[Cite as *State v. Hamon*, 2015-Ohio-887.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 12 CAA 12 0089
TIMOTHY S. HAMON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Court of Common Pleas, Case No. 11CRI 12 0657
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 11, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DOUGLAS DEMOLT Assistant Prosecuting Attorney CAROL HAMILTON O'BRIEN 140 North Sandusky Street Delaware, OH 43015	STEPHEN HARDWICK Assistant Public Defender 250 E. Broad St., Ste. 1400 Columbus, OH 43215

Gwin, P.J.

{¶1} Appellant, Timothy Hamon ["Hamon"], appeals from the November 21, 2012 judgment entry of the Delaware County Court of Common Pleas declaring a mistrial and granting appellee State of Ohio a new trial.

Facts and Procedural History

{¶2} On December 22, 2011, Hamon was indicted on three counts of rape of a child felonies of the first degree in violation of R.C. 2907.02 and three counts of gross sexual imposition with a child less than 12 years of age, felonies of the third degree in violation of R.C. 2907.05(B).

{¶3} On June 22, 2012, Hamon filed a motion requesting the trial court order the state to stipulate to the use of a polygraph test and for permission to submit polygraph evidence. The trial court not only considered Hamon's written motion, but also heard arguments from counsel. The court advised counsel that evidence of a polygraph examination was not admissible and ruled that Hamon could not bring up the polygraph issue before the jury. The trial court reasoned, "the Court can't order you or the state to participate in a polygraph." (T. July 6, 2012 at 37-38).

{¶4} On July 13, 2012, the Court filed a Judgment Entry denying Hamon's motion for an order directing the state to enter into a stipulation for use of a polygraph, or alternatively, for an order permitting the introduction of evidence concerning the results of a polygraph to be administered to the defendant. The trial court's written order stated that,

> The Court is without authority to order the State of Ohio to enter into any stipulation, including a stipulation for the use of a polygraph. The

> Defendant has not yet taken a polygraph examination; therefore, any issue as to the admissibility of such test results is not yet ripe for motion at this time.

Judgment Entry filed July 19, 2012 at 4.

{¶5} A jury trial had begun in Hamon's case. During the state's case, while Defense Counsel was cross-examining Detective Kester, counsel asked the investigative officer the following questions:

> [Question]: Let me ask you this, is part of your investigation do you sometimes ask suspects if they are willing to take a polygraph examination?
>
> [Answer]: Yes
>
> [Question]: And did you do that in this case?
>
> [Answer]: I did

{¶6} The prosecutor requested permission to approach the bench. (4T. at 492). During the side bar conference, the state objected to the questions asked by Hamon's attorney. The jurors were then returned to the jury room so the matter could be addressed in open court and outside the hearing of the jurors.

{¶7} Outside the presence of the jury, the court reminded Hamon's counsel that polygraph evidence is not admissible without a stipulation by the parties, and defense counsel admitted that there was no such stipulation in this case. The court asked the counsel for the state if they wished to continue, or wished to have a mistrial, and counsel asked for time to confer, so the court called another recess.

{¶8} At the conclusion of this recess, the state suggested a curative instruction without giving an opinion on the necessity for mistrial. However, the court noted that no curative instruction could protect the state. The court again recessed to research the issues. The court once more took the bench outside of the presence of the jury to decide the matter of whether to declare a mistrial. Hamon's counsel argued to the court that his questions were proper and intended to show Hamon's actions (i.e. in agreeing to take a polygraph) were consistent with his proclaimed innocence. The trial judge was upset with counsel's disregard of its previous order concerning the polygraph evidence. Defense counsel objected "to the court raising its voice" and noted, "The jury can overhear what we are talking about in the courtroom." (4T. at 497). The defense further stated,

> Your Honor, it would be inappropriate to tell the jury that polygraphs are inadmissible in Ohio, it's not the law.

4T. at 500.

