IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. 48-2006
	:	
PAUL WILLIAMS,	:	
	:	
Defendant	:	1925(a) OPINION

Date: May 2, 2007

OPINION IN SUPPORT OF THE ORDER OF NOVEMBER 14, 2006 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Paul Williams has appealed from the sentence imposed by this court on November 14, 2006. Williams's appeal should be granted. Williams's conviction was not against the weight of the evidence; however, a reference made by a Commonwealth witness that another suspect had passed a polygraph examination prejudiced Williams such that a new trial is required.

The charges in this case arise from a theft that occurred on July 2, 2005 at a Turkey Hill Minit Mart. On November 14, 2005, Williams was charged with Count 1 Robbery, 18 Pa.C.S.A. § 3701(a)(1)(ii); Count 2 Theft by Unlawful Taking or Disposition, 18 Pa.C.S.A. § 3921(a); Count 3 Receiving Stolen Property, 18 Pa.C.S.A. § 3925(a); Count 4 Criminal Trespass, 18 Pa.C.S.A. § 3503(a)(1)(i); Count 5 Simple Assault, 18 Pa.C.S.A. § 2701(a)(3); Count 6 Harassment, 18 Pa.C.S.A § 2709(a)(1). On September 29, 2006, a jury returned of verdict of guilty as to Count 2 Theft by Unlawful Taking or Disposition, Count 3 Receiving Stolen Property, and Count 4 Criminal Trespass and a verdict of not guilty as to Count 1 Robbery and Count 5 Simple Assault. On September 29, 2006, the court found Williams not

guilty as to the summary offense of Count 6 Harassment. On November 14, 2006, this court sentenced Williams as follows: Count 2-Twenty-four months intermediate punishment under the supervision of the Adult Probation Office of Lycoming County; the first two months to be restrictive intermediate punishment to be served at the Lycoming County Prison/Pre-release center and pay a fine of $500; Count 4-Twenty-four months intermediate punishment under the supervision of the Adult Probation Office of Lycoming County; the first two months to be restrictive intermediate punishment to be served at the Lycoming County Prison/Pre-release center and pay a fine of $100. The sentences under Counts 2 and 4 were to be served consecutively.

On December 13, 2006, Williams filed a notice of appeal. On December 12, 2006, this court issued an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Williams to file a concise statement of matters complained of on appeal within fourteen days of the order. On December 29, 2006, Williams filed his concise statement of matters.

In his concise statement of matters, Williams asserts two issues. They are:

> (1) The trial court erred in denying the requested mistrial based on the statement by the officer that one of the suspects was cleared by a polygraph examination.
>
> (2) The verdict was against the weight of the evidence in that the evidence presented at trial was equally persuasive against the other suspects in the case and was identical as to Nathan Reese as to render any verdict the product of conjecture or guesswork.

The court will address each of these two issues in reverse order.

William's weight of the evidence claim must fail. A claim that the verdict was against the weight of the evidence is addressed to the sound discretion of the trial court. ***Commonwealth v. Snyder***, 870 A.2d 336, 345 (Pa. Super. 2005). "'A true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed.'" ***Commonwealth v. Hunzer***, 868 A.2d 498, 507 (Pa. Super. 2005), *app. denied*, 880 A.2d 1237 (Pa. 2005) (quoting ***Commonwealth v. Galindes***, 786 A.2d 1004, 1013 (Pa. Super. 2001)). In reviewing a weight of the evidence challenge, the trial court is not required to view the evidence in the light most favorable to the verdict winner. ***Commonwealth v. Sullivan***, 820 A.2d 795, 806 (Pa. Super. 2003).

It is within the exclusive province of the trier of fact to determine the weight of the evidence and to pass on the credibility of the witnesses. ***Hunzer***, 868 A.2d at 506. In so doing, the trier of fact is free to believe all, part, or none of the evidence presented. ***Ibid.*** A court may not substitute its judgment for that of the trier of fact. ***Commonwealth v. Passmore***, 857 A.2d 697, 708 (Pa. Super. 2004), *app. denied*, 868 A.2d 1199 (Pa. 2005).

