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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001927-MR

JARED MCCARTHY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 15-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON, JUDGES.

COMBS, JUDGE: Appellant, Jared Ladan McCarthy (Jared), was convicted of driving under the influence, fourth offense; he was sentenced to two-years' imprisonment. On appeal, he argues that the trial court erred in allowing the Commonwealth to introduce evidence of his refusal to take a warrantless blood test

and in giving the jury an *Allen* charge. After our review, we affirm in part, reverse in part, and remand.

We limit our discussion of the record to the issues before us. On November 1, 2014, Jared was arrested for DUI by Officer Benjamin Fleury of the Owensboro Police Department. Officer Fleury transported him to the hospital for a blood test, which he refused. A Daviess County grand jury indicted Jared for DUI 4th offense in Five Years, Aggravated.

On August 29, 2016, Jared filed a motion *in limine* to exclude introduction of his refusal to take a warrantless blood test in reliance upon *Birchfield v. North Dakota*, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). *Birchfield* involved three consolidated cases. One of the Petitioners, Mr. Birchfield, refused to allow his blood to be drawn after he was arrested for DUI; his refusal exposed him to criminal penalties under North Dakota law. He entered a conditional guilty plea to a misdemeanor violation of North Dakota's refusal statute and argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The state district court rejected his argument, and the North Dakota Supreme Court affirmed.

The United States Supreme Court granted *certiorari.* The Court concluded that the Fourth Amendment **permits warrantless breath tests** incident

to arrests for drunk driving; however, it reached a different conclusion regarding **blood tests:**

> Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It is well established that a search is reasonable when the subject consents, *e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), and that sometimes consent to a search need not be express but may be fairly inferred from context, cf. *Florida v. Jardines*, 569 U.S. 1, —— – ——, 133 S.Ct. 1409, 1415–1416, 185 L.Ed.2d 495 (2013); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. See, *e.g., McNeely, supra,* at ——, 133 S.Ct., at 1565–1566 (plurality opinion); *Neville, supra,* at 560, 103 S.Ct. 916. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.
>
> It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. **There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.**

Id., 136 S. Ct. at 2185. (Emphasis added). The Court continued as follows:

> Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. There is

> no indication … that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws . . . . [W]e conclude that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed.

Id. at 2186.

On August 31, 2016, the trial court conducted a hearing on Jared's motion. The court prohibited the Commonwealth from using Jared's refusal as evidence of intoxication or as an aggravating circumstance, but it did permit the Commonwealth to use the fact of his refusal in order to explain why there was no test result. However, the court prohibited Jared from asking Officer Fleury why he did not obtain a warrant for a blood test.

The trial court's written order, entered on September 7, 2016, provided as follows:

> ***IT IS HEREBY ORDERED AND ADJUDGED*** that the Defendant's refusal to take the warrantless blood test shall not be used as an enhancement during the trial. The Commonwealth can introduce the refusal to explain the absence of any scientific evidence but cannot use the refusal to imply any motivation as to why the Defendant refused the test. The Commonwealth cannot use the refusal as implying guilt against the Defendant in its case in chief.

(Emphasis original).

Trial was held on September 27, 2017.[1] At approximately 4:35 p.m., the jury was dismissed to deliberate. The video record picked back up at approximately 5:58 p.m., showing the jurors returning to the courtroom. The court asked the name of the foreperson, and someone responded that they had not yet elected one. The trial court then addressed the jury as follows:

> You have, the first thing I told you in the instructions, first thing you do, is go back and elect a foreperson. Because that's who I'm going to speak with. Also, you have a duty to reach a verdict, if you can, if at all possible. I want you to go back, please follow the instructions of the court, elect a foreperson to orchestrate your discussion. And, come back when you are able to reach a verdict or if you have the same conclusions. Thank you.

At 6:15 p.m., the jury returned to the courtroom to watch the officer's dashcam video again. At 6:39 p.m., the jury again returned to the courtroom and returned a verdict. Jared was convicted of DUI, fourth offense within five years. He was sentenced to two (2) years.

In his appeal, Jared argues that although the trial court sustained his motion *in limine* in part, it erred in ruling that the Commonwealth could tell the jury that he refused to submit to a blood test. He reasons that the Fourth Amendment establishes that "suppressed evidence is to be suppressed." He also

[1] This was the second trial. A mistrial was declared after the first trial because the jury was deadlocked.

contends that the trial court erred in precluding him from introducing evidence or from arguing that the police could have obtained a warrant.

