

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 34109-7-III

STATE OF WASHINGTON, Respondent,

v.

JOIHN MARK HAMILTON, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

John Mark Hamilton requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on August 15, 2017, affirming his bench trial conviction for attempted robbery in the second degree. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

Whether the trial court's conclusion that Hamilton took property by threat of force deprived the State of its burden to prove an essential element of the charge, when its findings of fact did not identify an objective threat made by Hamilton and its oral findings identified the victim's subjective fear as the reason for concluding a threat was made.

IV. STATEMENT OF THE CASE

The State charged John Hamilton with attempting to rob a convenience store clerk in the first degree. CP 1, 9. He was tried by the court. CP 51-53.

The clerk was not a native English speaker and required the assistance of a Punjabi interpreter at trial. I RP 73-74. Several witnesses reported difficulties in communicating with her as the result of a language barrier. I RP 130, 163, 165, 186, II RP 242, 244, 250-51. Consequently, much of the evidence introduced at trial was conflicting, and the police acknowledged their communications with the store clerk were often a matter of interpreting hand signals. I RP 186, 188-89, 190, II RP 244, 245-46, 250-51.

Surveillance video from the incident showed Hamilton engaged in an extended conversation with the store clerk. Exhibit 10. The video shows Hamilton standing at the side of the counter while another customer completes a purchase. Ex. 10 at 0:00 – 0:06. The video then skips forward and shows Hamilton standing at the counter in front of the clerk, speaking to her while leaning forward and gesturing, before walking back to the side of the counter still speaking as another customer approaches. Ex. 10 at 0:06 – 0:24. Hamilton waits while that transaction is completed. Ex. 10 at 0:24 – 0:52.

As the customer in front is receiving his change, Hamilton turns toward the counter and picks up a wine bottle by the neck, turning it upside down momentarily before walking back to the counter and placing

the wine bottle on the counter in the correct position. Ex. 10 at 0:52 – 0:59. The other customer leaves the store, and Hamilton picks the wine bottle back up off the counter before apparently setting it down again seconds later. Ex. 10 at 0:59 – 1:08. He continues to speak to the clerk across the counter for some time. Ex. 10 at 1:08 – 2:35. At one point he again briefly picks up the bottle and places it back down while continuing the conversation. Ex. 10 at 1:36 – 1:41.

Eventually, the clerk steps away from the counter waving her hands and Hamilton also backs away from the counter, continuing to talk and point at her. Ex. 10 at 2:25 – 2:35. The clerk eventually backs away from the counter and lies down on the ground, where she stays for nearly a minute while Hamilton looks on, appearing to continue speaking to her. Ex. 10 at 2:35 – 3:29. Eventually Hamilton begins to walk around the counter toward the clerk's side and she begins to get up before the video skips and shows Hamilton standing behind the counter pointing out, with the clerk no longer present. Ex. 10 at 3:30.

Hamilton can then be seen pulling several handfuls of lottery tickets out of rolls behind the counter and carrying them back toward the front of the store. Ex. 10 at 3:40 – 4:12. As he approaches the front window, he appears to point and yell at two people outside walking

toward the door. Ex. 10 at 4:12 – 4:19. He then drops the lottery tickets and exits the store. Ex. 10 at 4:23 – 4:27. Once outside, he points and shouts at the two people on the sidewalk before walking away out of the view of the camera. Ex. 10 at 4:27 – 4:47.

The store clerk denied knowing the defendant or recognizing him as a customer. I RP 73-74, 80-82, 87. However, she told a deputy that she had seen the man in the store multiple times and he lived nearby. II RP 236, 248. According to the clerk, the man said he was there to do a robbery and she became afraid. I RP 83. He had a bottle in his hand and lifted it up, and she fell to the ground to save herself as he was going to hit her. I RP 84. This testimony was not supported by the video evidence. She also told the police that he had asked for her rings and she took them off. II RP 245-46. This testimony was also not supported by the video. The clerk did not explain the lengthy conversation that was shown on the video. She did not recall being shown a photo lineup or choosing one of the photos, although she had previously identified Hamilton in a photographic montage. I RP 103-04, 205.

