34035-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CARRIE L. AENK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

OTHER CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court violated Ms. Aenk's Sixth and Fourteenth Amendment right to present a defense by prohibiting her from introducing critical evidence.

2. The court violated Ms. Aenk's right to present a defense under Wash. Const. art. I, §§ 3 and 22, by prohibiting her from introducing critical evidence.

3. The court violated Ms. Aenk's right to present a defense by precluding her from presenting testimony that the Hatfields told her to use the check as the second payment for the adoption of horses Quinn and Baron.

4. Ms. Aenk's conviction for third-degree theft violated her Fourteenth Amendment right to due process because it was based on insufficient evidence.

5. The state failed to prove that Ms. Aenk obtained money from the Hatfields by color or aid of deception.

6. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

II. ISSUES PRESENTED

1. Whether the trial court abused its discretion in excluding hearsay testimony that it determined was offered to prove the truth of the matter asserted, i.e., the existence of an oral contract?

2. Whether the trial court's exclusion of hearsay testimony actually affected the defendant's constitutional right to present a defense where the defendant testified to the same facts that she claims on appeal were excluded by the trial court's ruling?

3. Whether the State presented sufficient evidence that the defendant committed the crime of third degree theft by deception?

4. Whether this Court should impose costs against the defendant if the State prevails on appeal?

III. STATEMENT OF THE CASE

The defendant, Carrie Lee Aenk, was charged on January 28, 2015, in Spokane County Superior Court with one count of attempted second degree theft and one count of third degree theft by deception. CP 1. Her case proceeded to jury trial in October of 2015, and she was convicted of both charges. CP 96-97.

Factual History

In 2013, Elle and Dustin Hatfield began to look for horses for the new property that they had purchased, as both had grown up around horses.

RP 128, 130-131. Mr. Hatfield assisted in the online search from Afghanistan where he worked nine months out of the year as a defense contractor. RP 128, 219. He located a Craigslist advertisement for a horse offered through a charity organization, "The Shepherd's Way Animal Rescue" (hereinafter "Shepherd's Way"); Mrs. Hatfield called in response to the ad and spoke with the defendant, Mrs. Aenk. RP 128-129, 220-221. Mrs. Aenk and her husband, Allen, ran the rescue operation. RP 342-43.

Mrs. Hatfield asked Mrs. Aenk whether the advertised horse would be appropriate for a special needs child,[1] as the Hatfield's daughter was autistic and Shepherd's Way advertised that it provided therapy animals for kids with developmental disabilities. RP 129, 221-222. Mrs. Aenk indicated that the horse would be appropriate for a special needs child, but she had other people interested in the horse, so the horse would be adopted "on a first come/first serve" basis. RP 129.

The following day, Mrs. Hatfield and her daughter went to see the horse, Duke, at Mrs Aenk's farm in Springdale, Washington. RP 129, 131-132. Mrs. Hatfield believed that if they did not adopt Duke immediately, notwithstanding the fact that a fence was not yet constructed at their new

[1] Defendant's brief indicates that Mrs. Hatfield wanted Duke for her "grown daughter." Appellant's Br. at 1. The Hatfield's daughter was 16 years old at the time the events occurred. RP 161.

property, they would lose it to someone else. RP 132. Mrs. Aenk told Mrs. Hatfield that Duke could be boarded at the Aenk property until the Hatfield fence was complete. RP 132.

Mrs. Hatfield wrote Mrs. Aenk a check in the amount of $520 ($500 was to be paid for Duke's adoption and $20 was paid for a book authored by Mrs. Aenk) and signed a contract for the adoption of Duke. RP 134-35, 439; Ex. 6. Also during the initial visit with Mrs. Aenk, Mrs. Hatfield inquired if there were any other available adoptable horses. RP 137. Mrs. Aenk told her that there were no other horses that were rideable or adoptable at that time. RP 137. Mrs. Aenk cashed this check at the Hatfields' bank, Global Credit Union, on August 9, 2013. RP 289.

Approximately a week later, Mrs. Hatfield and her daughter returned to the Aenk property in order to allow the child to ride Duke, and Mrs. Hatfield again asked Mrs. Aenk if there were other horses available for adoption. RP 138. Mrs. Aenk told her that the only horses that she had that were rideable were "Quinn" and "Barren,"[2] but that she was not interested in parting with them because they were her favorite horses. RP 138, 222. Mrs. Aenk told Mrs. Hatfield that she "wouldn't let them go for anything less than [$]5,000" apiece. RP 138-139. Mrs. Hatfield thought

[2] "Barren" is also spelled as "Baron" and "Barron" throughout the clerk's papers and exhibits. RP at *passim*, *see* CP at 13, 22; Ex. 14, 15. "Barren" has been used herein to be consistent with the spelling used in the Verbatim Report of Proceedings.

Mrs. Aenk was joking because there was no way that she would pay $5,000 for a horse. RP 139.

Mrs. Hatfield then countered, in a joking manner, "what about [$]2,500?" RP 139, 173-174. Mrs. Aenk indicated that she would take $2,500 apiece for the horses. Mrs. Hatfield said that her husband would "never go for that" but that he might agree to $2,500 for the pair. RP 139-140. Mrs. Aenk showed her the pair of horses, two very loveable Tennessee Walkers. RP 140. Mrs. Hatfield testified that she would love to have those horses, but not for Mrs. Aenk's asking price. RP 140, 174. Mrs. Aenk said she would talk to her husband, and "see what [they] can do." RP 140. During a later telephone conversation, Mrs. Aenk told Mrs. Hatfield that she had talked to her husband, and that while it would be hard letting Quinn and Barren go, the Aenks "could let them go for that $2,500." RP 140-141.

Upon Mr. Hatfield's return from Afghanistan, the entire Hatfield family went to the Aenk farm. RP 141. Mr. Hatfield confirmed with Mrs. Aenk that the asking price for Duke and Barren was $2,500 for both horses together. RP 142, 223, 225. Mrs. Hatfield began to fill out one adoption agreement for both horses, but Mrs. Aenk gave her a second contract for Barren, and indicated that two separate adoption contracts needed to be prepared. RP 143, 224-225; Ex. 7-8. At Mrs. Aenk's direction,

Mrs. Hatfield scratched out Barren's name from Quinn's contract, RP 144, 443; Ex. 7, and completed a second contract for Barren,[3] RP 144; Ex. 8.

