

Circuit Court for Kent County
Case No. 14-K-09-007419

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1121

September Term, 2020

LAMAR DEVON SAMPSON

v.

STATE OF MARYLAND

Graeff,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: March 18, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2009, a jury in the Circuit Court for Kent County convicted appellant, Lamar Devon Sampson, of attempted second-degree murder, first-degree assault, second-degree assault, three counts of reckless endangerment, use of a dangerous weapon with intent to injure, and three counts of use of a handgun in the commission of a felony or crime of violence. The court sentenced appellant to 30 years on the conviction for attempted second-degree murder and five years, consecutive, on each of the convictions for reckless endangerment.¹

On appeal,² appellant presents the following two questions for this Court’s review, which we have rephrased slightly, as follows:

1. Did the circuit court err in denying appellant’s motion for a mistrial after the lead investigator testified that the individual the defense argued was the shooter had passed a polygraph examination?
2. Did the circuit court err in denying appellant’s motion for a mistrial based on prejudicial comments and questions from the court?

For the reasons set forth below, we answer the first question in the affirmative, and therefore, we shall reverse the judgments of the circuit court and remand for a new trial.

¹ The court merged appellant’s conviction for use of a dangerous weapon with intent to injure. A three-judge panel in the circuit court vacated appellant’s three convictions for use of a handgun in the commission of a felony or crime of violence.

² Appellant filed an initial appeal on March 22, 2010, but this Court dismissed the appeal as untimely filed. *See Sampson v. State*, No. 162, Sept. Term, 2010, slip op. at 3 (filed Jan. 18, 2012). On January 27, 2020, appellant filed a Petition for Post-Conviction Relief (the “Petition”), seeking permission to file a belated notice of appeal due to ineffective assistance of counsel in failing to “note a direct appeal in a timely manner.” On November 16, 2020, this Court granted appellant’s request to file a belated appeal.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Factual Background

During the early morning hours of Sunday, January 25, 2009, a dance at the Chestertown Fire Hall in Kent County shut down due to a fight. As people were exiting the hall, several fights broke out. A shooting occurred, resulting in Marcellus Black, Sr. being struck by two bullets, James Berry being grazed by a bullet, and a bullet being lodged in the side mirror of a vehicle that was close to Trooper John Hickey's head. Mr. Black, Shawn Wilson, Charles Smith, and Mr. Berry identified appellant as the shooter.

Mr. Black testified that, when he exited the hall, he observed a group of men fighting near his dad's truck, which he drove to the hall, and he demanded that the men get off his truck. Appellant, who Mr. Black had known since elementary school, turned around, made a comment, walked towards Mr. Black, and swung at him. Mr. Black and appellant fought for a few minutes.

After the fight broke up, Mr. Black walked back to his truck with his girlfriend, Ms. Wilson, to see if any damage was done. Mr. Black then heard gunshots, and when he turned around, he saw appellant walking toward the front of the truck, with a gun pointed at Mr. Black and "a vindictive smile on his face." Mr. Black pushed Ms. Wilson away and began running. Appellant shot at Mr. Black four times, and two bullets hit Mr. Black. Mr. Black stopped running when he realized that he had been shot. He walked back to a police car he had spotted when he was running, but nobody was in the car.

Ms. Wilson ran to Mr. Black and helped him to her vehicle. A police officer approached and asked some questions, but Mr. Black could not talk because he had trouble breathing and thought he was going to die. Mr. Black ultimately was taken to shock trauma. While he was at the hospital, Sergeant Owens³ visited him. Mr. Black recounted the events that occurred and identified appellant as the shooter.

Ms. Wilson testified that she arrived at the dance at approximately 12:30 a.m. on January 25. She did not make it into the hall because, as she parked her vehicle, she observed several fights going on in the parking lot. She saw appellant, Mr. Smith, and two other individuals in a fight near her vehicle. She also observed a brief exchange between appellant and Mr. Black that progressed into a fight. She got out of her vehicle to make sure no one else attacked Mr. Black.

