STATE OF NEW JERSEY

v.

GUSTAV FLOWBERT,
Defendant - Appellant

A-08-1234-T3

Superior Court, Appellate Division

Submitted August 22, 2008 - Decided September 4, 2008

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Cr-06-9028.

Henry D. Thorough argued the cause for the defendant-appellant (Walden & Pond, L.L.P., attorneys for defendant-appellant; Mr. Thorough of counsel and on the brief)

Mark S. Desade, First Assistant Prosecutor, argued the cause for the State of New Jersey (Nicholas McIavelli, Essex County Prosecutor; Mr. Desade of counsel and on the brief).

GRIM, J.A.D. joined by **REAPER, J.A.D.**

On September 20, 2006, 18-year-old Gustav Flowbert ("Defendant"), 18-year-old Arthur Rambo ("Rambo"), and 12-year-old Vladimir Nabakough ("Vlad" or, as he was known locally, "Little Vlad") were each involved to some degree in a burglary that resulted in the death of a person other than one of the participants. Subsequently, defendant was indicted on charges of burglary in the second degree (N.J.S.A. 2C:18-2), conspiracy to commit burglary (N.J.S.A. 2C:5-2), and felony murder (N.J.S.A. 2C:11-3(a)(3)). He was convicted of all charges on March 7, 2008, following a three-day trial in Superior Court, Law Division, Essex County.

In this appeal, defendant contends that the trial court erred in two respects. First, he claims that the trial court improperly allowed the jury to consider the out-of-court statement of a witness to the burglary who had left the country before the trial using funds provided by the defendant. Secondly, he claims that the trial court improperly admitted evidence with regard to a polygraph examination defendant agreed to take.

We disagree on both counts. We hold that defendant's actions in securing the absence of the witness from trial gave rise to forfeiture by wrongdoing under the common law of evidence applicable in New Jersey and, therefore, the out-of-court statement was properly considered by the jury. We further hold that the polygraph evidence was properly admitted pursuant to a stipulation entered into between the State and the

defendant before the examination was given. For these reasons, we affirm defendant's convictions on all counts.

The Facts

At approximately 4:15 p.m. on the afternoon of September 20, 2006, Newark Police officers were summoned to 123 Washington Street, where 34-year-old Victor Yugo ("Yugo") lay unconscious in a lane of traffic, surrounded by debris from a multiple-car accident. An ambulance arrived shortly thereafter, and rushed Yugo to a nearby hospital, but he failed to regain consciousness and ultimately died from his injuries two days later.

Eyewitnesses explained to the police that Yugo had been walking west on New Street, holding an assortment of clean shirts on hangers in front of him while carrying a bouquet of flowers in his other hand. His view thus obstructed, Yugo arrived at the southeast corner of Washington Street, where he was blindsided by a large man wearing a stocking mask and running at top speed. The collision forced Yugo from the sidewalk and onto the ground, where he unfortunately landed in the path of oncoming traffic. The man in the stocking mask continued running, turned west on Central Avenue, and disappeared in the distance.

Officers at the scene were also approached by nearby resident Louis Sinclair ("Sinclair"), who explained that the collision was the aftermath of a burglary that had just taken place at his house two blocks south on Warren Street. Sinclair then told the police the same story he later testified to at trial.

Sinclair said he had called out sick from work that day and had been in the bathroom preparing to take a shower, when he heard the doorbell ring. He walked to a window at the front of the house from which location he could see Rambo standing on the front steps with a basketball under his arm. Sinclair recognized Rambo and assumed that he had come seeking Sinclair's son Upton, as the two were neighborhood friends. Knowing that Upton was not home, and being in a state of undress, Sinclair elected not to answer the door and instead returned to the bathroom.

Moments later, Sinclair was alarmed by a noise coming from the living room toward the side of the house. He entered the room and saw a man wearing a stocking mask and carrying an empty pillowcase. Sinclair shouted "Hey!" and moved toward the intruder, who appeared startled and made his way out of the open window through which he had apparently entered. As Sinclair reached the window, the intruder dropped approximately 10 feet onto the sidewalk below. Sinclair leaned out of the open window and saw two large men in stocking masks, as well as Little Vlad, who he recognized from the neighborhood. Upon seeing Sinclair in the window, the three took off running. Sinclair left the window, quickly threw on some clothes, and went out the front door to pursue the individuals. He gave up his chase upon arriving at the scene at 123 Washington Street.

