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Court of Appeals  
Division III  
State of Washington

34109-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JOHN M. HAMILTON, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court applied an erroneous legal standard in evaluating whether Hamilton used force or the threat of force in attempting to take property from the Food Mart that lowered the State's burden of proof on an essential element of the charge.

2. The trial court improperly permitted testimony that opined on the guilt of the defendant.

## **II. ISSUES PRESENTED**

1. Whether the trial court's oral remarks regarding the victim's fear during the robbery can be considered as a basis for error if the trial court entered formal findings of fact and conclusions of law regarding the bench trial?

2. Does Mr. Hamilton establish the trial court employed the wrong test as to whether he used or attempted to use force during the robbery; i.e., whether an ordinary person in the victim's position could reasonably infer a threat of bodily harm from the defendant's acts?

3. Has Mr. Hamilton established it was improper opinion testimony for a detective to proffer testimony that a thief or robber will attempt to isolate a store employee before the commission of a crime?

4. Has Mr. Hamilton provided any evidence or argument to rebut the presumption that the trial judge did not consider inadmissible evidence when rendering his verdict?

5. Does the invited error doctrine preclude review of Mr. Hamilton's claim that a detective proffered inadmissible testimony during cross-examination?

### **III. STATEMENT OF THE CASE**

The defendant, John Hamilton, was charged by second amended information in the Spokane County Superior Court with attempted first degree robbery with a deadly weapon enhancement allegation. CP 9; RP 232-34. After a bench trial, the court found Mr. Hamilton guilty of the lesser-included offense of attempted second degree robbery. CP 81-86. This appeal timely followed.

#### Substantive facts.

On January 28, 2013, Kuljeet Kaur was part-owner and worked at the PR Food Mart, a convenience store, at 115 South Pines Road in Spokane. RP 75-76, 78-79, 81, 160. At approximately 4:40 p.m., Ms. Kaur was working behind the counter in the store. RP 82, 239. She became fearful when a male customer approached her behind the counter and said he was

“here to do a robbery.”<sup>1</sup> RP 83-84, 86. The suspect had a full “big” glass beer bottle in his hand. RP 84-85.<sup>2</sup> The suspect raised the bottle as if he was going to strike Ms. Kaur, and she fell backward. RP 84. This was the first time the clerk had been “robbed.” RP 86.<sup>3</sup> The suspect demanded Ms. Kaur’s rings, which she removed and placed onto the counter.<sup>4</sup> RP 246. Ms. Kaur subsequently exited the store to summon help. RP 93. Police were called by Nick Damascus, a friend of the clerk. RP 93.

At the time of the incident, Mr. Damascus lived at 123 North Pines Road. RP 128. He remarked that day-to-day conversation with Ms. Kaur in English was difficult. RP 130, 153-54. On the date of the incident, Ms. Kaur “pounded” on his door, screaming in a frantic manner. RP 132.<sup>5</sup> Ms. Kaur

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<sup>1</sup> The area in which the clerk was standing is not open to the public. RP 89. The cash register, lottery tickets, and cigarettes were located in this area. RP 91.

<sup>2</sup> Detective Kirk Keyser stated that a store video of the event showed a wine bottle being used. RP 187. The bottle was glass, and approximately ten to twelve inches in length. RP 187-88.

<sup>3</sup> Ms. Kaur had worked at the store approximately four to five years. RP 116.

<sup>4</sup> Deputy Chan Erdman remarked that he viewed the store surveillance video which was of poor quality, and he did not observe Ms. Kaur remove her rings. RP 249-50.

<sup>5</sup> Mr. Damscus had not previously observed Ms. Kaur like this before. RP 132. Mr. Damscus commented, “I really think that she was in such a hysterical frame of mind that she wasn’t really cognizant of what she was

pointed toward the store. RP 132. As Mr. Damascus approached the store with Ms. Kaur, he observed a male inside the store, acting erratically, rummaging for something. RP 134. The individual exited the store, mumbling, and left on a bicycle. RP 136-37. Before he left, the suspect dropped something inside the store. RP 140-41.