Hamilton gave police a post-arrest interview about the incident and also testified at trial on his own behalf. I RP 25, 27-28, 36-42, II RP 314. In both statements, Hamilton acknowledged being a regular customer of

the Food Mart and described an arrangement with the store clerk where he would hock costume jewelry in exchange for merchandise, returning later to pay for the items and retrieve the jewelry. II RP 318, 321-23. About a month and a half before the incident, he had purchased gas and incidentals by hocking a gold ring with diamonds, and when he returned to pay for the items, the clerk would not return the ring despite taking his money. II RP 326-28, 331.

On the day in question, Hamilton told the clerk he wanted to talk to her about the ring and asked her to return it, but she refused. II RP 332, 338-39. He became more adamant, and she lied down on the floor. II RP 339-40. When he started to go around the counter, she got up and ran out of the store. II RP 341. Acknowledging that he was angry, Hamilton started to grab the lottery tickets but realized it was stupid and did not take them. II RP 348, 350.

In its ruling, the trial court found the evidence insufficient to establish that Hamilton used a deadly weapon or that he took property from the clerk's person or in her presence. CP 84-85. However, the court believed there was sufficient evidence of attempted theft due to Hamilton's taking the lottery tickets and then dropping them. III RP 428. Thus, the dispositive question in determining whether attempted robbery

had occurred was whether Hamilton acted with force or threat of force to accomplish his goals. III RP 431. The trial court observed that the clerk “felt” as though Hamilton had raised his hand to strike her, which caused her to be fearful. III RP 431. Accordingly, because it believed Hamilton had engaged in “reasonably aggressive behavior” during the confrontation with Kaur that caused her to leave the store, the trial court held the force element was satisfied and convicted Hamilton of attempted second degree robbery. III RP 432, 435.

In its findings of fact and conclusions of law following the bench trial, the trial court found that Hamilton “was agitated and upset” and that the clerk “was in fear for her safety and perplexed by the defendant’s actions.” CP 82. It also incorporated all of its verbal findings from the hearing in which it announced the verdict. CP 84. At no point did the trial court find that Hamilton issued a threat to the clerk, or identify what words or actions he committed that constituted a threat of force. CP 81-86. It found that Hamilton’s actions with the bottle did not amount to an attempt to use the bottle as a deadly weapon. CP 85. Nevertheless, the court concluded that Hamilton attempted to take the lottery tickets by the use or threatened use of immediate force, violence or fear of injury, and that he used the force to obtain or retain possession of the property. CP 84.

Accordingly, it found Hamilton guilty of the lesser degree offense of attempted robbery in the second degree. CP 85.

The court sentenced Hamilton to 55.5 months' incarceration. CP 69. On review, he argued that the trial court relieved the State of its burden of proof on the element of threatened force because it did not find that Hamilton issued any threat, and relied solely upon the store clerk's subjective report of fear to conclude that the element was met.

Appellant's Brief at i, 11-12. The Court of Appeals affirmed the conviction. Despite the fact that the trial court specifically incorporated its oral comments into its written findings, the Court of Appeals held that the trial court's oral remarks were not themselves findings and could not be used to impeach the written findings. *Opinion*, at 5-6. Furthermore, even though the trial court entered no finding as to any threat issued by Hamilton, either explicitly or implicitly, and the only relevant finding stated that the clerk was in fear for her safety, the Court of Appeals concluded that "nothing in the way the case was tried suggested that the victim's actual fear satisfied the element of the crime." *Opinion*, at 6.

Hamilton now seeks review of the Court of Appeals' ruling that the trial court's failure to find a specific, objectively reasonable threat did

not result in relieving the State of its burden of proof as to an essential element of the charge.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(3), review will be accepted if a significant question of law under the Constitution of the State of Washington or of the United States is involved. Because the case questions whether the trial court held the State to its constitutional burden of proof as to the element of threatened force, review is appropriate.