The contracts indicated that the adoption fee was "nonrefundable" which did not concern the Hatfields because they believed that language simply meant that "you get an animal for life." RP 144, 226. Mrs. Hatfield completed each contract to indicate the adoption fee was $1,250 for each horse,[4] but the contracts were altered after she signed them (and without her agreement) to indicate the adoption fee was $2,500 for each horse.[5] RP 144-145, 148, 225-226; Ex. 7-8. Barren's contract was also altered to indicate that the Hatfields would pay upon delivery of the horse.[6] RP 148. Mrs. Hatfield denied that she had altered the contracts. RP 148.

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[3] Mr. Aenk was not present when the Quinn and Barren contracts were signed. RP 351. He also testified that when he saw the contracts shortly after they were signed, he was unable to see the dollar amount that was written in for the adoption fee. RP 364.

[4] Both Mr. and Mrs. Hatfield testified that they specifically remembered writing that the adoption fee was $1,250 because they used their calculator to determine what half of $2,500 was. RP 145, 225.

[5] At trial, Mrs. Aenk and her husband both testified that the agreed price for Quinn and Barren was $2,500 apiece. RP 352, 451. Mrs. Aenk testified that Mrs. Hatfield drafted the contracts to indicate the adoption costs of Quinn and Barren were $2,500 each. RP 442, 489. Mrs. Aenk denied altering the contracts after they had been signed by Mrs. Hatfield. RP 451.

[6] Mr. Aenk testified that the agreement regarding payment for the horses was that the Hatfields would pay for one up front, and then pay for the second horse upon delivery. RP 353. Mrs. Aenk testified that she also understood that she was to be paid upon delivery of Barren. RP 445.

After "grabbing" the contracts back from Mrs. Hatfield, Mrs. Aenk told the Hatfields she could not make copies of the contracts for them because she did not have a copier available at the ranch. RP 144-146, 227; Ex. 7-8. However, she said she would email them a copy, and Mrs. Hatfield provided her email address at the bottom of the contract. RP 146. Despite several requests from the Hatfields, Mrs. Aenk never sent copies of the contracts.[7] RP 149, 226.

Mrs. Hatfield wrote a check to Mrs. Aenk personally, not to Shepard's Way, at Mrs. Aenk's request,[8] RP 240, noting on the bottom of the check that it was for Quinn and Barren. RP 151. Mr. Hatfield signed the check, and the Hatfields immediately went to purchase fencing supplies, as the Aenks "had the right to come and inspect the property at their will" in order to ensure the horses would be cared for. RP 151-152.

The Aenks "stopped by" to inspect the Hatfields property multiple times. At their first visit, the Aenks told the Hatfields that they needed to move the fence, and that some of the fence posts were not going to work. RP 156. The Hatfields reconfigured the fence as suggested by the Aenks,

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[7] Eventually, however, Mrs. Aenk emailed Mr. Hatfield a blank boilerplate Shepherd's Way contract, without any of the salient provisions completed pertaining to the Hatfields' agreement with the Aenks. RP 227.

[8] Mr. Aenk testified that when doing adoptions for Shepard's Way, sometimes they would take checks written to the organization, and sometimes they would take checks written to either Mrs. Aenk or himself personally. RP 365.

alterations costing them approximately $1,000. RP 156, 229. During their second visit, the Aenks told the Hatfields that "things were moving along" but that they needed to make one additional change to the fence. RP 156. The third time the Aenks visited the Hatfields' property, the Aenks said "things were really looking good and … were on target." RP 155-156. [9, 10]

On August 24, 2016, the day of the Aenks' third visit to the Hatfield property, Mrs. Aenk called the Hatfields and told them that she would need cash instead of the check the Hatfields previously gave her, because "she couldn't get the check to go through" at several banks, including the Hatfields' bank.[11] RP 154, 230, 454. The Hatfields called their bank to ensure they had sufficient funds to cover the $2,500 check, and were told that funds were available. RP 99, 154. Despite the availability of funds, and despite the Hatfields' willingness to meet Mrs. Aenk at the bank to ensure that the check was cashed, Mrs. Aenk insisted that the Hatfields deliver cash instead. RP 154-155. The Hatfields agreed to give Mrs. Aenk

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[9] Star Hart, Elle Hatfield's mother, was present at the Hatfield property in August 2013 when the Aenks were also present. As Mrs. Aenk and Elle Hatfield were walking around the fence, Ms. Hart heard Mrs. Aenk say that the fence "looked good … real good," and that she would deliver the horses the following day. RP 106-107.

[10] Mr. Aenk testified that the land the Hatfields intended to use for the horses was originally unsuitable as it was unfenced, heavily forested, and without adequate water or shelter. RP 357, 395.

[11] The Hatfields had given Mrs. Aenk a post-dated check, dated August 24, 2013. RP 258, 443.

cash if she returned the $2,500 check to them. RP 155. The Aenks met the Hatfields later that day at the Hatfield property (the Aenk's third visit to the property). RP 231. Mr. Hatfield gave Mrs. Aenk the cash;[12] however, she did not return the check[13] or provide him with a receipt for the cash. RP 155, 232. Mr. Hatfield testified Mrs. Aenk said she had left the check at her house,[14] and would return it, and would provide a receipt when the horses were delivered. RP 155.

When the Aenks visited the property the next day, the Hatfields expected delivery of the horses.[15] RP 156, 232-233. However, the Aenks

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12 The Hatfields also gave Mrs. Aenk an additional $100 as a delivery fee for the horses, totaling $2,600 in cash. RP 160.

13 Mr. Aenk testified that Mr. Hatfield told the Aenks to "hold on to the check" after giving them $2,600 cash, and Mrs. Aenk testified that she understood the check to be the second payment for Barren. RP 430, 458.

