IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 67431-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAMES THOMAS CONNER,[1]	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 19, 2011

Lau, J. — James Conner appeals his second degree assault conviction and life sentence. Conner argues that the trial court erred in ruling that polygraph evidence has not yet gained general acceptance in the relevant scientific community under the Frye[2] standard and in excluding his polygraph examination results. Conner also argues insufficient evidence supports the jury's finding that he intentionally assaulted Officer Ross Mathison and the car he drove was a deadly weapon. Because the record shows the trial court properly excluded the polygraph evidence and sufficient evidence supports Conner's conviction, we affirm.

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[1] Court documents show the appellant spelling his name both "Conner" and "Connor." For consistency in this opinion, we will use "Conner."

[2] Frye v. United States, 293 F. 1013 (1923).

FACTS

DuPont Police Sergeant Ross Mathison observed a vehicle speeding and running a red light. Mathison pulled the vehicle over to the side of the road, approached driver James Conner, and requested his license and insurance information. Conner began searching through some paperwork on the front passenger seat but then suddenly reached over and started rolling up his window. Standing near the driver's door, Mathison told Conner to stop and struck the window with his flashlight. Conner then revved his engine and "abruptly turned the wheel to the left," forcing Mathison to jump out of the way when the car took off. Report of Proceedings (RP) (Oct. 26, 2009) at 202. According to Mathison, Conner's action was a "deliberate attempt to pull the wheel to the left to turn into [him]." RP (Oct. 26, 2009) at 244. Mathison explained that if he had not jumped back, his foot would have been run over and crushed. Mathison feared that Conner was trying to hurt him; there was no reason for Conner to turn left, as there was nothing in the way to prevent him from going straight.

After Conner drove away, Mathison requested assistance. He pursued the vehicle and testified that during the pursuit, Conner maneuvered around numerous other vehicles and failed to yield to Mathison's lights and sirens. Officer Tom Yabe and Trooper James Meldrum joined the pursuit. Officer Yabe deployed stop sticks and

immobilized Conner's vehicle, and Conner was arrested.

Mathison spoke with Conner once he was taken into custody. Conner said he knew he was going to jail and panicked; he also told Mathison he was not trying to hit him and he was sorry.

Conner testified that he stopped at the red light and was not speeding and that he left the scene because he had a warrant for his arrest and wanted time to call his girl friend to let her know he was going to be arrested. He further testified that he did not turn the steering wheel to the left, the vehicle was not capable of rapid acceleration, he did not intend to injure Mathison, and Mathison was not in danger of being struck.

The State charged Conner with one count of second degree assault with a deadly weapon (motor vehicle), one count of attempting to elude a pursuing police vehicle, and one count of illegal possession of a controlled substance. The State later amended the information to allege aggravating factors—Conner's high offender score and committing the offense against a law enforcement officer in the course of his official duties. Conner pleaded guilty to the possession and attempting to elude charges.

In preparation for trial on the assault charge, Conner took a polygraph test administered by polygraph specialist Richard Smith. Conner passed the examination, during which he answered, "No" when he was asked whether he turned his wheel to the left. Defense counsel requested a Frye hearing to determine admissibility of the

polygraph results.

At the Frye hearing, Smith testified for the defense. Smith detailed his training, education, and certifications. He also described advancements in polygraph technology, such as monitoring a subject's respiration, electrodermal skin activity, and blood vessel dilation.

Smith testified that polygraphers use several different testing methods, but that he uses the Utah Zone of Comparison test ("Utah test"). According to Smith, this test has the greatest accuracy and the fewest inconclusive results. Smith also testified that recent studies show polygraph results are more accurate than other routinely admitted forms of evidence.

Smith testified that despite the Utah test's accuracy, numerous problems remain. Not everyone can be tested because certain emotional, psychological, or physical issues may interfere with the normal functioning of the automatic nervous system. Intent is difficult to test, and inconclusive results or false positives are common when addressing mental state in a polygraph test. Smith noted that countermeasures may allow subjects to beat a polygraph test, and polygraphers must devise ways to address those countermeasures.

Smith testified that the scientific community that understands and is devoted to polygraph research accepts polygraphy as valid and reliable and many psychologists view polygraphy favorably. Smith noted that polygraph tests are used by federal

investigative intelligence institutes for truth verification and in postconviction sex offender treatment and monitoring in Washington. But Smith conceded that another community of scientists reject polygraphy.

The trial court denied Conner's motion to admit the polygraph results. The court found too many variables, including the subject's personality, the preparation of the examiner to the examinee, and the design of the test. The court deemed polygraphy "too subjective" to pass the Frye test.

On October 20, 2009, the jury found Conner guilty of second degree assault. The court found Conner was a persistent offender under RCW 9.94A.030(34) and sentenced him to life in prison without possibility of parole.

ANALYSIS

Polygraph Evidence

Conner contends polygraph evidence meets the Frye standard and the trial court erred in excluding his polygraph results from evidence. The State counters that Conner failed to prove polygraph evidence passes the Frye test.

Washington applies the Frye standard for determining admissibility of evidence based on novel scientific procedures. State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). The Frye standard provides that evidence based on a scientific theory or principle is admissible only if it has achieved general acceptance in the relevant scientific community. Copeland, 130 Wn.2d at 255. The "'core concern . . . is

only whether the evidence being offered is based on established scientific methodology.'" In re Detention of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (quoting In re Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993)). We review admissibility under Frye de novo, and it involves a mixed question of law and fact. Copeland, 130 Wn.2d at 255.

In Washington, polygraph evidence is inadmissible absent a written stipulation by both parties. 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. Ahlfinger, 50 Wn. App. 466, 468, 749 P.2d 190 (1988). Washington courts have limited polygraph evidence because "the polygraph has not attained general acceptance by the scientific community." Ahlfinger, 50 Wn. App. at 468-69. Our Supreme Court has suggested it might reconsider whether unstipulated polygraph evidence is admissible if the proffering party demonstrates that polygraphy meets the Frye general acceptance standard. Ahlfinger, 50 Wn. App. at 469. But as recently as 2004, our Supreme Court indicated that "[r]esults of polygraph tests are not recognized in Washington as reliable evidence and are . . . inadmissible without stipulation from both parties." State v. Thomas, 150 Wn.2d 821, 860-61, 83 P.3d 970 (2004).

Our review of the record shows the trial court properly excluded Conner's polygraph results. The court considered polygraphy's numerous variables and subjectivity and found that it did not meet the Frye test.[3] The defense cites to United

[3] Specifically, the court noted that variations of the test have different degrees of

States v. Posado, 57 F.3d 428, 434 (5th Cir. 1995), as support for the accuracy of modern polygraph techniques. But that case was decided based on Texas law, which uses the Daubert[4] rather than the Frye test for admissibility of scientific evidence. Posado, 57 F.3d at 433. The Posado court also specifically noted that it was not holding that polygraph examinations were scientifically valid; it was merely overturning the Fifth Circuit's per se rule against admissibility. Posado, 57 F.3d at 434.

The defense also cites State v. Gregory, 80 Wn. App. 516, 521-22, 910 P.2d 505 (1996), as an example of a court recognizing the "apparent increased use [of polygraph testing] in the criminal justice system." But the Gregory court concluded it was not in a position to question our Supreme Court's prohibition of polygraph evidence absent stipulation by both parties. Gregory, 80 Wn. App. at 522. The defense also cites State v. Eaton, 82 Wn. App. 723, 919 P.2d 116 (1996), where the court upheld the trial court's order that a defendant must submit to polygraph testing as a condition of community placement. Eaton, 82 Wn. App. at 733-34. The Eaton court did not comment on the reliability or accuracy of polygraph tests when used as evidence at a criminal trial. These cases do not establish that polygraph results

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reliability and accuracy, a subject's psychological or emotional state may make polygraph testing ineffective, various countermeasures may allow subjects to defeat the test, and polygraphy is misunderstood and even rejected by other communities of scientists. These findings support the conclusion that polygraph results do not meet the Frye test.

[4] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

currently meet the Frye test. Rather, existing case law confirms that polygraph results are inadmissible absent stipulation from both parties. Thomas, 150 Wn.2d at 860-61.

Recent literature the defense cites similarly fails to establish that polygraph testing meets the Frye test in Washington. The argument that recent literature "suggests" a high level of polygraphic accuracy does not establish general acceptance in the relevant scientific community. Having no evidence that polygraphy satisfies the Frye test, the trial court properly excluded Conner's polygraph test results.[5]

Sufficiency of the Evidence

Conner argues that the State failed to prove he intentionally assaulted Officer Mathison and the car he drove was a deadly weapon. The State counters that sufficient evidence exists to support Conner's second degree assault conviction.

In reviewing sufficiency of the evidence in a criminal case, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hagler, 74 Wn. App. 232, 234-35, 872 P.2d 85 (1994). The party challenging a finding of fact bears the burden of demonstrating that the finding is not

[5] Recently the Washington Supreme Court reconfirmed that Frye is the proper test for admissibility of novel scientific evidence in Washington criminal cases and that polygraph tests are inadmissible under Frye. Anderson v. Akzo Nobel Coatings, Inc., No. 82264-6, 2011 WL ___, at *7-8, 13 n.4 (Sept. 8, 2011).

supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

We interpret all reasonable inferences from the evidence in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201. Circumstantial evidence is as probative as direct evidence. State v. Moles, 130 Wn. App. 461, 465, 123 P.3d 132 (2005). This court must defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). Given the fact finder's opportunity to assess witness demeanor and credibility, we will not disturb those findings. See State v. Pierce, 134 Wn. App. 763, 774, 142 P.3d 610 (2006).