Our review of a ruling on a suppression motion is two fold. "The trial court's factual findings are reviewed for clear error and are deemed conclusive if supported by substantial evidence. And the trial court's application of the law to the facts found is reviewed de novo." *Kerr v. Com.*, 400 S.W.3d 250, 265 (Ky. 2013) (footnotes omitted).

Jared relies primarily upon *Birchfield*. After the parties submitted briefs, this Court's decision in *Commonwealth v. Brown*, 560 S.W.3d 873 (Ky. App. 2018), became final.

In *Brown,* the Commonwealth appealed from the trial court's order granting Brown's motion to suppress. Brown had lost control of her car and hit a tree, severely injuring herself and killing her passenger. At the hospital, a state trooper read the implied consent warning to Brown, and she gave permission for blood to be drawn. Several months later, a grand jury indicted Brown for second-degree manslaughter, DUI (aggravated pursuant to KRS 189A.010(11)(c)), and driving without a license.

The trial court determined that Brown had not consented to blood testing knowingly and voluntarily. This Court disagreed and analyzed Kentucky's implied consent statute in light of *Birchfield*:

> The general rule, established by KRS 189A.103, is that every driver consents by default to such testing by virtue of driving on Kentucky roadway. *Helton* [*v. Commonwealth*, 299 S.W.3d 555] at 559 [(Ky. 2009)].
> . . . .
> Kentucky's statutory scheme differs from North Dakota's in that it enhances the eventual penalties for refusing, rather than creating a new crime of refusal to submit to testing. DUI incidents which result in fatalities implicate the aggravating factor defined in KRS 189A.010(11)(c) and require a minimum sentence of four days in jail upon conviction. Because the provisions of KRS 189A.010(5), 189A.010(11)(e), and KRS 189A.105, work in concert to double that mandatory minimum sentence to eight days when the defendant refuses to consent, the trial court relied on *Birchfield* in concluding that Kentucky's implied consent scheme is coercive. We disagree.
>
> The other consequences of refusal are clearly administrative or evidentiary in nature, and the doubling of a mandatory minimum jail sentence is unquestionably a criminal sanction. Yet, that sanction is contingent on conviction on the underlying charge. It differs significantly in its effect from the statutes examined by the Supreme Court in *Birchfield.* It lacks the coercive force of mandating the accused undergo an intrusive test or else accrue an additional criminal charge. Indeed, if a defendant faces a first-offense DUI charge without any aggravating circumstances, or is not convicted on an aggravated DUI charge, the sanction does not even apply. We conclude that *Birchfield* does not apply to the instant situation, and no Fourth Amendment violation occurred. Thus, the trial court committed reversible error in excluding the blood test results.

Id. at 878.[2]

However, the issue in the case before us differs from both *Birchfield* and *Brown,* which reached contradictory results based on differing views of implied consent to submit to blood testing. In the case now before us, Jared was not compelled to submit to a blood test, nor did he suffer an enhanced penalty for exercising his constitutional right to refuse to do so. Nonetheless, he contends that the court erred in allowing the Commonwealth to **make any** comment about the absence of evidence concerning blood testing. We agree that the trial court erred on this issue.

We are persuaded that allowing the Commonwealth to comment on Jared's lack of a blood test was improper and that it impermissibly burdened Jared's exercise of his constitutional right to be free from unreasonable searches and seizures as well as his right to remain silent. Thus, it had the direct result of allowing the jury to infer Jared's guilt of driving under the influence from his refusal to submit his blood for testing -- especially where he was prohibited from

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[2] We also note a recent unpublished decision, *Larue v. Commonwealth*, No. 2017-CA-000719-DG, 2019 WL 103959, at *5 (Ky. Ct. App. Jan. 4, 2019), *disc. rev. denied* (Ky. April 11, 2019), wherein this Court held that:

> [I]n reliance on *Brown*, … Kentucky's implied consent statutory scheme does not violate the Fourth Amendment, as interpreted by *Birchfield*. Therefore, although Kentucky's implied consent warning, based on KRS 189A.105, is defective as stated in *Hernandez-Gonzalez*, [72 S.W.3d 914, 917 (Ky. 2002)], it is not unconstitutional as a matter of law because it does not threaten a separate criminal charge for failure to submit to a blood test.

inquiring as to why the officer did not obtain a search warrant to compel him to do so. At issue is the implication that the prosecution's comment on the exercise of a Constitutional right inevitably impairs and compromises that right.