In reviewing a weight of the evidence challenge, "a trial court must determine whether certain facts are so clearly of greater weight that to ignore them or give them equal weight with all the facts is to deny justice." ***Snyder***, 870 A.2d at 345.

> 'A trial court will grant a new trial when it believes the verdict was against the weight of the evidence and resulted in a miscarriage of justice. Although a new trial should not be granted because of a mere conflict in testimony or because the trial judge on the same facts would have arrived at a different conclusion, a new trial should be awarded when the jury's verdict is *so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.*'

Commonwealth v. Lloyd, 878 A.2d 867, 872 (Pa. Super. 2005), *app. denied*, 887 A.2d 1240 (Pa. 2005)(eo).

Williams's convictions for theft by unlawful taking or disposition, receiving stolen property, and criminal trespass were not against the weight of the evidence. The Commonwealth's evidence that Williams committed these crimes was primarily based upon the identification testimony offered by the victim, Betty Delker. Delker was the clerk at the Turkey Hill Minit Mart which was the subject of the theft during the early morning hours of July 2, 2005. Delker testified that around 1:15 a.m. an individual came into the store, pushed her, requested that the register be opened. After she opened the register, the individual took money and left the store. N.T., 24-26 (9/27/06). Delker also testified that the area that the individual entered to access the cash register was one that was not permitted to be entered by regular customers and was a separate secured area of the store. The cash register was located on a type of island that is one step off the floor of the store separating it from the publicly accessible store area; she also testified that the individual was not authorized to enter that part of the store area and that it was off limits to non-employees. N.T., 28-29 (9/27/06). Delker further testified as to the description she furnished to the police indicating the person was a white male, average height, not much taller than she was, yet tall, wearing a t-shirt over his face with tan, sandy brown hair; Delker also gave testimony that she focused on the perpetrators eyes. See, N.T. 30-32 (9/27/06).

Delker testified that she had identified Williams from a photo array, Commonwealth's Exhibit No. 2, that showed the individuals' faces half covered so that only the top of the nose to the top of the head were visible in the array, similar to the way the perpetrator's face was

covered on the date of the offense; she said she made the identification based primarily upon the eyes. N.T. 33-34 (9/27/06). She also testified that she identified Williams at the preliminary hearing held in July 2005 and also made an in court identification of Williams. N.T. 35-36 (9/27/06). The foregoing testimony was elicited from Delker during her direct examination.

On cross-examination, testimony was also elicited from Delker to the effect that she had focused on both the eyes and hands of the thief. N.T. 50 (9/27/06). Cross-examination also disclosed the photo array identification she made as to Williams had occurred in October, some three months after the incident; further, Delker had been shown other photos in an initial photo array and identified another individual as the perpetrator with that identification being based on other things such as the color of the other individuals' hair. Id. at 49-50; 58. This was two months prior to her photo array identification of Williams. Ms. Delker also acknowledged that on July 28, some three to four weeks after the robbery, she believed that she had seen an individual who was the perpetrator walking on the street in the vicinity of the store where she was working. Delker called the police and advised them of that fact. Id. at 51-52. Subsequent testimony brought out that this individual was not Williams although the police had made a follow-up contact with that person. There was also testimony elicited from Delker on cross-examination which suggested that approximately two years prior to the theft at issue she had worked at another convenience store that had employed Williams at the same time. Id. at 52-58; 62.