A robbery, in simple terms, is a taking of property that is forcible and against the will of the person from whom it is taken. *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005); RCW 9A.56.190. A threat of violence need not be explicit or direct to support a robbery conviction; implicit threats are sufficient. *State v. Shcherenkov*, 146 Wn. App. 619, 624, 191 P.3d 99 (2008), *review denied*, 165 Wn.2d 1037, 205 P.3d 131 (2009). However, determining whether the defendant used intimidation or threat of bodily harm to take the property is determined under an objective standard, not a subjective one. *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888 (2014). The question for the trier of fact is whether, under the circumstances of the case, a reasonable person would have felt sufficiently threatened to accede to the defendant's demand for the

property. *State v. Clark*, 190 Wn. App. 736, 756, 361 P.3d 165 (2015), review denied, 186 Wn.2d 1009, 380 P.3d 502 (2016).

The trial court's findings, both written and oral, identify nothing constituting a threat of force. It points to no explicit threat made by Hamilton, nor does it find any implicit threat of force arising from Hamilton's actions or the circumstances of the encounter. Instead, its only pertinent finding as well as its oral ruling identify the clerk's subjective fear as the basis for finding that Hamilton used force. III RP 431, CP 82. But whether Hamilton threatened force against the clerk is not determined by her subjective experience, but by an objective evaluation of the circumstances. *Witherspoon*, 180 Wn.2d at 884. By emphasizing only the clerk's fear and omitting any finding as to which actions or circumstances constituted an objective threat, the trial court appeared to apply a subjective, rather than an objective, standard to the "threat of force" element of the charge.

This error constitutionally undermines Hamilton's conviction. The State must prove every element of the crime beyond a reasonable doubt, and an error in the law that relieves the State of its burden of proof as to an essential element is reversible. *See State v. Sibert*, 168 Wn.2d 306, 311-12, 230 P.3d 142 (2010). Moreover, the error is not harmless because, in

the absence of any findings of fact constituting an objective threat by Hamilton, the trial court's verdict probably would have been different had it applied an objective, rather than a subjective, standard. *See State v. Banks*, 149 Wn.2d 38, 44-46, 65 P.3d 1198 (2003).

Because constitutional error affected Hamilton's conviction when the trial court's verdict relieved the State of its burden of proof as to an essential element, namely, that Hamilton used a threat of force to attempt to take property from another, review is appropriate under RAP 13.4(b)(3).

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and this Court should enter a ruling reversing Hamilton's conviction and remanding the case.

RESPECTFULLY SUBMITTED this 31 day of August, 2017.


ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

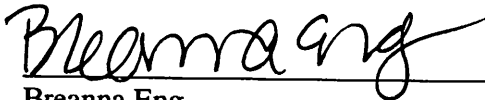
John Mark Hamilton
406 S Van Marter Rd
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And, pursuant to prior agreement of the parties, by e-mail to the following:

Brian O'Brien
Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 31 day of August, 2017 in Walla Walla, Washington.


Breanna Eng

FILED
AUGUST 15, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 34109-7-III
Respondent,)	
)	
v.)	
)	
JOHN MARK HAMILTON,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — John Hamilton appeals from a conviction at bench trial for attempted second degree robbery, arguing that the court permitted improper evidence and applied an incorrect standard in assessing the elements of the crime. We affirm.

FACTS

Mr. Hamilton entered a convenience store that he frequented and argued with the clerk, Ms. K.K. The incident was captured on surveillance video without audio and led to a charge of attempted first degree robbery while armed with a deadly weapon. The two participants related significantly different versions of the encounter at a bench trial in the Spokane County Superior Court.

K.K. is a native Punjabi speaker who speaks little English. She indicated that a man came up to the counter holding a glass bottle and said he was there to do a robbery.