When deputies arrived at the store, Ms. Kaur was hysterical, crying, and yelling. RP 162, 165, 242. The front counter inside the store appeared “disheveled,” with lottery tickets scattered on the ground. RP 163, 244-45.

Detective Kirk Keyser testified he had a reasonable amount of on-the-job training and education in loss prevention and theft. RP 179. Also, he had supervised a group of loss prevention executives who managed controlled closed circuit cameras for theft prevention. RP 183. Detective Keyser stated that generally an individual planning a theft or robbery will attempt to seclude the employee to avoid witnesses to the event. RP 179-80. Thereafter, the defense attorney voiced an objection claiming it was a “summary” of the behavior of individuals committing these types of crimes. RP 180-81. The trial court ruled stating:

Well, to the extent that the officer’s background becomes important in terms of a description of what a particular

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saying, too, in the sense that she was extremely upset.” RP 138. Ms. Kaur’s ability to effectively communicate after the incident was limited. RP 14, 150. Throughout Deputy Chan Ederman’s contact with Ms. Kaur, she had difficulty breathing and “she was pretty scared.” RP 243.

suspect may be doing and how that relates to a crime the state alleges to have been committed, that would seem to me to be relevant. Obviously other individuals' propensities to commit crimes or their particular mannerisms in committing a crime doesn't directly speak to whether this defendant committed it, but it may speak to what the officer, again, in his experience, would indicate to him as someone may be committing a crime in this type of situation. I think for that purpose it is relevant.

Obviously as to whether someone finally commits a crime or not, that is in this case the Court's decision or otherwise the jury's decision, and goes to the ultimate facts. No one can express an opinion about guilt. Beyond that, I'll allow you to continue.

RP 181-82.

Detective Keyser noted a language barrier when he spoke with Ms. Kaur after the incident. RP 186. Inside the store, Ms. Kaur showed Detective Keyser the location of the wine bottles, and how one was used during the event. RP 186-87.

Detective Keyser reviewed the surveillance tape and reflected:

[T]he defendant appeared to wait until no other customers were in the store until he approached the victim, Ms. Kaur. [T]hat during the time he appeared to be having a verbal interaction with Ms. Kaur, at several points during the video he looked behind him or out towards the glass window, which would be indicative of someone determining if there was anyone else watching the event.

I saw that after Ms. Kaur left the premises --

[DEFENSE ATTORNEY]: Your Honor, I'm going to object. I'm not sure adequate foundation has been laid, and this is opinion evidence.

THE COURT: It is opinion evidence. But I think there was foundation laid as in terms of his experience and training on theft. To the extent he has that, which sounds like he clearly does, I will allow you to proceed.

...

[DETECTIVE]: After she left, I noticed that the defendant pointed and followed her with his finger until she was out of sight prior to him engaging and removing the lottery tickets. Which would be customary, in my opinion and training, that he -- the defendant is again waiting until witnesses are out of area before he begins to obtain the items that are involved in the theft.

And then I also noticed that upon confrontation by witnesses, which would have been occurred through the glass, that is the point in which the defendant dropped the items that he had removed from the lottery -

[DEFENSE ATTORNEY]: [J]udge, I'm going to object again. This is the detective's theory of the case. And I believe it is invading the province of the Court and would be inadmissible.

I would ask the detective testify what he observed, not his interpretation what he observed and what it meant to him as a law enforcement officer.

[DEPUTY PROSECUTOR]: Your Honor, he has training and experience in looking at what people do and why they might do those actions, so this is clearly within his realm of education and training experience. This is completely appropriate.

THE COURT: I agree. It is his observations, and what that means based on his experience. I'm going to allow him to continue.

...

[DETECTIVE]: [A]s he approaches the glass and can see outside, it appears that Mr. Damascus and Ms. Kaur are outside; that the items are dropped from the defendant's hands, again indicating that the seclusion of not being seen during the process of a theft.

RP 279-82.

During cross-examination of the detective, the following exchange took place regarding the detective's interview of the defendant:

[DEFENSE ATTORNEY]: *I know you'll be candid:* When you -- I know you -- and -- so but I have to ask you this:

When you spoke to Mr. Hamilton in the interrogation room, were you -- were you really looking for evidence -- were you really evidence gathering, or would it be fair to say that you were looking for statements from Mr. Hamilton that might incriminate him?