The Commonwealth introduced additional testimony from other witnesses which suggested that Williams had no money on the evening prior to the robbery, but he did have

money, which he used to solicit a purchase of drugs, in the early morning hours following the robbery. See, e.g. testimony of Allison Weed N.T. 67-69 (9/27/06). Weed also testified that Williams had described how he had carried out the robbery. Id. at 70-71. Accordingly, if the jury accepted the testimony of Delker and/or the testimony of Weed, the testimony of either of them alone would have been sufficient to indicate that Williams had committed the theft and receiving stolen property offense. The criminal trespass offense depended solely upon Delker's testimony and again if the jury believed her testimony in this regard, then evidence would have been sufficient to sustain that conviction.

Accordingly, the Commonwealth presented sufficient evidence at trial for the jury to find beyond a reasonable doubt all of the elements of the offenses of theft by unlawful taking or disposition, receiving stolen property, and criminal trespass. While there may have been evidence pointing to other suspects as the culprit who committed the robbery of the Turkey Hill Minit Mart on July 2, 2005 (as more fully referenced infra), that evidence is not so overwhelming that to ignore it would be to deny justice. The jury as trier of fact was charged with the responsibility of weighing and evaluating the conflicting evidence. In doing so, the jury returned a guilty verdict as to these three offenses it found Williams committed. Under these circumstances, the court will not invade the province of the jury and interfere with their determination based upon the weight of the evidence.

With regard to the remaining issue raised by Williams, that this court erred by denying the mistrial based upon the statement of Officer Lowmiller that another suspect in this criminal episode had been cleared through a polygraph examination, this court is compelled to find that this evidence was so prejudicial to Williams a mistrial should have been granted by this court.

Given all the other evidence in the case, the polygraph reference by the prosecuting officer clearly bolstered the testimony of the victim, Delker that she now had identified the correct individual, Williams, as being the perpetrator and so bolstered the Commonwealth's other evidence that Williams was put in a position where the improper polygraph reference prevented him from receiving a meaningful defense to the allegations. Accordingly, we submit to the Superior Court that our prior rulings denying the mistrial were error and we should be reversed and the case remanded for a new trial.

A motion for a mistrial is directed to the sound discretion of the trial court. ***Commonwealth v. Johnson***, 846 A.2d 161, 166 (Pa. Super. 2004). A court need only grant a mistrial where the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. ***Commonwealth v. Messersmith***, 860 A.2d 1078, 1092 (Pa. Super. 2004), *app. denied*, 878 A.2d 863 (Pa. 2005); *see also*, ***Commonwealth v. Feliciano***, 884 A.2d 901, 903 (Pa. Super. 2005). "Further, the grant of a mistrial is unnecessary where a cautionary instruction is adequate to overcome any possible prejudice." ***Johnson***, 846 A.2d at 166.

The results of polygraph examinations that raise inferences of guilt or innocence are inadmissible at trial because of the unreliable nature of polygraph examinations. ***Commonwealth v. Watkins***, 750 A.2d 308, 315 (Pa. Super. 2000); ***Commonwealth v. Sneeringer***, 668 A.2d 1167, 1174 (Pa. Super. 1995), *app. denied*, 680 A.2d 1161 (Pa. 1996). But, the mere mention of a polygraph examination at trial does not automatically constitute reversible error. ***Watkins***, 750 A.2d at 315; ***Commonwealth v. Stanley***, 629 A.2d 940, 942 (Pa. Super. 1993). "Whether a reference to a polygraph test constitutes reversible error depends

upon the circumstances of each individual case and, more importantly, whether the defendant was prejudiced by such a reference." ***Watkins***, 750 A.2d at 317.

During the direct examination of prosecuting officer, Brian Lowmiller of the Muncy Borough Police Department, it was disclosed that the investigation initially did not have a known suspect for the July 2nd offense at the Turkey Hill Minit Market, despite video surveillance. N.T. 118 (9/27/06). Officer Lowmiller indicated that he followed up various leads as to possible suspects. Id. at 118-119. No specific individual had been charged with the crime until the middle of the following October and at that time he had received information causing him to suspect Williams to be involved. Id. at 120.

