IN THE MISSSOURI SUPREME COURT

STATE EX REL. SANDRA KEMPER,	)	
	)	
Relator,	)	
	)	
vs.	)	No. SC87246
	)	
THE HONORABLE	)	
DAVID LEE VINCENT,	)	
CIRCUIT JUDGE,	)	
21ST JUDICIAL CIRCUIT,	)	
	)	
Respondent.	)	

ON PRELIMINARY WRIT OF PROHIBITION

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This action is one involving the question of whether the Respondent exceeded his jurisdiction in declaring a mistrial, sua sponte, after a determination that manifest necessity existed and setting the case for re-trial; and whether Respondent abused his discretion by denying Relator's Motion to Dismiss for lack of subject matter jurisdiction in that a re-trial is barred by the double jeopardy clause of the United States Constitution and the Missouri Constitution.

This Court has jurisdiction of the matter pursuant to Article V, Section 4 of the Missouri Constitution, and Sections 476.070 and 530.020 of the Missouri Revised Statutes.

STATEMENT OF FACTS

Trial commenced in the case of State vs. Sandra Kemper on September 12, 2005 for events occurring on November 16, 2001. Respondent is the presiding judge over the case of State v. Sandra Kemper, Cause No. 02CR-001525, in Division No. 9 of the 21st Judicial Circuit (St. Louis County). Relator, Sandra Kemper is a criminal Relator charged with Count I – Murder First Degree (by means of arson), Count II – Arson First Degree, Count III – Assault First Degree, Count IV – Assault First Degree, and Count V – Assault First Degree. **(Relator hereinafter refers to Relator or her trial counsel)**.

The State presented evidence through Detective John Raines, an eighteen-year veteran of the St. Louis County Police Department with specialized training and certification in fire investigation. (A.104-105 from Supplemental Appendix of Respondent). Det. Raines testified that he responded to the scene of the fire at issue to do a cause and origin investigation and arrived while the fire department was still doing fire suppression. (A.107 from Supplemental Appendix of Respondent). Det. Raines noted a V pattern of burning as a way of determining the origin and pace of the fire. (A.122-126 from Supplemental Appendix of Respondent).

Det. Raines testified that he believed the trashcan in the laundry room was set on fire. (A.133, 210-211 from Supplemental Appendix of Respondent).

Det. Raines explained to the jury his method of conducting a fire investigation and why the fire was not accidental. (A.133-134, 155, 210-211 from Supplemental Appendix of Respondent). He also testified that he ruled out careless smoking as a cause of fire. (A.148-150, 152 from Supplemental Appendix of Respondent). He examined the deceased victim's body which was located in the basement area where the fire started, as part of his investigation and was able to determine that the victim was breathing at the time of the fire because the victim had smoke and soot around his mouth. (A. 131 from Supplemental Appendix of Respondent). Det. Raines explained why the version of events told to him at the scene by Relator as to her attempted rescue of victim was not plausible and he turned the scene over to homicide detectives. (A.153-154 from Supplemental Appendix of Respondent).

Det. Raines testified that after the fire he received additional information that furthered the fire investigation. (A.160 from Supplemental Appendix of Respondent). Specifically, that police received information that the Relator was associated with three previous fires, evidence that the

trial court ruled inadmissible. (A.16 from Appendix to Relator's Brief); (A.231-236 from Supplemental Appendix of Respondent).

Det. Raines testified that homicide detectives consulted with him as a technical advisor when Relator was later being interviewed about how the fire started on November 16, 2001. (A.161 from Supplemental Appendix of Respondent). The evidence showed that Relator had confessed to intentionally setting the fire during the course of a polygraph examination and subsequent interviews. (A.226 from Appendix to Relator's Brief); (A.237-262 from Supplemental Appendix of Respondent).

Respondent made a pre-trial ruling on January 12, 2005, allowing evidence concerning the polygraph examination as it related to whether the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement if the State introduced any of Relator's statements. The trial court's ruling was in response to Relator's position that the polygraph evidence was admissible to show the confession was coerced. The trial court's order, however, did not include nor contemplate the use of the polygraph results and there is no court order that granted Relator or the State the right to present and introduce the results of a polygraph examination at trial. (A.16 from Appendix to Relator's Brief).