[DETECTIVE]: Both. I was looking for the truth. And what - His physiological characteristics during of the interview led me to believe that he was doing one of two things: Absolutely lying and hiding something from me, or contemplating not telling me something.

...

And so I was trying to determine which one has happened here, and am I potentially going to have him confess to me to five robberies, or is he potentially going to confess to me there was some other instant or some other things involved in this incident.

I was seeking the truth.

RP 286-87 (emphasis added).

After a media release in March of 2013, Mr. Hamilton was developed as a suspect. RP 193-95, 197-98. The detective prepared photo montages which included Mr. Hamilton. RP 198-201. The detective subsequently contacted Ms. Kaur and Mr. Damascus and asked each to look at the montage. RP 201. Mr. Damascus selected Mr. Hamilton, with 90 percent certainty. RP 203. Ms. Kaur identified Mr. Hamilton. RP 205.

Thereafter, Mr. Hamilton was interviewed by Detective Keyser at the Public Safety Building. RP 215-17. The interview was recorded but not transcribed. RP 228-29.

During his incarceration in the Spokane County Jail, Mr. Hamilton spoke with a female, and generally discussed the event with her. RP 268. The female asked if there was any audio of the incident. RP 268. Specifically, Mr. Hamilton stated: “Well, yeah, we don’t want to hear what I’m saying,” and laughed. RP 268. He then stated: “See about audio because audio would be pretty damning. It wouldn’t be good. I don’t know why they wouldn’t have audio, but I hope they don’t.” RP 268-69; Ex. 19.<sup>6</sup>

During Mr. Hamilton’s case-in-chief, he asserted that Ms. Kaur was interested in jewelry, and he would trade jewelry for store merchandise.

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<sup>6</sup> Mr. Hamilton admitted on cross-examination that he was concerned about an audio recording of the event. RP 390. The surveillance camera did not capture the audio of the robbery.

RP 321-22. Mr. Hamilton claimed that he bartered a \$400 ring for approximately \$20 of store goods approximately one month prior to the incident. RP 327-28. Prior to the incident, Mr. Hamilton returned to the store to retrieve the ring. RP 329-30. He asserted that he offered \$40 for the ring, and Ms. Kaur declined. RP 330-31. On the day of the incident, Mr. Hamilton was angry that Ms. Kaur did not return the ring, and that she had “robbed” him.<sup>7</sup> RP 336-38. Mr. Hamilton claimed he did not remember placing a wine bottle in his hand. RP 335. He then maintained that he was “messaging” with the wine bottle when he placed it on the counter, and he wasn’t “cognizant” that the wine bottle was in his hand. RP 342. After Ms. Kaur left the store, Mr. Hamilton was angry, and began grabbing lottery tickets behind the counter. RP 348, 370. He realized this maneuver was “stupid,” moved toward the exit, and dropped the tickets inside the store after observing Ms. Kaur and Mr. Damascus outside of the store.<sup>8</sup> RP 348-50, 372, 375.

Ultimately, the trial court found Mr. Hamilton guilty of the lesser-included offense of attempted second degree robbery. CP 81-86. With

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<sup>7</sup> During cross-examination, Mr. Hamilton denied making this claim on direct examination. RP 363-64.

<sup>8</sup> Mr. Hamilton admitted that he did not intend to pay for the lottery tickets. RP 373.

regard to whether force was used, the trial court made the following oral remarks:

The fourth element is whether the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear. As I understand the law, any degree of force or threat no matter how slight is sufficient. *The question is whether or not in our common experience the threats create an apprehension of danger.*

Ms. Kaur testified that she felt that the defendant raised his hand as if he was going to hit her. She was afraid of him. She was afraid of his potential actions. She expressed her fear. And the degree of force, however slight, was sufficient in order to have that apprehension.

It's fairly clear on the video that, again regardless of why Mr. Hamilton was there, it is clear that the dispute was -- even though you can't hear the words, the dispute was heated, at least on Mr. Hamilton's side. There was pointing of fingers and reasonably aggressive behavior.