Washington recognizes three assault definitions: "'(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery], (2) an unlawful touching with criminal intent [battery], and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm [common law assault].'" State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003) (alterations in original) (quoting State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263 (1988)).

A person is guilty of assault in the second degree if he or she assaults another

with a deadly weapon. RCW 9A.36.021(1)(c).[6] A deadly weapon is defined to include a motor 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 defined as "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). Whether a weapon is deadly under the circumstances in which it is used is a question of fact. State v. Carlson, 65 Wn. App. 153, 160, 828 P.2d 30 (1992).

Here, the jury evaluated the conflicting testimony, each witness's credibility, and the persuasiveness of the evidence. Mathison testified that Conner turned the vehicle

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[6] RCW 9A.36.021 provides in full:
"(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
"(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
"(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
"(c) Assaults another with a deadly weapon; or
"(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
"(e) With intent to commit a felony, assaults another; or
"(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
"(g) Assaults another by strangulation.
"(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.
"(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony."

toward him, requiring him to jump out of the way for fear his foot would be run over. Mathison also stated that Conner could have driven straight rather than turning left. Conner's version of the facts differs, but the jury is entitled to believe one witness over another. Based on the testimony, the jury could have reasonably found that Conner intended to assault Mathison by causing him to fear substantial bodily harm.

It was also reasonable to infer that Conner's vehicle was a deadly weapon, i.e., powerful and heavy enough to cause substantial bodily harm in these circumstances. "The test is not the extent of the wounds actually inflicted." State v. Cobb, 22 Wn. App. 221, 223, 589 P.2d 297 (1978). Rather, the test is whether the weapon was capable of causing death or substantial bodily harm under the circumstances of its use. Carlson, 65 Wn. App. at 160. Mathison testified that Conner drove the car in a manner that could have caused him substantial bodily harm (by running over his foot). The record also indicates that the car was "heavy." RP (October 28, 2009) at 346. The jury could reasonably infer from the testimony and exhibits that Conner used the car as a "deadly weapon." We affirm Conner's conviction for second degree assault.

Statement of Additional Grounds (SAG)

In his pro se SAG, Conner asserts the same sufficiency of the evidence arguments that he raised in his appellant brief. We decline to further address those contentions.

Conner's other SAG arguments are similarly without merit. First, Conner argues that juror 25 contaminated and prejudiced the jury pool during voir dire when he stated he would believe police officer testimony over other forms of testimony. Jury pool contamination cases generally involve pretrial publicity that leads to a legitimate concern about biased jurors or prejudice to the defendant. See State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009). A trial judge is in the best position to determine the prejudice of a statement and a jury's ability to be fair and impartial. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). We do not believe that juror 25's comments constitute juror misconduct. "'Voir dire examination serves to protect [the right to an impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors.'" State v. Briggs, 55 Wash. App. 44, 54, 776 P.2d 1347 (1989) (alteration in original) (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)). Here, in response to defense counsel's questioning, juror 25 merely stated he would believe police officers over citizens. The judge granted defense counsel's motion to excuse the juror. Conner fails to show prejudice or contamination of the jury pool.

Conner next argues that the trial court violated his statutory and constitutional rights by continuing his trial beyond the 60-day speedy trial time limit. In Conner's case, whether speedy trial rights were violated hinges on when various defense attorneys were appointed and when the parties moved for continuances during

litigation. While the record reflects that Conner went through several attorneys and that the defense requested continuances throughout the process, it contains neither specific continuance orders nor orders regarding dismissal and appointment of defense counsel. If a defendant "wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We will not address the issue here.

Conner next argues that the trial court erred when it allowed Officer Yabe and Trooper Meldrum to testify as to what they heard on the radio, thus introducing prejudicial testimony. But the court immediately gave a limiting instruction in each case, and defense counsel had ample opportunity to cross-examine Yabe and Meldrum regarding their statements about what they heard over the police radio. Conner fails to show the court erred in permitting the testimony.

Lastly, Conner wishes to preserve the issue of ineffective assistance of counsel so it may be raised in a personal restraint petition. Because this issue appears to concern matters outside the existing record, he must raise it in a properly supported personal restraint petition. McFarland, 127 Wn.2d at 338 n.5 (1995).

CONCLUSION

Because the trial court properly denied Conner's request to admit his polygraph results and sufficient evidence supports Conner's second degree assault conviction, we affirm.

WE CONCUR: