually removed the clot and irrigated her vagina the doctor needed to use a scope for his examination. His examination showed that M.S. had a deep laceration that extended the entire length of her vagina. In his 28 year career as a pediatric surgeon he had never seen such an extensive injury to a child's

vagina. Dr. Joyner repaired the injury by cauterizing the blood vessels and suturing the lacerations. Dr. Joyner did not believe the injury would have healed on its own without medical intervention. With surgery she should be able to regain normal genital function. 3 RP 151, 161-162, 173-174, 194-195.

Dr. Wiester is the head of the suspected child abuse and neglect (SCAN) team. Dr. Paris called Dr. Wiester to consult on M.S.'s case because of her concerns about the unusual nature of the injury, and her concerns about the delay in getting treatment for M.S. 3 RP 211, 223, 425-427.

Dr. Wiester obtained a history from Ms. Williams. She ordered a forensic examination, and notified CPS. Dr. Wiester was suspicious of the explanation that M.S.'s injuries were self-inflicted. The kind of injury M.S. had would have been very painful, and it would not be likely a child would have done that to herself or during the course of play as had been reported. She also did not believe M.S. playing on playground equipment would have exacerbated the injury that Dr. Stephens originally observed. 3 RP 226, 231-232, 235-237, 290-291.

Dr. Wiester consulted with Dr. Joyner and Dr. Paris. She reviewed the findings and photographs from M.S.'s surgery. She

noted that the kind of injury was rare, and would have required a significant amount of force. Based on that, and the delay in medical reporting Dr. Wiester concluded the injury was consistent with inflicted trauma, and not accidental trauma. She opined that the hairbrush reported to have impaled M.S. could have caused the injury. She did not believe that M.S. herself could have caused those injuries with the hairbrush. Dr. Wiester concluded that no caregiver would look at M.S.'s injuries and think that they had been caused by accident. 3 RP 247-254, 259-264, 302.

Detective Gillebo from the Lynnwood Police Department responded to Children's Hospital and met with Ms. Williams and the defendant. The defendant told the detective that the incident happened on the preceding Wednesday, which was January 25. The defendant repeated the story that he had given Ms. Williams and Dr. Stephens. The defendant speculated that M.S. was exploring herself with the brush after seeing her mother examined in an OBGYN exam. Ex. 35A; 3 RP 944-946.

Detective Gillebo talked to the defendant about going back to their home with the defendant to get the brush and clothing M.S. had been wearing. The detective then went to speak with a social worker and Dr. Wiester. Although he was only gone for 15 minutes,

by the time he returned the defendant had already left for home. When the defendant returned Detective Gillebo asked the defendant why he left without waiting for the detective. The defendant had told Ms. Williams that he could not locate the detective. He told the detective that he wanted to get clothing for M.S. 3 RP 498, 500, 948-953.

When the defendant returned he gave Detective Gillebo the hairbrush, stating that he had not tampered with it. Detective Gillebo then asked the defendant to give him a call when the defendant got home so that the detective could arrange to photograph the area where M.S. was injured and collect her clothing. The defendant never called. Detective Gillebo ended up calling later and arranging with Ms. Williams to have Officer Hoirup come to their home and perform those duties. 3 RP 630-639, 954-957.

As a result of these events Ms. McGuire and her supervisor obtained an order to pick up the defendant's and Ms. Williams' infant, J.A., on March 6. On that date the defendant agreed to a second interview with the police. He first spoke with Detective Post. The defendant repeated the same version of event that he had given during the initial investigation. During a break Detective

Gillebo advised the defendant that his child had been removed by CPS. Ms. Williams came to the police department to discuss the situation with the defendant. After they finished their discussion the defendant agreed to talk to Detective Post and Gillebo a second time. 3 RP 665-666, 833-836, 966, 968-971.

During this second interview Detective Gillebo presented the defendant some information about the medical evidence which cast doubt on the defendant's claim that the girls were responsible for M.S.'s injury. The detective also questioned the defendant about other discrepancies in the defendant's original statement. The defendant then changed his story; he claimed that he walked in the room to see M.S. sitting with her pants down, legs spread, and the handle of the brush partially inserted into her vagina. When he went to scoop her up he accidentally kicked the brush into her vagina. The defendant said he was angry when he saw M.S. That day the girls had been acting inappropriately, and he had a difficult time dealing with that. On an earlier occasion when he had to confront the girls about their inappropriate behavior he had "blistered their butts." Detective Post asked the defendant if his anger played a part in him kicking the brush into M.S.'s vagina. The defendant admitted that it had, and that he had intentionally kicked

the brush. In a recorded statement the defendant said he wore steel toed boots. When he kicked the brush the handle went all the way inside her. 3 RP 839-842, 972-979; Ex. 37A.