14 Mr. Aenk testified that he and his wife went to the bank to cash the check when they were "headed back out that same day to [the Hatfield] property to help with fencing again." RP 367. He claimed that after Mrs. Aenk came out of the bank and told him that the computers were down and the check could not be cashed, he called Mr. Hatfield and insisted on cash payment. The Aenks then proceeded to the Hatfield property where Mr. Hatfield had cash in an envelope. RP 369. Mr. Aenk testified that Mr. Hatfield did not want a receipt and that Mrs. Aenk gave him the original contracts for the horses and retained a copy for their records. RP 369, 418, 440. However, when Detective Carr spoke with Mrs. Aenk during the criminal investigation, Mrs. Aenk told Detective Carr that she had the adoption contracts and documentation available. RP 291. They were never produced.

15 Mr. Hatfield testified that based on all of the discussions regarding improvements that needed to be made to the property, Mrs. Aenk agreed to deliver the horses on the Monday following the Saturday when the Hatfields paid the Aenks $2,600 in cash. RP 395-96. However, Mr. Aenk testified that the property was still not ready for the horses on Monday, RP 409, even though the fence was better than when he had left it on Saturday. RP 396. He testified that "somebody … tore the fence down that Sunday." RP 429.

did not deliver the horses as expected, nor did they return the check or provide a receipt for the cash payment. RP 156-157, 233. The Aenks indicated that they could not deliver the horses for approximately one and half to two more weeks because they had "all these things going on," RP 157, 234, and they preferred to have the horses delivered early in the day so they could become familiar with a new pen during daylight hours. RP 233.

Because Mr. Hatfield was preparing to leave again on business, and would not return for three months, the Hatfields were very disappointed that delivery would be delayed. RP 157-158. In a series of text messages[16] on Monday, August 26th, 2013, between Mrs. Hatfield and Mrs. Aenk, Mrs. Hatfield offered to come and pick up the horses from the Aenks. RP 159-160, 234; Ex. 13-15.

Mr. Hatfield testified that the relationship continued to degrade "towards the end of the night" and that his wife was upset, so he called Mrs. Aenk to attempt to procure either the horses, or a refund of his money. RP 235. Mrs. Aenk told Mr. Hatfield that the Shepherd's Way board[17]

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[16] Mrs. Hatfield testified that the text messages that were admitted were incomplete and did not contain all communications between Mrs. Aenk and the Hatfields regarding the delivery of the horses. RP 186.

[17] The board was apparently comprised of five members. Mr. Aenk testified that he and his wife were on the board, but that he could not remember who the other board members were. RP 417. Mrs. Aenk testified that she and her husband were on the board and named the other three board members. RP 435. Mr. Hatfield testified that Mrs. Aenk

would be having an "emergency meeting" to determine whether the horses would be delivered at all, because the board members[18] deemed the Hatfields to present a "hostile environment" for the horses. RP 235. Mrs. Aenk told Mr. Hatfield that she was not on the board, but that if the board decided that they could not have the horses, they would receive their money back. RP 235.

The next day, on August 27, 2013, Mr. Hatfield spoke with Mrs. Aenk who told him that the board decided that the Hatfields would not be allowed to adopt the horses, and that they would be given a refund. RP 236. However, at approximately 4:57 p.m. that day, Mr. Hatfield received a telephone call from an employee of ACE check cashing service,[19] indicating that Carrie Aenk was attempting to cash a check for $2,500, and requesting approval for the transaction.[20] RP 160-161, 198, 236.

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told him that she was not on the board. RP 235. Both of the Aenks denied there was an "emergency meeting" that Monday to discuss the delivery of the horses. RP 418, 429, 498.

[18] In a text message to Elle Hatfield on August 26, 2013 at 6:06 p.m., however, Mrs. Aenk stated, "If the unreasonableness continues, *I will abide* by the contract and determine that the horses will be unsafe in that environment and cancel all three contracts." Ex. 13 (emphasis added).

[19] A manager for ACE check cashing testified that an individual might prefer to use ACE to cash a large check because ACE is able to "get through the transaction" more quickly than a bank which may "hold on" to the check longer. RP 204.

[20] The Aenks both testified that Mrs. Aenk took the check into ACE to determine whether the check was "valid" (because according to them, Global Credit Union was unable to cash it on August 24, 2013) but that she did not intend to negotiate the check at that time. RP 409, 460. Mrs. Aenk also testified, however, that she took the check to ACE

Mr. Hatfield indicated that ACE should not cash the check; he then called his bank to place a stop payment on the check and Crime Check to report the incident. RP 98, 161, 237. Mrs. Hatfield sent a text to Mrs. Aenk at 5:20 p.m. that day demanding a refund. RP 476; Exs. 14, D-109.

Despite this, the Hatfields again tried to negotiate with Mrs. Aenk after she attempted to cash the check. RP 238. At some point, Mrs. Hatfield testified that they did, in fact, rent a trailer to attempt to pick up the horses at the Aenk ranch, but Mrs. Aenk said that "if [they] came anywhere near her property, that she would shoot [them]." RP 163, 477-478; Ex. 15.

Procedural History

During trial, the State objected on hearsay grounds to testimony of Mr. Aenk regarding several statements made by Mr. or Mrs. Hatfield to him. RP 344-345, 348, 360, 362-363, 368, 374, 398. Specifically, the State objected to Mr. Aenk answering a question during direct examination that required him to testify about the substance of his discussions with Mr. or Mrs. Hatfield about when the horses would be delivered. RP 374.

The Court ruled that this question called for hearsay testimony, and sustained the objection. RP 374-75. However, after Mr. Aenk criticized the trial court in the jury's presence for precluding him from telling the "whole

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because she had received a call from Mrs. Hatfield inquiring why the check had not yet been cashed. RP 460.

truth and nothing but the truth that [he] swore to" tell, the trial court excused the jury and allowed the parties to argue the admissibility of the hearsay testimony. RP 376.

Defense counsel first argued that the hearsay testimony was admissible because Mr. Aenk's testimony would be inconsistent with other witnesses' previous testimony at trial, and that it was "important that the jury hear both sides of the story." RP 375. Then counsel argued that the statements were admissible because they were not hearsay, as they were not offered for the truth of the matter. RP 379. He argued that the statements would be offered to demonstrate "[Mrs. Aenk's] state of mind … and intent … and to show why the Aenks would not deliver the horses until Tuesday." RP 379. To this argument, the court ruled that Mr. Aenk could not testify to Mrs. Aenk's state of mind, and that the defense was really attempting to prove the truth of the matter asserted, i.e., that there was an agreement as to when the horses would be delivered. RP 379-380.

The trial court gave defense counsel another opportunity to articulate how those statements that he intended to elicit could be offered to prove something other than the truth of the matter asserted, in order that the court could give the jury the proper limiting instruction. RP 380. Defense counsel indicated he understood the court's ruling, but struggled with it,

because he had "just never had this issue arise in a trial before where [he] was prohibited from asking these kinds of questions." RP 380.

The Court again invited defense counsel to proffer any statements he intended to elicit that would not be offered for the truth of the matter asserted, and stated that it would rule on the admissibility of those statements and give a limiting instruction to the jury if any statement were admitted for a limited purpose. RP 382. However, defense counsel admitted that he did not "know exactly what the answer[s] would be," but,

> that there were discussions about when it would be okay or that the horses were or were not going to be delivered or whether there was an agreement about it, whether there was a dispute about it, whether he discussed with them why the horses were not going to be delivered until a certain time; basically the whole context of what was going on at this point in the relationship between these parties.

RP 383-84.

In response, the court stated:

> And many of those things you just said are perfectly fine for him to testify to: What [were] his problems with the property? Why did he feel - why did he say it wasn't ready to be delivered or the - you know, we're not going to deliver the horses now because of this, this and this. All of those things are his testimony as to what his state of mind is, what his actions were. But you are asking him - or he's wanting to say what the Aenks (sic) told him to somehow establish an agreement, which, to me, what I'm hearing, is you're trying to prove that there was this agreement based on what somebody else said…

> You're trying to prove an agreement by saying the … Hatfields said it was okay.[21]

RP 384.

The court reiterated that Mr. Aenk could testify to: "why he said the horses wouldn't be delivered, his concerns regarding the condition of the property … what he can't say is 'the Hatfields agreed with me on this' because you then are offering their statement that they agreed to prove they agreed, to prove the truth of the matter asserted." RP 386.

The prosecutor raised the possibility that the statements were being admitted to impeach her witnesses' earlier statements, another exception to the hearsay rule. RP 386. After hearing defense counsel's argument on that point, the Court held that because the prior statements were not under oath, the exception would not apply. RP 389. Defense counsel declined a fourth invitation by the court to articulate any other exception to the hearsay rule, and the court directed Mr. Aenk, who was still unclear on the court's ruling,[22] to avoid testifying to what someone else said. RP 391.

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[21] Defense counsel argued that anytime a person tries to enforce an oral agreement, their testimony would be precluded by such a ruling, and that he had "never heard of that being called hearsay." RP 384. The court observed that in the civil context, the parties to the contract are each parties to the case (and therefore, each party's statements would be admissible against their party opponents). RP 385.

[22] **Mr. Aenk**: Okay, just making sure I understand. So what I say or what I do is okay to testify to. What they say or what they did, I'm not allowed to testify to.

The Court: What they said, you're not allowed to testify to… If they signed a piece of paper, and you saw them sign it, you can say, "I saw

Mrs. Aenk was convicted of both counts by the jury on October 15, 2015. CP 96-97. On October 23, 2015, the defense filed a motion for a new trial under CrR 7.5 and 7.6 alleging that the trial court's hearsay rulings was an irregularity that prevented the defendant from having a fair trial and an error of law. CP 99. The State argued that the Court did not abuse its discretion in sustaining the State's objection to Mr. Aenk's hearsay testimony when the defendant could not make an offer of proof as to what the anticipated testimony would be, and that the defendant was not denied a fair trial because ample evidence was presented for the jury to consider why the defendant believed "she could keep the check and cash the check as payment for one of the horses." CP 106-109. The Court heard oral

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> them sign a piece of paper," because that is not a statement. It's what you're observing.
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> …
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> **Mr. Aenk**: I think they're one and the same, but I'll do my best.
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> …
>
> But you say something, and you're doing something. You saying something is you doing something because you're speaking to me.
>
> …
>
> **The Court**: Here is a clear rule: Don't testify to what someone else said… You can testify to what your wife said.

RP 390-391.

argument on December 15, 2015, and denied the motion for a new trial. RP 605-626; CP 162-165. The court orally ruled:[23]

> … The argument that was made initially in the pleadings was that the Court precluded Ms. Aenk or defense counsel from eliciting testimony from Ms. Aenk to show the effect on the listener; in essence, that the evidence was not being offered to prove the truth of the matter asserted, so therefore it's not hearsay, but to show why Ms. Aenk's actions in not cashing the check but in checking to see that the check was good or that there were funds to cover it was based on what the Aenks (sic) said.
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> Again, it wasn't clear at the hearing exactly what the statement was by Mr. Hatfield because when I questioned Mr. Wall about that, he said, "Well, I'm not sure what the answer is." But in all fairness, I think he was expecting the testimony to be something like -- and this is from the Aenks -- that Mr. Hatfield said, "Here's cash for the second horse. Keep the check to pay for the third horse, Barren." So that, I think in all fairness, is what Mr. Wall was hoping to elicit from Mr. and/or Ms. Aenk.
>
> Ms. Aenk was asked during her questioning, without objection by the state, without limitation by the Court, she testified that she tried to give Mr. Hatfield back his check but she ended up keeping it, and that her understanding was that she was keeping the check for the second payment for the third horse, for Barren. So she did testify to that, again, without objection.
>
> She also testified that Ms. Hatfield had called her and asked her why she hadn't cashed the check yet and that she had reported that she wasn't supposed to cash it until Barren was delivered. So in terms of Ms. Aenk being able to testify what her understanding was and why she acted the way she did by keeping the check even though cash had been given and by

[23] The Court incorporated its lengthy oral ruling into its written findings and conclusions of law denying the motion for a new trial. CP 162-165.

attempting to assure that it was negotiable, she got that testimony in without objection.