Relator gave an opening statement and told the jury that Relator's confession was not freely and voluntarily made under all circumstances surrounding and attending the making of the confession. Relator discussed the results of Relator's polygraph examination in her opening statement. (A.2-3 from Supplemental Appendix of Respondent). Relator repeatedly referred to the polygraph evidence while cross-examining the State's witness, Sgt. Melissa Webb. (A.227 from Appendix to Relator's Brief). Relator represented to the jury through her cross-examination of Sgt. Webb that it was only fair that the jury should have seen the polygraph evidence when the State presented evidence of Relator's audio taped confession during the State's direct-examination of Sgt. Webb. (A.226 from Appendix to Relator's Brief). The State objected in open court stating that Relator was fully aware that the State of Missouri could not elicit testimony about a polygraph examination. Relator, also speaking in open court responded, that the State's legal objection was absolutely untrue and that she has begged and pleaded with the trial court for a couple of years to have the State present the whole case (including polygraph results). The court sustained the State's objection as to form noting that Relator was asking for a legal conclusion and possibly work product. (A.227 from Appendix to Relator's Brief).

Relator proceeded to state, in leading question form to Sgt. Webb that it was true that Relator was hooked up to a polygraph machine and; did Sgt. Webb know that the police polygraph interviewer repeatedly told Relator that she had failed the polygraph test when in fact she did not. (A.227 from Appendix to Relator's Brief).

For the first time, on re-direct the State mentioned a polygraph examination. The State asked Sgt. Webb about Relator's request to take the polygraph examination to exonerate herself and her spouse Steven Kemper. (A.230 from Appendix to Relator's Brief). The State elicited from Sgt. Webb that Detective Schunzel, the polygraph examiner had told Sgt. Webb that Relator showed deception. (A.231 from Appendix to Relator's Brief).

After Sgt. Webb's testimony and outside the presence of the jury with counsel and Relator present, the court stated that it was its intention to note that results of polygraph examinations are not admissible in a Missouri court of law. The court further noted that the State may have opened the scope of the issue when examining Sgt. Webb on the signs of deception and Relator would be able to respond to the signs of deception. (A.231-232 from Appendix to Relator's Brief).

Relator moved for a judgment of acquittal at the close of the State's evidence which was denied since Respondent determined that the State had presented a submissible case without evidence of the polygraph examination. There was a determination by the fire investigator that the fire was intentionally set and Relator confessed to setting the fire being motivated by financial distress and wanting financial gain from fire and life insurance. Relator made admissions to homicide detectives who did not administer the polygraph examination. (A.209-213 from Appendix to Relator's Brief); (A.237-262 from Supplemental Appendix of Respondent).

On September 19, 2005, Relator presented testimony from a polygraph expert, David Raskin. Evidence was presented to the jury that David Raskin invented the computerized polygraph; that Relator's expert had generated polygraph studies concerning convicted psychopaths and that he had tested the "very famous serial killer" Theodore Bundy and Bundy failed the polygraph examination. (A.24 from Supplemental Appendix of Respondent).

The State objected to this line of questioning and the court was asked to instruct the jury to disregard the results of any other polygraph tests. The objection was sustained and the jury so instructed. (A.25 from Supplemental Appendix of Respondent).

While under direct examination, Relator's polygraph expert was questioned about the results of the Relator's polygraph test administered by the police polygraph interviewer. (A.34 from Supplemental Appendix of Respondent). Relator's polygraph expert stated that the Relator clearly did not have a deceptive result and Relator then reminded the jury that her polygraph expert invented the computerized polygraph. Relator's expert stated that Relator was "close to a clear definite truthful result of the (polygraph) test and far from a deceptive result." (A.36-37 from Supplemental Appendix of Respondent). Relator elicited evidence from her polygraph expert that the Relator was being truthful when she denied any involvement in the fire at issue and once again Relator was eighty-eight per cent truthful in her denial. (A.64-65 from Supplemental Appendix of Respondent).

Relator then played portions of videotaped polygraph examination and interviews with her expert (Raskin) providing commentary. Once again, testimony was elicited by Relator that Relator passed the polygraph examination. (A.77 from Supplemental Appendix of Respondent). Relator's polygraph expert went on to testify as to the *chilling effect* on a person if they are telling the truth and told they failed *especially if it's an important matter like this and their life is on the line*. (A.77 from Supplemental Appendix of

Respondent). Relator then elicits from her polygraph expert that the Relator had a polygraph test score showing eighty-eight per cent out of a hundred chances that she is telling the truth. (A. 88 from Supplemental Appendix of Respondent).

On cross-examination, the State asked David Raskin if he knew that polygraph evidence is inadmissible in the State of Missouri. (A.93-94 from Supplemental Appendix of Respondent). Relator objected as to relevance and that the State was asking for a legal conclusion. The court overruled and the witness answered. David Raskin indicated that in some proceedings it is allowed and he had personally testified approximately forty-five times in courts of law before juries. (A.94 from Supplemental Appendix of Respondent). The State then asked David Raskin whether he knew the reason why polygraph examinations and results are inadmissible. Relator objected stating the question presented was asking the polygraph expert to speculate. The objection was overruled. David Raskin responded that he had written a lot and lectured on the subject and it was his opinion that the early history of polygraph produced a lot of problems; looking at charts, making decisions and using it for confessions along with a low level of technical sophistication and high level of error. The courts would be remiss if they allowed that in, per David Raskin. (A.95 from Supplemental Appendix of Respondent).

Raskin went on to state, *however, it is his belief and "shown by extensive scientific research that many courts believe that polygraph evidence is something that juries are incapable of dealing with in any reasonable way That it overwhelms them (juries). They (juries) are not able to exercise any independent judgment as to the quality of the evidence. And that is absolutely wrong, from the science. So the courts have not read the science. And they (courts) worry because they have always worried about that with all kinds of experts. And yet they (courts) admit evidence in other fields, which are probably overwhelming to juries, such as DNA evidence. So it doesn't even make any sense. It's wrong scientifically and it's wrong procedurally. So I think there will come a day, perhaps, that the courts will recognize this and realize that it's a very useful aid to the triers of fact."* (A.95-96 from Supplemental Appendix of Respondent).

On September 20, 2005, after discussion with both counsel and with Relator present, a mistrial was declared, sua sponte due to manifest necessity. (A.232-237 from Appendix of Relator's Brief). Relator filed a motion to dismiss for lack of subject matter jurisdiction (double jeopardy), which was denied by Respondent on October 6, 2005. (A.21-23 from Appendix of Relator's Brief).

I.

RESPONSE TO RELATOR'S POINTS RELIED ON

Relator is not entitled to an order prohibiting Respondent from taking any action other than vacating the order of October 6, 2005 because Respondent did not error when declaring a mistrial sua sponte wherein Relator presented evidence of polygraph examination results and a polygraph expert testified about the results of Relator's polygraph examination which is inadmissible evidence because polygraph examinations lack scientific support for their reliability and Respondent determined that the improper evidence before the jury was so prejudicial and impressive that its improper influence could not be removed by an admonishment or instructions to the jury to disregard the inadmissible evidence which created a manifest necessity to warrant a mistrial and therefore respondent is not barred from retrial under the double jeopardy clause.

ARGUMENT

A. A MANIFEST NECESSITY TO DECLARE MISTRIAL

During the jury trial that commenced on September 12, 2005, Relator purported to offer polygraph examination evidence to show that the Relator's confession was not freely and voluntarily made under all circumstances surrounding and attending the making of the confession. Relator had confessed to a polygraph examiner during the course of a polygraph examination and subsequent interviews. Relator offered this evidence pursuant to Missouri Approved Instructions, MAI-CR 3d 310.06, which provides:

> "Evidence has been introduced that the defendant made certain statements relating to the offense for which she is on trial.
>
> If you find that a statement was made by the defendant, and that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you may give it such weight as you believe it deserves in arriving at your verdict.
>
> However, if you do not find and believe that the defendant made the statement, or if you do not find and believe that the statement was freely and voluntarily made under all of the

circumstances surrounding and attending the making of the statement, then you must disregard it and give it no weight in your deliberations." MAI-CR 3d 310.06 (modified).

Respondent cited legal support for Relator's limited use of polygraph evidence at trial. The United States Supreme Court ruled in Crane vs. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (U.S. 1986), that a jury was entitled to hear evidence regarding the circumstances under which said confession was given to determine the confession's credibility. Evidence surrounding the making of a confession bears on its credibility as well as its voluntariness. Id. 476 U.S. at 688. Furthermore, as persuasive authority, the Kentucky Supreme Court in Rogers v. Commonwealth, 86 S.W.3d 29 (Ky. 2002) reversed a trial court's refusal to allow a defendant to present evidence of a polygraph examination in circumstances surrounding the making of a confession. Kentucky, like Missouri, has a long-standing rule excluding evidence of polygraph results and references to polygraph examinations. Id. at 38, citing Morton vs. Commonwealth, 817 S.W.2d 218, 222 (Ky. 1991); also see State v. Biddle, 599 S.W.2d 182 (Mo.banc 1980).

Respondent's pre-trial ruling on January 12, 2005, allowed evidence concerning the polygraph examination as it related to whether the statement was freely and voluntarily made under all of the circumstances surrounding

and attending the making of the statement if the State introduced any of Relator's statements and was in response to Relator's position that the polygraph evidence was admissible to show Relator's confession was coerced. The pre-trial order did not specifically address introducing the results of a polygraph examination. The law in Missouri is clear that polygraph results are inadmissible. State v. Biddle, 599 S.W.2d 182 (Mo.banc 1980).

The State consistently objected to any mention of the polygraph examination evidence throughout the course and scope of the underlying trial arguing that the polygraph pre-test, examination, post-test and results were inadmissible under Missouri law. Id at 191; State v. Hall, 955 S.W.2d 198, 207 (Mo. App.1997); (A.1-15 from Appendix of Relator's Brief). The State did not introduce at any time during the trial the issue of a polygraph examination and consistently objected to all evidence related to the polygraph examination and the testimony of David Raskin, Relator's polygraph expert. The State's position was that "polygraph examination results are not admissible in Missouri and that it is inappropriate to present any evidence related to a polygraph examination, even when the results are not admitted." State v. Hall, 955 S.W.2d 198, 207 (Mo banc. 1997).

In Hall, during the penalty phase of his murder first-degree trial, the Defendant sought to introduce evidence that he passed a polygraph examination as a mitigating factor. The trial court ruled that the polygraph was inadmissible. The Missouri Supreme Court stated, "It is also inadmissible to introduce whether or not a polygraph test has been taken even if the results are not offered into evidence." Id. at 207. Based on Hall, the State argued that the results of the polygraph examination are inadmissible even if the Relator passed the examination. The State never injected the issue of polygraph results at trial.

Relator first mentioned polygraph results during her opening statement when she told the jury "you'll hear expert testimony from Dr. Raskin, world renowned, worked on Patty Hearst case, the Ted Bundy case, and primarily testified on behalf of the government." Relator further told the jury that despite the fact that the Detective told Relator that she flunked the polygraph, she didn't flunk the test and that she was not deceptive. (A.2-3 from Supplemental Appendix of Respondent).

The next mention of polygraph examination results was during Relator's cross-examination of Sgt. Webb. Relator introduced the polygraph examination and test results evidence by putting forth in leading question form to Sgt. Webb that Relator was hooked up to the polygraph equipment by

another Detective and this should be known to the jury, out of a sense of fairness; that as the triers of fact, they should see it all, that it should be made known to the jury. (A.226 from Appendix of Relator's Brief). In open court, the State objected stating, "the defendant (Relator) knows full well that the State of Missouri cannot elicit testimony about a polygraph examination." Relator responded with "Your Honor, that is absolutely untrue. I have begged and pleaded this court for a couple of years to have the State present the whole case." The trial court sustained the State's objection and added that Relator was asking for a legal conclusion and possibly work product. (A.227 from Appendix of Relator's Brief).