After the fight ended, she and Mr. Black walked to the passenger side of Mr. Black's truck, and they heard gunshots. She saw appellant standing at the front of the truck with his hand up, and she heard four more gunshots come from the front of the truck. Appellant was approximately ten feet away, but she could not see what appellant had in his hand. No one else was standing next to appellant. Mr. Black pushed her out of the way and ran. The next time Ms. Wilson saw Mr. Black, he was lying across a state police vehicle. Ms. Wilson ran to Mr. Black and helped him to her vehicle.

³ At the time of the incident, Sergeant Owens was a detective assigned to the Kent Bureau of Investigation. At the time of trial, however, he had been promoted to a sergeant. We will refer to him throughout this opinion as Sergeant Owens.

Mr. Black subsequently was transported to shock trauma. Sergeant Owens came to the hospital a day or two later, and she identified appellant as the person who shot Mr. Black. Ms. Wilson stated that her statement was based solely on her own observations, without anyone else's input. She testified that she knew Mr. Smith and appellant, and she was positive it was appellant, not Mr. Smith, who shot Mr. Black.⁴

Mr. Smith testified that he came to the fire hall on January 24, 2020, with appellant and two other individuals. While they were in the hall, he and an individual named "Mookie," who attended the dance with Mr. Smith's ex-girlfriend, Apollonia Ryan, had an argument.

The dance was shut down after a fight broke out. Between 12:00 a.m. and 12:30 a.m., Mr. Smith began exiting the hall. He and Mookie fought near a truck. He saw appellant and Mr. Black fighting, and when it ended, appellant walked around the driver's side of the van, toward the back of the van. Mr. Smith then heard a gunshot, and he saw appellant shooting a gun while walking toward the passenger side of the van. Mr. Smith later testified that he heard three gunshots and saw appellant shoot Mr. Black. Mr. Smith knew appellant well. Mr. Smith was good friends with Mr. Black and he had no reason to shoot Mr. Black.

Mr. Smith went home, and at approximately 3:30 p.m., he received a call requesting that he come to the police station. He arrived at the station at approximately 4:30 p.m. and

⁴ Ms. Wilson testified that appellant was "tall and black," and Mr. Smith was "short and light skinned." She had known appellant since 1997, and had ample opportunities to observe him prior to the shooting.

learned that there was a warrant for his arrest because he had been identified as the shooter. He later discovered that the arrest warrant was based on a protective order that his ex-girlfriend filed against him earlier in the morning, after the shooting.⁵

Mr. Smith gave a statement, but he did not reveal everything he knew because he did not want to be in the middle of the situation. He falsely stated that he was not near the shooting to observe the shooter. Mr. Smith was upset because he was being “blamed for something [he] didn’t do,” and he insisted that he was not the shooter.⁶

Mr. Smith testified that, two to three days after giving his first statement to the police, he gave a recorded statement to the police and told the whole truth about what he witnessed. He identified appellant as the person who shot Mr. Black. He stated that he was motivated to return to the police because he feared that not telling the whole truth would backfire.

On cross-examination, Mr. Smith testified that he previously had been convicted of a felony, i.e. intent to distribute a controlled dangerous substance. He served approximately four years and five months of his sentence. The shooting happened during the year that Mr. Smith was released from prison.

⁵ Mr. Smith was served with the protective order at the police station, but no further action was taken pursuant to the order.

⁶ On redirect examination, counsel for the State asked Mr. Smith how he felt “when [he] found out that someone else was blaming [him] for shooting someone who [he] got along with and knew.” Mr. Smith responded, “I was pissed, hurt, frustrated, everything... so I was emotionally messed up about the whole situation.”

James Lamont Berry testified that he was at the dance and it ended because a “window was broken outside.” When he exited the hall, he witnessed people “fighting, arguing, and throwing things back and forth at each other, and just chaos.” He saw approximately six fights.

There was an argument next to a burgundy van as he walked past, and then he heard a gunshot behind the van. The shot was fired in the air. As he walked behind the van, he saw a person stick their hand out and fire a gun. He then heard an additional five gunshots.

The third gunshot hit him in the neck, about “a quarter inch away from [his] jugular vein.” Following the gunshots, people started running. Mr. Berry did not know that he had been shot until someone pointed it out to him. Initially, he did not see the shooter’s face, but after he was hit, he looked and saw that it was appellant. In a state of shock, Mr. Berry sat on the ground.