Where the objections came up was in Mr. Aenk's testimony, which preceded Ms. Aenk's testimony. And I went back and I, again, tried to follow through with all of the assertions as it kind of went through. There was an objection to the question to Mr. Aenk, "Did you have discussions with the Hatfields about when the horses would be delivered?" "Yes." "What was the substance of that -- of those discussions?" And that's where the hearsay objection came up from the state.

The offer that was eventually made, as I took the jury out of the courtroom and we talked through this, it was offered that Ms. Hatfield would've said, according to the Aenks, Mr. Aenk, that it was okay to deliver the horses on Tuesday, which, again, isn't getting into this issue about why she kept the second check and why she attempted to make sure it was still negotiable.

Again, as I went through the notes, at one point defense counsel said, "Well, I'm admitting this to show a prior inconsistent statement," which, again, would be under Evidence Rule 613, which is impeachment where you ask the witness first whether they made the statement; and then if they deny it, you can ask them about a prior inconsistent statement.

But there's also limitations on bringing in extrinsic evidence of prior inconsistent statements, and so I'd asked about whether this was trying to be done for impeachment under prior inconsistent statements. So while that was at least asserted, Counsel didn't pursue that theory, and they basically again came back saying it's just not hearsay.

It was asserted the jury needs to hear both sides of the story. It was also asserted this was being offered to show Ms. Hatfield's state of mind as opposed to the Aenks' or Ms. Aenk's state of mind. Later, there was an assertion by Counsel that he -- that they were trying to prove an

> agreement, which again, to me, if you're trying to prove that there was an agreement, I still feel that that's trying to prove the truth of this statement, "Yeah, keep the other check and use it to pay for the third horse."
>
> ….
>
> So as I went through the transcript, I think that I did what I could to make a record regarding what the statement is that was trying to be elicited and how it would be admissible under whatever theory. Given the information that I had, I'm satisfied that it was appropriate to make the rulings that I made.
>
> Now, even looking at it and looking at some of the things that are being argued today that may not have been articulated well during the hearing, Ms. Aenk still had an opportunity to say what she believed the Hatfields had told her, that "Keep the other check," "It's for the third horse," "Why haven't you cashed the other check?" It came in without objections.
>
> It still was a judgment call for the jury in terms of credibility because the Hatfields insisted they didn't make those statements, and the jury concluded beyond a reasonable doubt that, in essence, the Hatfields were more credible. So I do not find that this rises to the level of an error by the Court that substantially precluded the defendant from being able to present their theory of the case, and I'm going to deny the motion for a new trial.
>
> You've certainly made your record. And if a court of appeals feels I am wrong, you absolutely have a remedy with them, but I'm not convinced that Ms. Aenk was prejudiced in the presentation of her case, given that testimony.

RP 620-623, 625-626.

Mrs. Aenk was sentenced on January 7, 2016. CP 631-681. The court sentenced her to sixty days in jail on each count, to run concurrently.

CP 189. Additionally, the court suspended 304 days on each count for 24 months conditioned on law abiding behavior, no contact with the victims, and payment of restitution totaling $600. CP 189, 191. The court found, in part, that it was appropriate to sentence Mrs. Aenk to serve some jail time because she had "30 years of not one, two, at least three convictions, four now, and at least three other times where she was able to avoid a permanent conviction by working out a resolution[24] and paying money back." RP 669.

[24] For instance, in 2015, Mrs. Aenk entered into a Stipulated Order of Continuance in Grant County, in which the State agreed to dismiss a charge of theft in the third degree upon payment of restitution, CP 159-160, stemming from an incident in which she agreed to buy $8,300 worth of hay, but instead of delivering a cashier's check when the hay was delivered, she delivered a "donation receipt" for the hay, listing the donation at $8,300. CP 154.

Also included in the Court's discussion of Ms. Aenk's criminal history were a 1982 deferred sentence, subsequently revoked, for felony theft (Missoula County, Montana), a 1982 withheld judgment for felony issuance of an insufficient funds check (Kootenai County, Idaho), a 1985 plea of guilty to felony violation of check laws (Ford County, Kansas), a 1996 plea of guilty to bank fraud in Federal court, and a 2011 dismissal after payment of restitution for second degree possession of stolen property and third degree theft (Spokane County, Washington). CP 114-150.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY RULED THAT MR. AENK'S TESTIMONY REGARDING WHAT MR. HATFIELD TOLD HIM WAS INADMISSIBLE HEARSAY; ERROR, IF ANY, WAS HARMLESS AS THE DEFENDANT WAS FULLY ABLE TO PRESENT HER DEFENSE NOTWITHSTANDING THE COURT'S RULING EXCLUDING THAT TESTIMONY.

1. The trial court did not abuse its discretion in determining that Mr. Aenk's testimony regarding Mr. or Mrs. Hatfield's statements were hearsay, and the trial court therefore properly excluded the testimony.

'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). If a statement is not offered to prove the truth of the matter, but for some other purpose, it is not hearsay. ER 801. Other statements may be hearsay, but fall within one of the well-established exceptions to the hearsay rule, and are admissible. ER 803. This Court reviews a trial court's evidentiary rulings for abuse of discretion, and a trial court's decision to admit or exclude evidence is entitled to great deference. *See, e.g., State v. Pavlik*, 165 Wn. App. 645, 650, 268 P.3d 986 (2011); *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). A court abuses its discretion when its ruling is "manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The burden is on the appellant to prove abuse of discretion. *Williams,* 137 Wn. App. at 743.

On appeal, the defendant claims that Mrs. Aenk "sought to introduce testimony that Dustin [Hatfield] told her to keep the check and to use it as the second payment for Quinn and Barron." Appellant's Br. at 6. The defendant claims that this testimony was not hearsay because it was not offered for the truth of the matter, but rather for its effect on her. In her appeal, the defendant has not assigned error to the trial judge's rulings on the defense's other arguments at trial that the hearsay testimony was admissible as a prior inconsistent statement, ER 801(d)(1)(i), or to demonstrate the "state of mind" of the declarant, ER 803(3), and therefore, those arguments below will not be addressed herein.

First, as the trial court noted in its ruling on the defendant's motion for a new trial,[25] based upon the same argument now presented on appeal, the pertinent hearsay testimony, objection and argument occurred during *Mr. Aenk's testimony*, rather than during Mrs. Aenk's testimony. RP 377-392. If the proffered statements were made to Mr. Aenk, then they would be irrelevant to demonstrate the effect on the listener, because whatever effect the statement(s) may have had on Mr. Aenk was immaterial to

[25] The defendant has not assigned error to the Court's ruling on her motion for a new trial, which was also based on the exclusion of hearsay testimony by Mr. Aenk. A trial court's ruling on a motion for a new trial under CrR 7.5 is also reviewed by the appellate court for abuse of discretion. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). Defendant's failure to assign error to the court's denial of her motion for a new trial could be viewed as an acknowledgment that the court did not abuse its discretion in declining to grant a new trial based on its alleged erroneous hearsay rulings.

Mrs. Aenk's subsequent conduct. ER 401. If Mr. Aenk were to have testified that Mr. Hatfield made an oral agreement with *him*, and then he relayed that agreement to his wife, such testimony would be hearsay within hearsay, which is also inadmissible without separate exceptions for each instance of hearsay. ER 805. This issue was not raised or analyzed below.

The trial court did not abuse its discretion in deciding that the true purpose behind the defense's desire to admit this testimony *was* to prove the truth of the matter asserted, i.e., that the Hatfields agreed to allow Mrs. Aenk to keep the check and use it as payment for the second horse. In Washington, statements offered to prove the existence of an oral contract are hearsay, and are inadmissible unless an exception or exemption applies. *See Condon Bros., Inc. v. Simpson Timber Co.,* 92 Wn. App. 275, 284, 966 P.2d 355 (1995) (Trial court exclusion of oral contract hearsay testimony affirmed on appeal where the oral agreement was offered to prove that the opposing party had entered a contract with appellant.) Based on available Washington case law, therefore, the trial court here did not err in excluding similar hearsay evidence that it perceived to be offered for the purpose of proving an agreement by the Hatfields to allow Mrs. Aenk to use the check as a second payment for the horses. The defendant has not established otherwise. The trial court did not err.

2. The Defendant was fully able to present her defense because she was able to testify, without objection or limitation by the court as to why she retained the check as a second payment, and therefore, any error in excluding the hearsay testimony was harmless.

The defendant argues that the exclusion of this hearsay evidence prevented her from presenting a defense. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). However, the constitutional right to present a defense is not unfettered and a defendant does not have a right to introduce irrelevant or inadmissible evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006) *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014); *State v. Stacy*, 181 Wn. App. 553, 566, 326 P.3d 136 (2014). Even where a defendant alleges that the exclusion of proffered evidence denied her the right to present a defense, the trial court's decision to exclude that evidence is reviewed for abuse of discretion. *See, e.g., State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007) ("The right to present defense witnesses is not absolute… A trial court's decision to exclude evidence will be reversed only where the trial court has abused its discretion"). As discussed above, the proffered hearsay testimony was not admissible as it did not satisfy any exemption from or exception to the hearsay rule. Thus, defendant was not entitled to have this

hearsay evidence admitted at trial, and the court did not deprive her of her right to present a defense.

Even assuming that the testimony was both relevant and admissible, its exclusion was harmless. Error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Washington courts rule error harmless if the evidence admitted or excluded was merely cumulative. *See State v. Flores*, 154 Wn.2d 1, 19, 186 P.3d 1038 (2008) quoting Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L. REV. 277, 319 (1995).

The defendant contends that she "sought to introduce testimony that Dustin [Hatfield] told her to keep the check and to use it as the second payment for the adoption of Quinn and Baron." Appellant's Br. at 6. Contrary to her claim, however, the *defendant was permitted to testify* as to why she kept the check and to her belief that it was to be used as the payment for the third horse. Thus, the evidence excluded during *Mr. Aenk's* testimony was merely cumulative, offered in an attempt to bolster Mrs. Aenk's testimony.

Mrs. Aenk gave the following testimony during direct examination:

Q. And did you give Mr. Hatfield the check?

A. I tried to.

Q. And did you ultimately end up keeping the check?

A. Yes.

Q. Okay. What was your understanding of why you were keeping the check?

A. Because we were -- I can't give hearsay.

Q. No. I'm just asking you what your understanding was.

A. My understanding of being allowed to keep the check was for the second payment for Barren.

Q. Okay. And did you then intend at some point to negotiate that check for the contract for Barren?

A. We didn't try to negotiate it.

RP 458.

Q. And did you, at some point, go to ACE Cash Express?

A. Yes.

Q. All right. And why did you go there?

A. I received a phone call.

Q. A phone call from who?

A. Mrs. Hatfield.

MR. WALL: Okay. And Your Honor, I do think this is something that is not a statement. It is a question

that Ms. Hatfield asked my client so I don't believe that that would be covered by the hearsay rule.

THE COURT: So you do not believe this is being offered to prove the truth of the matter asserted.

MR. WALL: No matter asserted. It's a question's being asked; so she's not - it's not a statement.

THE COURT: Okay.

Q. (BY MR. WALL) Did Mrs. Hatfield ask you something in that phone call?

A. Yes.

Q. What did she ask you?

A. Why haven't we cashed the check yet.

Q. Okay. And what did you tell her?

A. I told her because we weren't supposed to cash it until after Barren was delivered.

Q. Okay. And then you said you went to ACE.

A. Correct.

Q. And what was your purpose in going to ACE? Why did you go there? What did you -

A. Because I'm not allowed to say.

Q. No, no. What did you intend to do when you got to ACE?

A. I intended to verify the check.

RP 459-460.