The adverse inference raised by Relator that the State was hiding admissible evidence for a couple of years, could not be overlooked. Under the doctrine of curative admissibility, the State only on re-direct of Sgt. Webb inquired about the polygraph examiner's conclusion that Relator was deceptive. (A.230-231 from Appendix of Relator's Brief). Relator first introduced evidence about Relator's polygraph examination and results during her cross-examination of Sgt. Webb, a homicide detective who did not administer the polygraph. Relator inquired of Sgt. Webb on more than ten occasions about the Relator taking the polygraph examination or the results of Relator's polygraph examination. (A.217-227, 229 from Appendix of

Relator's Brief). In State v. Phillips, 939 S.W.2d 502 (Mo.App. 1997), under the doctrine of curative admissibility, where the defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue the defendant injects. The defendant must first introduce evidence, though it might be technically inadmissible evidence. Id. at 505.

The results of a polygraph examination are inadmissible in a Missouri court of law, even if the parties stipulate to their admission. Biddle at 191. Relator presented inadmissible evidence of the results of the polygraph examination contrary to Biddle and contrary to the limited purpose of whether defendant's statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement.

The record will show that Relator repeatedly elicited specific testimony about the polygraph results and that the Relator had a score of 88% showing Relator's truthfulness. (A.64-65, 77, 88 from Supplemental Appendix of Respondent). In State v. Taylor, 663 S.W.2d 235, 241 (Mo.banc 1984) a psychiatrist was allowed to testify that a victim suffered from "rape trauma syndrome" as a result of a rape by defendant. This Court reversed defendant's conviction and ordered a new trial ruling that the

expert's testimony went too far. "The expert's testimony was not sufficiently based on a scientific technique, which was either parochially sound or rationally accepted, to overcome the inherent danger of prejudice created by his status as an expert." Id. at 241. "Admission of scientific evidence depends on wide acceptance in the relevant scientific community of its reliability." Id. at 239. Missouri courts have never accepted, as a matter of law, the reliability of polygraph examinations. Biddle at 189.

The rule in Missouri is that expert opinion testimony should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved. The evidence must aid the jury. "A jury is competent to determine credibility." Taylor at 241. See also State v. Link, 25 S.W.3d. 136 (Mo.banc 2000). Although Respondent gave Relator some latitude during her direct examination of Relator's polygraph expert, David Raskin, Relator elicited testimony directly commenting on the Relator's credibility thus invading the province of the jury in determining the credibility of the witnesses. (A.36-37, 64-65, 77, 88 from Supplemental Appendix of Respondent).

"Evidence of polygraph results raises another concern which cuts to the very heart of the jury system. Unlike other scientific evidence, which

may be used to identify an individual or object allegedly involved in the perpetration of a criminal act, polygraph evidence purports to settle the sole issue reserved for the jury in a criminal case. There is no place in our jury system for a machine or an expert to tell the jury who is lying and who is not." Biddle at 190. "Otherwise, trials could degenerate to a battle of experts expressing opinion on the substance of witness' veracity." Taylor at 241.

The record clearly refutes Relator's continued argument to the Respondent that the polygraph examination evidence was presented to illustrate the coercive tactics by police and not to show that the Relator was truthful. (A.236 from Appendix to Relator's Brief). Relator repeatedly elicited evidence from a polygraph expert that the Relator was being truthful when she denied setting the fire. Clearly the expert's specific statement that Relator was being truthful when she denied setting the fire was an express opinion about her credibility and the expert's entire testimony carried with it an implied opinion that Relator was telling the truth which was a direct comment on the guilt or innocence of Relator. (A.36-37, 64-65, 77, 88 from Supplemental Appendix of Respondent). The general rule that while an expert may express an opinion regarding an ultimate issue in a case, the

expert may not express an opinion on the guilt or innocence of the defendant. State v. Jaco, 156 S.W.3d 775 (Mo.banc 2005).

Relator's polygraph expert's testimony that Relator was truthful (88%) was of no real benefit to the jury but was unfairly prejudicial by giving the polygraph evidence an air of scientific legitimacy which the Missouri courts say the polygraph does not possess. If Relator's position was that the police were coercive in their interrogation of Relator, cross examination is an adequate tool and closing argument gives Relator a forum to develop her theory with which a jury is capable of understanding without a polygraph expert guiding them on the ultimate issue of credibility.

It was clear to Respondent that the jurors were confused and would be unable to disregard the polygraph testimony presented by the Relator. The polygraph expert testified that he invented the computerized polygraph (A.23 from Supplemental Appendix of Respondent); he worked on Patricia Hearst case, John Delorean case, Hillside Strangler case, Louise Woodward case, Jeffrey MacDonald case (A.14 from Supplemental Appendix of Respondent); and personally did polygraph and test results for "famous serial killer Ted Bundy" who failed the polygraph test (A.24 from Supplemental Appendix of Respondent). The jurors were allowed to take notes during the trial and the unwarranted reliance by the jury on the

inadmissible evidence made giving an admonition or a curative instruction ineffectual.

The Court of Appeals found it necessary to discharge the jury in State v. Franks, 702 S.W.2d 853, 856. (Mo.App.1985), holding that the State as well as a Defendant has the right to a fair impartial jury. In Franks, a juror came forward after the jury had been impaneled and sworn and told the court that a deputy sheriff had mentioned to four other jurors the previous evening that this case had been tried twice before and ended with a hung jury each time. The juror said that these four had expressed immediate concern as to the possibility of reaching a verdict since two other juries had failed previously and that the information had been conveyed to all other jurors by breakfast the following day. The trial judge in his discretion determined that manifest necessity existed, aborted the trial and dismissed the jury telling them that the information they had received may make it impossible to be fair and impartial and may confuse the jurors to an extent that would affect their judgment. The appellate court stated, "We shall defer to the trial court's discretion." Id. at 856.

In Aguilar, on cross-examination by counsel for defendant, counsel elicited irrelevant, prejudicial evidence about a co-conspirator's acquittal in a companion case. Although the trial court did not grant a protective order

forbidding inquiry into co-conspirator's trial, the trial court stated that it was sure that counsel knew that the outcome in co-conspirator's case was irrelevant. The trial court granted State's motion for a mistrial. State v. Aguilar, 478 S.W.2d 351, 353 (Mo.banc 1972). The trial court stated that the reference to a companion case being dismissed was so prejudicial to the State's case that there would be no relief that could erase the matter from the minds of the jury and that it's a matter that is sufficiently prejudicial that in the trial court's discretion a mistrial was a manifest necessity. Id. at 353. This Court held that the trial court did not abuse its discretion by granting a mistrial and for that reason Appellant was not subjected to double jeopardy in violation of constitutional standards. Id. at 355.

Whether a mistrial is required to protect the interest of the public in having a fair trial which will result in a just judgment is a matter of discretion on the part of the trial court, limited only by the concept that there must be manifest necessity to abort a trial over the objection of defendant. Aguilar citing United States v. Jorn, 400 U. S. 470 (1971).

"In the exercise of discretion the trial court can and should consider that when such prejudicial matters are intentionally injected into a case and the trial is permitted to continue, in the event of an acquittal because of the prejudicial matter being presented to the jury, the State has no right of appeal

to obtain a new and fair trial." Aguilar at 355. "Another, unquestionably and important factor is the need to hold litigants to standards of responsible professional conduct in the clash of an adversary criminal process." Id. at 355. Relator's presentation of wholly inadmissible, prejudicial and impressive polygraph evidence and results, violated this valued principle of the adversary criminal process.

Perhaps Relator misunderstood the law regarding polygraph examination results if she believed that the January 12, 2005 pre-trial court order allowed admission of all polygraph evidence to include its results. State v. Biddle, 599 S.W.2d 182 (Mo.banc 1980). Relator stated in the hearing of the jury, that the law permitted the polygraph evidence and results. (A.226-227, 229 from Appendix to Relator's Brief). However, Relator did not give a sufficient response when Respondent inquired, "How did you convince me to allow this evidence (polygraph test results) in?" and "What case law were you relying on when you convinced me to allow this evidence?" just prior to Respondent ordering a mistrial. (A.232-233 from Appendix to Relator's Brief).

The purpose of the court's pre-trial ruling of January 12, 2005, denying the State's Motion to Exclude Evidence of Polygraph if the State offers any other statement by the Relator was to allow Relator to present the

taped interview of the polygraph examination to the jury, excluding prejudicial propensity evidence regarding other previous fires where it was alleged Relator had knowledge. Relator would have been able to present essentially most of the polygraph interview to the jury, including the polygraph examiner's accusations that respondent "is lying." Respondent did not specifically address the polygraph results in the pre-trial order since there was no Missouri case cited by either counsel allowing the admission of the results of a polygraph examination.

The court announced its intention to exclude any mention of polygraph test results after the testimony was before the jury. Both Relator and the State informed the Respondent that they understood that if the audio taped statements of the Relator's confessions were offered into evidence by the State that the Respondent was allowing unlimited testimony of the polygraph evidence. The State had launched a continuous objection to all polygraph evidence and Relator never provided any authority for an exception to State v. Biddle.

Relator's reliance on State v. Baldwin, 808 S.W.2d 384 (Mo.App. 1991) and State v. Mick, 546 S.W. 508 (Mo.App.1976) as dispositive to issues in this case is misplaced. Both Baldwin and Mick address curative admissibility. In Baldwin, defendant inferred that she was interrogated for

four hours straight without food or water, not allowed to leave and told that she was lying after taking a polygraph test. The trial court allowed the State to elicit testimony from a police witness as to why the interrogation lasted so long to rebut the adverse inference raised by the defense. The **results** of the polygraph examination were **not admitted**. Id at 388. In Baldwin, the State did not present evidence of polygraph results and limited its evidence to one witness to explain the routine that the polygraph pre-test could require two hours, otherwise the jury could adversely infer that the defendant was subjected to four hours of unrelenting interrogation without food or drink until she told her interrogators what they demanded. Id. at 391. Mick is a case decided pre-Biddle, when parties could stipulate to polygraph tests and results and is not the current law in Missouri.

B. RETRIAL NOT BARRED

Retrial is necessary because the jury was unable to disregard the inadmissible polygraph evidence creating the manifest necessity to discharge the jury. The law invests courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. US v. Perez, 22 US 579, 580 (1824).

It is up to the courts, and not the parties, to protect the integrity of the jury system. See, e.g., State v. Biddle at 191. Relator claimed in her motion to dismiss for lack of subject matter jurisdiction that her retrial is barred by the double jeopardy clause. The double jeopardy clause generally bars a retrial where a judge orders a mistrial in a previous trial without the defendant's consent, unless there was a manifest necessity for the declaration of a mistrial. State v. Lee, 948 S.W.2d 627, 629 (Mo.App.1997). Clearly, there was a manifest necessity for the mistrial when Relator presented the inadmissible and prejudicial polygraph results to the jury and therefore Relator's retrial is not barred by the double jeopardy clause.

Furthermore, in State v. Creamer, 161 S.W.3d 420, 425 (Mo.App.2005) a "declaration of mistrial and subsequent retrial will not

violate double jeopardy if justice would not have been served by continuation of the original proceedings." Id. at 425. It was evident during the trial of this matter that justice would not have been served by continuation of the original proceedings. Respondent was in a position to observe the jury and it was obvious the jury was thoroughly confused and could not disregard the improper and inadmissible evidence offered by Relator, prejudicing the rights of the parties to a fair trial.

It would have been unreasonable for Respondent to expect the jurors, who were taking notes and presented inadmissible evidence in the form of polygraph examination results, to disregard said evidence. The Court of Appeals reversed the trial court in a civil judge-tried domestic dispute, holding that polygraph tests and results are still inherently unreliable and not admissible even in a trial to the court and that the aggrieved party had been prejudiced by the admission of the polygraph results and retrial was necessary. Boling v. Boling, 887 S.W.2d 437, 440 (Mo.App.1994). The Court of Appeals further noted in Boling that there was a danger of uwarranted reliance of polygraph results with a jury. Id. at 440.

In State v. Rayner, 549 S.W.2d 128, 131-133 (Mo.App.1977), the court held "[W]hen inadmissible evidence saturates the State's case with prejudice it cannot always be purged by the simple expedient of instructing a

jury to disregard it. The attendant delay and cost of a new trial vis-à-vis preservation of the integrity of a fair trial as contemplated by our system of justice never becomes an issue in a criminal case. Delay and cost occasioned by a new trial, however, regrettable, must always yield to a fair trial." Id. at 133.