{¶9} The trial court declared a mistrial,

> There is no question in this Court's mind that it's a manifest error to ask the question about the polygraph, regardless of what the results, regardless if your client wished to take one or not take one, the court does not feel that there is any way a curative instruction can be given.
>
> If you read the case law, it is clear and the Court's concluded you can't cure the situation with a curative instruction, so this court sees no alternative but to grant a mistrial. I understand the State has a question, but you want a ruling to make sure the case is tried fairly, both for the

> State of Ohio and for the defense, and this Court does not see how it can be cured with a curative instruction. A mistrial having been granted, we'll start a new trial on the 13th of November at 9 a.m. be here at 8:30 in the morning.

T. at 501-502. After the trial court ruled, defense counsel told the court "I would submit I have a proposed curative instruction." 4T. at 503.

{¶10} On November 2, 2012, Hamon filed a motion to dismiss the indictment with prejudice on the grounds that the mistrial was not supported by manifest necessity. The trial court denied the motion. This Court dismissed the appeal pursuant to *State v. Crag,* 53 Ohio St.3d 243, 559 N.E.2d 1353 (1990), for lack of a final order. The Ohio Supreme Court accepted Hamon's discretionary appeal, and remanded this case to this Court for further proceedings pursuant to *State v. Anderson, 138* Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23. *State v. Hanlon,* 139 Ohio St.3d 314, 2014-Ohio-1927, 11 N.E.3d 1152.

Assignment of Error

{¶11} Hamon raises one assignment of error,

{¶12} "I. THE TRIAL COURT ERRED BY DENYING MR. HAMON'S MOTION TO DISMISS."

Analysis

{¶13} Generally, the state is afforded only a single opportunity to require a defendant to stand trial. *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment,

"protects individuals from being tried for the same offense more than once," providing, in pertinent part: "'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' "

{¶14} In evaluating whether the trial judge acted properly in declaring a mistrial, the courts have been reluctant to formulate precise, inflexible standards. Rather, the courts have deferred to the trial court's exercise of discretion in light of all the surrounding circumstances:

> We think, that in all cases of this nature, the law has invested 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. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. * * * But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

United States v. Perez, 9 Wheat 579, 22 U.S. 579, 580, 6 L.Ed. 165 (1824). *See, also*, *United States v. Clark,* 613 F.2d 391,400 (2nd Cir. 1979), *certiorari denied* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (a second prosecution is not barred on double

jeopardy grounds when the trial judge had no reasonable alternative to ordering a mistrial in the first trial); *State v. Widner*, 68 Ohio St.2d 188, 190, 429 N.E.2d 1065, 1066-1067(1981). *See also, State v. Conley*, 5th Dist Richland No. 2009-CA-19, 2009-Ohio-2903, ¶ 22.

{¶15} When a mistrial is premised on the prejudicial impact of improper evidence, the trial judge's evaluation of the possibility of juror bias is entitled to "great," but not unlimited, deference by a reviewing court. *State v. Gunnell,* 132 Ohio St.3d 442, 2012-Ohio-3236, 973 N.E.2d 243, ¶ 33*; Ross v. Petro*, 515 F.3d 653, 661 (6th Cir. 2008); *Washington*, 434 U.S. at 514, 98 S.Ct. 824, 54 L.Ed.2d 717. A trial court must act "rationally, responsibly, and deliberately" in determining whether to declare a mistrial. *Gunnell* at ¶ 33. However, a trial court's failure to make an explicit finding of "manifest necessity" does not render a mistrial declaration invalid, as long as the record provides sufficient justification for the ruling. *Washington* 434 U.S. at 516–517, 98 S.Ct. 824, 54 L.Ed.2d 717.

{¶16} In *Gunnell,* the Ohio Supreme Court considered whether a juror's outside research, i.e., a handwritten definition of the word "perverse" and an instruction on "involuntary manslaughter" that the juror had printed off the internet, constituted grounds for a mistrial. *Gunnell* at ¶ 9–10. The materials had been intercepted by the bailiff when the juror arrived in the morning to continue jury deliberations and had not been shared with other jurors. *Id.* at ¶ 8. After learning of the juror's possession of this information, the trial judge conducted a brief hearing during which the trial judge first informed the parties of the issue that had developed regarding the juror's outside research and then proceeded to question the juror regarding her research, including what information she

had found, why she had looked for it, and whether she had shared that information with any other jurors. *Id.* at ¶ 11. The trial court did not, however, question the juror to determine whether any prejudice or bias was created by the information or whether the juror could disregard it. *Id.* at ¶ 14, 32. A divided Ohio Supreme Court held that because the trial court failed to conduct "any meaningful inquiry" to "ascertain the scope of the prejudice, if any, to the [defendant] before determining that the juror could not be rehabilitated and that a mistrial was necessary," the trial court "did not soundly exercise" its discretion to declare a mistrial, manifest necessity did not exist, and the Double Jeopardy Clause barred reprosecution of the defendant. *Id.* at ¶ 37–40. This case is not the same.

{¶17} In *Arizona v. Washington*, a defendant's first murder conviction was reversed because the prosecutor withheld exculpatory evidence from the defense. During defense counsel's opening statement at the second trial, he disclosed to the jury that the state's withholding of information had caused the new trial. The prosecutor objected and moved for a mistrial on the ground that the defense attorney's misconduct could not be remedied. The mistrial was granted, and the defendant was subsequently convicted at a third trial. The Supreme Court affirmed this conviction despite the failure of the trial judge to expressly find a manifest necessity for the mistrial or to consider other alternatives. According to the Court, it is within the trial judge's discretion to determine if a statement by defense counsel might have created juror bias. The Court made clear, however, that its relaxed review would be inappropriate in cases where the mistrial had been caused by the conduct of a prosecutor. We are mindful of the Supreme Court's statement in *Washington* that,

> [u]nless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred.

Washington, 434 U.S. at 513, 98 S.Ct. 824, 54 L.Ed.2d 717 (*quoting United States v. Dinitz*, 424 U.S. 600, 612, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976)).See also, *Pierson v. State,* 426 S.W.3d 763, 775(Tex App. 2014).

> A trial court "is not constitutionally required to make an explicit finding of 'manifest necessity,' nor to establish on the record the full extent of its carefully considered basis for the mistrial." *Glover*, 950 F.2d at 1241 (*citing Washington*, 434 U.S. at 516–17, 98 S.Ct. 824). One of the factors a reviewing court will consider in determining whether the trial court abused its discretion by declaring a mistrial, however, is whether the trial court showed sufficient caution before its declaration. Thus, in Arizona *v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), the Supreme Court upheld a trial court's declaration of mistrial only after noting that "the trial judge did not act precipitately.... On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial." Id. at 515–16, 98 S.Ct. 824.

United States v. Gantley, 172 F.3d 422, 429-430(6th Cir. 1999).

{¶18} In the case at bar, the trial judge conducted an on-the-record discussion and permitted the parties time to research their positions on the admissibility of the polygraph question.

{¶19} Further, it is clear that a great potential for jury bias existed at the time the trial judge declared a mistrial. The source of jury bias was defense counsel's insinuation that the Hamon had agreed to take a polygraph test. Counsel's stated intent in eliciting this information in the jury's presence was to imply that the agreement to take the test was consistent with his proclaimed innocence, to the prejudice of the government. It is axiomatic that the results of a polygraph examination are not admissible unless the parties stipulate in writing to the admission of the results. *See State v. Jamison*, 49 Ohio St.3d 182, 190, 552 N.E.2d 180(1990), *citing State v. Souel*, 53 Ohio St.2d 123, 126, 372 N.E.2d 1318(1978). "[S]ince it is uniformly held that such a test is not judicially acceptable, it reasonably follows that neither a professed willingness nor a refusal to submit to such a test should be admitted." *State v. Hegel*, 9 Ohio App.2d 12, 13, 222 N.E.2d 666(2nd Dist. 1964). Further, "the Supreme Court of Ohio has held that the state is not required to provide through discovery the results of a polygraph test performed on state witnesses because the subjective interpretations of the examiner prevent polygraph examinations from being reasonably reliable." *State v. Hesson*, 110 Ohio App.3d 845, 858, 675 N.E.2d 532(4th Dist. 1996)*, citing State v. Davis*, 62 Ohio St.3d 326, 341-42, 581 N.E.2d 1362(1991). Moreover, polygraph results are not scientific tests subject to discovery pursuant to Crim.R. 16. *Davis*, 62 Ohio St.3d at 342, 581

N.E.2d 1362. *See, also, State v. Buhrman*, 2d Dist. No. 96CA145, 1997 WL 566154(Sept. 12, 1997).

{¶20} The mere mention that a witness or defendant had taken a lie detector test has been held to be prejudicial error. *State v. Russell,* 2nd Dist. Montgomery No. 21458, 2008-Ohio-774, ¶114; *People v. York*, 29 Ill.App.3d 113, 329 N.E.2d 845(1975); *State v. Harris*, 1st Dist. Hamilton No. C-83092, 1984 WL 6987(Oct. 3, 1984).

{¶21} The corollary to Hamon's argument is of course, the state would be permitted to use a defendant's refusal to submit to a polygraph test after being offered one as consciousness of the defendant's guilt.

{¶22} In *State v. Mottram*, the state sought to introduce the defendant's refusal to take an offered polygraph test at trial. The state reasoned, "conduct is evidence of the consciousness of guilt or innocence, or in short, of guilt or innocence. The analogy is with the conduct of one who flees from the scene of the crime, or who secretes stolen property." 158 Me.325, 184 A.2d 225, 228(1962). In rejecting the state's contention, the Supreme Court of Maine noted,

> In addition to refusing to admit the result of a lie detector test, the courts have also denied admission in evidence of the refusal or willingness of a respondent to take the test. The underlying reason for this rule rests in the belief that the fact finder would be unable to assess the evidence without assuming a non-existent value for lie detector tests in general.
>
> The worth of evidence of refusal or willingness to take a lie detector test rests, in our opinion, upon a general acceptance of the worth of

> evidence of the result of such a test. The result does not have the accuracy entitling it to admission in evidence. It follows that a refusal or willingness to take a test of which the result would have been without value in evidence, likewise has no value for the fact finder. Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (willingness of respondent inadmissible); *Hayes v. State* (Okl.Cr.) 292 P.2d 442 (voluntary submission by defendant to lie detector test inadmissible).
>
> * * *
>
> In our opinion, far reaching as the explanation might be, the jury in practice would give weight to the refusal to take the test in the belief that the test itself would have had value if taken. The inference would be quickly and erroneously drawn from refusal to consciousness of guilt to guilt.

158 Me. At 330; 340; 184 A.2d at 228; 230. *See also, State Hegel*, 9 Ohio App.2d 12, 13-14, 222 N.E.2d 666(2nd Dist. 1964).

{¶23} Hamon's arguments that the trial court and the state did not request exclusion of Hamon's *offer* to take a polygraph test are meritless. In *State v. Jackson*, the Supreme Court of Ohio stated categorically,

> Jackson asserts in his fifth proposition of law *that the trial court erroneously refused to permit Newkirk to be cross-examined about Jackson's asserted willingness to take a polygraph examination*. Jackson argues that he was entitled to attack Newkirk's credibility because

> Newkirk's September 7 written summary did not refer to a polygraph examination.
>
> The subject of polygraph examinations is complex, confusing to the jury, and not relevant to the issues at trial. Even if Jackson had successfully taken a polygraph examination, the trial court could refuse to admit this evidence. *State v. Jamison* (1990), 49 Ohio St.3d 182, 190, 552 N.E.2d 180, 188. Although polygraph examination results may be admitted for corroboration or impeachment, the parties must first jointly stipulate admissibility and follow certain explicit conditions. *State v. Souel* (1978), 53 Ohio St.2d 123, 7 O.O.3d 207, 372 N.E.2d 1318; *State v. Levert* (1979), 58 Ohio St.2d 213, 12 O.O.3d 204, 389 N.E.2d 848. *If polygraph examination results were not admissible, the trial judge had no reason to allow Jackson's asserted offer into evidence. See State v. Woodruff* (1983), 10 Ohio App.3d 326, 10 OBR 532, 462 N.E.2d 457. Jackson's proposition of law lacks merit.

57 Ohio St.3d 29, 36-37, 565 N.E.2d 549(1991) (Emphasis added).

{¶24} Hamon's appeal to this Court to reverse the Ohio Supreme Court's decision in *Jackson* also is untenable. Article IV of the Ohio Constitution designates a system of "superior" and "inferior" courts, each possessing a distinct function. The Constitution does not grant to a court of common pleas or to a court of appeals jurisdiction to reverse or vacate a decision made by a superior court. See, *State, ex rel. Potain v. Mathews*, 59 Ohio St.3d 29, 32, 391 N.E.2d 343, 345(1979); R.C. 2305.01.

{¶25} Our conclusion that the Double Jeopardy Clause does not prohibit retrial in this case is further bolstered by the fact that the first trial was aborted before a determination on the merits had occurred.

> Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

Arizona v. Washington, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717. *See, also, Wade v. Hunter,* 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed.2d 974(1949). "At least in the absence of an acquittal or a termination based on a ruling that the prosecution's case was legally insufficient, no interest protected by the Double Jeopardy Clause precludes a retrial when reversal is predicated on trial error alone." *State v. Calhoun,* 18 Ohio St.3d 373, 376-377, 481 N.E.2d at 628(1985); *State v. Glover*, 35 Ohio St.3d 18, 20, 517 N.E.2d 900.

{¶26} We are further convinced that the public interest in just judgments is best served under such circumstances by the declaration of a mistrial and the commencement of a new trial. It cannot be disputed that the mistrial was not prompted or provoked by any misconduct on the part of the prosecutor. *State v. Glover,* 35 Ohio

St.3d 18, 20, 517 N.E.2d 900(1988). Nor was the declaration of a mistrial an abuse of discretion. The fact that another court may have resorted to alternative remedies (such as a continuance or curative instructions) is not dispositive. *State v. Glover,* 35 Ohio St.3d 18, 19-20, 517 N.E.2d 900 (disregarding the fact that another judge may have resorted to alternative measures), *citing Washington*, 434 U.S. at 511. See, also, *State v. Dillon,* 5th Dist. Muskingum No. 2008-CA-37, 2009-Ohio-3134, ¶112.

{¶27} In the case at bar, the record reveals the substance from which the trial judge made his determination that a mistrial was a manifest necessity, and that a curative instruction was insufficient to cure the prejudice caused by the reference to Hamon's willingness to take a lie detector test.

{¶28} The first source of jury bias was defense counsel's questioning, made in direct violation of a court order, that Hamon offered to take a polygraph test. Hamon's intent in making this line of questioning obviously was to bolster his own defense, to the prejudice of the government. In *United States v Gantley*, the Court observed,

> Thus, the jury could not help but suffer some unfair bias against the government by virtue of Gantley's statement regarding his having taken a polygraph examination. Indeed, at least two other federal courts have affirmed declarations of mistrial after a witness testified about polygraph examination results, concluding that the strong possibility of jury bias undermined confidence in a fair outcome. *See Ferby v. Blankenship*, 501 F.Supp. 89, 92 (E.D.Va.1980) (on habeas review, affirming the state trial court's conclusion that, after a witness testified the defendant was willing to take a lie detector test, a mistrial was appropriate because "[curative]

> instructions could not preserve the integrity of the verdict"); *Pettigrew v. Hardy*, 403 F.Supp. 869, 870 (D.Ariz.1975) (on habeas review, affirming the state trial court's conclusion that a mistrial was necessary after the defendant testified he passed a lie detector test).

172 F.3d 422, 430. Compounding the prejudice accruing to the state is that there was no way for the state to explain or otherwise mitigate defense counsel's disclosure. "Because the law prohibits mention of polygraph examinations, the State could not address defense counsel's improper disclosure or his implied assertion of appellant's innocence in any meaningful way." *Simmons v. State,* 208 Md.App. 677, 694, 57 A.3d 541, 551(2012).

{¶29} In addition, the trial judge believed that Hamon's counsel deliberately and intentionally violated the spirit if not the letter of the trial court's pre-trial ruling refusing to permit the defense to admit evidence or testimony relating to polygraph tests. The court's "displeasure" at defense counsel could have "seriously and unfairly prejudiced the jury" against Hamon. *United States v. Gantley*, 172 F.3d 422, 430-431. In *Gantley*, the trial judge became visibly upset after the defense mentioned Gantley's polygraph examination. The Court in *Gantley* further observed,

> Not only is there a "fundamental need for judicial neutrality" in every case, but the jury must also perceive the judge as neutral—"'justice must satisfy the appearance of justice.' " *Anderson v. Sheppard*, 856 F.2d 741, 746, 747 (6th Cir.1988) (*quoting Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954)). We have no reason to believe (and the parties do not argue) that Judge Forester was anything but neutral in fact.

> But the parties and Judge Forester rightly believed that the jury might have come to think Judge Forester was inclined against Gantley. The jury's observation of Judge Forester's understandable, if short-lived, anger against Gantley is likely to have caused some level of unfair jury bias.

172 F.3d 422, 431. In the case at bar, defense counsel objected "to the court raising its voice" and noted, "the jury can overhear what we are talking about in the courtroom." (4T. at 497). The defense further stated,

> Your Honor, it would be inappropriate to tell the jury that polygraphs are inadmissible in Ohio, it's not the law.

4T. at 500.

{¶30} In *Arizona v. Washington*, during defense counsel's opening statement, he made an improper comment about the "hidden evidence" in the first trial and stated that the second trial was granted because of that prosecutorial misconduct. 434 U.S. at 499, 98 S.Ct. at 824, 54 L.Ed.2d at 724. The Supreme Court observed:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, *often not present in the individual juror bias situation, that the entire panel may be tainted.* The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial as he did in *United States v. Dinitz,* 424 U.S. 600 [96 S.Ct. 1075, 47 L.Ed.2d 267 (1976)]. Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless

> unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred.

434 U.S. at 512–13, 98 S.Ct. at 834, 54 L.Ed.2d at 732–33 (footnote omitted).(Emphasis added). The Supreme Court also noted that although "some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions [,]" the trial judge's evaluation of the likelihood of prejudice was given "the highest degree of respect." 434 U.S. at 511, 98 S.Ct. at 833, 54 L.Ed.2d at 732. As the trial court in the case at bar noted, Hamon has never submitted himself to polygraph examination. Whether he would pass such a test is purely conjecture. Accordingly, the issue of whether testimony is relevant or irrelevant, confusing or misleading is best decided by the trial judge who is in a significantly better position to analyze the impact of the evidence on the jury. *State v. Taylor*, 39 Ohio St.3d 162, 164, 529 N.E.2d 1382(1988). The trial court has discretion to admit or exclude relevant evidence, but it has no discretion to admit evidence relating to a polygraph examination unless the prerequisites to admissibility are met,

> The trial court cannot admit the results of a polygraph test into evidence simply at an accused's request. *State v. Levert* (1979), 58 Ohio St.2d 213, 12 O.O.3d 204, 389 N.E.2d 848. Such results are admissible only if both the prosecution and defense jointly stipulate that an accused

will take a polygraph test and that the results will be admissible. *State v. Souel* (1978), 53 Ohio St.2d 123, 7 O.O.3d 207, 372 N.E.2d 1318.

State v. Jamison, 49 Ohio St.3d 182, 190, 552 N.E.2d 180 (1989). In the case at bar there was never a polygraph examination of Hamon. Nor was there any evidence of a stipulation on behalf of the state as to admissibility of a polygraph examination.

{¶31} In the case at bar, the motion and the trial court's action was instigated by defense counsel's impermissible questioning relating to Hamon's willingness to take a polygraph exam. We conclude that the trial court exercised sound discretion, acted responsively, and deliberately with respect to the possible juror panel bias created by the improper comment of defense counsel and that the mistrial order is supported by the requisite high degree of necessity.

{¶32} Hamon's sole assignment of error is overruled.

By Gwin, P.J.,

Delaney, J., and

Baldwin, J., concur