Q. (BY MR. WALL) Can you read this text message for us?

A. "In-box from Elle Hatfield: It has become evident that our professional relationship has degraded to the point we can no longer do business together since we have already paid you for Duke via a check in the amount of 500 and cash for Quinn and Barren in the amount of 2,500 plus transport fee of 100, and we just received a phone call that you are trying to cash the check that you forgot to return, and you continue to make things difficult for us. We choose to cans the contract and choose to -" goes on, sorry, "-- choose to cans the contract and look for horses elsewhere. We are requesting a full refund within 48 hours. The total refund amount is $3,100. We are fully prepared to take legal action and press criminal charges if necessary."

Q. (BY MR. WALL) Were you surprised to get this text?

A. Yes.

Q. Were you surprised that Ms. Hatfield was claiming that they had already paid for both Quinn and Duke (sic)?

A. Yes.

RP 476.

And, on cross examination, Mrs. Aenk testified:

Q. And it's your testimony today that you -- she called you?

A. Correct.

Q. And told you to cash that check?

A. No.

Q. What -- what did she tell you to do?

A. That's hearsay.

> THE COURT: Ma'am, you've already testified to it without an objection. So you let the lawyers make the objections. I'll rule on objections. Otherwise, just answer the question, please.
>
> A. Okay. She asked me why we have not cashed the check yet.

RP 495.

During the defendant's motion for a new trial, the trial court analyzed the same issue and found that the defendant was not prejudiced by his ruling excluding Mr. Aenk's testimony regarding statements made by Mr. or Mrs. Hatfield, because *Mrs. Aenk* was able to testify, without objection, to the same facts. RP 626.

> Ms. Aenk was asked during her questioning, without objection by the state, without limitation by the Court,[26] she *testified that she tried to give Mr. Hatfield back his check but she ended up keeping it, and that her understanding was that she was keeping the check for the second payment for the third horse, for Barren. So she did testify to that, again, without objection.*

RP 621 (emphasis added).

> Now, even looking at it and looking at some of the things that are being argued today that may not have been articulated well during the hearing, *Ms. Aenk still had an opportunity to say what she believed the Hatfields had told her, that "Keep the other check," "It's for the third horse,"*

[26] To the extent that Mrs. Aenk declined to answer questions that *she* believed called for hearsay testimony, where the State neither objected, nor the Court limited her testimony, any error would be invited error. *See, e.g.*, RP 495. The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. Invited error precludes judicial review. *See, e.g., State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1986).

> *"Why haven't you cashed the other check?" It came in without objections.*

RP 625 (emphasis added).

The error alleged here did not contribute to the guilty verdicts that were obtained. Mrs. Aenk was fully able to testify as to her understanding of the adoption agreements, and thus, Mrs. Aenk was able to present a defense. The jury simply did not believe her testimony. Neither the court's evidentiary rulings nor the court's decision to deny the defendant's motion for a new trial based on those evidentiary rulings were an abuse of discretion, and should not be disturbed on appeal.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT THE DEFENDANT COMMITTED THE CRIME OF THIRD DEGREE THEFT BY DECEPTION.

Ms. Aenk challenges the sufficiency of the evidence supporting her conviction for third degree theft by deception. The purpose for sufficiency of the evidence review is "to guarantee the fundamental protection of due process of law." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal

case, *all* reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Id*. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id*. In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *Id.*

Our Supreme Court has stated:

> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (the court defers to the jury's determination regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

A person commits theft in the third degree by deception if he or she commits theft of property or services by deception, and the property does not exceed seven hundred and fifty dollars in value. RCW 9A.56.050(1)(a). Theft by deception means by color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him of such property or services. RCW 9A.56.020(1)(b). "By color and aid of deception" means that the deception operated to bring about the obtaining of the property or services; it is not necessary that the deception be the sole means of obtaining the property or services. RCW 9A.56.010(4); CP 92. "Deception" occurs when an actor knowingly promises performance which the actor does not intend to perform or knows will not be performed.[27] RCW 9A.56.010(5)(e); CP 93. Defendant alleges on appeal that the element of "deception" was not proven beyond a reasonable doubt at trial. Appellant's Br. at 8-9.

A defendant's intent to deprive at the time the property was taken may be inferred from acts occurring subsequent to the commission of the alleged crime. *See, e.g., U.S. v. Latney*, 108 F.3d 1446, 1449-50 (D.C. Cir. 1997) ("[L]ater acts are most likely to show the accused's intent

[27] "Deception" may occur in other ways, but here the State alleged that it occurred as provided in RCW 9A.56.010(5)(e).

when 'they are fairly recent and in some significant way connected with prior material events").

The State argued below that the "deception" began when Mrs. Hatfield wrote Mrs. Aenk a check for Duke because Mrs. Aenk never intended to give the Hatfields any of the horses, RP 570, that Mrs. Aenk's conduct and promises were a "scam from the beginning," RP 571, and that this "was a masked theft via … contract[s] … contracts that the Hatfields never even got." RP 585. The State presented sufficient evidence, both direct and circumstantial, that Mrs. Aenk knowingly promised to perform a contract, i.e., the adoption of Duke, which she did not intend to perform, or knew would not be performed.

First, Mrs. Aenk pressured Mrs. Hatfield to make a quick adoption of Duke; during the initial telephone call, Mrs. Aenk claimed that she had other people interested in Duke, and when Mrs. Hatfield and her daughter went to look at Duke the next day, Mrs. Aenk claimed that there had been another woman who looked at the horse earlier that day, and another was coming later in the day. RP 129, 132. She also ingratiated herself to Mrs. Hatfield, during the initial telephone conversation, by talking to her for an hour and a half to two hours during their initial visit, RP 137, and then by becoming very friendly with her by Mrs. Hatfield's second visit, "wanting to be [her] friend," and "talk about [their] lives." RP 139. Both of

these tactics, i.e., high pressure sales and gaining the trust of fraud targets are commonly associated with fraud schemes targeting the unwary. This behavior is circumstantial evidence from which the jury could infer Ms. Aenk's ill-intent.

