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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it precluded the defense from presenting the exculpatory results of Appellant's polygraph examination.
2. The trial court erred when it ruled that Appellant had not established that polygraph examinations have achieved acceptance in the scientific community or that the proffered results of his polygraph examination were sufficiently reliable.
3. The trial court violated Appellant's constitutional right to present relevant evidence in his defense when it excluded the results of his polygraph examination.
4. The State failed to prove beyond a reasonable doubt that Appellant specifically intended to assault the officer, which is an essential element of second degree assault.
5. The State failed to prove beyond a reasonable doubt that Appellant's car was a deadly weapon under the circumstances in this case, which is an essential element of second degree assault.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it ruled that polygraph

examinations have not achieved general acceptance within the relevant scientific community where Appellant presented evidence establishing: (1) the technological advances in polygraph testing techniques; (2) the high standards required for an individual to become certified as a polygraph examiner; (3) the precautions taken to ensure reliable and valid results; and (4) studies establishing the high percentage of accuracy of current testing? (Assignments of Error 1 & 2)

2. Did the trial court's decision to exclude the exculpatory results of the polygraph test deny Appellant his constitutional right to present evidence in his defense, when Appellant established that polygraph testing has achieved general acceptance within the relevant scientific community and that the results of his polygraph were sufficiently reliable? (Assignments of Error 1 & 3)
3. Is the mere fact that Appellant turned his steering wheel to the left sufficient to establish that Appellant specifically intended to assault the officer, where the officer was standing next to and not in front of the car, and where Appellant made no other gestures, comments or motions

indicating an intent to harm the officer? (Assignment of Error 4)

4. Is an officer's opinion that the car's tire could have rolled over his foot sufficient evidence to establish that the car was used in a manner likely to cause death or substantial bodily injury, and was therefore a deadly weapon? (Assignment of Error 5)

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

While on patrol close to midnight on August 27, 2008, DuPont police officer Ross Mathison noticed a car traveling above the posted speed limit and failing to stop at a red light. (RP 196-97, 199) The car then proceeded across an Interstate 5 overpass and turned left onto the northbound Interstate 5 onramp. (RP 197-98) Mathison followed the car and activated the lights on his patrol car to initiate a traffic stop. (RP 198) The car pulled over onto the right shoulder and stopped. (RP 198)

Mathison parked his patrol vehicle behind the car and approached the driver, James Thomas Connor. (RP 196, 198-99) Mathison stood beside the car next to Connor's window, and requested identification and insurance papers. (RP 199)

According to Mathison, Connor began to look through a stack of papers on the passenger seat, then he suddenly reached over and began to roll up the window. (RP 199, 200)

Mathison testified that he told Connor to stop, and banged his flashlight against the window, but Connor grabbed the steering wheel and abruptly turned it to the left, revved the car's engine, and drove away. (RP 201-02, 205, 206-07) Mathison jumped back because he thought his foot was going to be run over by the car. (RP 205) Mathison used his hand to push off Connor's car in order to maintain his balance. (RP 207)

Mathison also testified that Connor could have driven straight because there were no objects blocking the car's path. (RP 206) Mathison could not remember if Connor started his vehicle before pulling away or if the car was already running. (RP 227) But during a pretrial interview with the defense, Mathison said that Connor's car's ignition was off when he first approached, and Connor started the ignition just before he drove away. (RP 293, 295)

As Connor sped away, Mathison returned to his patrol car and notified dispatch about the incident. (RP 206) A Washington State Patrol officer and a City of Steilacoom officer joined in the

pursuit, and Connor was eventually stopped and taken into custody about 10 minutes later. (RP 157, 159, 160, 161-62, 171, 175, 179) Mathison asked Connor if he intentionally tried to hit him with his car, and Connor apologized and explained that he simply panicked and drove away, but was not trying to hit Mathison. (RP 217)

Connor testified that he stopped at the red light and was not speeding. (RP 313) He did have a warrant for his arrest, so he was concerned when he saw Mathison's patrol car, and Connor knew he was going to be arrested once Mathison initiated the traffic stop. (RP 314-15) Connor pulled his car onto the right shoulder, turned off the ignition and put the car into park. (RP 315, 316)

Connor testified that he wanted time to call his girlfriend to let her know that he was going to be arrested. (RP 317-18) So he started the car and drove away. (RP 317) He did not turn the steering wheel to the left, and Mathison was not in danger of being struck. (RP 317, 320) In fact, Connor testified that Mathison actually stepped forward towards the car when it started to pull away. (RP 320) Connor never intended to injure or scare Mathison. (RP 320)

Connor also testified that his car had a number of problems, and was not capable of rapid acceleration from a stop. (RP318) A

mechanic who recently worked on Connor's car confirmed that the car was in such poor condition that it would be difficult to accelerate from a stop. (RP 345, 346)

B. PROCEDURAL HISTORY

The State charged Connor with one count of second degree assault with a deadly weapon, with an aggravating factor that the victim was an on-duty law enforcement officer (RCW 9A.36.021(1)(c), 9.94A.535(3)(v)). (CP 4) The State also charged Connor with one count of attempting to elude a pursuing police vehicle (RCW 46.61.024) and one count of unlawful possession of a controlled substance (RCW 69.50.401). (CP 5) Connor pleaded guilty to these two latter charges prior to trial. (RP 4, 11-16; CP 8-12, 13-21)

Connor took a polygraph examination during which he was asked whether he turned the steering wheel to the left. (RP 36, 98) He answered no. (RP 98) The polygraph examiner, Richard Smith, found that he was not being deceptive. (RP 36, 98) Connor asked the court to allow him to present the exculpatory results to the jury at trial. (RP 36, 98-99) Following a Frye hearing, the trial court denied the motion, finding that Connor had not established that polygraph examinations are accepted as reliable by the

scientific community. (RP 107-08; CP 165) Connor offered to take a new polygraph examination and stipulate to its admissibility regardless of result, but the State refused. (RP 110)

The jury convicted Connor of second degree assault. (CP 63; RP 390) At sentencing, the State asserted that Connor had two prior most serious offenses, and that he was therefore a persistent offender. (CP 65-70; RP 399) The court agreed, and sentenced Connor to a term of life without the possibility of parole. (CP 128, 132, 162; RP 411) This appeal timely follows. (CP 121)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT INCORRECTLY RULED THAT POLYGRAPH EXAMINATIONS ARE NOT ACCEPTED IN THE SCIENTIFIC COMMUNITY AND ARE NOT SUFFICIENTLY RELIABLE, AND THE COURT'S DECISION TO EXCLUDE THE EXCULPATORY RESULTS OF CONNOR'S POLYGRAPH EXAMINATION DENIED CONNOR HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Washington has adopted the Frye standard for determining whether evidence based on novel scientific procedures is admissible. See State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996); Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923). The Frye rule provides that 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. State v. Cauthron, 120 Wn.2d 879, 886, 846 P.2d 502 (1993).

Review of admissibility under Frye is *de novo* and involves a mixed question of law and fact. Copeland, 130 Wn.2d at 255 (citing Cauthron, 120 Wn.2d at 887). “The reviewing court will undertake a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority.” Copeland, 130 Wn.2d at 255-56 (citing Cauthron, 120 Wn.2d at 887-88).

Since State v. Woo, polygraph evidence has been inadmissible in Washington absent a written stipulation by both parties. 84 Wn.2d 472, 527 P.2d 271 (1974); see also State v. Renfro, 96 Wn.2d 902, 639 P.2d 737 (1982). The original rationale for this stipulation requirement was the notion that the polygraph had not attained general acceptance by the scientific community. State v. Bartholomew, 98 Wn.2d 173, 203, 654 P.2d 1170 (1982). But the Washington 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 P.2d 6 (1982); Woo, 84 Wn.2d at 474-75.

In support of his request to admit the results of his polygraph examination, Connor presented the testimony of Richard Smith, who is a trained and certified polygraph examiner. (RP 43-45) Smith detailed the training and certifications that he has achieved in the area of polygraph administration, but also the requirements imposed on any individual seeking to become certified as a polygraph examiner. (RP 44-45)

Smith testified that the technology of polygraph machines has made significant advances over the years; original polygraph machines measured only blood pressure, while current machines simultaneously monitor several physiological systems, including blood pressure, respiration, electrodermal skin activity, and blood vessel dilation. (RP 46-48) He explained how the human body responds when presented with a question that has a “threatening” component or when a person has an emotional feeling of concern or fear. (RP 46-48) Current polygraph machines detect and measure these physiological responses. (RP 44, 46-48)

Smith testified that there are several techniques for preparing and questioning an individual, but he uses the “Utah Zone of Comparison” technique, which has been shown to have the greatest accuracy and fewest inconclusive results. (RP 49-50) The

Utah technique has been used and reviewed for at least 15 years, and was found by the American Polygraph Association to have an accuracy rate of 91 percent. (RP 50, 53; Exh. D1) In fact, recent studies have found that polygraph results have a higher degree of accuracy than other routinely admitted forms of evidence, such as eyewitness testimony. (RP 89-90)

According to Smith, the scientific community that understands and studies polygraphs accepts the Utah technique as valid and reliable. (RP 54) Smith further testified that polygraph tests are widely used throughout the Federal investigative and intelligence agencies, and are used in Washington State in postconviction sex offender treatment and monitoring. (RP 75) Smith also explained the precautionary steps that he takes to ensure reliability and to ensure that an individual being tested cannot "beat" the polygraph machine. (RP 56-64)

Smith's testimony is supported by recent literature and legal authority. Current research indicates that modern polygraph techniques accurately predict truth or deception up to or even more than ninety percent of the time. United States v. Posado, 57 F.3d 428, 434 (5th Cir. 1995); Donald J. Krapohl, VALIDATED POLYGRAPH

TECHNIQUES, Polygraph, Volume 35 Issue 3 (2006)¹; David C. Raskin, THE POLYGRAPH IN 1986; SCIENTIFIC, PROFESSIONAL AND LEGAL ISSUES SURROUNDING APPLICATION AND ACCEPTANCE OF POLYGRAPH EVIDENCE, 1986 Utah L.Rev. 29, 72 (1986) (“existing literature suggests an accuracy of 90% or higher when examinations are conducted to assess the credibility of suspects in criminal investigations.”); United States v. Galbreath, 908 F. Supp. 877, 892 (D.N.M. 1995) (“although the polygraph test has been plagued with controversy . . . it now appears that there is general acceptance of the control question polygraph technique when it is administered by a properly qualified examiner”).

Appellate courts have also noted the increased scientific validity of the modern polygraph examination and its “apparent increased use in the criminal justice system.” See State v. Gregory, 80 Wn. App. 516, 910 P.2d 505 (1996). Additionally, in some contexts, Washington courts recognize the apparent validity and usefulness of polygraph test results. For example, in State v. Eaton, the court found it appropriate for a trial court to order the defendant to submit to polygraph examinations as a condition of

¹ This article was submitted by the defense at the Frye hearing, but the trial court chose not to review it before ruling on the admissibility of the polygraph results. (Exhibit D1; RP 94, 107)

community placement because, the court reasoned, polygraph tests are the only way to “verify or disprove” reports that the defendant had violated a condition of his sentence. 82 Wn. App. 723, 734, 919 P.2d 116 (1996).

If the Court of Appeals in Eaton found that polygraph evidence is reliable enough to be used against a defendant charged with a probation violation, then surely polygraph evidence is reliable enough to be admissible in a trial when proffered by the defendant as evidence of his innocence.

Clearly, tremendous advances have been made in polygraph instrumentation and technique in the years since Woo and Renfro. Because Connor presented evidence that the reliability of polygraph results in general, and of the Utah technique in particular, is now generally accepted within the relevant scientific community, the trial court erred when it refused to allow Connor to present the exculpatory results of his polygraph examination.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution grant criminal defendants the right to present evidence and testimony in their own

defense.² See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). In State v. Ahlfinger, the court held that because polygraph evidence was not generally accepted in the scientific community at that time, and thus not minimally reliable under the Frye test, the defendant did not have a constitutional right to present exculpatory polygraph evidence. 50 Wn. App. 466, 472, 749 P.2d 190 (1988). But in this case, Connor has shown that polygraphs have gained acceptance in the relevant scientific community and that the result of his polygraph examination is reliable. Accordingly, the trial court's decision to exclude the exculpatory results of the polygraph violated Connor's constitutional right to present a defense.

The denial of this right was prejudicial to Connor's defense. The primary disputed fact was whether or not Connor intentionally turned the steering wheel to the left as he drove away from the traffic stop. Connor testified that he did not turn the wheel, and that

² The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." Art. 1, § 22 provides, in relevant part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf[.]"

he did not intend to injure Mathison. (RP 317, 320) Mathison testified that Connor abruptly turned the wheel hard to the left. (RP 202) Relying on Mathison's testimony, the State argued that Connor's act of turning the wheel toward Mathison proved his intent to assault Mathison. (RP 359, 363, 366)

Credibility was a primary issue before the jury, and the verdict reflects its decision not to credit Connor's testimony. Under these circumstances, the results of the polygraph examination that bolstered Connor's credibility could have been decisive. "Where credibility is as critical as in the instant case, the circumstances are such as to make the polygraph evidence materially exculpatory within the meaning of the Constitution." McMorris v. Israel, 643 F.2d 458, 462 (7th Cir. 1981) (citing Peter Westen, COMPULSORY PROCESS II, 74 Mich. L. Rev. 191, 197 (1975)).

Furthermore, any concern that juries may give undo weight to polygraph evidence is unfounded. First, stipulated polygraph evidence may be admitted in Washington. The stipulation does not reduce the risk that the jury will consider the results infallible. As noted by the Ohio Court of Appeals in State v. Hill, "[w]e do not consider it logical and reasonable to hold . . . that . . . [polygraph] evidence has probative value when offered under stipulation but

that it has no probative value without such stipulation.” 317 N.E.2d 233, 238 (Ohio. App. 1974).

Second, vigorous cross examination can rectify any potential prejudice. The cross-examiner can reinforce the jury’s role as the final arbiter of credibility by presenting evidence of the error rates of polygraph examinations or particular problems with the examination done in the case at hand (as is currently done with other imperfect scientific methods, such as fingerprint analysis or DNA testing). Third, proper limiting instructions can explain to the jury that polygraph evidence is but one piece of evidence to be weighed by the jury along with the other evidence presented.

Because Connor established that polygraph testing techniques and standards have reached a level of general acceptance in the scientific community, and that his proffered polygraph results (obtained using the most accurate Utah technique) met at least minimum standards of reliability, the trial court erred when it denied his motion to present the results to the jury. This error denied Connor his constitutional right to present exculpatory evidence in his defense, and therefore compromised his ability to provide an adequate defense to the jury. Connor’s assault conviction should be reversed, and he should be allowed to

present the polygraph results to a jury at a new trial.

B. THE STATE FAILED TO MEET ITS BURDEN OF PROVING THE ESSENTIAL ELEMENTS OF ASSAULT BECAUSE THE EVIDENCE DID NOT ESTABLISH THAT CONNOR INTENDED TO ASSAULT MATHISON AND DID NOT ESTABLISH THAT CONNOR USED HIS CAR AS A DEADLY WEAPON.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvane, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To support a second degree assault conviction, the State must prove beyond a reasonable doubt an intentional assault with a deadly weapon. RCW 9A.36.021(1)(c). In this case, the State failed to prove that Connor intended to assault Mathison, or that Connor’s car was a deadly weapon.

1. The State failed to prove the essential element of intent.

Assault in the second degree requires that the offender act with intent. RCW 9A.36.021(1)(c). As charged and instructed in

this case (CP 4, 52), the State had to prove that Connor had the specific intent to either: (1) cause Mathison bodily injury; or (2) create in Mathison apprehension and fear of bodily injury. See State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Specific intent cannot be presumed, but may be inferred as a logical probability from the surrounding facts and circumstances. State v. Pierre, 108 Wn. App. 378, 386, 31 P.3d 1207 (2001). The trier of fact ascertains “intent” by determining whether a person acts with the “objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); Wilson, 125 Wn.2d at 217.

For example, in State v. Baker, the defendant accelerated directly toward one officer’s occupied patrol car and toward another officer as he sat on his motorcycle. 136 Wn. App. 878, 881-82, 151 P.3d 237 (2007). Baker also “flipped off” one officer, laughed, and then sped off. 136 Wn. App. at 882. Both the trial court and the appellate court found these circumstances sufficient to show Baker’s intent to assault the two officers. 136 Wn. App. at 882-83.

The evidence here shows no similar intent. Unlike Baker, Connor did not drive at a high speed directly toward Mathison, and made no other gestures or comments to indicate his disregard for

Mathison's safety. Moreover, Mathison was standing beside the car and towards the back of the driver's door. (RP 200, 201, 205) No matter how hard a person turns a steering wheel, a car is simply not capable of moving laterally. And Connor was parked on the right shoulder, so he had to steer the car to the left in order to return to the roadway. (RP 198) Even if Mathison is correct that Connor turned the steering wheel to the left and accelerated away from the traffic stop, this act alone does not prove, beyond a reasonable doubt, that Connor intended and hoped to either injure or cause fear of injury to Mathison.

Connor may have acted negligently or recklessly when he drove away from the traffic stop, but no reasonable juror could have concluded that he specifically intended to assault Mathison under the facts of this case.

2. The State failed to prove that Connor's car was a "deadly weapon" under the circumstances of this case.

A "deadly weapon" includes 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 harm." RCW 9A.04.110(6). Substantial bodily harm is "bodily injury which involves a temporary but substantial

disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

A vehicle is not per se deadly; rather, it is the vehicle's “inherent capacity” and the circumstances under which it is used that determine whether it is a deadly weapon. State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). The circumstances include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” Shilling, 77 Wn. App. at 171 (quoting State v. Sorenson, 6 Wn. App. 269, 273, 492 P.2d 233 (1972)).

The State did not prove, beyond a reasonable doubt, that the manner in which Connor used his car made it capable of causing death or substantial bodily harm. Mathison testified that if he had not moved, he “assumed” that the back tire of the car would have run over his foot and he “probably would have got a crushed foot, or it would have hurt real, real bad.” (RP 205) Simple foot pain, even “real, real bad” pain, is not included in the statutory definition of death or substantial bodily harm. RCW 9A.04.110(4)(b). The State failed to present any evidence beyond Mathison’s personal opinion to establish the type and severity of injury that a foot might

suffer if it were briefly rolled over by a car tire. There was simply no evidence that Mathison could have suffered substantial injury of the kind contemplated by the statute.

V. CONCLUSION

Connor established that polygraph testing has achieved general acceptance in the relevant scientific community, and that his polygraph results were sufficiently reliable. The trial court's decision to exclude the results was error, which denied Connor his constitutional right to present exculpatory evidence in his defense, and prejudiced the presentation of his case. Additionally, the State failed to prove that Connor intended to cause Mathison injury or fear of injury even assuming he turned the steering wheel to the left and drove away from the traffic stop. And there was no evidence to support the jury's conclusion that the car was a deadly weapon under the circumstances in which it was driven in this case. For each of these reasons, Connor's second degree assault conviction must be reversed.

DATED: May 7, 2010



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CERTIFICATE OF MAILING

I certify that on 05/07/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) James T. Connor, DOC# 762343, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

Stephanie Cunningham

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