In *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct.1229, 1233, 14 L.Ed.2d 106 (1965) (footnote omitted), the United States Supreme Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." The Court explained that allowing such comment on the defendant's exercise of his right not to testify "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614, 85 S.Ct. at 1232–33. In *Miranda v. Arizona*, 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 1625 n.37, 16 L.Ed.2d 694 (1966), the United States Supreme Court stated unequivocally that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." In *Romans v. Commonwealth*, 547 S.W.2d 128, 130 (Ky. 1977), the Kentucky Supreme Court held that allowing the prosecution to use the fact that the defendant "did not come forth with the explanation or story upon which he ultimately relied for his defense" was a "[r]are[] . . . indefensible blundering" meriting reversal.

The reasoning prohibiting any comment pertaining to the exercise of the Fifth Amendment privilege against self-incrimination equally applies to the Fourth Amendment privilege of being allowed to refuse unreasonable searches and seizures. This is especially true as consciousness of guilt can be inferred from a defendant's refusal to consent to a search or to speak without counsel present. In discussing inferring consciousness of guilt, the Third Circuit of the United States Court of Appeals opined that there is "little, if any, valid distinction between the privilege against self-incrimination and the privilege against unreasonable searches and seizures[.]" *United States v. Thame*, 846 F.2d 200, 206 (3d Cir. 1988). Similarly, the Ninth Circuit compared the Fourth and Fifth Amendment privileges, holding that evidence should be equally inadmissible in the case of silence and in the case of refusal to let an officer search. The Court explained that "[i]f the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be 'freely and voluntarily given.'" *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978).

In *Birchfield, supra*, the United States Supreme Court held that a defendant could not be required to submit to a blood test incident to an arrest for drunk driving because it is significantly more intrusive than a breath test. Therefore, a search warrant had to be obtained to take such defendant's blood

without consent. The Court explained "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." *Id.*

The *Birchfield* holding built upon the United States Supreme Court's prior decisions which recognized that "a compelled physical intrusion beneath [a suspect's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation" is "an invasion of bodily integrity [which] implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 1616, 84 L.Ed.2d 662 (1985)).

The *Birchfield* decision also held that while refusal to consent to a blood test could result in civil penalties under implied consent laws (such as loss of a driver's license), it could not result in criminal penalties. *Birchfield*, 136 S.Ct. at 2185.

Thus, *Birchfield* established that a defendant in Jared's situation was entitled to Fourth Amendment protections against an involuntary search of his blood without a warrant. However, the *Birchfield* decision left open the question of **whether any reference can** be made to a defendant's exercise of the

constitutional right of refusing to voluntarily consent to a blood test during a criminal prosecution for drunk driving.

As noted already, our case of *Commonwealth v. Brown*, *supra*, did not address this issue. Instead, it determined that the defendant in that case expressly consented to blood testing and that, therefore, a warrant was not needed. *Id.* at 876-79. The Court also opined in *dicta* that our implied consent scheme is not coercive and that *Birchfield* does not limit its application. *Brown*, 560 S.W.3d at 878.

In order to determine whether Jared's right to be free from a warrantless search allows for comment on his choice to exercise this right, we must examine other cases. Kentucky courts have recognized that exercising one's right to be free from a warrantless search is entitled to protection. In *Deno v. Commonwealth*, 177 S.W.3d 753, 762 (Ky. 2005), the Kentucky Supreme Court held that it is unconstitutional to penalize a defendant for exercising his right to be free of warrantless searches by using the defendant's refusal of consent as evidence of guilt. However, as explained *Coulthard v. Commonwealth*, 230 S.W.3d 572, 582 (Ky. 2007), a refusal to consent to a warrantless search can be "relevant for purposes other than to simply penalize [a defendant] for the exercise of a legal privilege."

