[Cite as *State v. Banner*, 2010-Ohio-5592.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94078

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MANU BANNER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515907

BEFORE: Jones, J., McMonagle, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 18, 2010

ATTORNEYS FOR APPELLANT

Ronald L. Frey
Ian N. Friedman
Ian N. Friedman & Associates, LLC
1304 West 6th Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Michael P. Graham
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Manu Banner ("Banner"), appeals his conviction for rape, kidnapping with sexual motivation specifications, and gross sexual imposition. Finding merit to the appeal, we reverse the case for a new trial.

{¶ 2} In 2008, Banner was charged with six counts of rape, five counts of kidnapping, and one count of gross sexual imposition. The case proceeded to a trial by jury, at which the following evidence was presented.

{¶ 3} "D.L."[1] was born on January 3, 1996. When he was seven years old his cousin, Banner, lived in a duplex in Lakewood. D.L. testified that one day when it was chilly outside and there were no leaves on the trees, he went with Banner to walk the dog. After the walk, Banner told D.L. to go into the garage. D.L. remembers a neighbor's van parked in the garage. Banner opened the van door and ordered D.L. inside and to take his pants off. Banner took his own pants off and anally raped D.L. D.L. just laid there because he was scared and Banner told him not to tell. D.L. testified he remembered white liquid coming out of Banner's penis. He stated that he did not tell anyone because he was scared and thought Banner "would do something to me."

{¶ 4} When D.L. was still seven years old, Banner tried to have D.L. perform oral sex on him by telling him to "suck it." He made D.L. touch his penis. D.L. also recalled Banner raping him in the basement of his (Banner's) house when he was seven years old. He testified that Banner got some "washing liquid," put it on his penis, and stuck his penis in D.L.'s rectum. D.L. testified that Banner raped him at least ten times in the garage at the Lakewood house.

{¶ 5} D.L. also testified that when he was eight, Banner anally raped him once at his grandmother's house, when the grandmother was not there.

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[1] We refer to the victim by his initials in accordance with this court's policy to use initials to identify victims in sexual assault cases.

{¶ 6} When D.L. was 12 years old, he went to see Banner's new house in Bedford. He went into the basement and Banner followed. Banner told D.L. to take his pants down and then anally raped D.L.

{¶ 7} D.L. recalled another time when he threatened to tell someone about what Banner had been doing to him and Banner became angry and yelled at D.L. "you better not tell." D.L. testified about another incident in which Banner came into his bedroom and asked D.L. if he "remembered what we used to do." D.L.'s younger brother came in and D.L. would not let his brother leave because he did not want anything to happen with Banner.

{¶ 8} D.L.'s mother testified that when D.L. was seven or eight, he complained that his "bottom" hurt. She took him to the doctor and the doctor recommended a sitz bath, but did not perform a physical examination. When she went to give him the bath, the mother noticed his bottom was red. Around the same time, the mother noticed D.L. "wasn't his normal self."

{¶ 9} A social worker testified that she handled the sex abuse investigation regarding D.L. and Banner. During her initial interview with D.L., he disclosed to the social worker that Banner had been raping him since he was seven years old. The social worker explained how she recommended follow-up services for D.L. and made unsuccessful attempts to interview Banner. She also stated that it was not unusual for child sex abuse victims, especially males, to delay in reporting their abuse and stated that 90 percent of the agency's cases have no medical evidence to support the abuse.

{¶ 10} The investigating detective testified that he interviewed D.L., who disclosed the abuse to him. He testified that D.L. was afraid, embarrassed, and emotional. The detective also had an opportunity to interview Banner. Banner spoke with the detective for over two hours, denying any abuse had occurred.

{¶ 11} The detective then testified after he interviewed Banner, he asked Banner if he wanted to take a polygraph test. As soon as the offer was made, the officer testified that Banner "immediately started shaking and his breath started shaking." Banner declined the detective's offer, telling him that "he was just extremely nervous all the time, so the test would be inaccurate if he took it."

{¶ 12} At the close of the state's evidence, the trial court granted defense's Crim.R. 29 motion for acquittal as to one count of kidnapping and one count of rape.

{¶ 13} In his defense, Banner testified that he turned himself into police because he is "not a criminal" and "had nothing to hide." He denied ever inappropriately touching his cousin. He admitted that there was a van in the Lakewood garage that was at times unlocked and that he had been alone with D.L. on occasion.

{¶ 14} The jury convicted Banner of three counts of rape, three counts of kidnapping with specifications, and one count of gross sexual imposition; the jury acquitted Banner of one count of kidnapping and one count of rape. The trial court sentenced Banner to a mandatory ten years on the three kidnapping charges; a mandatory term of life in prison on the three rape charges; and five

years for gross sexual imposition. The court further ordered the rape charges and the gross sexual imposition charge run consecutive to each other and to the kidnapping charges for an aggregate sentence of 35 years to life in prison.