The defendant was arrested and charged with Second Degree Assault DV. 3 RP 983; 1 CP 107-108. After he was arrested the defendant had two telephone conversations with his mother. In each conversation the defendant again stated that he kicked the brush into M.S.'s vagina out of anger. 3 RP 984-985; Ex. 43.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION FOR MISTRIAL.**

Prior to trial the defendant moved to exclude evidence (1) that he had taken a polygraph exam and (2) that the first attempt to take the polygraph exam was aborted when he consumed controlled substances before coming in for that test. The State agreed that evidence that the defendant was scheduled for a polygraph exam and that he took that exam should not be admitted into evidence. The court granted both motions. 3 RP 70-79.

Trial began on March 4, 2013. Ms. McGuire testified on March 11, the sixth day of trial. During direct examination regarding the order to pick up J.A. the following exchange occurred:

Question: And did you have contact with Detective Gillebo about that process?

Answer: Yes

Question: And what was the reason for contacting him?

Answer: I contacted him because of a polygraph had been scheduled.

3 RP 666.

The defendant objected and moved for a mistrial. After protracted argument the court granted the motion. It also granted the State's motion to not discharge the jury until the next day. The next day the State moved for reconsideration. The court granted the motion for reconsideration and reversed its decision granting the motion for mistrial. 3 RP 666-684, 688-705.

The court then instructed the jury:

Before we continue with the cross 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 left. Her final answers are to be disregarded and you're to take no note of it.

3 RP 710.

The defendant argues that the trial court erred when it reversed its decision to grant the motion for mistrial, ultimately denying his motion. A trial court should grant a motion for mistrial

“only when the defendant has been so prejudiced that nothing short of a new trial can insure the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial.” State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert denied, 479 U.S. 995 (1986).

A decision to grant or deny a motion for mistrial is reviewed for an abuse of discretion. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert denied, 523 U.S. 1008 (1998). The trial court’s decision on a mistrial motion is given deference on review. State v. Perez-Valdez, 172 Wn.2d 808, 818, 265 P.3d 853 (2011). A decision to deny a motion for mistrial will be overturned “only when there is a ‘substantial likelihood’ the prejudice affected the jury’s verdict.” State v. Russell, 125 Wn.2d 25, 85, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995).

To determine the effect of a trial irregularity the court will look at (1) its seriousness (2) whether it involved cumulative evidence and (3) whether the court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014

(1989). These factors are balanced against each other to guide the reviewing court in the ultimate determination of whether there is a substantial likelihood that the error affected the jury's verdict. State v. Garcia, 177 Wn. App. 769, 783, 313 P.3d 422 (2013), review denied, 179 Wn.2d 1026 (2014).

**1. The Witnesses' Inadvertent Remark About A Scheduled Polygraph Was Not A Serious Trial Error That Denied The Defendant A Fair Trial.**

The first factor to consider is the seriousness of the trial error. Here, the error was not so serious that it justified granting the defendant a new trial.

The results of a polygraph examination are not admissible, unless the parties stipulate to admit it. State v. Sutherland, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980). However, "[t]he fact that a jury is merely apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference to the result is not prejudicial." State v. Terrovona, 105 Wn.2d 632, 652, 716 P.2d 295 (1986).

Other courts that have considered this issue have likewise concluded that reference to a polygraph only constitutes reversible error only when the defendant has actually been prejudiced. See Propriety and Prejudicial Effect of Informing Jury that Witness in

Criminal Prosecution Has Taken Polygraph Test, 15 A.L.R. 4<sup>th</sup> 824 (1982). The Maryland Court of Appeals set out factors courts have commonly considered when assessing whether the mention of a polygraph constituted prejudice justifying reversal in Guesfeird v. State, 480 A.2d 800, 803 (1984). They include: "whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; whether a great deal of other evidence exists; and, whether an inference as to the result of the test can be drawn" *Id.* Courts in Washington have used these same factors in assessing whether reference to a polygraph test constitutes prejudicial error.

In Terrovona the defendant presented an alibi witness. Cross examination of that witness cast doubt on the witnesses' ability to remember anybody's location at any particular time. Toward the end of cross examination the witness was asked if he remembered talking to a particular person on a particular date. The witness did not recall the man, stating "He must have been the polygraph examiner?" Terrovona, 105 Wn.2d at 652. The Court held reference to the polygraph under these circumstances did not

prejudice the defendant since the witness's value as an alibi witness was already demonstrated to have been weak. Id.

In contrast, the defendant was entitled to a new trial under the circumstances presented in Sutherland. There the State's principal witness to a murder had originally been the State's prime suspect although he was later excluded by police. Over the defense objection the prosecutor was permitted to elicit testimony from the detective on redirect that he had arranged for the witness to take two polygraph tests after the defense challenged the quality of the police investigation on cross examination. Sutherland, 94 Wn.2d at 528. The court held that this testimony was prejudicial error, because it strongly implied that the witness had passed the polygraph tests, and thereby satisfied police that he was not the guilty party. Id. at 530.

Standing alone, questioning the defendant about a scheduled polygraph test would not have entitled the defendant to a new trial in State v. Descoteaux, 94 Wn.2d 31, 614 P.2d 179 (1980), overruled on other grounds, State v. Danforth, 97 Wn.2d 255 (1982). There no evidence was presented that the defendant actually took a test, and thus it was not necessarily prejudicial. Id. at 38. However, when combined with the suggestion that the test

was scheduled to reveal “possible [work release rule] violations” and other “criminal activities” it was prejudicial error. The question permitted jurors to draw the inference the defendant had been involved in unrelated acts of misconduct. Id. at 39.

Here testimony that police had scheduled a polygraph exam did not prejudice the defendant to the extent that he was deprived of a fair trial. The reference to the polygraph was made in the context of explaining the circumstances in which J.A. was removed from Ms. Williams’ and the defendant’s custody. The prosecutor did not deliberately elicit testimony regarding a polygraph. The witness had been advised of the court’s pretrial rulings, both orally and in writing. The prosecutor expected the witness to testify that she had pursued a pick up order because law enforcement had been unwilling to take the child into custody without one. Her unexpected answer regarding a scheduled polygraph test was inadvertent. 3 RP 667, 672, 706-707.

The entire State’s case was not dependent on Ms. McGuire’s testimony. Rather the State’s case rested largely on a combination of testimony from medical professionals and Ms. Williams, and the defendant’s own statements.

Whether the defendant or witnesses were credible was not a pivotal issue in the case. M.S.'s injuries had been documented by photographs. Two of the defendant's statements had been recorded. In the first statement he initially claimed M.S.'s was injured when he was not present. Ex. 35A. In the last statement the defendant admitted he caused M.S.'s injuries when he intentionally kicked the brush handle into her vagina. Ex. 37A. The defendant repeated that admission to his mother. Ex. 43. The combination of the physical evidence, the various doctor's opinions that M.S.'s injuries were the result of great force that could not have been inflicted by a child, and the defendant's ultimate admissions presented a strong case that the defendant had intentionally assaulted M.S. causing her substantial bodily harm.

Finally, unlike the circumstances in Sutherland the testimony did not give rise to a reasonable inference that the defendant had lied, or that any other witness was necessarily telling the truth. Ms. McGuire's reference to the polygraph did not disclose who the test had been scheduled for. Nor did it disclose who had requested a polygraph examination, or whether one had even been given.

In this regard the erroneous reference to the polygraph presents a similar situation to that in Garcia. There the defendant

was charged with unlawful possession of firearm, based on a prior conviction for first degree robbery. The defendant stipulated that he had a prior conviction for a serious offense, but the jury was instructed that to convict him of the offense it must find he had been previously convicted of first degree robbery, a serious offense. When the error was discovered after closing argument, the court replaced the erroneous instruction with a corrected instruction. It then denied the defendant's motion for mistrial. Garcia, 177 Wn. App. at 772-773. The Court of Appeal held this error was less serious than the type of irregularity that triggers a mistrial because there was no direct connection between the defendant and the crime referenced in the erroneous instruction. Id. at 780-781.

Like the error in Garcia, the erroneous mention of a polygraph test drew no direct link between the defendant and a test or the likely results of a test. Although there was evidence that the defendant changed his story there was no direct or indirect evidence that the reason he changed his story was due to a polygraph result because there was no evidence that he ever took one. The evidence did show that he fully cooperated with police, talking to them every time they asked for an interview.