*I will acknowledge he was on, as I refer to it the customer side of the counter, but the threat no matter how slight would be sufficient, and I believe it is here.* I believe that to be true beyond a reasonable doubt. And I will find that that element has been met.

Force or fear was used by the defendant to obtain or -- obtain or retain possession. This is sort of a corollary, I suppose, of the fourth element. Certainly Ms. Kaur again left of building based upon her fear. The building was then empty. There was no one there, and the defendant used that opportunity to remove the lottery tickets from the dispenser.

RP 431-32 (emphasis added).

#### IV. ARGUMENT

**A. THE TRIAL COURT’S ORAL REMARKS CANNOT BE USED TO IMPEACH ITS WRITTEN FINDINGS AND CONCLUSIONS. MOREOVER, THE TRIAL COURT MADE A DETERMINATION THAT THERE WAS SUFFICIENT FORCE USED BASED UPON AN OBJECTIVE ANALYSIS OF THE EVIDENCE.**

With regard to Mr. Hamilton’s first assignment of error, he claims the trial court applied a subjective standard, rather than an objective analysis, when determining whether the taking of property was accomplished by force, violence, or fear of injury against Ms. Kaur. *See* Appellant’s Br. at 9.

A robbery occurs when a person:

unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.

RCW 9A.56.190.

“Robbery encompasses any taking of ... property [that is] attended with such *circumstances of terror*, or such threatening by *menace, word or gesture* as in common experience is likely to create an apprehension of danger and induce a [person] to part with property for the safety of his [or her] person.” *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888

(2014), *as corrected* (Aug. 11, 2014) (emphasis in the original).<sup>9</sup> In *Witherspoon*, the defendant claimed the victim had no subjective fear at the time of the robbery. The Supreme Court found that a rational jury could find the defendant used or threatened force by an implied threat based upon the victim's testimony that she saw an unknown individual approach her, claiming he had a pistol behind his back. Ultimately, the Supreme Court held an objective test is employed to determine if "the defendant used intimidation" and whether "an ordinary person in the victim's position could reasonably infer a threat of bodily harm from the defendant's acts." *Witherspoon*, 180 Wn.2d at 884.<sup>10</sup>

A threat can be communicated "directly or indirectly" and a threat of immediate force may be implied by words or conduct. RCW 9A.04.110(28); *Washington v. Farnsworth*, 185 Wn.2d 768, 771, 374 P.3d 1152 (2016) "Any force or threat, no matter how slight, which

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<sup>9</sup> An attempt consists of the intent to commit a specific crime and a substantial step toward the commission of that crime. RCW 9A.56.200. The Supreme Court has defined the substantial step element of criminal attempt as conduct "strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wn.2d 443, 451-52, 584 P.2d 382 (1978).

<sup>10</sup> In a concurring opinion, Justice Gordon McCloud stated she agreed with the majority opinion that the State need not prove the victim's actual, subjective fear to establish a robbery. "The fact that the State need not *prove* actual fear to sustain a robbery conviction shows how broadly the robbery statute sweeps." *Witherspoon*, 180 Wn.2d at 905 (emphasis in the original).

induces an owner to part with his property is sufficient to sustain a robbery conviction.” *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

Mr. Hamilton does not assert a sufficiency of the evidence claim. Rather he relies on the trial court’s oral remarks as a basis for error. An oral decision of the trial court which is inconsistent with its written findings of fact and conclusions may not be used to impeach the court’s findings. *Mairs v. Department of Licensing*, 70 Wn. App. 541, 545, 854 P.2d 665 (1993); *Johnson v. Whitman*, 1 Wn. App. 540, 546, 463 P.2d 207 (1969). In addition, although the trial court’s oral opinion may be used to clarify written findings of fact and conclusions, an oral opinion itself is not a finding of fact. *State v. Williamson*, 72 Wn. App. 619, 623, 866 P.2d 41 (1994). Essentially, an oral decision “has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law and judgment.” *State v. Kilburn*, 151 Wn.2d 36, 39 n.1, 84 P.3d 1215 (2004).

Here, the trial court’s mention in its oral ruling regarding the victim’s subjective fear, if anything, was a statement of fact. There is nothing which precludes the trier of fact from considering the evidence to form its legal conclusion as to whether force was used during the crime. Moreover, the trial court’s remark was not a conclusion of law. The court briefly mentioned Ms. Kaur was in fear in its written findings. Mr. Hamilton’s claim fails. *See State v. Reynolds*, 80 Wn. App. 851, 860,

912 P.2d 494 (1996) (finding without merit defendant’s assertion that an exceptional sentence was based on unproven inferences where the defendant based this claim on certain oral comments made by the court: “The court did not include those statements in its written findings, and [we] will not further consider this claim”).

Notwithstanding the above analysis, the trial court formally found in its written findings that Mr. Hamilton manifested an implied threat of force. Mr. Hamilton was agitated and upset. CP 82 (finding of fact D). He held a full wine bottle upside down and approached Ms. Kaur and placed the bottle on the counter. CP 82 (findings of fact F, G, and H).<sup>11</sup> An argument began and Mr. Hamilton picked up the wine bottle as he directly stood in front of Ms. Kaur. CP 82 (finding of fact H and I). Ms. Kaur testified she was in fear and perplexed by Mr. Hamilton’s actions, laid down on the floor, and covered her head. CP 82 (finding of fact J). As Mr. Hamilton approached Ms. Kaur while on the ground, she subsequently ran out of the store in fear. CP 83 (finding of fact L). The trial court’s conclusion of law “E” states: “That the taking was against the person’s will

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<sup>11</sup> Mr. Hamilton does not assign error to any of the trial court’s written findings of fact and conclusions of law. Unchallenged findings of fact are verities on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). The findings of fact are verities despite Mr. Hamilton’s own analysis and conclusions of the store’s surveillance tape as discussed in his brief. *See*, Appellant’s Br. at 3-5.

by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person." CP 84.

Although not expressly stated, the trial court made an objective assessment to determine whether the defendant used intimidation. An ordinary person in Ms. Kaur's position would likewise reasonably fear that Mr. Hamilton threatened to use force. This claim has no merit.

**B. MR. HAMILTON HAS NOT REBUTTED THE PRESUMPTION THAT A TRIAL COURT DOES NOT CONSIDER INADMISSIBLE EVIDENCE.**

In his second assignment of error, Mr. Hamilton alleges the trial court improperly permitted opinion testimony regarding his guilt. Appellant's Br. at 2.

1. Testimony regarding the behavior of individuals preparing for a theft or robbery inside a business.

No witness, whether an expert or a lay person, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).<sup>12</sup>

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<sup>12</sup> In *Black*, the expert witness testified to the existence of a specific profile of symptoms for rape victims, known as the rape trauma syndrome, and that the victim in that case fit the profile. 109 Wn.2d at 339. The Supreme Court found that the rape trauma syndrome was not a scientifically reliable means of proving lack of consent in a rape case, and that the expert's testimony that the victim fit the profile invaded the province of the jury. *Id.* at 348-50.

However “testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the [trier of fact], and is based on inferences from the evidence is not improper opinion testimony.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). ER 702 requires an appellate court to make two inquiries: “(i) does the proffered witness qualify as an expert; and (ii) would the proposed testimony be helpful to the trier of fact.” *State v. Janes*, 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993). “Practical experience is sufficient to qualify a witness as an expert.” *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). Mr. Hamilton does not challenge Detective Keyser’s qualifications.

Generally, expert evidence is helpful and appropriate when the testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the trier of fact to the prejudice of the opposing party. *State v. Jones*, 59 Wn. App. 744, 750, 801 P.2d 263 (1990).

To determine whether statements are impermissible opinion testimony, an appellate court considers the circumstances of the case, including “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Here, the detective did not express a personal opinion that he believed Mr. Hamilton was guilty, any opinion of Mr. Hamilton's intent, or the veracity of any witness.<sup>13</sup> Rather, the specific nature of his testimony was the general behavior of individuals planning a theft or robbery, which includes isolating an employee to avoid any witnesses to the event. The defendant denied committing the robbery. In addition, there was substantial other evidence before the trial court to support the conviction. The detective's testimony did not meet the *Kirkman* standard of impermissible testimony.