Officer Lowmiller then obtained a photograph of Williams from J-Net. Officer Lowmiller used this photograph to make up a photo array again showing just the upper half of the faces on the array, as in the first array showed to Delker, Exhibit No. 2. Officer Lowmiller testified that he then took the photo array to Delker and that she looked at it 15 seconds. In response to his request that she show him the one she believed to be the person who did the robbery she took a pen and initialed and dated Williams' photo on the array. N.T. 127-129 (9/27/06). This was similar to how she had identified the "wrong" individual in the initial array she had been shown.

On cross-examination, Officer Lowmiller contradicted Delker's testimony to the effect that she had concentrated on the perpetrator's eyes and discussed the eyes with him at her initial interview the night of the theft. Officer Lowmiller stated that Delker had been emotionally upset and basically gave him just the clothing description and the color of the hair with no reference to the eyes of the perpetrator. N.T. 132-134 (9/27/06). Officer Lowmiller

also acknowledged that he had shown Delker a photo array prior to the photo array he showed her in October, which contained Williams's photograph. Id. at 133-134. The initial photo array did not include Williams's photograph but contained the photograph of another suspect, Nathan Reese. Delker, upon viewing the initial array, indicated that the photograph of Reese looked like the perpetrator of the offense and she had also signed and initialed that photograph. Id. at 133-134; 136-137. Officer Lowmiller also indicated that a short time after the incident, Delker had indicated a third gentleman by the name of Greg Balliet, who had walked past her place of employment, appeared to her to be the individual who had robbed her. Id. at 137-138. Officer Lowmiller acknowledged that he had not shown any further photographs of Greg Balliet to Delker and that an investigation by his Chief cleared Mr. Balliet of any involvement. Id. at 138-139. The police also had a fourth suspect, a gentleman by the name of Mark Ritter, who was known to have committed another robbery apparently of similar circumstances. Ritter was not followed up on as a suspect in this matter and no photograph of Ritter was shown to Delker. Ritter had a connection to the Commonwealth witness, Allison Weed. Id. at 139-140. Officer Lowmiller revealed also that Ritter had been the first individual to apparently finger Williams to the police. Id. at 141.

Officer Lowmiller further acknowledged that he did not have a photograph of Williams showing his appearance in the vicinity of the date of the offense, July 5, 2005. N.T., 143 (9/27/06). Officer Lowmiller acknowledged the first time Delker had said anything about eyes having significance in her identification was at the time of the preliminary arraignment at the District Magisterial Judge's Office. Id. at 144 (9/27/06). She also indicated to Officer

Lowmiller that when she first identified Nathan Reese she was concentrating on the perpetrator's hair and mask. Id. at 145.

Immediately, after sharing that information on cross-examination, Officer Lowmiller was subject to re-direct examination and questioned by the Assistant District Attorney as to whether or not he and his Chief had followed up the leads as to the additional people, which Officer Lowmiller confirmed and then this exchange occurred between the District Attorney and Officer Lowmiller:

> Q: And some of the people that Mr. Protasio has mentioned such as Nathan Reese, for example, that you indicated were suspects, was an investigation conducted of Mr. Reese before a decision was made as to whether or not to charge him?
>
> A: Yes, there was.
>
> Q: And ultimately, what was the decision with regard to Mr. Reese?
>
> A: The decision was made--he was actually interviewed by a polygraph examination.
>
> MR. PROTASIO: Your Honor, may we approach?

N.T. 145-146 (9/27/06)

At the ensuing sidebar argument and at various other times thereafter during the trial, defense counsel, James Protasio, Esquire objected to the reference made to the polygraph by Officer Lowmiller and requested a mistrial. The court, at the time of the objection, was not certain as to whether or not the Commonwealth had intended to bring into evidence the reference as to the polygraph given to Mr. Reese or if this was an inadvertent reference made by Officer Lowmiller on his own initiative. The argument presented against the mistrial

motion by the Assistant District Attorney, however, strongly suggested the polygraph testimony was part of the Commonwealth's plan to buttress the police determination that the other prime suspect, Mr. Reese, was not involved by telling the jury that Mr. Reese had taken a polygraph test and impliedly passed it. In fact, based upon argument by the District Attorney at that time, it would appear that if Attorney Protasio had not objected Officer Lowmiller would have gone on to testify that Reese had successfully passed the polygraph examination and was thus cleared as a suspect. See, N.T. 147-153 (9/27/06).