The sequence of events suggests no link between the defendant and a polygraph result. The final interview with Detectives Gillebo and Post occurred after the defendant had been informed that his own child J.A. had been removed from his and Ms. Williams' custody. The defendant began the interview by repeating his original story. However, at the point that Detective Gillebo told the defendant that based on information from the doctors that the detective did not believe the defendant's story, the defendant's whole demeanor changed. He slumped, and said "[a]llright. I was frustrated. I was angry..." He then admitted to accidentally kicking the brush that M.S. had up against her vagina. When the detective challenged the claim that it was accidental, the defendant sighed, looked down and rubbed his eyes, and admitted that he kicked the brush out of anger. 3 RP 976-978. The reasonable inference from this testimony was that the defendant had reached the point where he realized that his claim that M.S. or her sister had caused M.S.'s injuries was not going to be accepted by the authorities.

The absence of a link between any test result and the defendant is also apparent when considered in light of how vague the reference was and other evidence presented. As noted Ms.

McGuire's reference to a polygraph did not indicate who had requested a polygraph test, who was supposed to take the test, when the test was supposed to happen, or even if a test had been taken. CPS was involved with both Ms. Williams and the defendant. That agency arranged to have all three girls removed from their custody. 3 RP 501-502, 711. The defendant had told a consistent story up to the point that he spoke with Detectives Post and Gillebo together. However before that time Ms. Williams had admittedly lied twice about when M.S. was injured and the circumstances surrounding her injury. 3 RP 473, 496-497. Given these circumstances the more reasonable inference from the vague reference was that CPS was still conducting its investigation and had attempted to arrange to have Ms. Williams take a polygraph.

The defendant argues that the reference to a scheduled polygraph exam strongly infers that he took a test and failed. He incorrectly states that Ms. McGuire testified that the polygraph was scheduled for March 6, the date the defendant spoke first to Detective Post, and then to Detective Post and Detective Gillebo. BOA at 17. The only events that Ms. McGuire testified to that were tied to specific dates were the date the pick-up order was signed (March 5) and the date that it was executed (March 6). Although

there is an inference that Ms. McGuire called Detective Gillebo on one of those two dates, she did not specifically testify when she called him. Nor did her testimony specify on what date a polygraph had been scheduled. Thus the testimony did not lead to the logical inference that the defendant had been scheduled for a polygraph on March 6.

The defendant also relies on testimony that the defendant was a possible suspect from the beginning of the investigation because he had been alone with M.S. when she was injured. The defendant asserts without any citation to authority that “it is common understanding that (sic) polygraph are given to suspects, not just anybody.” BOA at 18. It is questionable whether standard police investigation techniques are a matter of common knowledge. In at least one case a defendant attempted to introduce expert testimony on the “standard of care” for police investigations in sexual assault cases. In re Morris, 176 Wn.2d 157, 168, 288 P.3d 1140 (2012).<sup>3</sup> Additionally, other cases demonstrate that witnesses

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<sup>3</sup> The court upheld the trial court's decision to exclude this evidence on the basis that it was not helpful to the trier of fact under the circumstances of that case. While the court found that evidence which bore on the quality of the police investigation was relevant to the defense theory that the allegations had been fabricated by the child's mother during a dissolution proceeding, the defendant had not demonstrated a miscarriage of justice because he was able to attack the police investigation through other avenues. Morris, 176 Wn.2d at 160-170. Thus Morris recognizes that in some cases expert testimony regarding police

have been given polygraph tests. See Terrovona 105 Wn.2d at 652, 15 AL.R. 4<sup>th</sup> 824.

The defendant also points to evidence that Detective Post interviewed the defendant separately before she interviewed him with Detective Gillebo. He argues that evidence, coupled with testimony regarding Detective Post's training, and that she confronted him about their suspicions that the defendant was lying based in part on his behavior, led to the reasonable inference that Detective Post was a polygraph examiner, and the defendant's "behavior" was flunking the polygraph examination. This argument should be rejected because it assumes that jurors would engage in wild speculation, rather than basing their decision on the evidence as the court had instructed them to do so.

Detective Gillebo explained that he asked Detective Post to interview the defendant because she was more experienced with that type of investigation than he was. His testimony that he was unfamiliar with some of the medical terminology until he was assigned the investigation showed that he did not have a lot experience with that kind of assault case. 3 RP 966, 977. In

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investigative techniques might be relevant. Expert testimony is admissible because it addresses information that is not commonly known by non-experts. ER 702.

contrast Detective Post testified to her extensive training in investigations, including as a crimes against person detective and forensic child interviewer. 3 RP 827-832.

It was defense counsel that employed the term "lying." There was no evidence that the detective accused the defendant of lying. Rather the testimony was that Detective Post and Gillebo confronted the defendant with evidence that did not support his version of events. 3 RP 905.