If this court finds the testimony was error, the testimony does not warrant reversing the conviction because an appellate court presumes the trial court did not consider inadmissible evidence in rendering its verdict, and there is sufficient admissible evidence to uphold the conviction. *See State v. Miles*, 77 Wn.2d 593, 464 P.2d 723 (1970). In *Miles*, a bench trial, the defendant claimed the court erroneously admitted a toy pistol into evidence. The Supreme Court held the admission of the toy pistol was error, but presumed the trial judge did not consider the toy pistol in rendering its

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<sup>13</sup> The Supreme Court has held that there are some areas which are clearly inappropriate for opinion testimony in criminal trials, such as expressions of personal belief as to the guilt of the defendant, the intent of the defendant, or the veracity of witnesses. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

verdict. *Id.* at 602. Accordingly, the Supreme Court held the admission of the toy pistol was not reversible error because there was sufficient admissible evidence to sustain the conviction. *Id.* at 602. In *State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26 (2002), our high court recognized:

In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.

A defendant can rebut the presumption by showing “the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made.” *Id.* at 246-47.

Here, Mr. Hamilton does not address or attempt to rebut the presumption that the trial court did not rely on this testimony in arriving at its verdict. In any event, there is no evidence the trial court relied on the detective’s testimony as it was not referenced during the court’s oral remarks nor is the testimony contained within its written findings of fact and conclusions of law. Moreover, the verdict is supported by sufficient admissible evidence. This claim is without merit.

2. The defense attorney's question regarding the detective's motive for questioning Mr. Hamilton and the related answer was invited error and not subject to review. In addition, the defendant has not met his burden to establish the court relied on this testimony in arriving at its verdict.

Here, the defense attorney asked Detective Keyser if his purpose, when interviewing Mr. Hamilton, was to incriminate Mr. Hamilton. He requested the detective be "candid." Now, Mr. Hamilton asserts "error" because the detective answered candidly. The detective remarked that he was looking for the truth and Mr. Hamilton's physiological characteristics led the detective to believe that Mr. Hamilton was either not being truthful *or* contemplating not telling the detective something. To the extent that Detective Keyser offered his opinion about whether Mr. Hamilton was being truthful during his interview, this testimony was elicited on cross-examination by defense counsel. Invited error bars review because a party cannot set up an error at trial and then complain about it on appeal. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). This prohibition applies even to constitutional issues, *id.* at 870-71, and it is strictly applied. *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999), *as amended* (July 2, 1999); *see also State v. Vandiver*, 21 Wn. App. 269, 273, 584 P.2d 978 (1978) (testimony elicited on cross-examination was invited error precluding appeal).

Likewise, Mr. Hamilton has neither discussed nor attempted to rebut the *Miles* presumption that a trial court will not consider inadmissible evidence. In point of fact, there is no indication either in the trial court's oral remarks or its findings and conclusions that it relied on the detective's remarks when rendering its verdict. Mr. Hamilton's claim fails.

**C. UNLESS MR. HAMILTON'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT'S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

The trial court determined the defendant to be indigent for purposes of his appeal. CP 92-93. The State is unaware of any change in the defendant's circumstances. Should the defendant's appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2, as amended.

## V. CONCLUSION

Mr. Hamilton has not established the trial court used the wrong test to determine whether he used or attempted to use force against Mr. Kaur during the robbery. In addition, Mr. Hamilton has not addressed or attempted to rebut the presumption that a trial court will not consider inadmissible evidence. Finally, defense counsel invited error, if any, when he asked the lead detective to be candid regarding the motive behind his interview of the defendant. Such invited error precludes review. The Court should affirm Mr. Hamilton's conviction for attempted second degree robbery.

Dated this 27 day of February, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Larry D. Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JOHN M. HAMILTON,  
  
Appellant,

NO. 34109-7-III  
  
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on February 27, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
[andrea@burkhartandburkhart.com](mailto:andrea@burkhartandburkhart.com)

2/27/2017  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)

# SPOKANE COUNTY PROSECUTOR

February 27, 2017 - 3:17 PM

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