

NO. 40086-3-II

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COURT OF APPEALS

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JAMES THOMAS CONNOR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 08-1-04006-4

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exclude the polygraph evidence when polygraph examinations are unreliable and are not generally accepted in the scientific community?

2. Was there sufficient evidence to support the jury's finding that defendant intended to assault Sergeant Mathison when defendant purposely turned his steering wheel toward Sergeant Mathison while fleeing the traffic stop?

B. STATEMENT OF THE CASE.

1. Procedure

On August 29, 2008, the Pierce County Prosecuting Attorney's office (State) charged JAMES THOMAS CONNOR, hereinafter "defendant," with one count of second degree assault with a deadly weapon: a motor vehicle, one count of attempting to elude a pursuing police vehicle, and one count of unlawful possession of a controlled substance – forty grams or less of marihuana, in Pierce County Cause No. 08-1-04006-4. CP 1-2.

The information was later amended to include the aggravating factors of defendant's high offender score and that the offense was

committed against a law enforcement officer who was performing his official duties at the time. CP 4-6.

On October 20, 2009, defendant pled guilty to one count of unlawful possession of a controlled substance – forty grams or less of Marihuana, and one count of attempting to elude a pursuing police vehicle. CP 8-12, 13-21.

The case was assigned to the Honorable Vicki Hogan for trial. The trial began with a CrR 3.5 hearing in which Judge Hogan ruled that defendant's statements to Police Patrol Sergeant Ross Mathison would be admissible at trial. RP 34.

In preparation for trial, defense submitted to an independent polygraph examination. Defense requested a *Frye*¹ hearing to determine the admissibility of the results from defendant's polygraph examination. RP 36. After hearing testimony from Richard Smith about the reliability of polygraph testing, Judge Hogan denied defendant's motion to admit the polygraph. RP 42-108.

On October 30, 2009, the jury returned the verdict, finding defendant guilty of assault in the second degree. CP 63.

Defendant was found to be a persistent offender (RCW 9.94A.030(34)) and sentenced to life without the possibility of parole for assault in the second degree. CP 7, 125-139, 161-162.

¹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Defendant was also sentenced to a standard range sentence of 29 months in prison for attempting to elude a pursuing police vehicle and 90 days in jail for possession of a controlled substance – forty grams or less of Marihuana, both to run concurrent with his prison sentence for assault in the second degree. CP 125-141.

Defendant filed a timely notice of appeal from entry of this judgment. CP 121.

2. Facts

On the night of August 27, 2008, Sergeant Ross Mathison, a police patrol sergeant with the DuPont police department, observed defendant speeding and running a red light. RP 190, 196. Sergeant Mathison turned on his emergency lights and pulled over defendant's car for a routine traffic stop. RP 198. Sergeant Mathison approached defendant from the driver's side and advised defendant of the reason for the stop. RP 198-199.

Sergeant Mathison requested defendant's driver's license, insurance information, and registration. RP 199. Defendant began searching through some paperwork on the driver's side seat, then abruptly reached over and started rolling up his window. RP 199-200. Sergeant Mathison kept telling defendant to stop and began striking defendant's

window with his flashlight. RP 200-201. Defendant revved the engine, abruptly turned the wheel to the left towards Sergeant Mathison and accelerated. RP 202. Sergeant Mathison had to jump back to prevent getting injured by defendant's car. RP 202, 205.

Sergeant Mathison testified at trial that when defendant turned the wheel towards him, he was fearful. RP 253. He specifically testified that "I don't want to get hit by another car that is coming. I don't want to get hurt by the vehicle, I want to go home to my family." RP 253.

Sergeant Mathison testified that his fear was increased by the fact that defendant deliberately pulled the steering wheel to the left "like he was trying to hurt me, get me out of the way . . ." RP 253. Sergeant Mathison testified that there was nothing that defendant had to drive around and "[h]e could have just went straight, instead of pulling the wheel to the left and into me." RP 245. Defendant confirmed that there was nothing in front of him preventing him from going forward in a straight manner. RP 293-295.

After defendant drove off, Sergeant Mathison returned to his vehicle to notify dispatch and requested assistance. RP 206-207. He then pursued defendant's vehicle. *Id.* During the pursuit, defendant maneuvered around numerous other vehicles and failed to yield to Sergeant Mathison's police lights and sirens. RP 207.

Officer Tom Yabe, from the Steilacoom police department, and Trooper James Meldrum, from the Washington State Patrol, joined in the pursuit. RP 158-160, 176-177. Trooper Meldrum was working on August 27th when he was informed that a DuPont officer was in pursuit of a vehicle that had assaulted him on a traffic stop. RP 176. While in pursuit, he observed defendant driving between 45 and 55 mph. RP 177.

Officer Yabe heard an officer call out via radio that he had made a traffic stop and the suspect was now fleeing and had assaulted him in the process. RP 158-160. Officer Yabe responded to the call. *Id.* When he located the vehicle, he deployed stop sticks. *Id.* Stop sticks are a series of tubes with detachable quills that are designed to puncture a tire and cause a controlled release of the air within the tire. *Id.* Officer Yabe observed defendant swerve around the stop sticks and swerve towards Officer Yabe. RP 169. Eventually, the stop sticks immobilized defendant's vehicle and defendant was arrested. RP 209.

Once in custody, Sergeant Mathison asked defendant why he ran. RP 217. Defendant replied that he knew he was going to jail so he panicked and fled. *Id.* Defendant also told Sergeant Mathison that he wasn't trying to hit him and that he was sorry. RP 217.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXCLUDED THE POLYGRAPH EVIDENCE BECAUSE POLYGRAPH EXAMINATIONS ARE INSUFFICIENTLY RELIABLE AND ARE NOT GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY.

The *Frye* standard is used in Washington for determining the admissibility of scientific evidence. See *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996); *Frye v. United States*, 293 F. 1013 (D.C. Circ 1923). Under the *Frye* standard, evidence based on a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community. *Copeland*, 130 Wn.2d at 255, (citing *State v. Canaday*, 90 Wn.2d 808, 813, 585 P.2d 1185 (1978)). Review of admissibility under *Frye* is *de novo* and involves a mixed question of law and fact. *Copeland*, 130 Wn.2d at 255 (citing *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502(1993)).

It is well settled in Washington that the results of a polygraph examination are inadmissible absent a stipulation from both parties. See *State v. Renfro*, 96 Wn.2d 902, 905, 639 P.2d 737 (1982); *State v. Sutherland*, 94 Wn.2d 527, 529; 617 P.2d 1010 (1980); *State v. Woo*, 84 Wn.2d 472, 527 P.2d 271 (1974).

The Washington State Supreme Court has suggested that it might reconsider whether unstipulated polygraph evidence is admissible if the proffering party is able to demonstrate that the polygraph evidence meets the *Frye* standard. *State v. Grisby*, 97 Wn.2d 493, 502, 647, 647 P.2d 6 (1982). As recently as 2004, the Washington State Supreme Court stated that the polygraph still does not meet the *Frye* standard. *State v. Thomas*, 150 Wn.2d 821, 860, 83 P.3d 970 (2004). Here, defendant failed to demonstrate that the polygraph has gained general acceptance in the relevant scientific community.

At the *Frye* hearing, defense presented the testimony of Richard Smith, who owns and operates a polygraph service. RP 43. Mr. Smith testified that there have been many advancements in the field of polygraph testing, such as monitoring the subject's respiration, electrodermal skin activity, and using a Photoelectric Plethysmography mit to monitor the dilation of blood vessels. RP 46-48.

Mr. Smith testified that there are many different types of polygraph testing and that the method he uses, called the "Utah Zone of Comparison" method, is considered to have the highest accuracy rate, at 91%, and the fewest inconclusive results for polygraph testing. RP 50. Mr. Smith testified that polygraphers prefer different techniques based on which technique they learned in school. RP 80.

However, Mr. Smith's testimony also highlighted numerous problems still present with polygraph testing. Not everyone can be tested on a polygraph because of certain emotional, psychological or physical issues that interfere with the normal functioning of the autonomic nervous system. RP 57-58. There is a high rate of inconclusive or false positives when addressing mental state in polygraph examinations. RP 59. Additionally, Mr. Smith testified that as soon as polygraphers have reached the pinnacle in terms of technology and instrumentation and handling countermeasures, new countermeasures are developed and polygraphers must come up with ways to address the new countermeasures. RP 65.

Mr. Smith testified that a scientific community that understands and is devoted to polygraph research accepts the current state of polygraphs as being valid and reliable. RP 54. However, he also testified that there is another community of scientists that do not accept the polygraph as being valid and reliable. RP 77.

Defense argues that the validity of polygraph testing is supported by recent literature and legal authority. Appellant's Brief, p. 10. Specifically defense cites to *United States v. Posado*, 57 F. 3d 428 (5th Cir. 1995), as the legal authority supporting the admissibility of polygraph results. However, that case was decided based on Texas law which uses

the less stringent *Daubert*² standard for admissibility on scientific evidence. *Id.* at 429.

The Washington State Supreme Court has repeatedly rejected the *Daubert* standard for determining whether evidence based on scientific principles is admissible at trial. *See State v. Jones*, 130 Wn.2d 302, 306, 922 P.2d 806 (1996); *Copeland*, 130 Wn.2d at 251. Polygraph examinations are not generally accepted in the scientific community, and therefore do not meet the *Frye* standard.

Defense also relies on an article by Donald J. Krapohl for support. Appellant's brief, p. 10. However, the footnote on page one of that article explicitly states: "The views expressed in this article are solely those of the author, and do not necessarily represent those of the Department of Defense, the US Government or the APA."³ Donald J. Krapohl, Validated Polygraph Techniques, Polygraph, Volume 35 Issue 3 (2006).

The legal authority in Washington State has been consistent in recognizing that polygraphs are not generally accepted in the relevant scientific community, and therefore are not admissible in court absent a stipulation by both parties. *See State v. Thomas*, 150 Wn.2d at 860 (results of polygraph tests are not recognized in Washington as reliable evidence and are inadmissible without stipulations from both parties),

² *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d. 469 (1993).

³ The APA is the American Polygraph Association.

(citing *State v. Renfro*, 96 Wn.2d at 905); *State v. Ahlfinger*, 50 Wn. App. 466, 468-69, 749 P.2d 190 (1988) (Washington courts have limited the admissibility of polygraph evidence to require stipulations by both parties because the polygraph has not attained general acceptance by the scientific community), (citing *State v. Bartholomew*, 98 Wn.2d 173, 203, 654 P.2d 1170 (1982)).

Defense has failed to provide any relevant binding authority that polygraph evidence is admissible in Washington or passes the *Frye* test. The Court properly excluded the polygraph evidence.

2. SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND ALL THE ELEMENTS BEYOND A REASONABLE DOUBT INCLUDING THAT DEFENDANT INTENDED TO ASSAULT SERGEANT MATHISON.

Due process requires the State to bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Additionally, challenging

the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences therefrom. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in a light most favorable to the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant was charged and convicted of assault in the second degree with a deadly weapon with the aggravating factor that the victim was an on-duty law enforcement officer, RCW 9A.36.021(1)(c), RCW 9.94A.535(3)(v). The jury was instructed that:

An assault is an act, with unlawful force, done with intent to inflict bodily injury on another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 43-62; Jury Instruction 7. The jury was instructed that in order to convict defendant of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 27th day of August, 2008, the defendant assaulted R. Mathison with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

CP 43-62; Jury Instruction 12. Defendant's argument focuses on the sufficiency of the evidence presented at trial that proved defendant intended to assault Sergeant Mathison. Appellant's brief, p. 16.

"Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability." *State v. Billups*, 62 Wn. App. 122, 126, 813 P.2d 149 (1991) (citing *State v. Caliquiri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983)); *State v. Delmarter*, 94 Wn.2d at 638. Sergeant Mathison testified that defendant deliberately turned the steering wheel towards him in an attempt to push Sergeant Mathison out of the way. RP 202. Sergeant Mathison tried to jump out of the way as defendant's vehicle accelerated towards him. RP 205. The jury could conclude from defendant's act of turning the steering wheel towards Sergeant Mathison that defendant intended to injure Sergeant Mathison or put Sergeant Mathison in fear of injury.

Both Sergeant Mathison and defendant testified that there was nothing in front of defendant's car preventing defendant from pulling his car out straight. RP 245, 293-295. Sergeant Mathison testified that defendant revved his engine and stomped on the gas, then abruptly turned the wheel to the left towards Sergeant Mathison. RP 202. Sergeant Mathison stated that defendant deliberately pulled the steering wheel to

the left “trying to push me [Sergeant Mathison] out of the way, or scare me, or hit me.” RP 205. The jury could infer from this that defendant intended to inflict bodily injury on Sergeant Mathison, or put Sergeant Mathison in fear of bodily injury. The jury could conclude from the fact that defendant could have driven straight but chose to turn his vehicle towards Sergeant Mathison when he drove off that defendant intended to assault Sergeant Mathison.

Although defendant testified that he did not turn his wheel to the left, the jury may not have found his testimony credible. Credibility determinations are solely for the trier of fact. *State v. Camarillo*, 115 Wn.2d at 71. The jury’s finding that defendant is guilty of second degree assault with a deadly weapon indicates that the jury rejected defendant’s explanation and believed Sergeant Mathison.

The jury was instructed that a “deadly weapon” means
any weapon, device, instrument, substance or article
including a vehicle, which under the circumstances in
which it is used, attempted to be used, or threatened to be
used, is readily capable of causing death or substantial
bodily injury.

CP 43-62; Jury Instruction 9 (emphasis added). The jury was instructed that “substantial bodily harm” means

Bodily injury that involves a temporary but substantial disfigurement, or causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

CP 43-62; Jury Instruction 11.

An automobile is readily capable of causing substantial bodily injury. The jury heard Sergeant Mathison testify that if he hadn't jumped back, defendant's vehicle probably would have run over his foot. RP 205. Mr. Lewis testified that defendant's vehicle is heavy. RP 346. The evidence supported the conclusion that the car was, at the very least, capable of fracturing Sergeant Mathison's foot. Such an injury would be included in the definition of substantial bodily injury.

There was sufficient evidence for the jury to find all the elements, including intent, beyond a reasonable doubt.

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STATE OF WASHINGTON

D. CONCLUSION.

For the forgoing reasons, the State respectfully requests the Court  affirm defendant's conviction and sentence for assault in the second degree.

DATED: July 8, 2010.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.8.10 
Date Signature