SUPREME COURT NO. _____

NO. 73903-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RODNEY WILLIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Dean S. Lum, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Rodney Willis, the appellant below, requests review of the Court of Appeals decision referred to in section B.

B. COURT OF APPEALS DECISION

Willis requests review of the Court of Appeals decision in State v. Rodney Willis, No. 73903-4-I, filed July 24, 2017 and attached to this petition as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the lead detective's facial expressions during petitioner's trial testimony – which clearly expressed her opinion that he was being untruthful – deny petitioner his constitutional rights to trial by jury, due process, and the right to confront the witnesses against him?

2. Where the Court of Appeals decision on this issue misinterprets State v. Bourgeois,[1] and conflicts with precedent on whether jurors' observations during trial inhere in the verdict, should this Court grant review under RAP 13.4(b)(1)?

3. Did the lead detective also improperly express her opinion on petitioner's guilt during her trial testimony, thereby denying petitioner a fair trial?

[1] State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997).

4. Is review appropriate under RAP 13.4(b)(1) where the Court of Appeals decision – finding any error on this issue invited and therefore waived – conflicts with this Court's prior precedent on the invited error doctrine?

D. STATEMENT OF THE CASE

1. Trial Court Proceedings

The King County Prosecutor's Office charged Rodney Willis with Murder in the First Degree for the September 7, 2012 death of Herman Tucker. CP 1. Tucker and Willis had a physical altercation inside a SeaTac motel room. 13RP 307-308. Tucker was shot once and died from his injuries. 13RP 310-313; 14RP 631-634. Willis was charged under a theory of felony murder – that he killed Tucker while committing or attempting to commit Robbery in the First or Second Degree. CP 1. Willis's defense was excusable homicide – during the course of protecting himself and his teenage sister (who was also present), Tucker was accidently shot. 16RP 1137-1150; CP 69-79.

Events leading up to the altercation were contested at trial.[2] Tucker, who was 47 years old, had taken Willis's 16-year-old sister to the motel to have sex with her. 9RP 8; 13RP 306; exhibit 5HH. According to Willis, when he attempted to intervene and remove his sister from the premises,

[2] A detailed discussion of the trial evidence can be found in Willis's Court of Appeals briefing. See Brief of Appellant, at 5-19.

Tucker attacked him, the two struggled, and a pistol in Willis's possession accidently discharged, striking Tucker. 13RP 307-313; 14RP 631-634.

Willis's sister (Earnetra Turner) and one of Willis's friends (Kavahn Matthews-Smith) cut favorable deals for themselves in exchange for testimony as prosecution witnesses. 9RP 9; 10RP 203-204; 13RP 252, 274. Turner testified that Tucker had been intentionally lured back to the motel room with a plan to rob him. 9RP 76-78. Mathews-Smith also testified that Tucker was targeted for a robbery. 10RP 212-221, 239-250, 268-270.

Jurors convicted Willis and found a firearm enhancement proved. CP 84-85. After denying a defense motion for new trial, the Honorable Dean Lum sentenced Willis to 420 months in prison. CP 160, 187-192. Willis timely filed his Notice of Appeal. CP 166-167.

2. Court of Appeals

On appeal, Willis primarily made two claims.

The first involved an improper opinion on his guilt. See Brief of Appellant, at 20- 27; Reply Brief of Appellant, at 1-9. During defense counsel's cross-examination of the lead investigator in this case – King County Sheriff's Detective Christina Bartlett – counsel explored the fact that, during her interrogation of Willis immediately following his arrest, Bartlett told Willis that whether he went to the motel to kill Tucker or merely with

the intent to rob him was an important distinction. 11RP 528, 532; 12RP 44-45.

Defense counsel noted, and Detective Bartlett conceded, that during the interrogation, she gave the impression that an intended robbery resulting in death was less serious than an intended killing resulting in death, although Willis would face a murder charge under either scenario. 12RP 46-47. Using a transcript of the interrogation, defense counsel continued:

> Q: Let's go back to the page, where we were, 16, then. So you tell him, "I don't think you planned a murder, but I think this was a lick."[3] In fact, I counted, and I think you tell him about 12 times that you don't think he intended to murder anybody, but you do believe that he intended to rob somebody?
>
> A: I do believe that he intended to rob Herman Tucker.

12RP 47 (emphasis added).

The State recalled Detective Bartlett in its rebuttal case. On cross-examination, defense counsel focused on the fact that, during the interrogation, both sides were being deceptive; Bartlett was misleading Willis and Willis was responding in kind. 16RP 980-982. In response, Bartlett claimed that she had given Willis every opportunity to explain that he had been trying to protect his sister, which led to the following exchange:

> Q: Okay. Well, let's see. You said you gave him every opportunity. But, in fact, there were eight times, and

[3] Detective Bartlett testified a "lick" is a robbery. 12RP 17.

we can go through there, that you absolutely told him I don't believe you, and I think you did this for sure. Starting with number one on page 18.

A: I do believe that he committed this murder.

Q: Okay. And you –

A: That's not a lie.

Q: And no matter what he told you from page 18 all the way up to the last page you told him I don't believe you. Absolutely don't believe that I think maybe you didn't murder him, but I think you went there to do a lick, and I don't believe otherwise, isn't that true?

A: I said that I believe that you went there to rob him. I had the text messages and I believed it.

16RP 982-983 (emphasis added).