Sergeant Owens approached Mr. Berry for a statement. At that time, he was unsure of the shooter and in shock from the bullet that hit his shoulder, so he did not give a name to the police. Mr. Berry refused medical treatment and left the scene.

The next day, Monday, January 26, 2009, at approximately 10:00 a.m., Detective Wode of the Chestertown Police Department approached Mr. Berry at his workplace with a photographic array. He was shown six pictures, in two rows of three, and asked to select

the person who shot him the previous day.⁷ After several minutes, he pointed to appellant's picture in the middle of the top row.

Mr. Berry described the person that shot him to Detective Wode as approximately five feet ten inches to six feet tall and skinny, weighing approximately 140 to 150 pounds. In the written statement he gave the police the night of the shooting, Mr. Berry described a fight between two black males. One, a smaller male weighing approximately 130 pounds and wearing red, "pulled out a gun and started shooting at the larger black make," and it appeared that the larger man "was shooting back." The smaller black male wearing red was the one that shot Mr. Berry.

On redirect-examination, Mr. Berry stated that the person he referred to as the smaller black male was appellant. He described appellant as weighing 130 pounds and "he was slim, or skinny."⁸

In response to questioning by the court, Mr. Berry stated that he had been four to five feet away from Mr. Black, and he knew Mr. Black had been shot. Seconds after Mr. Berry was shot in the neck, he heard Mr. Black scream. Mr. Berry could not tell which bullet hit Mr. Black.

⁷ Initially, Mr. Berry testified he was shown eight pictures, two rows of four, but after counsel presented him with the exhibit reflecting the photo line-up, he confirmed that he was presented with six photos.

⁸ On recross-examination, counsel told appellant to stand up and asked Mr. Berry to describe appellant's weight and height at that time, nine months after the shooting. Mr. Berry stated that appellant was approximately six feet tall and weighed approximately 150 pounds. Later, defense proffered that Sergeant Wickes of the Kent County Detention Center would testify that, at the time of trial, appellant weighed 220 pounds.

Mr. Berry knew Mr. Smith, who was short and light skinned, and Mr. Smith was not the person that shot him. He also knew appellant well, but he did not tell the police that appellant was the shooter.

Trooper John Hickey, a member of the Maryland State Police, testified that he arrived at the scene and attempted to break up a fight between two individuals. He grabbed the individual who appeared to be the aggressor and wrestled that person to the ground. While attempting to handcuff the person and effectuate an arrest, Trooper Hickey heard gunshots. He drew his weapon and took cover near the driver side door of a van, trying to find the person who was shooting. He first heard one gunshot, and then he heard three or four more from the same area. People were running and screaming; there were approximately 100 people in the general area.

Trooper Hickey radioed for more officers. He saw Mr. Black leaning against the police car, holding his chest. Other people helped Mr. Black into a van. Mr. Black had difficulty breathing as he held his chest and gasped for air. Someone advised that another person, Mr. Berry, had been shot, so Trooper Hickey went over to him.

Emergency personnel arrived, and Trooper Hickey began processing the scene. Trooper Hickey noticed a bullet hole on the outer part of the mirror of the van behind which he had taken cover during the gunshots. There was a fragmented bullet in the hole. He also found a "spent bullet" by the van.

Sergeant Owens testified that he was the lead investigator in the case. He arrived on the scene at approximately 1:20 a.m. By the time he arrived, there were police vehicles

and an emergency vehicle already at the scene. He spoke to some officers who were there, including Trooper Hickey. He then requested that the Maryland State Police Crime Scene Unit process the scene. Crime scene technician, Stephanie Peterson arrived at approximately 2:00 a.m. Two bullets were recovered from the scene, one from the ground and the other from the mirror of the van behind which Trooper Hickey took cover.

Mr. Berry gave Sergeant Owens an oral statement, indicating that the smaller black male appeared to be the one who fired in his direction, resulting in a bullet hitting him. Mr. Berry said that the smaller black male, who was wearing a “bright red vest,” was approximately five feet ten inches tall, and he weighed approximately 130 pounds. There “appeared to be a larger black male behind the van firing back or at least with a gun drawn.” Sergeant Owens looked at Mr. Berry’s injury and saw that he was grazed by a bullet.

At approximately 3:10 a.m., Sergeant Owens received a phone call informing him that Ms. Ryan was at Queen Anne’s County Sheriff’s Department obtaining a protective order against Mr. Smith, the person she identified as the shooter. Sergeant Owens subsequently issued an arrest warrant for Mr. Smith, and Mr. Smith subsequently went to the Sheriff’s office.

When Mr. Smith arrived at the station with his brother, Eric Gordon, he spoke with Sergeant Owens. Mr. Smith was adamant that he was not responsible for the shooting, and he was anxious to talk. Mr. Smith was interviewed for several hours, and he gave a written statement. In the statement, Mr. Smith stated that he was in a fight at the dance. He left before the shooting, but he heard from some people that appellant was the shooter.

Sergeant Owens testified that he interviewed Mr. Smith again the next morning. This time, Mr. Smith appeared eager to provide more information. Reading from his notes, Sergeant Owens stated:

[Mr. Smith] explained that the reason why he didn't tell the truth the previous day, or the whole truth was because he was scared that [appellant] . . . didn't care who he shot. And he also stated that he saw the police officer on the ground where [appellant] was, and that [appellant] must have seen the police officer when he did the shooting. And [Mr. Smith] stated that . . . he was there and saw [appellant] . . . He said that he saw [appellant] with a gun shooting into the crowd.

On the afternoon of January 26, Sergeant Owens went to the hospital to interview Mr. Black. Mr. Black recounted his fight with appellant, and he identified appellant as the man who shot him. After interviewing Mr. Black, Sergeant Owens interviewed Ms. Wilson, who was at the hospital with Mr. Black. Ms. Wilson's statement regarding the incident was substantially similar to Mr. Black's statement.

That evening, Sergeant Owens issued an arrest warrant for appellant. Although Mr. Berry described the shooter as small and weighing approximately 130 pounds, and Mr. Smith likely matched that description, but appellant did not, Sergeant Owens stopped considering Mr. Smith a suspect within two days after the incident.

Defense counsel questioned Sergeant Owens' failure to perform a Gunshot Residue Test ("GSR") on Mr. Smith within 24 hours of the shooting. Sergeant Owens responded, stating:

After so many hours, it's no longer accurate and the State lab's no longer processing them. And it doesn't take much . . . the gunshot residue, there's . . . there's three chemicals that are emitted from the primer . . . of a gun when you shoot. They're easily washed off or knocked off your hands, and it has

to be done real . . . the old kits, it was 2 hours, and, the new ones, I think it's 4 to 6 hours. But the Maryland State Police Crime Lab is no longer processing them right now.

Counsel also questioned the Sergeant about his decision to dismiss Mr. Smith as a suspect after Mr. Smith and his brother lied in their first statements, stating that Mr. Smith was not present during the shooting, but in the second interview, Mr. Smith told Sergeant Owens that he was present and witnessed appellant fire the weapon. As discussed in more detail, *infra*, Sergeant Owens stated two times that a polygraph test was conducted on Mr. Smith, and he subsequently stated that Mr. Smith passed the polygraph.

After the court denied defense counsel's motion for a mistrial and his subsequent motion for judgment, the defense presented its case. Mr. Smith's ex-girlfriend, Ms. Ryan, testified that she had dated Mr. Smith until three days before the shooting. She attended the dance with Mookie, her child's father, and while at the dance, she saw Mr. Smith. In the parking lot, Mr. Smith and Mookie fought. Mr. Smith's brother joined in to fight Mookie.

Ms. Ryan testified that she saw appellant fighting with her cousin "Ty." When she heard gunshots, appellant and Ty were still fighting. The shots came from the area where Mr. Smith was located. Mr. Smith had something in his hand, but Ms. Ryan did not know if it was a gun. After the shots were fired, Mr. Smith ran.