Secondly, Mrs. Aenk failed to deliver the horses as promised when the fence was complete, even though she acknowledged the fence was complete and in good condition. RP 132, 134-135, 155-156, 232-233. The Aenks provided multiple excuses for not delivering the horses as promised: the fence was torn down, RP 429; they had too many things going on and could not deliver for one and a half to two weeks, RP 157, 234; they had appointments and were unable to meet the Hatfields at their farm, Ex. 13; they did not want to deliver the horses late in the day for fear that the horses would not adjust well to their new home, RP 233; because it was haying season, the Aenks were too busy on their tractors to accommodate delivery or pick up of the horses, Ex. 13; and Mrs. Hatfield's attitude posed a "hostile environment" for the horses and Mrs. Aenk feared for their safety in her care, RP 235; Ex. 13. This litany of empty excuses is evidence from which the jury could infer that Mrs. Aenk never intended to deliver any of the horses, including Duke. *See, e.g. State v. Manion*, 112 A.3d 506, 521 (Md. 2015) ("The trial court, after viewing the entirety of the evidence and weighing the credibility of the witnesses, could have reasonably determined

that Manion's "lies" and excuses, which the court characterized as "too numerous to name," supported, in part, a reasonable inference of his criminal intent").

Mrs. Aenk's fraudulent scheme was to induce the adoption of the animals, require a "nonrefundable" payment by check made out to her personally, and then find fault in the property upon which the animals were to be housed, and continually change the terms of the agreement, so as not to have to perform delivery of the horses, but be able to retain the "nonrefundable" adoption fee.

Certainly the issue of the missing original contracts weighed heavily[28] against Mrs. Aenk, especially given Mrs. Aenk's testimony that she is a meticulous record keeper. RP 440, 447. It makes no sense that Mrs. Aenk, who had allegedly operated Shepherd's Way for ten years, would give *original* adoption contracts to the adopter of an animal. It is also illogical that she would be unable to provide the Hatfields with copies of the contracts within a reasonable time. She had a copy machine at her residence, RP 429, and should have been able to copy and send duplicates of the contracts to the Hatfields. She also had the capability to email documents, as she emailed a blank copy of the contracts to Mr. Hatfield.

[28] The trial court noted at sentencing that he, too, was especially bothered by the missing original contracts. RP 668.

RP 227. Certainly, the jury wondered why, if Mrs. Aenk had, in fact, given Mr. Hatfield the original contracts and retained copies for herself, would she then email a blank contract to Mr. Hatfield, rather than a copy of her copy of the contract.

Furthermore, the jury heard testimony regarding the altered purchase prices in the contracts for Quinn and Barren. The purchase prices were doubled without the Hatfields' knowledge or consent. RP 144-145, 148, 225-226. Mrs. Aenk attempted to cash the Quinn/Barren check, but, notwithstanding the availability of funds, insisted on cash payment, for which Mrs. Aenk failed to provide a receipt or return the check because she "forgot" it at home (even though Mr. Aenk testified that the Aenks went to the bank to cash the check on the way to the Hatfield property to look at the fence). RP 154-155, 230, 367, 369, 454. The fraudulent scheme regarding the adoption of Quinn and Barren was highly probative as to Mrs. Aenk's intent regarding the adoption of Duke.

Mrs. Aenk's story was replete with inconsistencies and specious explanations from which the jury could infer Mrs. Aenk's intent to deprive and deceive. The jury observed and listened to the defendant as well as to the prosecution witnesses whose testimony was inconsistent with defendant's on almost every element. Questions of credibility are questions of fact to be decided by the jury and so are the inconsistencies between the

defendant's testimony and that of the other witnesses. This court does not reweigh the evidence in a sufficiency challenge, nor does it substitute its judgment for the jury's on credibility determinations. The jury did not believe Mrs. (or Mr.) Aenk's story, and that judgment should not be disturbed on appeal. The facts as discussed above create a sufficient inference that the defendant never intended to honor the Duke contract, and deceived the Hatfields by promising performance that she never intended to perform.

C. IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY, THIS COURT SHOULD REQUIRE THE DEFENDANT AFFIRMATIVELY ESTABLISH A CLAIM OF INDIGENCY AS SET FORTH IN THIS COURT'S JUNE 10, 2016 ORDER BEFORE THIS COURT DETERMINES WHETHER TO AWARD COSTS AS AUTHORIZED IN RCW 10.73.160 AND RAP 14.2.

If the defendant is unsuccessful in this appeal, the defendant requests this Court decline to impose the appellate costs authorized in RCW 10.73.160 and RAP 14.2.[29] This Court should require the defendant to provide the requested information as set forth in this Court's general order dated June 10, 2016, regarding her claim of continued indigency.

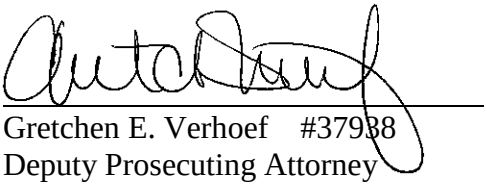
[29] It appears this Court has addressed this issue in its General Order dated June 10, 2016, dealing with motions on costs.

V. CONCLUSION

The trial court did not abuse its discretion in excluding Mr. Aenk's testimony regarding what the Hatfields had said to him about the delivery of the horses or whether the check was to be used as payment for Barren. The trial court did not err in finding this testimony was proffered to prove an oral agreement, i.e., the truth of the matter asserted. Furthermore, the defendant herself was able to testify without objection or limitation by the court as to the oral statements or agreements allegedly made by the Hatfields, and therefore, she was both able to present a defense and error, if any, in excluding the testimony from Mr. Aenk was harmless. For these reasons, the State respectfully requests that this Court affirm the trial court and jury verdicts.

Dated this 19 day of August, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. DESARAE M. DAWSON, Appellant.	NO. 33953-0III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 19, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Thomas E. Weaver
tweaver@tomweaverlaw.com

8/19/2016 (Date) Spokane, WA (Place) (Signature)