In *Coulthard*, the Kentucky Supreme Court allowed the use of the defendant's refusal to consent to fingerprint sampling only for rebuttal and to impeach the defendant's testimony regarding his claim of self-defense. *Id.* at 582-83. The Court emphasized:

> **As the traditional truth-testing devices of the adversarial process, impeachment and rebuttal are vital to ensuring a just and fair trial. Thus, preserving each party's right to utilize such devices at trial should weigh heavily when considering counterbalancing claims of "constitutional privilege."**

Id. at 583 (emphasis in the original).

In its analysis, the Kentucky Supreme Court examined United States Supreme Court cases which involved the right to remain silent, opining that it was appropriate in the specific context of a defendant's choosing to testify to allow the Commonwealth to comment on the defendant's failure to consent. *Id.* at 582-83. One of those cases was *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S.Ct. 2124, 2129, 65 L.Ed.2d 86 (1980), which provides that when a defendant "cast[s] aside his cloak of silence" and decides to testify, the truth-telling function of the adversarial process prevails over the limits of the privilege against self-incrimination, and "the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."

The Kentucky Supreme Court recognized that such cases:

> involved the privilege against self-incrimination and whether arguments regarding its use violated either the Fifth or Fourteenth Amendments, the principles set forth therein aptly appl[ied to a] determination as to whether [using the defendant's refusal to consent to a search] violated the Fourth Amendment and Section 10 of the Kentucky Constitution.

Coulthard, 230 S.W.3d at 584. In doing so, the Kentucky Supreme Court recognized that the right to be free from unreasonable searches has a heightened constitutional protection similar to the protection afforded to the right to remain silent.

Jared's situation stands in stark contrast to that of the defendant in *Coulthard* in that he is being penalized for exercising his right to be free of an invasive warrantless search. Unlike the defendant in *Coulthard*, Jared did not testify, and his failure to consent was not being used to rebut or impeach his testimony. It is true that the trial court prohibited the Commonwealth from using Jared's refusal as evidence of guilt. However, his refusal could be used to imply guilty knowledge that he was intoxicated. If indeed that is why the Commonwealth wished to be able to comment on Jared's refusal to submit to a blood test, Jared was doubly jeopardized when the court forbade him from offering his own commentary; *i.e.*, from eliciting evidence or arguing that there was no scientific evidence regarding his intoxication **and** that the police could have gotten a warrant and obtained a blood test.

The truth-telling device of the adversarial process was critically compromised when Jared was not allowed to comment on the absence of a search warrant. Jared hoped to rebut and impeach the officer's testimony by bringing up the fact that the officer could have applied for a search warrant to compel the taking of Jared's blood but chose not to do so -- the implication being that the officer might not have been certain that the results would have shown intoxication to a level appropriate for a drunk driving charge.

The Commonwealth was allowed to present its commentary while Jared was muzzled. And this inequity was indeed error. It was not harmless error because Jared had strong evidence that he was not intoxicated. Three witnesses testified that they had been out with Jared all evening and did not see him drink any alcohol. The officer stopped Jared because he swerved, but he testified that Jared explained that he swerved because he was distracted by talking to his passengers.

Additionally, the testimony from the officer that Jared appeared to be intoxicated was at least partially negated by the video evidence of the stop, which was far from conclusive in showing that Jared was intoxicated. It at least partially rebutted the officer's testimony. Jared's previous trial had ended in a mistrial. In light of the weak evidence used to convict Jared, allowing the Commonwealth to discuss Jared's refusal to submit to a blood test arguably could have been the factor

that led to his conviction. Therefore, we reverse on this issue and remand for a new trial in which the Commonwealth would be prohibited from making any reference to Jared's failure to consent to an invasive test.

Next, Jared argues that the trial court erred by giving the jury, *sua sponte*, an *Allen* charge[3] after less than an hour and one-half of deliberations. Jared acknowledges that the issue is unpreserved, but he requests that we review it for palpable error pursuant to RCr[4] 10.26.[5] This Court explained in *Gray v. Commonwealth*, 479 S.W.3d 94, 96–97 (Ky. App. 2015), as follows:

> The provisions of RCr 10.26 authorize us to consider a "palpable error" even where the error was insufficiently preserved for review if it affects the substantial rights of a party. An error is "palpable" where it is plain and obvious. *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky.2006). Relief may be granted only if we determine

[3] *Com. v. Mitchell*, 943 S.W.2d 625, 626 (Ky. 1997) explains that:

> Prior to the adoption of RCr 9.57, effective August 1, 1992, the trial judges of this Commonwealth were afforded substantial discretion as to how to instruct a deadlocked jury, so long as the instruction did not attempt to coerce the jury or indicate the judge's own opinion as to the verdict. ... Most trial judges used the so-called "*Allen* charge," *see Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896) …. However, … *McCampbell v. Commonwealth*, Ky.App., 796 S.W.2d 596 (1990), … criticized the *Allen* charge and noted that the preferred view with respect to charging a deadlocked jury is that reflected in 3 *American Bar Association Standards for Criminal Justice*, Standard 15–4.4 (2d ed. 1980). It is this standard which is now codified in RCr 9.57(1).

[4] Kentucky Rules of Criminal Procedure.

[5] RCr 10.26 provides in relevant part that: "A palpable error which affects the substantial rights of a party may be considered … by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

> that manifest injustice has resulted from the error. In order to prove "manifest injustice," we must be persuaded that "upon a consideration of the whole case," a substantial possibility exists "that the result [of the trial] would have been different but for the alleged error." *Ramsey v. Commonwealth*, 157 S.W.3d 194, 199 (Ky.2005).

Jared argues that the court's instruction to the jury was erroneous because it violated RCr 9.57 and thus was coercive. RCr 9.57(1) provides as follows:

> (1) If a jury reports to a court that it is unable to reach a verdict and the court determines further deliberations may be useful, the court shall not give any instruction regarding the desirability of reaching a verdict other than one which contains only the following elements:
>
> (a) in order to return a verdict, each juror must agree to that verdict;
>
> (b) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (c) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;
>
> (d) in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change his or her opinion if convinced it is erroneous; and
>
> (e) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Jared contends that "the trial court should not have given the aforementioned instruction because the jury had not reported … that it was unable

to reach a verdict." He also argues that "even if the court could have given such an instruction, the one given by the court was erroneous, because it did not contain each element . . . listed in RCr 9.57 . . . . Furthermore, the trial court's instruction was coercive."

Gray, supra, directly addresses the provisions of RCr 9.57:

> The language of the rule indicates that the five elements of RCr 9.57(1) are required only where a trial court proposes to give "any instruction regarding the desirability of reaching a verdict." If the trial court decides to give such an instruction, these elements are mandatory and exclusive—although they need not be recited verbatim. *Commonwealth v. Mitchell*, 943 S.W.2d 625 (Ky. 1997).
>
> However, upon learning that a jury is deadlocked and determining that further deliberations may be useful, a trial court is not *required* to instruct the jury as to the desirability of reaching a verdict. Rather than instructing the jury regarding the desirability of a verdict, the trial court in this case merely instructed the jurors to "go back and deliberate further and see if we can't come to a resolution on this and if you decide that you're just hopelessly deadlocked, we'll talk about that." When a trial court makes a statement that does not discuss the desirability of a verdict, the issue is not whether the statement complied with the provisions of RCr 9.57(1)—but whether the statement was coercive. *Mills v. Commonwealth*, 996 S.W.2d 473, 493 (Ky. 1999).
>
> We must focus primarily upon the language of the court's instruction, bearing in mind that "[t]he ultimate test of coercion is whether the instruction actually forces an agreement on a verdict or whether it merely forces deliberation which results in an agreement." *Abbott v. Commonwealth*, 352 S.W.2d 552, 554 (Ky. 1961).

Gray, at 97-98.

As the Commonwealth notes, the record is not clear why the jurors were brought out. However, the court's statement to "come back when you are able to reach a verdict or if you have the same conclusions" would support an inference that the jurors may have told the court they could not reach a verdict.

Regardless, we are not persuaded that the trial court gave an instruction under RCr 9.57. Nor are we persuaded that the court's statement was coercive. Rather, we conclude that the court's statement was merely to encourage the jurors to deliberate further, expressing ***in the alternative*** for them to come back when they reached a verdict or to come back to report if they had the same conclusions. We can discern no palpable error on this issue.

To recapitulate, we AFFIRM the judgment of the Daviess Circuit Court with respect to the *Allen* charge, but we REVERSE with respect to the error in allowing the Commonwealth to comment on the issue of the absence of a blood test. We REMAND for a new trial in which the Commonwealth would be prohibited from making reference to Jared's failure to consent to an invasive blood test.

ALL CONCUR.

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