The defendant mischaracterizes the evidence about the defendant's "behavior." That testimony was introduced during his cross examination of Detective Post. She testified that information about the defendant's behavior came from Detective Gillebo. 3 RP 904-905. Detective Gillebo testified about the defendant's behavior when he first contacted the defendant at the hospital. The defendant was agitated at first. The defendant went home to get the hairbrush despite his agreement to wait for the detective to accompany him. When the defendant handed the hairbrush to the detective he stated "I didn't tamper with it." 3 RP 941-942, 948, 951-953. That behavior, and the decision to delay treatment for M.S., could cause the detectives to question the defendant's story that he was not in the room when M.S. was injured.

The reasonable inference from this evidence was that Detective Gillebo had called in a more skilled investigator to see if she could get to the bottom of what happened to M.S. At the point that Detective Post interviewed the defendant he had maintained that he had nothing to do with M.S.'s injuries, despite medical evidence that those injuries could not have been caused by a child. The two detectives then questioned the defendant together when Detective Post's interviewing skills could not get information from the defendant that reconciled the discrepancy between his version of events and the physical evidence. There was nothing from the sequence of events, or from the explanation about why Detective Post interviewed the defendant, that would lead to a rational conclusion that he failed a polygraph exam.

**2. The Court Properly Instructed The Jury To Disregard The Witnesses' Testimony.**

The jury was instructed that they were to consider the evidence admitted by the court, unless it had been stricken from the record. 1 CP 45. The court specifically instructed the jury to disregard Ms. McGuire's "last answers." Jurors are presumed to follow the court's instructions. State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

Up to the point that the defendant made his mistrial motion Ms. McGuire had testified to two different time periods. The first part of her testimony related to when she was assigned the case and her contact with the Akre family on January 27. 3 RP 652-665. Her last answers revolved around the decision to pick up J.A. in the first few days of March. That testimony was relatively short, consisting of only two pages of the transcript. 3 RP 665-666. Because the last answers involved a distinct subject from her earlier answers, and the last answers included the erroneous reference to the polygraph test, the jury would understand that they were to disregard reference to the polygraph.

The defendant contends that the instruction was inadequate because it was vague as to what answers they were supposed to disregard, and because it was remote in time from the actual testimony. Under the facts of this case neither of these reasons supports the conclusion that the curative instruction was ineffective.

A curative instruction need not refer to the erroneous evidence in order to be effective. Garcia, 177 Wn. App. at 783. It has been recognized that a more specific instruction may do more harm than good because it would serve to reemphasize the excluded evidence. Id. Here the court's instruction to disregard

certain evidence did not refer to the polygraph, and therefore did not reemphasize it. It was specific as to what answers the witness gave – her last ones. Given that she had testified to two specific time periods, and that her “last answers” relating to the second time period that included reference to the polygraph, the instruction was not so vague that the jury would not understand what the judge was talking about.

The claim that the instruction was too remote in time from the trial error to be effective should likewise be rejected. The court gave jurors instructions throughout the case. When jurors were first assembled prior to jury selection the court gave them specific instructions. 4 RP 2-4. It gave them instructions each day when it recessed and at the conclusion of testimony. 3 RP 198, 302, 349, 440, 534-534, 641, 735, 844, 928, 998, 1067, 1104, 1151. The jurors were expected to remember each of these instructions and follow them. A one day delay between the erroneous evidence and the instruction to disregard it is not such an extended period of time that this court should find the jurors would have forgotten what evidence they should disregard. And if they did forget what that evidence was, then there is no reason to think that the erroneous evidence played any part in their deliberations.

### **3. Reference to the Polygraph Did Not Involve Cumulative Evidence.**

Because there was no other evidence regarding a polygraph test Ms. McGuire's reference to a scheduled polygraph test was not cumulative of other evidence. However, not all of the Hopson factors need support the decision to deny a motion for mistrial. In Garcia, the trial error did not involve cumulative evidence. Garcia 177 Wn. App. at 781. The Court nonetheless found that because the error was not so serious that a curative instruction could not cure any potential prejudice the trial court did not abuse its discretion when it denied a motion for mistrial. Id. at 783-785.

Here the error was not as serious as those at issue in Sutherland and Descoteaux. The polygraph evidence was not intentionally admitted. And it was so vague that there was no direct link between the defendant and a test much less the results of a test. As soon as the trial court denied the mistrial motion it instructed the jury to disregard the witness' last answers, including reference to the polygraph. Under these circumstances the motion for mistrial was properly denied.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on May 28, 2014.

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