On appeal, Willis argued that Detective Bartlett's answers to defense counsel's questions had been unresponsive. Whereas counsel had asked about Bartlett's views on the veracity of Willis's claims during the interview that he was not present at the motel and knew nothing about Tucker's death, the detective's unresponsive answers revealed her current opinion on Willis's guilt ("I do believe that he intended to rob Herman Tucker" and "I do believe that he committed this murder"). Brief of Appellant, at 20-22; Reply Brief, at 1-5 (focusing on detective's use of present tense to describe her views).

The Court of Appeals rejected this argument, finding that Bartlett's use of the present tense was simply a reflection of the manner in which defense counsel had asked the questions, and her answers reflected her views at the time of the interview. Moreover, since defense counsel had asked the questions on this subject, any error was invited. See Slip op., at 3-9.

Willis's second claim on appeal – and the primary focus of this petition for review – stemmed from denial of the defense motion for new trial. Immediately following the guilty verdict, members of the defense and prosecution teams, including Detective Bartlett, spoke with jurors. CP 93. In a motion for new trial, defense attorneys Theresa Griffin and Christopher Carney, along with defense investigator Karen Zytniak, explained what jurors revealed during this conversation. CP 93-98.

According to Griffin, several jurors indicated that Detective Bartlett "has more facial expressions than anyone they had ever seen." CP 93. Her expressions while sitting with prosecutors at counsel table caught jurors' attention throughout trial and they told her she should not play poker because it was easy to read her thoughts. CP 93. All jurors agreed with these assessments and laughed when Bartlett acted surprised at the revelation. CP 93. Two jurors told Bartlett that they perceived she was trying to tell them not to believe Willis while he was on the stand. CP 93. Carney provided a consistent declaration, indicating that "jurors agreed that Detective Bartlett's

facial expressions were very noticeable to them during the testimony of Mr. Willis." CP 96. According to Carney, when one juror said, "it was like you were trying to tell us not to believe him," all of the other jurors agreed. CP 96. Similarly, Zytniak indicated that all jurors noticed the detective's very expressive face and several wondered whether she had been intentionally trying to communicate with them. CP 97.

In the motion for new trial, the defense argued that Detective Bartlett's facial expressions communicated her opinion that Willis was not being truthful on the stand, this improper and unsworn opinion evidence violated Willis's constitutional rights – including his right to confront and cross-examine the witnesses against him – and it denied him a fair trial. CP 87-90. The defense also requested access to jurors to more fully explore what they had witnessed and to ensure a sufficient record. CP 90-91.

Although not contesting what jurors revealed, the State argued against a new trial and against any further discussions with jury members about what they had witnessed in court. CP 193-226.

In an oral ruling, Judge Lum denied the defense motion, finding no evidence that jurors considered Detective Bartlett's facial expressions, no evidence the expressions affected jurors' assessment of Willis's credibility, and that her expressions were indistinguishable from properly admitted evidence demonstrating Bartlett did not believe Willis to be credible. 17RP

39-42. Judge Lum concluded that any error was harmless beyond a reasonable doubt and denied access to jurors for additional interviews. 17RP 43-45. He then entered a consistent written decision. CP 187-192.

On appeal, Willis again argued that Detective Bartlett's facial expressions during Willis's testimony were improper comments on his veracity in violation of his right to trial by jury (citing State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001)) and violated his rights to due process and to confront the witnesses against him (citing Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), State v. Monson, 113 Wn.2d 833, 784 P.2d 485 (1989), State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)). See Brief of Appellant, at 29-41; Reply Brief, at 10-14.

The Court of Appeals rejected this argument. Citing State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997), the Court held that consideration of jurors' descriptions of the expressions on Detective Bartlett's face invaded jurors "thought processes," inhered in the verdict, and therefore were not properly considered in the motion for new trial. Slip op., at 10-12. Without these descriptions, the Court of Appeals then concluded there was no evidence to support a finding that Bartlett expressed an improper opinion and, consequently, no evidence Willis was prejudiced.

Slip op., at 9, 13.

The Court also rejected Willis's request to remand the matter for a hearing to better determine what jurors observed as Bartlett made facial expressions from counsel table during Willis's testimony. While agreeing that such a hearing could produce relevant evidence, and while recognizing that trial counsel for Willis had expressly requested a hearing, the Court found that Willis's trial counsel had nonetheless waived any hearing by not sufficiently articulating what a hearing could properly accomplish. Slip op., at 14-16.

Willis now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE ACCEPTED BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH BOURGEOIS AND OTHER DECISIONS DEFINING WHAT INFORMATION INHERES IN A JURY'S VERDICT.

Witnesses are forbidden from expressing their opinions on a defendant's veracity because, like improper opinions on guilt, these opinions invade the exclusive province of jurors to independently determine the facts and thereby violate a defendant's constitutional right to trial by jury. Montgomery, 163 Wn.2d at 591; Demery, 144 Wn.2d at 759. There is no authority for the proposition that it is okay for a lead case detective to express her opinion on the defendant's credibility through physical

manifestations of disbelief. Since opinions on the defendant's veracity are not permitted on the stand, they certainly are not permitted from counsel table.

Not only did Detective Bartlett's expressed opinions from counsel table improperly invade the jury's role to decide issues of credibility – thereby violating Willis's constitutional right to trial by jury – her opinion also violated Willis's rights to due process and to confront the witnesses and evidence against him. Both the state and federal constitutions guarantee the right to confront adverse witnesses. U.S. Const. Amends. 6 and 14; Const. art. I, §§ 3 and 22 (amend. 10); Davis v. Alaska, 415 U.S. at 315; Monson, 113 Wn.2d at 840; Hudlow, 99 Wash.2d at 14-15. Key to this right is the opportunity for cross-examination. Monson, 113 Wn.2d at 840. Indeed, "[t]he rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. at 294. Yet, Willis was denied these rights when Bartlett made her opinion known to jurors without an opportunity for the defense to object or to confront and challenge that opinion under cross-examination.

Detective Bartlett's improper expressions of disbelief were improper "evidence" under CrR 7.5(a)(1) and also fell under CrR 7.5(a)(5), since a trial "irregularity" may include the jury seeing or hearing that which it

should not. See, e.g., State v. Perez-Valdez, 172 Wn.2d 808, 817-819, 265 P.3d 853 (2011) (witness's opinion that victims of sexual abuse had told the truth); Bourgeois, 133 Wn.2d at 408-09 (spectator misconduct – glaring and gestures – observed by jurors); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (outburst from defendant's mother directed at judge and jury); State v. Mak, 105 Wn.2d 692, 700-701, 718 P.2d 407 (improper question by prosecutor), cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987) (witness's unresponsive answer revealing that defendant had a "record" and previously stabbed someone).

While seemingly accepting that Detective Bartlett should not have been expressing views from counsel table on the veracity of Willis's testimony, the Court of Appeals refused to consider the prejudicial aspects of her facial expressions (that jurors could see she did not believe him) under the assumption these observations inhered in the jury's verdict. This conclusion is not consistent with prior decisions from this Court.

Information inheres in the verdict if it concerns jurors' mental processes or motives in reaching a verdict or the weight jurors may have given to particular evidence. State v. Jackman, 113 Wn.2d 772, 777-778, 783 P.2d 580 (1989). Still, despite reluctance to explore how a jury arrived at its verdict, proof that jurors considered extrinsic evidence can be grounds

for a new trial. State v. Balisok, 123 Wn.2d 114, 117-118, 866 P.2d 631 (1994). To avoid consideration of evidence that inheres in the verdict, the proper inquiry is an objective determination of whether the extrinsic information could have affected the jury's verdict, rather than a subjective inquiry into the actual effect on the jury. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 273, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014, 807 P.2d 883 (1991)).

Citing this Court's opinion in Bourgeois, the Court of Appeals refused to consider jurors' observations that Detective Bartlett "lacked a poker face" (i.e., it was obvious what she was thinking) and refused to consider their observations that she did not believe Willis. Slip op., at 12. All that remained was evidence that Bartlett had many expressions, that both her eyes and face were very expressive, and that no one else except for jurors saw her making these expressions. Id. Based on this significantly pruned and sanitized evidence of jurors' observations, the Court of Appeals concluded that Willis could not demonstrate prejudice from the detective's improper conduct. Id. at 13.

The Court of Appeals misinterpreted Bourgeois. Bourgeois, a teenager, was charged with murder and assault. Bourgeois, 133 Wn.2d at 393. A juror reported seeing two spectators, both also teenage boys, glaring at one of the prosecution witnesses and "kind of staring her down." Id. at

398. That witness had testified that Bourgeois asked her to provide him with a false alibi and that she had been warned not to testify against him. Id. at 394. The same juror also reported that one of these teenage spectators made a gesture with his fingers as if to form a gun. Id. at 398. A second juror reported that "he noticed 'people . . . giving dirty looks to someone else' and 'an air of intimidation' in the court room." Id.

This Court upheld the trial judge's decision denying a defense motion for new trial based on the spectator misconduct. It found that the perception of "glaring" versus merely staring is largely subjective and the fact only two jurors saw it indicated it was not pronounced. Without evidence the reported glaring was more significant, it did not warrant a new trial. Id. at 408. The gun-mimicking gesture was more serious, however, and could have been viewed as a threat against the witness intended to deter her testimony. Id. at 409. On the other hand, there was no indication that Bourgeois had directed the spectator to make the threat or that he even knew the spectator. Ultimately, this Court concluded that the gesture was not so serious as to warrant a new trial. Id.

In Willis's appeal, when concluding that it could not consider jurors' opinions that Detective Bartlett "lacked a poker face" and that her expressions revealed she did not believe Willis's testimony on the stand, the Court of Appeals cited to the fact – in Bourgeois – that this Court refused to

consider a juror's assumption that the spectator making the gun gesture was a friend of Bourgeois's because that assumption inhered in the verdict and could not be used to impeach it. See Slip op., at 10-11 (citing Bourgeois, 133 Wn.2d at 409).

The problem with the Court of Appeals' reasoning is that jurors' observations that Bartlett's expressions made it obvious what she was thinking (no "poker face") and showed she did not believe Willis are not the equivalent in Bourgeois of the juror's assumption that the spectator and Bourgeois were friends. Rather, they are the equivalent of the jurors' observations in that case that the teens were glaring or staring at the prosecution witness and the observation of the gun-mimicking gesture, observations this Court properly considered in deciding whether a new trial was warranted for Bourgeois.

Arguably, the aspect of what jurors saw at Willis's trial that is most like the juror's assumption in Bourgeois that the spectator knew the defendant is the indication by some jurors that Bartlett had *intentionally* tried to convey her opinion of the testimony to them and the indication by others that they had wondered if these were intentional acts. See CP 93, 96-97, 220, 223, 225. However, even if this aspect of the jurors' revelations is not considered because it reflects their mental processes, jurors' observations that Bartlett was unskilled in hiding her feelings and expressed through her

facial expressions her disbelief in Willis's versions of events from the stand would remain. Only the detective's perceived intentionality would be stricken.