In Rayner, the trial court improperly allowed the State to introduce statements of a co-conspirator that were made subsequent to the commission of a crime. The testimony inculpated defendant and was permitted to stand during the course of the testimony of two more witnesses called by the State and during a noon recess. When the trial resumed following the noon recess, the trial court concluded that it had erred in permitting the testimony. The trial court refused to grant a mistrial and orally instructed the jury to disregard the officer's testimony insofar as it pertained to the co-conspirator's statements. The trial court's judgment was reversed and remanded for a new trial based on the prejudicial effect of the inadmissible testimony. Id. at 131.

In the case at issue, Respondent realized the error in permitting the testimony about the polygraph examination results. The record will reflect that the inadmissible polygraph evidence presented to the jury through the testimony of Relator's polygraph expert was offered for the improper

purpose to emphasize to the jury that the Relator was telling the truth when she denied setting the fire. The fact that considerable time elapsed before Respondent called a mistrial made it difficult to perceive that the inadmissible evidence was not indelibly planted in the jurors' mind. The jurors first heard of polygraph examination results on September 13, 2005 during Relator's opening statement. The jurors next heard of polygraph examination results during Relator's cross-examination of Sgt. Webb on September 16, 2005. Relator's polygraph expert then testified extensively about the Relator's polygraph examination and results on September 19, 2005.

In Rayner, the court stated "where incompetent evidence is admitted of a character highly prejudicial to the rights of the defendant, the error is generally not cured by a withdrawal instruction." Id. at 132. The Court of Appeals in Rayner construed State v. Burchett, 302 S.W.2d 9 (Mo.banc 1957) and State v. Benson, 142 S.W.2d 52 (Mo.banc 1940) as addressing the question whether the trial court's instruction to the jury to disregard inadmissible evidence was a sufficient antidote. The court held "that construed together, *Burchett* and *Benson* appear to compositely hold that if the character of this inadmissible evidence is so highly prejudicial or impressive that an appellate court cannot say as a matter of law that a

withdrawal instruction cured it, then a new trial is the only panacea." Rayner at 132.

The rule as it applies to prejudicial inadmissible evidence should apply to all parties. The inadmissible evidence of Relator's polygraph examination results was of such a "prejudicial" and "impressive" nature because it had a direct bearing upon the Relator's credibility in the eyes of the jury. The error in admitting the polygraph examination results could not be rectified by an admonition or curative instruction. Respondent had a lengthy discussion on and off the record with both counsel and gave careful consideration to alternatives to a mistrial before deciding that there was no other viable option herein; and a mistrial was then ordered. Justice would not have been served by a continuation of the proceedings and there was indeed a manifest necessity for the September 20, 2005 mistrial due to the Relator's presentation of the inadmissible polygraph results to the jury.

Under the circumstances of the trial at issue, the Respondent could not expect to expunge the highly "prejudicial" and "impressive" inadmissible polygraph examination results from the minds of the jurors. "[H]ow do you unring the bell?" Rayner at 133.

STANDARD OF REVIEW

Relator's Petition for Writ of Prohibition should be denied because the trial court acted within its jurisdiction to declare a mistrial when the trial court determined that a manifest necessity existed due to Relator's presentation to the jury of inadmissible evidence of polygraph results. On a petition for a writ of prohibition, review of this Court is limited to whether the trial court acted without jurisdiction or acted in excess of its jurisdiction. Norwood vs. Drumm, 691 S.W.2d 238, 241 (Mo.banc 1985).

The trial court in denying Relator's Motion to Dismiss for Lack of Jurisdiction because of double jeopardy maintained jurisdiction over the underlying criminal matter. A trial court's ruling on a motion to dismiss is reviewable for an abuse of discretion. A trial court abuses its discretion when a ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Keightley, 147 S.W.3d 179 (Mo.App 2004).

CONCLUSION

In view of the foregoing, Respondent respectfully requests that this Court permanently deny Relator's Petition For Writ of Prohibition.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 6,661 words, exclusive of the sections exempted by 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

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Certificate of Service

I hereby certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage paid, on February 8th 2006.

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