{¶ 15} Banner now appeals, raising the following six assignments of error for our review:

> "I. The defendant-appellant's right to due process of law as guaranteed by Article I, Section 10 of the Ohio State Constitution and the Fourteenth Amendment to the United States Constitution was violated when testimony concerning his refusal to submit to a lie detector test was admitted.
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> "II. Testimony that the defendant-appellant was unwilling to submit to a polygraph examination violated his constitutional privilege against self-incrimination and right to post-arrest silence.
>
> "III. The defendant-appellant was denied his fundamental right to effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States of America and made applicable to the states by and through the Fourteenth Amendment to the Constitution of the United States of America.
>
> "IV. The defendant-appellant's right to due process was violated as a result of prosecutorial misconduct.
>
> "V. The state of Ohio failed to introduce sufficient evidence to sustain a conviction in violation of appellant's right to due process of law as guaranteed by Article I, Section 10 of the Ohio State Constitution and the Fourteenth Amendment to the United States Constitution.
>
> "VI. Appellant's conviction were against the manifest weight of the evidence and, therefore, his convictions were in violation of the Ohio State Constitution and the Sixth and Fourteenth Amendments to the United States Constitution."

Polygraph Test

{¶ 16} In the first and second assignments of error, Banner argues that the trial court erred when it allowed testimony regarding his refusal to submit to a polygraph test into evidence.

{¶ 17} We must first note that defense counsel did not object to any of the evidence admitted regarding the defendant's refusal to submit to a polygraph test. Our review, therefore, is for plain error. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240, the Ohio Supreme Court analyzed the plain error standard and stated:

{¶ 18} "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." (Internal citations omitted.)

{¶ 19} Thus, to find plain error in this case we must determine that the error in admitting the testimony regarding the polygraph test affected the outcome of the trial. This is a high burden to overcome, but we are convinced it has been met in this case.

{¶ 20} The results of a polygraph examination may be admissible at trial only under limited conditions. Those conditions were enunciated by the Ohio Supreme Court in *State v. Souel* (1978), 53 Ohio St.2d 123, 372 N.E.2d 1318.[2]

{¶ 21} Absent meeting these specific conditions, neither party may introduce the result of such an examination. Id. In *State v. Bates* (Apr. 1, 1982), Cuyahoga App. No. 43904, we stated that since "the results of polygraph tests are inadmissible and precluded from consideration by the jury, the mere offer or

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[2]The conditions are:

"(1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

"(2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

"(3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

"(a) the examiner's qualifications and training;

"(b) the conditions under which the test was administered;

"(c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,
"(d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

"(4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given." Id. at syllabus.

refusal to undergo such test should also be excluded because unwarranted inferences are likely to be drawn as to defendant's guilt or innocence." Id. citing *State v. Hegel* (1964), 9 Ohio App.2d 12, 222 N.E.2d 666; *State v. Smith* (1960), 113 Ohio App. 461, 465, 178 N.E.2d 605.

{¶ 22} Even a defendant's professed willingness to submit to a polygraph test is inadmissible and testimony concerning it can constitute prejudicial error. See *Smith* at 465 (admission of testimony relating to submission of accused to a lie detector test, even though results thereof are not disclosed, constitutes prejudicial error where no curative instructions were given); *State v. Miller* (Apr. 20, 1987), Tuscarawas App. No. 86AP060038.

{¶ 23} Courts have also found that curative directions to disregard testimony regarding polygraph tests may not undo the damage inflicted by the mention of the test. See *State v. Doren*, Wood App. No. WD-06-064, 2009-Ohio-1667; *Miller*; *Bates*; *State v. Harris* (Oct. 3, 1984), Hamilton App. No. C-830927. In *Doren*, the court found reversible error and determined that the defendant had demonstrated prejudice when the jury submitted written questions regarding the polygraph even after the court gave curative instructions and when the remaining evidence did not constitute overwhelming proof of guilt. In *Bates*, this court reversed the defendant's conviction even after the prosecutor withdrew two questions regarding a polygraph test and the court instructed the jury to disregard the question.

{¶ 24} In this case, the first mention of the defendant's refusal to take a polygraph test was during the direct examination of the detective. The prosecutor

inquired whether the detective had any more conversations with Banner, other than the initial interview. The detective answered that as Banner was accompanying him to the booking window, he offered Banner the opportunity to take a polygraph test, but Banner refused. The state did not ask any follow-up questions regarding the test or Banner's refusal.

{¶ 25} On cross-examination, defense counsel's sole question to the detective was about the polygraph test:

> Counsel: "* * * [H]ow many times in the last year did you make the decision not to present a case to the grand jury because the suspect had passed a polygraph test."
>
> Detective: "None."