After the shooting, Ms. Ryan went to the Sheriff's Department to get a peace order against Mr. Smith because she did not want him around her. She denied identifying Mr. Smith as the shooter, but rather, she told the police she believed the gunshots came from

Mr. Smith's vicinity. There were several fights going on at the same time and a lot of "commotion" at the scene.

She told the police that Mr. Smith was wearing a red shirt and red jacket at the time of the shooting. She also told the police that she observed Mr. Smith holding a black object that looked like a handgun.

Ms. Ryan testified that Mr. Smith was a member of a gang named "Bloods," and he has two teardrop tattoos on his face. Ms. Ryan did not follow up with the peace order against Mr. Smith because he told her that it would violate his parole and he would be sent to prison.

The defense then called Corporal McFarland, the police officer who interviewed Ms. Ryan, to testify about the statement that Ms. Ryan gave to him. Reading from the notes he took during the interview, Corporal McFarland testified that Ms. Ryan stated that Mr. Smith and Mookie had a fight and then the party ended because someone broke a window. Mr. Smith ran away, and he then reappeared around the corner and started shooting in her direction. Mr. Smith fired five shots.

She saw Mr. Black, who was about ten feet away, fall against a car after being shot. Ms. Ryan described the gun to as "a medium sized gun that was not shiny." Ms. Ryan stated that Mr. Smith wore a red jacket, and he always wore red because he "was a member of the Bloods."

In its closing argument, the State noted that Mr. Berry, Mr. Black, and Ms. Wilson identified appellant as the shooter. The only witness who identified Mr. Smith as the

shooter was Ms. Ryan, but based on Ms. Ryan's demeanor, and the fact that she continued to change her story, she lacked credibility. Although witnesses testified that the shooter wore a red outfit at the time of the shooting, and Mr. Smith had worn red, so did appellant.

In response to the defense inference that Sergeant Owens failed to conduct an adequate investigation before dismissing Mr. Smith as a witness, the State noted that:

two people who were shot and two other eyewitnesses . . . say . . . [appellant] was the shooter . . . [Sergeant Owens] is a 22 year veteran. He can judge credibility just like you can. He found absolutely no evidence to support the original claim that Charles Smith was the shooter . . . he found Mr. Black, Ms. Wilson and Monty Berry to be credible witnesses [] to support [Mr. Smith]'s . . . assertions that [appellant] was the shooter.

Counsel stated that, Mr. Black did not immediately identify appellant as the shooter because he was in severe pain, and he had difficulty breathing.

Defense counsel argued that the State failed to meet its burden to show that appellant was guilty beyond a reasonable doubt. There were so many contradictory statements about the incident, but the first pieces of evidence gathered at the scene generally are the best evidence, and therefore, the statements given by Mr. Berry and Ms. Ryan within hours of the incident should be considered reliable. In that regard, he noted Mr. Berry's identification of the "smaller" black male as the shooter, and Ms. Ryan naming Mr. Smith as the shooter. Counsel concluded by stating that the evidence pointed to Mr. Smith as the shooter.

As indicated, following closing arguments, the jury found appellant guilty of multiple charges. This appeal followed.

STANDARD OF REVIEW

This Court has explained the standard of review for a trial court’s denial of a motion for mistrial as follows:

We review a trial court’s denial of a motion for mistrial for abuse of discretion. *Cooley v. State*, 385 Md. 165, 173 (2005); *Wilhelm v. State*, 272 Md. 404, 429 (1974); *Alston v. State*, 177 Md. App. 1, 6 (2007). A mistrial is “an extraordinary remedy and should be granted only ‘if necessary to serve the ends of justice.’” *Klaenberg v. State*, 355 Md. 528, 555 (1999) (quoting *Hunt v. State*, 321 Md. 387, 422 (1990)). *See also Garner v. State*, 142 Md. App. 94, 102 n.4 (2002). We will not reverse a trial court’s denial of a motion for mistrial “unless it is clear that there has been prejudice to the defendant.” *Wilhelm*, 272 Md. at 429. *Accord Cooley*, 385 Md. at 173; *Kosh v. State*, 382 Md. 218, 226 (2004) (“The determining factor as to whether a mistrial is necessary is whether ‘the prejudice to the defendant was so substantial that he was deprived of a fair trial.’”) (quoting *Kosmas v. State*, 316 Md. 587, 595 (1989)); [*Wilson v. State*, 148 Md. App. 601, 666 (2002)] (“The trial judge is in the best position to decide whether the motion for a mistrial should be granted. Accordingly, we will not interfere with the trial judge’s decision unless appellant can show that there has been real and substantial prejudice to his case.”).

Molter v. State, 201 Md. App. 155, 178–79 (2011) (quoting *Drake v. State*, 186 Md. App. 570, 587–88 (2009), *rev’d on other grounds*, 414 Md. 726 (2010)).

DISCUSSION

I.

Polygraph Testimony

Appellant contends that the circuit court erred in denying his motion for mistrial after Sergeant Owens testified that Mr. Smith passed a polygraph test. He argues that the testimony was “obviously inadmissible,” and it was especially damaging because his defense hinged on establishing that Mr. Smith was the shooter, and hearing that Mr. Smith

passed a polygraph test permitted the jury to infer that Mr. Smith was honest with the police and was not the shooter.

Although the court gave a curative instruction, appellant contends that the prejudice created by the damaging testimony could not be cured, noting that the trial court recognized the inability of the jury to disregard the mention of the polygraph result.⁹ In any event, appellant argues that the curative instruction only aggravated the prejudice because it highlighted for the jury that “it was because of the results of the polygraph examination that [Sergeant] Owens chose to pursue a different direction in the investigation.”

The State argues that the trial court properly exercised its discretion in denying appellant’s motion for a mistrial in favor of giving a curative instruction. It notes that the testimony about the polygraph result was elicited by defense counsel through repeated questions regarding the tests Sergeant Owens conducted on Mr. Smith, and there was only one reference to Mr. Smith passing the polygraph test. Moreover, although Mr. Smith’s credibility was at issue, the entire case did not depend on him, and there was other evidence “implicating [appellant] and exonerating [Mr.] Smith,” including the identification of appellant as the shooter by Mr. Black, Ms. Wilson, and Mr. Berry. The State asserts that, to the extent that appellant challenges the curative instruction, this contention is not preserved for review because appellant did not object after the instruction was given. In

⁹ Appellant notes that the court stated: “You can’t put milk back in a bottle after it’s spilled.”

any event, it asserts that the court was “within its discretion to determine that a curative instruction was sufficient to cure any prejudice.”

A.

Proceedings Below

Sergeant Owens’ testimony prompted defense counsel to move for a mistrial. His first motion was made during cross-examination of Sergeant Owens, after counsel attempted to show that the police investigation was inadequate, before eliminating Mr. Smith as a suspect. Sergeant Owens acknowledged that he did not test Mr. Smith for gunshot residue. Counsel then asked whether other tests were done on Mr. Smith before he was dismissed as a suspect within 24 hours of the incident. Sergeant Owens stated that a polygraph test was conducted. Counsel did not object but stated: “Okay. And in addition to that test, any other tests that you’ve done?” Sergeant Owens responded: “I think that’s it.”

Counsel then inquired about two different statements that Mr. Smith gave to the police. He established that the first statement that Mr. Smith gave, as well as the statement his brother gave, were false. When asked if he was concerned that these statements were not true, Sergeant Owens stated: “No, I wasn’t, because [Mr. Smith] had just taken a polygraph when I questioned him the second time.” Defense counsel continued down this line of questioning, asking whether he thought he should re-question other witnesses after Mr. Smith gave his second statement, and the following occurred:

[SERGENT OWENS]: After [Mr. Smith] passed a polygraph--

[DEFENSE COUNSEL]: Objection, Your Honor. I move for a mistrial.

Counsel advised the court that he did not know the results of the polygraph examination and thought that Detective Owens was “professional enough not to bring in the test results.” The court denied the motion and gave the following instruction to the jury:

Alright. Ladies and gentlemen, this is what I . . . it’s called a limited instruction. As a general rule, the mention of polygraphs, whether somebody has or has not taken them or been offered one, is not admissible as evidence in Maryland. You can’t put milk back in a bottle after it’s spilled. So the fact that this man says one was offered to an individual named Smith is, unfortunately, evidence in the case. It just happened too quick to do anything about it. It’s admitted only for the purpose of telling you that that was one of the reasons why this officer determined in his opinion that he was gonna believe [Mr.] Smith. You do not know, and there is no evidence in the case of whether or not Mr. Smith passed or failed it. So you can’t speculate on that. That’s the beginning and end of polygraphs in this case I hope.

At the end of Sergeant Owen’s testimony, defense counsel renewed his motion for a mistrial, arguing that appellant was prejudiced by the polygraph testimony. The court denied the motion, stating that the testimony “was incurred by the [d]efense.” Counsel again renewed its motion at the close of the defense case.

B.

Analysis

The general rule in Maryland is that evidence of a polygraph test is inadmissible. *Guesfeird v. State*, 300 Md. 653, 659 (1984). The reliability of the test has not been established, and the Court of Appeals has explained that, “[i]n our system of criminal justice, the trier of fact is the lie detector, and we have been steadfast in disallowing that

function to be usurped by a process we have not found to be trustworthy.” *State v. Hawkins*, 326 Md. 270, 275 (1992).

To warrant the extraordinary remedy of a mistrial, however, the reference to a polygraph test must be prejudicial to the defendant. *Guesfeird*, 300 Md. at 659. The Court of Appeals has referenced several factors that are relevant in determining whether a mistrial is the appropriate remedy when there is a reference to a polygraph test. Those factors include:

whether the reference to a lie detector was repeated or whether it was a single, isolated statement; 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. Accord *Kosmas v. State*, 316 Md. 587, 594–95 (1989). These factors are not the test to evaluate prejudice, but rather, they are helpful to the analysis regarding the test, i.e., “the resulting prejudice to the defendant.” *Guesfeird*, 300 Md. at 661.

Applying the requisite factors, there were two references to the polygraph test prior to the statement that Mr. Smith passed the test. Appellant objected, however, only to the last statement, which was solicited by defense counsel, as the trial court noted. In *Guesfeird*, however, the Court stated that, “[a]lthough the situation of a solicited reference certainly is more egregious, it is only one factor and is not the determinative test; the test is the resulting prejudice to the defendant.” *Id.*

The State does not dispute that Mr. Smith’s credibility was at issue, particularly given the defense theory that Mr. Smith was the shooter. It asserts, however, that “the

entire case did not depend on [Mr.] Smith and there was a great deal of other evidence implicating [appellant] and exonerating [Mr.] Smith,” including that Mr. Black and Ms. Wilson identified appellant, not Mr. Smith, as the shooter.

The State acknowledges that Sergeant Owens testified that Mr. Smith passed the polygraph test and suggested that this was the reason that he ruled out Mr. Smith as a suspect. This clearly was prejudicial to appellant.

Even assuming that the prejudice could be ameliorated by an effective curative instruction, the instruction here did not remove the prejudice. As indicated, the court instructed the jury that the polygraph evidence was not admissible, but it then instructed as follows:

You can't put milk back in a bottle after it's spilled. So the fact that this man says one was offered to an individual named Smith is, unfortunately, evidence in the case. It just happened too quick to do anything about it. It's admitted only for the purpose of telling you that that was one of the reasons why this officer determined in his opinion that he was gonna believe [Mr.] Smith. You do not know, and there is no evidence in the case of whether or not Mr. Smith passed or failed it. So you can't speculate on that.^[10] That's the beginning and end of polygraphs in this case I hope.

By telling the jury that the polygraph evidence, was admitted “only for the purpose of telling you that that was one of the reasons why this officer determined in his opinion that he was gonna believe [Mr.] Smith,” the court indicated that Sergeant Owens found Mr. Smith's version of events to be credible. Under these circumstances, we conclude that the

¹⁰ As indicated, there was evidence that Mr. Smith passed the polygraph test.

trial court abused its discretion in denying appellant's motion for a mistrial. He is entitled to a new trial.¹¹

**JUDGMENTS OF THE CIRCUIT COURT
FOR KENT COUNTY REVERSED. COSTS
TO BE PAID BY KENT COUNTY.**

¹¹ Based on our conclusion on this issue, we need not address appellant's second issue.