All jurors observed Detective Bartlett's expressions and all jurors agreed they reflected a disbelief in Willis's testimony.[4] See CP 93; CP 96-97. By striking these observations from an assessment of Willis's motion for new trial, the Court of Appeals has interpreted Bourgeois too broadly and rendered a decision inconsistent with this Court's prior decisions on what information inheres in a verdict. Review is appropriate under RAP 13.4(b)(1).

On a related issue, the Court of Appeals also rejected Willis's request that – should the record be deemed insufficient to support his factual claims regarding Detective Bartlett's conduct – the matter should be remanded back to the trial court so that jurors can be contacted regarding precisely what they saw. See Slip op., at 14-16. The Court of Appeals agreed that information regarding what jurors saw as Bartlett made her facial expressions at counsel table does not inhere in the verdict. But the Court of Appeals held the issue waived because trial counsel did not make a sufficient request below identifying admissible evidence to be gained. Id. at 16 n.27.

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[4] In State v. Barry, 183 Wn.2d 297, 311, 352 P.3d 161 (2015), this Court recognized that a trial participant's facial expressions can relay that individual's state of mind to jurors. This Court did not hold that whatever jurors saw would not be considered because it inhered in their verdict.

In fact, however, trial counsel indicated a need "to question the jurors about the facts and extrinsic evidence that was considered by the jurors to show that the misconduct occurred." CP 88. While some information counsel hoped to obtain might ultimately be disregarded because it invaded jurors' mental processes or motives in reaching a verdict or the weight jurors may have given to particular evidence, defense counsel's request for an opportunity to speak with jurors further was motivated in large part by a desire to find out *what jurors saw and when*, none of which would inhere in the verdict. See generally 17RP 4-12 (defense argument on motion). This was sufficient to preserve the issue for appeal and, should this Court deem it necessary to supplement the record with additional facts regarding what jurors observed, Willis asks this Court to remand for an evidentiary hearing.

2. THIS COURT ALSO SHOULD REVIEW WHETHER DETECTIVE BARTLETT EXPRESSED IMPROPER OPINIONS ON WILLIS'S GUILT FROM THE STAND.

"No witness, lay or expert, 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). This prohibition stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, which guarantee the right to a fair trial before an impartial trier of fact. A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. State

v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); Demery, 144 Wn.2d at 759; State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977, review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

As noted above, defense counsel cross-examined Detective Bartlett regarding her interrogation of Willis shortly after his arrest. During that cross-examination, Detective Bartlett indicated, "I do believe that [Willis] intended to rob Herman Tucker" and "I do believe he committed this murder." 12RP 47; 16RP 982-983.

The Court of Appeals found that, rather than expressing her current opinions on Willis's guilt, Bartlett was merely recounting her feelings at the time of the interrogation. See Slip op., at 5-7. But Bartlett's use of the present tense ("I do believe") indicates otherwise and would have been interpreted by jurors as a current view.

The Court of Appeals also held that, because Detective Bartlett provided these answers in response to defense questioning, any error was invited and therefore waived. See Slip op., at 3-8. While seemingly acknowledging that defense counsel's questions did not call for Bartlett's current opinions on Willis's guilt, citing only State v. Vandiver, 21 Wn. App. 269, 584 P.2d 978 (1978), the Court held that "the invited error doctrine may apply even when a witness gives a more detailed answer than the question calls for." Slip op., at 8.

In Vandiver, however, the witness's answer was responsive to the question asked. Counsel asked if the defendant had been arrested on a warrant, and the witness testified he had been arrested based on permission from the defendant's parole officer. Vandiver, 21 Wn. App. at 273. Both the question and answer focused on the basis for arrest. In contrast, at Willis's trial, defense counsel asked the detective about her mindset during the interrogation and received an answer about her mindset during trial. Neither Vandiver, nor any other case, stands for the proposition that defense counsel invites an answer that is non-responsive to the question posed. See also Reply Brief, at 1-3 (distinguishing cases of actual invited error premised on defense counsel's questioning).

The invited error doctrine precludes review of trial court error made "at the defendant's invitation." State v. Studd, 137 Wn.2d 533, 546-547, 973 P.2d 1049 (1999) (quoting State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)). The doctrine prohibits a party from setting up an error and then complaining about that same error on review. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). To be invited, an error must be the result of affirmative, knowing, and voluntary actions. In re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001). Moreover, the State bears the burden to prove an error is truly invited as

opposed to a consequence of the failure to object. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

The Court of Appeals' unwarranted expansion of the invited error doctrine in Willis's case conflicts with this Court's prior precedent on the doctrine. Review is therefore appropriate under RAP 13.4(b)(1).

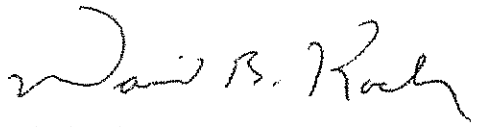
F. CONCLUSION

Because review is appropriate under RAP 13.4(b)(1), Willis asks that this petition be granted.

DATED this 22nd day of August, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KAVAHN ELIJAH MATTHEWS-SMITH, QIANTRE JAMIEL TAYLOR, AKA QIUAN-TRE JAMIEL DAEVION TAYLOR, AKA QIUAN-TRE JAMIEL DAZ TAYLOR, EARNETRA SHALIA TURNER, Defendants, and RODNEY LEE WILLIS, Appellant.	No. 73903-4-I DIVISION ONE UNPUBLISHED OPINION FILED: July 24, 2017

TRICKEY, A.C.J. — Rodney Willis appeals his conviction for first degree murder. He argues that the trial court erred when it allowed the lead detective in his case, Detective Christina Bartlett, to give her opinion on his guilt while testifying. Willis also contends that the trial court abused its discretion by denying his motion for a new trial after he learned that jurors had observed Detective Bartlett's facial expressions as she sat at the State's counsel table throughout the trial.

Because we conclude that Willis invited any error in eliciting Detective Bartlett's testimony and that the record does not establish that her facial expressions amounted to a serious trial irregularity, we affirm.

FACTS

In September 2012, Herman Tucker died from a gunshot wound to the chest at a Motel 6. There is no dispute that Willis shot Tucker, although Willis claims it was accidental.

The State charged Willis with murder in the first degree. At trial, Willis's younger sister, Earnetra Turner, and Willis's friend, Kavahn Matthews-Smith, testified that Tucker was shot during an attempted robbery. Tucker had been supplying Turner with marijuana for some time, but was angry at her because she would not have sex with him.[1] On the night of his death, Tucker had left Turner at the Motel 6 when she, once again, refused to have sex with him.

Willis, Matthews-Smith, and two other people used Turner's cell phone to lure Tucker back to the Motel 6, planning to rob him. But, when they confronted Tucker he charged at them. In the struggle that followed, Willis ended up shooting Tucker. Text messages exchanged between Willis, the other witnesses, and Tucker indicate that there was a plan to rob Tucker.

At trial, Willis denied that he attempted to rob Tucker. He testified that he went to the Motel 6 just to pick up his younger sister. Willis testified that Tucker became violent when Willis tried to leave with Turner. According to Willis, he accidentally shot Tucker in the struggle that followed.

The State played audio recordings of Detective Bartlett's pretrial interview with Willis for the jury. During the interview, Willis repeatedly denied being at the Motel 6 or being involved in any way with Tucker's death. He also initially denied

[1] At that time, Tucker was 47 years old and Turner was 16 years old.

knowing his sister, Turner. Detective Bartlett testified that, during the interview, she had told Willis things that were not true to elicit responses from him. Willis's counsel cross-examined Detective Bartlett at length about her strategies during the interview.

The jury found Willis guilty of first degree murder. After the jury delivered its verdict, the attorneys and their investigators met informally with the jury. Several jurors teased Detective Bartlett about her lack of a poker face. Some joked that she was trying to tell them not to believe Willis while he was testifying.

Willis moved for a new trial, arguing that Detective Bartlett's facial expressions amounted to unsworn and improper testimony about her opinion of Willis's guilt. Willis also sought access to the jurors' contact information. The court denied Willis's motion.

Willis appeals.

ANALYSIS

Opinions on Guilt – Invited Error

Willis argues that his right to a fair trial was violated when Detective Bartlett expressed her current opinion on his guilt at the time of trial. The State argues that Willis invited any error by eliciting the challenged testimony from Detective Bartlett during cross-examination. We agree with the State.

Under the invited error doctrine, "a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the defendant invited the error, the court considers "whether the defendant affirmatively assented

to the error, materially contributed to it, or benefited from it." In re Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The defendant must engage in "some type of affirmative action through which he knowingly and voluntarily sets up the error." State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014).

The invited error doctrine applies when a defendant objects to testimony that was given as a direct response to his questions. See, e.g., State v. McPherson, 111 Wn. App. 747, 764, 46 P.3d 284 (2002) (holding that any error in admitting testimony alleged to be an opinion on guilt was "clearly invited" because it was a "direct response" to the defense's question); State v. Vandiver, 21 Wn. App. 269, 273, 584 P.2d 978 (1978) (holding that the invited error doctrine precluded review of statements made by witnesses in response to defense's questions).

The State bears the burden of proving invited error. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Here, Willis argues that the trial court erroneously admitted opinions on his guilt. Personal opinions on the defendant's guilt and credibility are improper because they invade the defendant's right to have a jury determine the facts. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Because police officers, like the prosecution, represent the State, their opinions are "especially likely" to influence the jury. Demery, 144 Wn.2d at 762-63.

Willis argues that two of Detective Bartlett's statements were improperly admitted. First, on cross-examination during the State's case-in-chief, Willis's counsel asked Detective Bartlett about the way she had interviewed Willis. His

counsel emphasized that Detective Bartlett had told Willis that it was significant whether he had always intended to rob and kill Tucker or had intended only to rob Tucker but killed him in the struggle that ensued:[2]

> [Defense Counsel:] So you tell him, "I don't think you planned a murder, but I think this was a [robbery]."
>
> In fact, I counted, and I think you tell him about 12 times that you don't think he intended to murder anybody, but you do believe that he intended to rob somebody?
>
> [Detective Bartlett:] I do believe that he intended to rob Herman Tucker.
>
> [Defense Counsel:] So given that, that you are telling him over and over and over again and he is denying that he intended to rob him, but you absolutely are not listening to him. Do you ever offer him --[3]

It is clear that Detective Bartlett, adopting the tense used by Willis's counsel, was describing what she told Willis during the interview, not her view of his guilt at the time of her testimony. There was an implied, "I was telling him that" before her answer, which Willis's counsel understood. Willis's counsel's response was to say that Detective Bartlett was telling Willis "that" – apparently her belief that he intended to rob Tucker – over and over again. She continued to ask Detective Bartlett about what she said during the interview, without a request for clarification.