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She took off her rings and placed them on the counter, and then fell to the floor trying to protect herself. When the man came around to her side of the counter, she got up and fled the building, running to a next door neighbor. The neighbor testified that K.K. frantically beat on his door and reported a robbery, which he called in to the police. The two returned to the convenience store and saw a man, whom he identified as the defendant, rummaging around. When the man saw the two watching him, he dropped the lottery tickets he was holding and left the building.

Mr. Hamilton told the court that he had previously given K.K. a \$400 ring in exchange for \$20 worth of store merchandise and had come back to reclaim the ring. He offered \$40 for it. When K.K. turned the offer down, he angrily told her she was robbing him by demanding more money. When she fell to the floor, he tried to calm her down, but after she fled he grabbed some lottery tickets in anger, but dropped them when he realized what he had done.

His testimony was undermined by the recording of a telephone call he made while in the jail. In part, that conversation recited Mr. Hamilton stating:

Well, yeah, we don't want to hear what I'm saying, and laughs. . . . 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.

Report of Proceedings (RP) at 268-269.

The court's findings report much of what the judge saw on the video. Those findings indicate that Mr. Hamilton approached the counter holding a glass bottle by the

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neck upside down. After setting it down on the counter, he again picked it up after the argument began while standing directly in front of K.K. The next finding states that K.K., “who testified that she was in fear for her safety and perplexed by the defendant’s actions, lies down on the floor behind the counter in fear and covers her head with her hand.” Clerk’s Papers (CP) at 82.

Over objection, the detective was allowed to testify to observations he made while reviewing the defendant’s actions on the video. The court permitted the testimony due to the detective’s experience and training. In response to a concern that the officer’s testimony would lead to an expression of an opinion that the defendant was guilty, the court responded:

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.

RP at 182. During cross-examination, defense counsel encouraged the detective, whom he knew, to be “candid” about the information he was seeking when he interviewed the defendant and asked the detective if he was seeking evidence or “looking for statements from Mr. Hamilton that might incriminate him?” The detective responded:

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.

RP at 286-287. There was no objection to the response.

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The court recessed for two days to review the video and return a decision. The court delivered the verdict in open court, stating the facts it found and the elements of attempted first degree robbery that the judge found proved beyond a reasonable doubt. The court determined that the glass bottle was not wielded as a deadly weapon and determined that attempted first degree robbery was not proved. However, the court concluded that all of the elements of attempted second degree robbery had been established and found Mr. Hamilton guilty of that included offense. RP at 427-434. In his summary of the element of threatened use of force, the court noted several times that K.K. “feared” the defendant and his actions, or that she was “afraid.” RP at 431-432.

The court imposed a sentence at the midpoint of the standard range. Findings required by CrR 3.5 and CrR 6.1 were promptly filed. Mr. Hamilton then timely appealed to this court. A panel considered the case without argument.

ANALYSIS

This appeal presents two issues for our consideration. First, Mr. Hamilton contends that the trial court’s observations concerning the victim’s “fear” indicated that the court applied a subjective standard to this element. He next argues that the court erred in permitting the detective to express opinions during testimony. We consider the contentions in the order stated.

Consideration of Victim's Fear

The court's observations considering the victim's fear did not mean that the court misapplied that evidence to the relevant law. The court's oral remarks and the written findings both establish that the court properly applied the evidence to the law.

The crime of robbery is committed when one "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." RCW 9A.56.190. The "force or fear must be used to obtain or retain possession of the property," and the "degree of force is immaterial." *Id.* The "force or fear" element is adjudged by the reasonable person standard. *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888 (2014). That standard is "whether an ordinary person in the victim's position could reasonably infer a threat of bodily harm from the defendant's acts." *Id.*

"Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014) (citing *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id.* at 106. This court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's oral remarks may be used to clarify formal

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findings, but they are not themselves findings. *State v. Kingman*, 77 Wn.2d 551, 552, 463 P.2d 638 (1970). Allegedly inconsistent remarks cannot be used to impeach the written findings. *Johnson v. Whitman*, 1 Wn. App. 540, 546, 463 P.2d 207 (1969).