After speaking with Sinclair, the police went to Little Vlad's residence, where he lived with his grandmother who had custody of the boy. Vlad's father is deceased; his mother was a resident of Russia. The officers waited with Vlad's grandmother until he returned home at approximately 7 p.m. When the officers stated the reason for their visit, Little Vlad initially shrugged his shoulders and claimed not to know anything; however, his demeanor changed when he was told that Sinclair had identified him to the police as

having been present and perhaps having acted as a lookout during the break-in at Sinclair’s residence. Vlad's grandmother repeatedly told the officers that he was "a good kid" and encouraged Vlad to cooperate with the police to resolve what she characterized as a "misunderstanding."

Vlad was taken, along with his grandmother, to the police station for questioning, where he was read his Miranda rights and informed of the option to obtain counsel. After a brief conference alone with his grandmother, however, Vlad chose to waive these rights and submit to police questioning. He ultimately delivered a recorded statement to Detective Nathaniel East ("Detective East").

According to the statement, Vlad had returned to his apartment after school when he looked out the window and saw defendant and Rambo walking on the sidewalk dribbling a basketball between them. Defendant and Vlad are first cousins. Although he was younger, Vlad was often in the company of defendant, Rambo and their friends, particularly playing after-school sports such as basketball. On that afternoon, Vlad ran outside to join defendant and Rambo, but when he caught up to them, he found that they were uncharacteristically cold to him. Vlad asked if they were going to play basketball, but was told "just go home, Little Vlad. We'll catch up with you in a little bit…" Vlad noticed they were not talking, and observed empty pillow cases slung over each man's shoulder. Although defendant and Rambo continued to ignore Little Vlad, they did not stop him from trailing behind them.

As they approached Sinclair's house (Vlad assumed they were there to pick up their friend Upton), Rambo went to the front door and Little Vlad followed defendant to the side of the house. A few moments later, Rambo joined them and told defendant "Nobody home - let's go." Vlad watched as each man then took a stocking mask from his pants pocket, and pulled the mask over his face. They went to work quickly, defendant dragging a large barrel from a nearby alley onto the sidewalk beneath a window, and Rambo climbing onto the barrel and using its height to push open the window and then hoist himself through the opening.

A few moments later, Vlad heard a voice inside the house and watched Rambo hurry back out the window and jump down onto the sidewalk. When they saw Sinclair in the window, the three fled the scene. Defendant instructed everybody to "split up" and each took off down a different street. Vlad ran west on Warren Street (crossing Washington toward University Street), while Rambo ran east on Warren Street (in the direction of Halsey Street). While Vlad was unaware of, and therefore did not witness, the fatal collision (Detective East had disclosed only that police were investigating "the incident"), he stated unequivocally that "my cousin ran north down Washington Street."

Defendant was apprehended first by Newark police on September 21, 2006. He waived his Miranda rights and consented to an interview with Detective East. He confessed to having taken part in the burglary, but also denied ever having seen or collided with Yugo. According to defendant, he had started running north on Washington, but then changed his mind and turned east on Linden Street. Defendant claimed then and at trial that, as he ran down Linden, he had seen Rambo cutting west through the Rutgers faculty parking lot towards Washington Street. Defendant continued running, turning north on Halsey Street, where he eventually removed his mask and walked casually into the neighboring town of Harrison.

Detective East suspected that defendant was not being truthful, and asked him if he would be willing to take a polygraph examination to support his story. Defendant responded, "Absolutely." Defendant then met with the assistant prosecutor, who produced a stipulation form explaining that both parties (defendant and the State) agreed that any results produced by the test would be admissible at trial, as would the examiner's testimony concerning the implication of those results. Defendant signed this, in addition to a separate form indicating that he was electing to proceed without the presence of counsel.