Detective Bartlett made the second statement on cross-examination during the State's rebuttal. Willis's counsel returned to the subject of Detective Bartlett's

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[2] According to the defense, this was not true, because both could be charged as first degree murder. But, as the State points out, there is a difference. Homicide may be charged as first degree murder when it is premeditated or committed in the course of a robbery or attempted robbery. RCW 10.95.030(1). But premeditated murder committed in furtherance of a robbery may be charged as aggravated first degree murder. RCW 10.95.020(11)(a).

[3] Report of Proceedings (RP) (June 1, 2015) at 47.

interview with Willis. This time, counsel emphasized that Detective Bartlett's interview strategy had involved lying to Willis. She suggested that Detective Bartlett and Willis were "playing with each other back and forth" and "trying to hide from each other" what they knew.[4] After Detective Bartlett said that she had given Willis "every opportunity to say that he was trying to rescue his sister," Willis's counsel asked:

> [Defense Counsel:] Well, let's see. You said you gave him every opportunity. But, in fact, there were eight times, and we can go through there, that you absolutely told him I don't believe you, and I think you did this for sure. Starting with number one of page 18.
>
> [Detective Bartlett:] I do believe that he committed this murder.
>
> [Defense Counsel:] Okay. And you --
>
> [Detective Bartlett:] That's not a lie.
>
> [Defense Counsel:] And no matter what he told you from page 18 all the way to the last page you told him I don't believe you. Absolutely don't believe that I think maybe you didn't murder him, but I think you went there to do a [robbery], and I don't believe otherwise; isn't that true?
>
> [Detective Bartlett:] I said that I believe that you went there to rob him. I had the text messages and I believed it.[5]

Again, Detective Bartlett was clarifying what she had said to Willis during the interview and not improperly stating her opinion on his guilt at the time of trial. Counsel had just directed her to page 18 of the transcript of her interview, which included her statement to Willis that the crime looked to her, "like murder one."[6] Willis's counsel used the present tense as she paraphrased Detective Bartlett's

[4] RP (June 9, 2015) at 982.
[5] RP (June 9, 2015) at 982-83.
[6] Ex. 77 at 18.

statements during the interview back to her, and Detective Bartlett responded in the same tense.

Apparently reading along, Detective Bartlett responded that she believed that Willis committed the murder. She completed her answer by saying, "That's not a lie."[7] It is reasonable to conclude that the "that" refers to both what she had just said and her statement during the interview, suggesting that the former is just a restatement of the latter.

As before, Willis's counsel continued with her line of questioning, without indicating that she believed Detective Bartlett was improperly referring to her opinion at the time of trial. Further, Detective Bartlett's next response made it clear that the line of questioning was about what she had said and believed during the interview.

Willis's counsel's questions to Detective Bartlett about what she said or believed during the interview were affirmative and voluntary acts. They created or materially contributed to Detective Bartlett's testimony. Accordingly, we conclude that Willis invited any error in eliciting her testimony and, therefore, cannot challenge it on appeal.

Willis argues that he did not invite any error because Detective Bartlett offered her opinion at the time of trial, not her opinion during the interview, and consequently her answers were not responsive to the questions. We reject this argument for two reasons. First, as just explained, although she gave her answers in the present tense, Detective Bartlett was describing what she said and believed

[7] *RP (June 9, 2015) at 982.*

during the interview.

Second, the invited error doctrine may apply even when a witness gives a more detailed answer than the question calls for. For example, in State v. Vandiver, the defendant's counsel asked a witness if he had arrested the defendant pursuant to a warrant. 21 Wn. App. at 273. The witness responded that he had not had a warrant but had received permission from the defendant's parole officer. Vandiver, 21 Wn. App. at 273. The Court of Appeals held that the defendant had invited any error in admitting this evidence of the defendant's criminal history. Vandiver, 21 Wn. App. at 273.

Here, by aggressively questioning Detective Bartlett about her interview strategies, Willis's counsel invited her to explain herself. Her explanation gave more information than was strictly necessary to answer the question, but was clearly related to her answer. Thus, we conclude that, even if Detective Bartlett's answers were not directly responsive to Willis's counsel's questioning, Willis invited the error.[8]

Ineffective Assistance of Counsel

The State argues that Willis cannot challenge Detective Bartlett's statements on appeal because he failed to object at trial. Willis argues that he received ineffective assistance of counsel when his trial counsel failed to object to Detective Bartlett's testimony.

But Willis does not argue that he received ineffective assistance of counsel

[8] Willis argues that he can raise the issue for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). But a defendant may not raise an error on appeal that he invited, even if that error is a manifest error affecting a constitutional right. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

because his trial counsel questioned Detective Bartlett about her opinions and statements at the time of the interview. In fact, Willis acknowledges that Detective "Bartlett's opinion at the time of the interrogation was certainly relevant to" the defense's theory that Willis did not tell Detective Bartlett the truth during the initial interview because he did not trust her, and that his lack of trust was justified.[9] Since Willis is not arguing that his counsel was ineffective for pursuing the line of questioning that invited the error, it is irrelevant whether Willis's trial counsel was ineffective for failing to object to any error.