Nothing in the court's written findings suggest it applied a subjective standard in assessing the fear element. Conclusion of law E states that the court found beyond a reasonable doubt that "the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person." CP at 84. Nothing there suggests that the conclusion was based on the subjective state of the victim. The only relevant written finding of fact, J, states in its review of the video that K.K. "was in fear for her safety and perplexed by the defendant's actions, lies down on the floor behind the counter in fear and covers her head with her hand." CP at 82.

These notations simply suggest the factual truth that the victim was in fear of the defendant. They do not demonstrate that the court's conclusion of law was based on a misunderstanding of its obligations. None of the parties argued a subjective standard to the court and nothing in the way the case was tried suggested that the victim's actual fear satisfied the element of the crime. Instead, the remarks all seem directed to factually describing the offense.

Nothing in the record suggests the court misapplied the law in its deliberations. Accordingly, this issue is without merit.

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Detective's Testimony

Mr. Hamilton also argues that the trial court erroneously admitted into evidence improper opinion testimony by the detective. There was no error.

Well understood standards govern our review of this claim. With respect to the admission of evidence, trial court judges have great discretion and will be overturned only for manifest abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Additionally, in a bench trial, it is presumed that the judge followed the law and considered evidence solely for proper purposes. *E.g.*, *State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970); *State v. Bell*, 59 Wn.2d 338, 360, 368 P.2d 177 (1962).

However, it invades the province of the trier-of-fact for a witness to express an opinion that a witness is lying or that a defendant is guilty. *State v. Perez-Valdez*, 172 Wn.2d 808, 817, 265 P.3d 853 (2011) (lying); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (guilt). It is the trier-of-fact's obligation to determine credibility and decide guilt or innocence.

Mr. Hamilton contends that the detective's testimony violated both of these prohibitions. With respect to the answer he solicited on cross-examination with the request that the detective be "candid" about the interview with Mr. Hamilton, the invited

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error doctrine precludes review of the unchallenged answer. That doctrine prohibits a party from contributing to an error in the trial court and then trying to take advantage of that error on appeal. *E.g., State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995); *State v. Studd*, 137 Wn.2d 533, 545-549, 973 P.2d 1049 (1999). Having requested the candid response, and apparently being satisfied at trial with that answer, he cannot now complain that the answer constituted prejudicial error.

Mr. Hamilton also argues that the detective was erroneously allowed to give an indirect opinion that he was guilty by describing actions on the video that were consistent with those of a robber. Although this argument raises legitimate concerns about the proper scope of expert testimony, it is not persuasive in this bench trial. The trial judge expressly told the parties that a witness could not opine on the topic of guilt and that he would be making that determination. RP at 182. The trial judge clearly was aware of the potential dangers of the situation and restricted the testimony to its proper reach. Under these circumstances, there was no danger of any improper opinion testimony swaying the verdict.

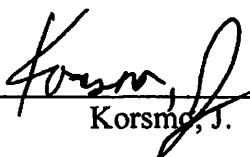
Appellant has not overcome the presumption that the trial court considered evidence solely for proper purposes. Accordingly, he has not established error and the conviction is affirmed.

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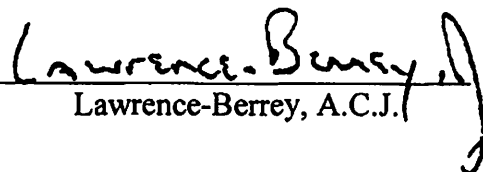
Mr. Hamilton also requests that we not award costs on appeal to the State. In light of Mr. Hamilton's significant debt for child support and previous legal financial obligations, we grant his request and deny costs on appeal.

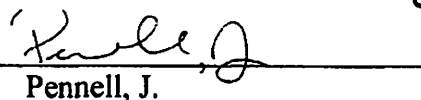
Affirmed. No costs will be awarded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Korsmo, J.

WE CONCUR:


Lawrence-Berrey, A.C.J.


Pennell, J.

BURKHART & BURKHART, PLLC

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Filing Petition for Review

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Petition for Review

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