Arrangements were then made for Officer Shanahan ("Shanahan" or "the Examiner") to administer the polygraph to defendant. Shanahan is a licensed polygraph examiner with substantial experience, having administered and analyzed "hundreds" of tests over the last 11 years. During defendant's test, late on the afternoon of September 21, Shanahan mixed control questions (geared toward establishing baseline physiological responses) with relevant questions, several of which were designed to test defendant's version of his escape route. Based on certain physiological disturbances defendant experienced during the relevant questions, Shanahan concluded that defendant was not being truthful when describing his version of the burglary's aftermath.

Thereafter, on September 22, Rambo was apprehended, submitted to questioning, and admitted to having taken part in the burglary. He denied any involvement with Yugo's death, maintaining that it was must have been defendant who knocked Yugo into the street. Rambo entered into a plea agreement with the State under which he pleaded guilty to burglary and conspiracy to commit burglary, and agreed to testify against defendant at trial.

The Prosecution

Defendant was indicted on October 13, 2006, in a three-count indictment charging burglary in the second degree (N.J.S.A. 2C:18-2), conspiracy to commit burglary (N.J.S.A. 2C:5-2), and felony murder (N.J.S.A. 2C:11-3(a)(3)). He was arraigned and entered a not guilty plea on October 16, 2006. Numerous motions were filed throughout 2007 and early 2008, which required consideration and resolution prior to trial. Of relevance to this appeal were two motions in particular.

First, defendant filed a motion in limine to suppress all evidence with respect to the polygraph examination because it was uncounselled and, he claimed, inherently unreliable. The trial court (Hon. Michael Cervantes, J.S.C.) held that the stipulation between defendant and the State was binding and therefore the evidence was not subject to suppression and could be introduced at defendant's trial.

Second, immediately before the trial, the State filed a motion in limine to admit the statement given by Little Vlad to Detective East after discovering that Little Vlad had left the country. Evidence submitted by the State established that Vlad had flown to St. Petersburg, Russia, on a one-way ticket and that defendant had financed this trip from jail, by instructing an acquaintance to wire $3,000 from his account to Vlad's mother in Russia. The trial court conducted a reliability hearing, during which Detective East explained that he had carefully probed any inconsistencies in Vlad's story, and did not record the statement until he was satisfied that Vlad was being truthful. Vlad's grandmother also testified that Vlad was "an honest kid" and a good student at school,

and that she believed his statement to be truthful. The trial court then ruled that the common law evidentiary rule of forfeiture by wrongdoing applied and granted the State's motion.

Trial began on March 4, 2008. The jury heard testimony from Sinclair, from Rambo, from eyewitnesses to Yugo's death, and from Detective East (who read Vlad's statement to the jury). Defendant testified in his own behalf consistently with his pretrial statement, admitting that he had participated in the burglary but denying that he had been the one to collide with Yugo and knock him into the path of oncoming traffic. Officer Shanahan testified in rebuttal as to the polygraph results.

The jury returned its verdict on March 7, 2008, finding the defendant guilty on all counts. On April 9, 2008, defendant was sentenced to 30 years imprisonment without parole for felony murder and, concurrently, to five years imprisonment for second-degree burglary (the crime of conspiracy to commit burglary having merged into the crime of burglary, see N.J.S.A. 2C:1-8a(2)). Defendant was committed to the custody of the Department of Corrections; bail pending appeal was denied.

On May 27, 2008, defendant filed a notice of appeal to this Court.

Discussion

We conclude, first, that the trial court did not err in determining that the statement of the witness Little Vlad was admissible at trial under the common law evidentiary principle of forfeiture by wrongdoing.

Under the Sixth Amendment, a criminal defendant reserves the right "to be confronted with the witnesses against him"; for this reason, testimonial hearsay has been held inadmissible unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). However, it is well established that a defendant may forfeit his right to confrontation under the Sixth Amendment where his own misconduct procures a witness's unavailability. *Davis v. Washington*, 547 U.S. 813, 833 (2006). This principle is explicit in the Federal Rules of Evidence, see F.R.E. 804(b)(6), clearly implicit in the New Jersey Rules of Evidence, see N.J.R.E. 804(a), and well-established in the common law of our nation. See *Giles v. California*, 128 S. Ct. 2678; 171 L. Ed. 2d 488 (2008).

We acknowledge that our Legislature has yet to enact a forfeiture-by-wrongdoing hearsay exception, but that is no bar to judicial action. N.J.R.E. 102 expressly provides that "[t]he adoption of these rules shall not bar the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." The forfeiture-by-wrongdoing exception is not a new rule of a far-reaching nature but rather is a longstanding common law doctrine aimed directly at ascertaining the truth. There is, therefore, no bar to the judicial adoption of the doctrine in this case, giving effect to the equitable principles codified in Federal Rule of Evidence 804 (b) (6), as has been done in several jurisdictions. E.g. *Commonwealth v. Edwards*, 444 Mass. 526; 830 N.E. 2d 158 (2005). Our own Supreme Court has stated that it does "not foreclose the possibility of fashioning new evidence rules on a unilateral basis." *Jacober v. St. Peter's Med. Ctr.*, 128 N.J. 475, 494 (1992). Grounded as it is in "overwhelming precedent[ ] and policy" (*Edwards*, 444 Mass. at 536; 830 N.E. 2d at 168), we join other

jurisdictions in judicially adopting the forfeiture-by wrongdoing-hearsay exception and applying it to the facts of this case.

We add that the New Jersey Constitution does not bar the conclusion we reach today. Defendant's confrontation right under article 1, paragraph 10 of the New Jersey Constitution is co-extensive with his Sixth Amendment right. Like our colleagues in *State v. Kent*, 391 N.J. Super 352, 376-377 (App. Div. 2007), "we are unpersuaded in the present circumstances that article I, paragraph 10 of the state constitution requires any greater protection for accused persons to cross-examine hearsay declarants about their out-of-court testimonial assertions than the United States Supreme Court has pronounced in *Crawford* and *Davis*."

The sole remaining question is whether defendant’s conduct in wiring $3,000 to Little Vlad's mother rose to the level of wrongdoing required to find the forfeiture-by-wrongdoing doctrine applicable. In deciding this question, we agree with a number of courts that have considered the issue in holding that an act need not be criminal to constitute "wrongdoing" under the doctrine. E.g. *Commonwealth v. Edwards*, 444 Mass. at 540; 830 N.E. 2d at 170 ("A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial"). This interpretation is consistent with the policies underlying the forfeiture by wrongdoing doctrine - that a defendant should not be permitted to undermine the judicial process or profit from his own misconduct - results which could easily occur if the rule were limited to unavailability procured by murder, threats, or intimidation. Under the circumstances, we cannot say that the trial court erred in finding that the wiring of $3,000 (an amount shown by the State to have been ample to purchase the plane ticket) was proscribed behavior given defendant's pending court date.

We conclude, second, that the trial court did not err in admitting the polygraph evidence against defendant at trial pursuant to the stipulation reached between defendant and the State before the polygraph examination was administered.

In *State v. McDavitt*, 62 N.J. 36, 46 (1972), our Supreme Court concluded that polygraph evidence, while generally inadmissible, may be admitted at trial where a defendant and the State enter into a valid stipulation agreeing to the admissibility of results before the test is administered. Such a stipulation was entered into here. Defendant would have us set the stipulation aside simply because he was not represented by counsel at the time of the stipulation, even though he executed a written waiver of his right to counsel. We decline to do so. A polygraph stipulation does not require a defendant to be represented by counsel in order to be valid. *McDavitt* itself contains no language suggesting that the absence of counsel should void an otherwise-valid polygraph stipulation. In *State v. Reyes*, 237 N.J. 250, 264 (App. Div. 1989), this court noted that our jurisprudence in this state “does not prohibit the waiver of the right to counsel at the signing of the stipulation."

McDavitt does require that stipulations must be given with "full knowledge" of the right to refuse consent and the consequences of entering into the agreement. 62 N.J. at 46. Defendant signed a stipulation form effectively explaining each of these concepts, while the assistant prosecutor stood by to answer any questions defendant may have had. The Supreme Court has already rejected one expansive interpretation of the "full knowledge"

requirement. *State v. Powell*, 98 N.J. 63 (1984) (holding that "full knowledge" does not require that a defendant "believe" the State's explanation of the governing law). We similarly decline to narrow *McDavitt*'s scope by holding that a defendant cannot have "full knowledge" without the assistance of counsel. In this context, we note that the defendant in *Powell* was unrepresented at the time of his stipulation.