Motion for a New Trial

Willis argues that the trial court abused its discretion when it denied his motion for a new trial. Specifically, he argues that Detective Bartlett's facial expressions while seated at the State's counsel table amounted to unsworn and improper opinion testimony on his guilt, which, in turn, constituted extrinsic evidence considered by the jury or a serious trial irregularity. We disagree. Because the record does not establish that Detective Bartlett's facial expressions amounted to opinions on guilt, Willis cannot show the prejudice required for a new trial.

The trial court may order a new trial when certain events occur during trial that materially affect one of the defendant's substantial rights. CrR 7.5(a). "A new trial is warranted in such circumstances only when the defendant 'has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.'" State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (internal

[9] Reply Br. of Appellant at 8.

quotations omitted) (quoting State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)).

When determining whether to grant a new trial, the court may not consider matters that inhere in the verdict. Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179, 422 P.2d 515 (1967). Factors inhering in the jury's process, and thus in the verdict itself, include the "mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, [and] the jurors' intentions and beliefs." Cox, 70 Wn.2d at 179-80. Statements concerning matters that inhere in the verdict "are inadmissible to impeach the verdict." Cox, 70 Wn.2d at 180.

For example, in State v. Bourgeois, the court had to determine the effect of two trial irregularities. 133 Wn.2d at 408-09. Both were alleged incidents of spectator misconduct: first, two spectators glared at a witness, and second, one of those spectators made a gun gesture at the witness with his hand. Bourgeois, 133 Wn.2d at 408. The court quickly dismissed the glaring, noting that the difference between glaring and staring "is largely a subjective determination." Bourgeois, 133 Wn.2d at 408. The Supreme Court acknowledged that the gun gesture could be viewed as a threat to discourage the witness from testifying but concluded there was no indication the defendant directed the spectator to make the gesture. Bourgeois, 133 Wn.2d at 409. In reaching that conclusion, the court deemed irrelevant the fact that one of the jurors had assumed that the spectator who made the gun gesture was associated with the defendant in some way, because the

juror's assumption showed the juror's "thought process" and, therefore, inhered in the verdict. Bourgeois, 133 Wn.2d at 409.

We will not reverse a trial court's ruling on a motion for a new trial absent a clear abuse of discretion, which occurs when no reasonable judge would have reached the same conclusion. Pete, 152 Wn.2d at 552.

Here, immediately after the trial ended, the prosecutors, defense attorneys, defense investigator, and Detective Bartlett spoke informally with members of the jury. The attorneys, investigator, and Detective Bartlett all submitted sworn statements describing their conversation.[10] According to the defense investigator, one juror said that Detective Bartlett "'wins a prize for the most facial expressions.'"[11] Similarly, according to one of the defense attorneys, "several jurors told [D]etective Bartlett that she, 'has more facial expressions than anyone they had ever seen.'"[12] One of the prosecutors agreed that several "jurors told Detective Bartlett that she had very expressive eyes and face."[13]

Another juror told Detective Bartlett that she "should not play poker" because the jurors could read her facial expressions.[14] And one juror commented, "'Oh yeah you definitely were trying to tell us not to believe Mr. Willis.'"[15] The State's witnesses agreed that several jurors teased Detective Bartlett about her lack of a poker face and that some had joked that Detective Bartlett was trying to

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[10] Neither of the parties have raised hearsay concerns about the fact that the affidavits are from non-jurors, recollecting the jurors' statements, rather than affidavits from the jurors themselves.
[11] Clerk's Papers (CP) at 97.
[12] CP at 93.
[13] CP at 223.
[14] CP at 93.
[15] CP at 93.

tell them not to believe Willis when he testified.

Detective Bartlett stated that she was not aware of having made any "observable expressions with [her] eyes or face during trial while seated at counsel table."[16] She also stated that she did not intend to "convey any message or information or to influence the jury in any way with any expressions."[17] Neither side stated that they had observed Detective Bartlett make any particular gestures or facial expressions during trial.

But before reaching Willis's arguments about what impact Detective Bartlett's facial expressions may have on the trial, we must determine whether any statements in the affidavits contain matters that inhere in the verdict.

The affidavits contain descriptions of how the jurors interpreted Detective Bartlett's facial expressions. By saying (1) that Detective Bartlett lacked a poker face, or (2) was trying to tell them not to believe Willis, the jurors offered their conclusions about whether she was intending to express a particular message.[18]

We disregard both conclusions because such determinations inhere in the verdict. Therefore, we consider Willis's claims based solely on the objective descriptions of Detective Bartlett's facial expressions contained in the affidavits: there were many of them, her eyes and face were very expressive, and no one else involved in the trial observed her making them.

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[16] CP at 220.
[17] CP at 220.
[18] In fact, these two conclusions demonstrate how individuals may interpret the same facial expressions in different ways. Saying Detective Bartlett has no poker face suggests that other people can tell what she is thinking or feeling, despite her attempts to conceal her thoughts. That is the opposite of the jurors' other conclusion, that Detective Bartlett was deliberately trying to convey a specific message with her facial expressions.

Willis contends that Detective Bartlett's facial expressions constituted extrinsic evidence or a serious trial irregularity. He also argues that the jurors' observations of Detective Bartlett's facial expressions require a new trial because substantial justice was not done. As noted above, a new trial is not warranted absent a strong showing of prejudice. Pete, 152 Wn.2d at 552.