The court then considered whether or not to give a curative instruction to the jury as suggested by a case submitted by the Commonwealth, specifically ***Commonwealth v. Brinkly***, 488 A.2d 980 (Pa. 1984). The court then extensively reviewed with counsel the giving of a curative instruction and with defense counsel seemingly taking position of objecting to giving the special instruction, but continuing to pursue a mistrial. Court was then reconvened without any further instruction being given to the jury for additional testimony from Officer Lowmiller concerning the nature of the overall investigation into the case. N.T. 154-160 (9/27/06). Upon the completion of the examination of Officer Lowmiller, the Commonwealth rested its case and before the defense proceeded, the court again discussed with counsel the aspect of giving an appropriate instruction. Id. at 170-175. Defense counsel took the position that although he did not object to the court giving a curative instruction he was not going to request it for failure of losing his right to assert that Williams was entitled to a mistrial based upon the polygraph testimony offered by Officer Lowmiller concerning Nathan Reese. Id. at 171, 174. The defense then introduced testimony of several witnesses attempting to establish basically an alibi defense as to Williams and also testimony that on the day prior to trial, Williams had gone

to the Uni-Mart where the victim was then working and the victim did not recognize him in anyway.

At the conclusion of the day's testimony, after the jury was recessed, the court and counsel again discussed the giving of a curative to be based on ***Commonwealth v. Watkins***, 750 A.2d 308, (Pa. Super 2000). N.T. 209 (9/27/06). The following day, September 28, 2006, the court reconvened in anticipation of having counsel present closing arguments, but then ascertained the defense had two additional witnesses and the Commonwealth had rebuttal testimony to present. However, prior to testimony being taken, the court again revisited the curative instruction issue in relation to the testimony of Officer Lowmiller concerning Nathan Reese taking a polygraph exam. It was at this time, for the first, the court's belief that defense counsel was objecting to the curative instruction was corrected by counsel's statement that he did not have an objection to the court giving the instruction and would not object to it, but the defense was not going to be put in position of asking the court to give the curative instruction. See, N.T. 10, 11 (9/28/06).

Upon the jury then being reconvened, the court gave this instruction to the jury:

> I need to give you an instruction and follow it and apply it. Yesterday, there was reference to the -- that was elicited on the record by the Commonwealth in which Officer Lowmiller gave an indication that he had administered a polygraph examination to a suspect named Mr. Reese in the matter. You must disregard that reference to the polygraph examination and not let that play any part in your decision whatsoever in this case.
>
> You may not infer anything one way or the other from the mention of the fact that that gentleman was subjected to a polygraph examination. Pennsylvania courts have long taken the position that any reference to a polygraph is inadmissible and inappropriate at the time of a trial, and that's because of the inherent unreliable nature of those examinations. It is so unreliable

> that the Court even prohibits any type of reference to such an examination; and, therefore, it is so unreliable that is could not in any way be deemed as appropriate evidence in any legal proceeding whatsoever, by it civil, criminal, or otherwise. And, therefore, I am instructing you that that matter has to be completely disregarded. And it was very inappropriate for that matter to have been brought to your attention.

N.T. 20, 21 (9/28/06).

Unfortunately, this was too little, too late. In reality, it had been too late once Officer Lowmiller uttered the statements.

This court believes the proper application of the standards as to when references to polygraph examination do or do not have such an adverse impact upon the proceedings as to require a mistrial mandate that a mistrial should have been granted by the court immediately after Officer Lowmiller gave the crucial statement to the effect that Nathan Reese was dismissed as a potential perpetrator of this offense upon his taking of a polygraph examination. This clearly implied to the jury that Reese had taken and passed the polygraph examination. It was clear the police had relied upon the polygraph to exclude Reese from being the perpetrator of the event, despite the fact that his photograph had been identified by the victim as being the likely perpetrator. This inappropriately bolstered the victim's testimony that she was now making a correct identification of Williams as the perpetrator. In other words, the polygraph bolstered the proposition that Delker's prior inconsistent statement/identification, was not reliable but her present identification of Williams was reliable. This is particularly significant because she also made at least one other inappropriate identification of a third individual who was walking by her store as being the perpetrator. The substantiation of Delker being in error previously but not now is further amplified by the facts that more likely than not, she had some

knowledge of seeing and knowing Williams from working in the same store as he had a couple of years before and yet also that she failed to recognize him upon seeing him in the store where she worked the day before the trial started. Regardless of these latter facts, the inferences raised from Officer Lowmiller's testimony were severely prejudicial to Williams as the clear inference would be to suggest to the jury that since Nathan Reese was offered a polygraph examination, that more likely than not, Williams was offered one and either did not take it and/or took it and failed it.

The ***Watkins*** decision sets forth the Pennsylvania Superior Court's guidelines, as stated in ***Commonwealth v. Brinkley***, 488 A.2d 980 (Pa. 1984) and ***Commonwealth v. Miller***, 429 A.2d 1167 (Pa. 1982) with regard to the factors a court must look at in determining whether polygraph examination testimony has prejudiced a defendant. These factors are:

> 1) The witness's reference to the polygraph test was not prompted by the questions;
>
> 2) The witness's reference to not suggest the results of the polygraph;
>
> 3) The trial court issued a prompt and adequate instruction regarding unreliability and an inadmissibility of polygraph tests and cautioned the jury to disregard any testimony concerning such tests.

Watkins at 318, 319.

In our case, the reference to the polygraph, as examined by all three factors, clearly indicates that its admissibility requires a granting of a mistrial. The witness's reference was prompted by a question of the Assistant District Attorney. Whether the response was what the Assistant District Attorney intended (as this court believes is certainly logical from the arguments presented by the Assistant District Attorney as referenced above) or was simply the

way the witness choose to answer the Assistant District Attorney's question is not really controlling. It is clear the Assistant District Attorney suggested the question with a presumed knowledge that the polygraph had been given and certainly could perceive that the witness would answer in the way that he did, that is, Reese was disregarded as a witness because he passed the polygraph exam.

The witness's reference clearly suggested the results of the polygraph. Although the objection was made before Officer Lowmiller could state the specific result of the polygraph exam the clear implication, based upon the question as to the polygraph being the reason that Mr. Reese was not considered to be the perpetrator by the police, was that he had taken and passed the polygraph exam.

Finally, this court did not issue a prompt and adequate instruction. Our hesitancy in issuing the instruction was that we were not at all certain an adequate curative instruction could be given based upon the nature and way in which the polygraph exam of Reese was brought into the case and its obvious impact. Therefore, even though the instruction to disregard this evidence was not promptly given it also was inadequate and would have been inadequate even if it had been given immediately upon Attorney Protasio making the objection and moving for a mistrial. The Commonwealth's witness's reference to the polygraph created a clear inference of Williams's guilt to the jury.

The key to linking Williams as the perpetrator clearly rested upon the jury believing that the victim, Delker, had finally made an appropriate identification of him as the perpetrator. That she had done so was clearly bolstered by testimony that a polygraph examination excluded

someone she had previously said was the perpetrator. Therefore, we believe that our judgment of sentence should be reversed and that this case be remanded for a new trial.

BY THE COURT,

William S. Kieser, Judge

cc: James R. Protasio, Esquire
DA
Judges
Christian Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)