Our holding on this issue is consistent with our jurisprudence as it currently stands, as well as with a subtle trend enlarging *McDavitt*'s scope, rather than narrowing it. See e.g. *State v. Castagna*, 187 N.J. 293 (2006) (recognizing the defendants' constitutional right to reference a witness's polygraph results, despite the fact that the State had not stipulated to their use at the defendants' trial).

We additionally reject defendant's arguments concerning the alleged wholesale unreliability of polygraph results. See generally *United States v. Scheffer*, 523 U.S. 303, 334 (1998) (Stevens, J., dissenting); *United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989). New Jersey is now among a number of jurisdictions that find polygraph evidence sufficiently reliable to warrant admission upon stipulation. *State v. Domicz*, 188 N.J. 285, 313 (2006). See also *State v. Valdez*, 91 Ariz. 274, 283-84, 371 P.2d 894, 900 (1962); *State v. Bullock*, 262 Ark. 394, 557 S.W.2d 193 (1977); *People v. Trujillo*, 67 Cal. App. 3d 547, 136 Cal. Rptr. 672, 676 (5th District 1977); *Codie v. State*, 313 So. 2d 754, 756 (Fla. 1975); *Pavone v. State*, 273 Ind. 162, 402 N.E.2d 976, 978-79 (1980); *State v. Marti*, 290 N.W.2d 570, 586-87 (Iowa 1980); *State v. Roach*, 223 Kan. 732, 576 P.2d 1082, 1086 (1978); *State v. Souel*, 53 Ohio St. 2d 123, 134, 372 N.E.2d 1318, 1323-24 (1978); *Cullin v. State*, 565 P.2d 445, 457 (Wyo. 1977).

Moreover, reliability is not truly in issue where there is a valid stipulation. In such cases, "reliability" is the exact issue upon which the parties have agreed; they are viewed as having waived their right to object to "the validity of the basic theory of polygraph testing" and are instead limited to challenges relating to the administration of the specific test in question. *Wisconsin v. Dean*, 103 Wis. 2d 228, 246; 307 N.W. 2d 628, 637 (Wis. 1981). The record before us indicates that defendant submitted to a properly-administered test by a qualified examiner; against the backdrop of a valid stipulation. This alone ends the inquiry into the examination's reliability.

It bears repeating that the examiner's testimony did not speak toward the underlying elements of the offense, but merely toward defendant's truthfulness in response to the questions he was asked at the time. Cf. *McDavitt*, 62 N.J. at 47. We are thus dealing with merely corroborative evidence, which cannot be meaningfully distinguished from other expert opinion testimony. See *Scheffer*, 523 U.S. at 334 (Stevens, J., dissenting). Officer Shanahan's testimony was not presented as the functional equivalent of DNA evidence, for example, and it is demeaning to assume that juries will be unduly swayed to conclude a defendant's guilt or innocence from the "scientific" trappings of polygraph technology. See id. at 318-319 (J. Kennedy, concurring in part and concurring in the judgment). Such concerns certainly do not justify a *per se* exclusion of an entire class of probative evidence. Here, as required, the judge properly charged the jury that the polygraph result did not by itself prove any element of the crime but merely indicated that at the time the examiner questioned the defendant, the examiner in his expert opinion concluded that the defendant was not answering truthfully the relevant questions asked.

The appropriate remedies for a defendant who is unhappy with the outcome of his stipulation consist in vigorous cross-examination and limiting instructions explaining the significance of an Examiner's testimony. Where admission would manifest a true injustice, it should also be remembered that a defendant retains his right to launch a N.J.R.E. 403 challenge (under which the trial court has the discretion to exclude relevant evidence where, inter alia, the "probative value is substantially outweighed by the risk of…undue prejudice, confusion of issues, or misleading the jury"). Another way of stating this is that defendant's concern about reliability "is a question of weight and not of admissibility." *New Mexico v. Anderson*, 118 N.M. 284, 298; 881 P.2d 29, 43 (1994).

Accordingly, the decision of the trial court is hereby ***affirmed***.

MERCY, J.A.D., dissenting

I find the majority's conclusions to be irreconcilable with a proper reading of the law and the Constitution and, therefore, I respectfully dissent.

First, it is clear to me that the admission of the statement of Vladimir Nabakough violated defendant’s confrontation rights as well as our evidence rules.

To begin with, there is simply no evidentiary rule that would permit the use of this out-of-court statement at trial. To be blunt, this court lacks the authority to pronounce a new rule of evidence. Only the Supreme Court, and not the Appellate Division, has the broad rulemaking power the majority here invokes for itself. See *State v. D.R.*, 109 N.J. 348, 352, 375-76 (holding the Appellate Division's unilateral adoption of a new evidence rule inappropriate given the "serious and far-reaching nature of the rule"). Commenting on *D.R.*, the Supreme Court said in *State v. Guenther,* 181 N.J. 129, 160 (2004), "We have held that significant changes to the Rules of Evidence 'should be adopted in accordance with the prescribed statutory procedure.'" There is in New Jersey no hearsay exception for statements such as this. Neither our Supreme Court nor our Legislature has adopted such an exception, and there may well be reasons behind that decision. See e.g. *Commonwealth v. Edwards*, 444 Mass. 526, 540; 830 N.E. 2d 158, 170, n.21 (2005) ("There may be some statements so lacking in reliability that their admission would raise due process concerns").

Moreover, there is no constitutional justification for admission of this statement. It is clearly hearsay and clearly testimonial and thus admissible only in strict conformance with the Confrontation Clause. See generally *Crawford v. Washington*, 541 U.S. 36 (2004); *State ex rel. J.A.*, 195 N.J. 324, 328 (2008) (“In *Crawford ...*, the United States Supreme Court dramatically altered the landscape of its Confrontation Clause jurisprudence, rendering unconstitutional the admission of an out-of-court ‘testimonial’ statement permitted by state hearsay rules, unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine that person“). Under the United States Constitution, forfeiture by wrongdoing applies only in a very narrow category of cases where the evidence clearly establishes that the wrongdoing was specifically designed to bring about the witness's unavailability. *Giles v. California*, 128 S. Ct. 2678; 171 L. Ed. 2d 488 (2008). I am not able to discern the evidentiary basis for any such finding from the record presently before the Court. The evidentiary hearing conducted by the trial court revealed that defendant and Little Vlad

are first cousins and part of a close-knit immigrant family that has often pulled together in times of need. The evidence further established that, days before the trial was to begin, Little Vlad’s mother, the sister of defendant’s father, was admitted to the hospital in St. Petersburg, Russia, suffering from an illness that doctors considered could well be terminal and was in dire need of financial assistance for treatment and medications. Under these circumstances, I am not prepared to say that defendant's decision to wire $3,000 to his aunt rises to the level of wrongdoing required as a matter of constitutional imperative. Nor am I prepared to say that, even if defendant knew as the State argues that the money might be used to enable the only child of a family member to attend his mother on her death bed, it would constitute "wrongdoing" in the way that "force, intimidation, or deception" obviously would. See N.J.S.A. 2C:29-3(b) (which requires one of these elements as a condition of liability for the hindrance of one's own prosecution).

Additionally, I am not prepared to say that article 1, paragraph 10 of the New Jersey Constitution does not grant additional protections to the defendant here. While the U.S. Supreme Court, in construing the federal constitution, establishes the "floor" of protection, it is the states that determine the "ceiling" of their own constitutions. New Jersey has often diverged from the federal construction of identical provisions, in recognizing greater protection under our own constitution than federal courts have recognized under the U.S. Constitution. See e.g. *State v. Sanchez*, 129 N.J. 261 (1992); *State v. Hempele*, 120 N.J. 182 (1990); *State v. Hunt*, 91 N.J. 338 (1982). Recognition by the federal courts of an evidentiary doctrine under federal law, expressly incorporated into a federal evidence rule, in no way compels recognition of the same doctrine under state law. Indeed, the absence of an evidence rule in New Jersey creating a hearsay exception similar to F.R.E. 804(b)(6) compels the contrary conclusion.[*]

Furthermore, I disagree with my colleagues with regard to the admission of the polygraph evidence. A defendant who does not have the assistance of counsel cannot begin to understand the ramifications of entering into a stipulation as to such evidence, and we should not permit it particularly in a case such as this one with a defendant who was less than a month past his 18th birthday and with no prior experience whatsoever with the legal system.

The simple fact is that whatever argument can possibly be made for admitting such evidence pursuant to a stipulation disappears when the stipulation is entered into without the assistance of counsel. Only when equipped with an attorney's expertise may a defendant begin to effectively negotiate the specifics of the exam he will submit to, thereby enhancing the exam's reliability through the adversarial process. See generally *State v. Dean*, 103 Wis. 2d 228, 246; 307 N.W. 2d 628, 637 (1981) (emphasis added):

> Requiring the parties ***and defense counsel*** to enter a stipulation encourages discussion and eventual agreement with regard to not only the general subject of the reliability of polygraph testing but also more specific subjects such as the qualifications required of the examiner, the designation of the examiner, the

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*.The majority’s suggestion that the doctrine is implicit in the state evidence rules is specious; our rule does no more than bar the *proponent* of a hearsay statement from arguing unavailability of a witness whose unavailability he himself has secured.

> phrasing of the test questions, and the specification of the conditions under which the test is to be given.

See also *State v. Reyes*, 237 N.J. Super. 250, 265-68 (App. Div. 1989) (D'Annunzio, J., dissenting).

Without the presence of counsel, notions of reliability dissolve and, in my opinion, the traditional rule of inadmissibility governs.

Moreover, I therefore strongly disagree with the majority in its assessment of the polygraph's reliability as a tool for measuring truthfulness, even when accompanied by a "qualified examiner." It is due to its inherent unreliability that the majority of jurisdictions exclude "lie detector" evidence entirely. A recent study by the National Research Council found that

> Almost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy. Although psychological states often associated with deception (e.g., fear of being judged deceptive) do tend to affect the physiological responses that the polygraph measures, these same states can arise in the absence of deception. Moreover, many other psychological and physiological factors (e.g., anxiety about being tested) also affect those responses. Such phenomena make polygraph testing intrinsically susceptible to producing erroneous results.

National Research Council, "The Polygraph and Lie Detection" (2002), available online at http://books.nap.edu/openbook.php?isbn=0309084369.

It is time and past time for New Jersey to join its enlightened sister states in concluding that, stipulation or no stipulation, polygraph evidence is simply too unreliable to be admitted into evidence in a criminal trial, and a stipulation cannot serve to create reliability where there would be none otherwise. Reliability is the touchstone of all evidence, and where a defendant is convicted on less than reliable evidence, due process of law has been violated. Yet "[i]n the more than thirty years since McDavitt, serious questions about the reliability of polygraph evidence remain." *State v. Domicz*, 188 N.J. 285, 313 (2006). See also *United States v. Scheffer*, 523 U.S. 303, 309 (1998) ("there is simply no consensus that polygraph evidence is reliable").

The admission of such unreliable evidence was particularly damaging in this case. Defendant has the same complexion as Rambo, is exactly the same height, and is within 10 pounds of Rambo's weight. With their faces concealed by stocking masks, there would be little to distinguish one from the other. Each was wearing the nondescript "dark hoody and jeans" described by eyewitnesses to be worn by Yugo's assailant. It is also important to note that Little Vlad's statement, while certainly harmful to defendant in the minds of the jury, was not inconsistent with the theory advanced by defendant. Thus, the sole difference between defendant's story and Rambo's version were the "unfavorable" polygraph results. Its admission was error, and it was harmful. It requires reversal.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

No. 61,803

STATE OF NEW JERSEY	:	
v.	:	**ORDER**
GUSTAV FLOWBERT,	:	
Defendant-Appellant.	:	

This matter having been brought before the Court on September 8, 2008, by the defendant-appellant, it is, on this 10th day of September 2008, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with the Court on or before November 24, 2008.

Francis Kafka, Deputy Clerk
For the Court