Willis argues that he was prejudiced because Detective Bartlett's facial expressions amount to her giving her opinion on his guilt or credibility. For example, in his brief, Willis implies that Detective Bartlett expressed her opinion on Willis's credibility through "physical manifestations of disdain, disgust and/or disbelief."[19] The record does not support that implication. The affidavits do not contain any descriptions of these alleged physical manifestations, nor did any of the jurors say that Detective Bartlett expressed disdain, disgust, or disbelief. Therefore, regardless of whether the expressions might constitute extrinsic evidence or a trial irregularity, we conclude that there is nothing in the record to establish that Detective Bartlett's facial expressions amounted to an opinion on guilt.

Without an opinion on guilt, Willis cannot show prejudice. And, without prejudice, Willis cannot show he is entitled to a new trial. Therefore, we conclude that the trial court did not err by denying Willis's motion for a new trial, and we do not consider whether Detective Bartlett's facial expressions amount to extrinsic evidence or trial irregularities.

[19] Br. of Appellant at 32.

Sufficiency of the Record

Willis argues that, if the record is insufficient to determine whether Detective Bartlett's facial expressions warrant a new trial, we should conclude that the trial court abused its discretion when it denied Willis's request to interview the jurors. Because Willis did not establish good cause below, we disagree.

"Individual juror information, other than name, is presumed to be private." GR 31(j). After the conclusion of a jury trial, the court may allow a party's attorney access to juror information upon a showing of good cause.

We review the trial court's decision on access to juror information for an abuse of discretion. State v. Blazina, 174 Wn. App. 906, 909, 301 P.3d 492 (2013). The trial court abuses its discretion when the decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Blazina, 174 Wn. App. at 909-10 (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

In his request to interview the jurors, Willis did not show good cause. He argued that he needed to access the jurors' information to make a record of "how they considered the facial expressions of Detective Bartlett."[20] Willis also stated that he "must be allowed to question the jurors about the facts and extrinsic evidence that was considered by the jurors to show that the misconduct occurred."[21]

At oral argument below, Willis argued that, while that the parties and the court knew "that the exaggerated facial expressions were not[iced] by the jurors,

[20] CP at 91.
[21] CP at 88.

otherwise, they wouldn't have noted them," unless they spoke to the jurors, they could not know whether the jurors observed Detective Bartlett's face while she was at counsel table or while she was testifying.[22] Willis argued that they also did not know if the jurors did not believe Willis because of Detective Bartlett's facial expressions, which was "exactly why [Willis] wanted to talk to them."[23]

In its oral ruling, the trial court stated that, during their conversation with the jurors, the parties disclosed "previously inadmissible character evidence about" Tucker.[24] The court was concerned that the jury's impressions might have been contaminated by this information. The court also stated that it had not observed anything out of the ordinary during trial.

Ultimately, the trial court denied Willis's request because it determined that Willis was seeking information that inhered in the verdict. First, the court assumed that the jurors observed Detective Bartlett's facial expressions while she sat at counsel table.[25] The court then stated that "[t]he only additional information that the defendant appears to want has to do with such matters as how the jurors interpreted Detective Bartlett's facial expressions, whether and how they were discussed in deliberations, and/or whether and how they affected the verdict."[26]

We conclude that the trial court did not abuse its discretion in denying Willis's motion to interview the jurors. Willis did not show that he was seeking more

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[22] RP (July 1, 2015) at 6-8.
[23] RP (July 1, 2015) at 8:22-9:1.
[24] RP (July 1, 2015) at 33.
[25] In his opening brief, Willis objects to the court assuming this instead of actually finding it from the facts. But, as mentioned above, Willis himself said the court could not determine when the jurors were observing Detective Bartlett from the current record.
[26] CP at 189.

information about the precise nature of the facial expressions and, thus, did not establish good cause.[27] Moreover, the trial court's concern that the juror's impressions of the trial may have been contaminated by learning negative facts about the victim's character was not unreasonable.

Cumulative Error

Willis argues that, even if neither Detective Bartlett's testimony nor her facial expressions alone requires reversal, the combination of the two require reversal under the cumulative error doctrine. "Under this doctrine, a defendant may be entitled to a new trial when errors, even though individually not prejudicial, cumulatively result in a trial that was fundamentally unfair." State v. Asaeli, 150 Wn. App. 543, 597, 208 P.3d 1136 (2009). Here, Willis has not established that there were multiple errors or that any of the errors resulted in a fundamentally unfair trial. His arguments, again, assume that Detective Bartlett's testimony was improper and that her expressions amounted to opinions on guilt. We reject these arguments for the reasons stated above.

Appellate Costs

Willis asks that no costs be awarded on appeal if the State substantially prevails. Appellate costs are generally awarded to the substantially prevailing party on review. RAP 14.2. But, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk

[27] On appeal, Willis focuses on the need to have jurors describe "precisely what they saw as Detective Bartlett made facial expressions from [the] counsel table." Br. of Appellant at 42. He contends that this information is necessary to complete the record and does not inhere in the verdict. We agree that jurors' accounts of their observations would not inhere in the verdict. But, since Willis did not make that request below, he cannot raise it now. RAP 2.5(a).

determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2.

Here, the trial court found that Willis was impoverished. We assume that Willis is still indigent. The State may file a motion for costs with the commissioner if it has evidence indicating that Willis's financial circumstances have significantly improved since the trial court's determination.

Affirmed.

Trickey, ACJ

WE CONCUR:

Mann, J.

Spearman, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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