{¶ 26} On re-direct, the polygraph test was again the only topic mentioned. The prosecutor asked the detective how many times in the last year had a suspect passed a polygraph test. The detective replied "none" and explained that every suspect he had asked declined to take the test. On re-cross, counsel inquired whether polygraph tests were admissible in Ohio, to which the detective testified they were not. On its second re-direct, the state continued to question the detective about the polygraph test, asking him "do you use polygraphs as an investigative tool?" The detective replied that it was one part of the investigation. The state then inquired "[a]nd would you consider whether or not somebody had passed it in your investigation, would you consider that in evaluating the case?" The detective responded with a lengthy answer stating that the results of a polygraph would be part of the "package" that goes to a prosecutor to evaluate

when determining whether and what charges to bring against a defendant. In sum, the entirety of the detective's cross-examination by defense counsel, two re-directs by the prosecutor, and defense counsel's re-cross examination dealt with the polygraph issue.

{¶ 27} No further mention of the polygraph test was made until the direct examination of Banner. Defense counsel asked what happened when Banner saw the detective. Banner offered that when he was headed back to his cell, the detective stopped him and asked him if he wanted to take a "lie detector test." Counsel inquired "[h]ow did that make you feel?" Banner proceeded to explain why he did not want to undergo a polygraph examination, stating that he would be putting his life in the hands of a toy or machine.

{¶ 28} During cross-examination of Banner, the state inquired if there were any parts of the detective's testimony with which he disagreed. Banner answered that he disagreed with the detective's statement that his (Banner's) demeanor changed when he was asked to take the test.

{¶ 29} After Banner testified and the defense rested, the state called the detective back to the stand as a rebuttal witness. The state again inquired about the polygraph test and Banner's demeanor during that time. During cross-examination of the detective, defense counsel elicited several answers about the offer to take a polygraph test and the state redirected with its own questions regarding the same. Again, the totality of the detective's rebuttal

testimony, both on direct and on cross-examination, dealt with the polygraph issue.

{¶ 30} On appeal, the state argues that it did not purposely or directly elicit testimony regarding the polygraph test. The state further maintains that the defense invited any error by raising the issue during the detective's initial cross-examination. We disagree. The issue was first raised by the detective during direct examination. Further, the state called the detective as a rebuttal witness, and the prosecutor specifically questioned him about Banner's demeanor after Banner declined to take the test. Banner's refusal to take the polygraph test was also detailed in the police report given to the state. We find it troublesome that a 22-year veteran of the police department, who easily testified that he knew polygraph tests were not admissible in a trial, introduced into evidence that Banner refused to take the test. We further find that the defense's questioning about the polygraph test was in response to the state making it an issue in the first place.

{¶ 31} We find that the unabated discussion of the issue during the trial rises to the level of plain error. Additionally, some of the responsibility must be placed upon the trial court judge who either ignored or overlooked the repeated errors.

{¶ 32} Our review of case law where no prejudice has been found were cases where any reference to a polygraph was fleeting or adequate curative instructions were given. *Doren*; *State v. Williams* (Mar. 26, 1997), Hamilton App. No. C-960296 (noting that a curative instruction is "often sufficient" to remove any

prejudice that might affect the trial's outcome). In this case, the references to the defendant's refusal to take the polygraph test were repetitive and at no time were curative instructions either requested or given. Simply put, the record is replete with inadmissible references to the polygraph test.

{¶ 33} As the First District Court of Appeals stated in *State v. Harris* (Oct. 3, 1984), Hamilton App. No. 830927:

{¶ 34} "The case sub judice turned on the credibility of the witnesses. The jury essentially had to choose to believe either the victim or appellant as to whether or not appellant committed the crimes charged. The evidence implying the results of the polygraph test may have improperly bolstered the credibility of the victim's testimony in the minds of the jurors. It is possible that the polygraph test was the deciding factor in the minds of some jurors. Under these circumstances, we find that the introduction of the evidence concerning the victim's polygraph test was highly prejudicial to the right of appellant and that no curative instruction could remove that harm that may have been done." Id. at 6.

{¶ 35} The law in Ohio is clear. Polygraph results are not admissible except under strictly controlled circumstances and any discussion of a defendant's willingness or refusal to take a polygraph test may not be allowed into evidence. Although there was some other equivocal testimonial evidence presented by the state that Banner molested his cousin, we cannot overlook the grievous errors on the part of the parties and the trial court in this case. As the court so well stated in *Hegel,* supra, "[a]lthough the loathsome nature of the alleged crime naturally

arouses indignation, the state nevertheless was required to rely upon competent evidence in the prosecution of the accused, and its failure to do so prevented the defendant from having a fair trial."

{¶ 36} Therefore, we find the trial court committed plain error in allowing the evidence in regarding Banner's refusal to take a polygraph test.

{¶ 37} The first and second assignments of error are sustained.

{¶ 38} Although the first and second assignments of error are dispositive of the appeal, we find that it is important to address Banner's claim that his counsel was ineffective. We note the record contains ample evidence to establish both prongs of a claim for ineffective assistance of counsel as set forth in *Strickland*. See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Banner claimed in his fourth assignment of error that the state engaged in prosecutorial misconduct. Upon reviewing the record, we note that the prosecutor's repeated questions about Banner's refusal to take the polygraph test and the prosecutor's comments regarding the polygraph test during closing arguments, were inappropriate.

Accordingly, judgment reversed and case remanded for a new trial.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR