Supreme Court No. _____
COA No. 75465-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYE GLEN WEST,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT RULES

CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER

Tye Glen West was the appellant in Court of Appeals No. 75465-3-I, in which Division One held that this Court has overruled State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001).

B. COURT OF APPEALS DECISION

The Court of Appeals issued its decision in Mr. West's appeal on October 30, 2017, affirming his conviction for trafficking in stolen property. Appendix A (Decision).

C. ISSUES PRESENTED ON REVIEW

1. Whether a trial court commits error when it allows police officers to give live courtroom testimony opining on the credibility of the accused.

2. Whether such testimony violates ER 608(a).

3. Whether such testimony violates the Sixth Amendment's jury trial guarantee, which reserves credibility determinations to the jury.

D. STATEMENT OF THE CASE

Tye West went to trial on charges of complicity to burglary and trafficking in stolen property. The State alleged that Mr. West knew that his friend, who he drove to the general area of a house, was burglarizing it; the State further alleged that West later knowingly sold

stolen jewelry, given to him for assisting in that burglary, to a pawn shop. Mr. West readily admitted that he indeed pawned jewelry, using his full legal name -- but he had been given the jewelry from a person to whom he gave drugs; he was unaware of his friend's commission of burglary, and he did not know the jewelry was stolen. CP 65, 69-70, 25-26.

Two police witnesses were called to testify about their interrogation of Mr. West after his arrest. Over the defendant's pre-trial objection, the officers were permitted to regale the jury with their opinions of West's credibility, and their assessments as to the believability of his account of events, based on their experience of how things "work" on the street in the world of crime, trafficking and drugs. CP 51; 5/23/16RP(am) at 10-11; see, e.g., 5/24/16RP at 43-44 ("We told him that it doesn't really work that way.").

> He was admitting the pawning portion, but was only saying that he had met this person who he exchanged the heroin for the jewelry… Things that he was saying just didn't make sense. And at some point when he wouldn't come from the story that he was just given the jewelry for heroin, we confronted him at that point[.]

5/24/16RP at 43-44.[1]

In closing, the prosecutor leaned heavily on the officers' testimony to argue that Mr. West's account was not true. See, e.g., 5/24/16RP at 60 ("The detectives told you from their experience as being on the road and Detective Maples in being a narcotics officer, this doesn't make sense… They told him: That doesn't make sense.. . . It's time to be truthful…). The prosecutor echoed the officers' assertions that Mr. West never told the truth, stating that instead, "he comes up with a new story that fits the facts better but still doesn't make sense." Id. The jury found Mr. West not guilty of complicity to burglary, but convicted him of knowingly trafficking in stolen property. CP 25-26. The Court of Appeals affirmed. Appendix A.

E. ARGUMENT

Where a defendant properly objects, live in-court testimony of police officers opining on the credibility of the accused, whether directly or by inference, is prohibited.

1. Review is warranted under RAP 13.4(b)(1).

The Court of Appeals decision approved the testimony of the police officers, stating that this Court has overruled the holding of State

[1] The police officers' testimony and the prosecutor's closing argument are fully discussed in the Court of Appeals briefing and in the Court of Appeals opinion. AOB, at pp. 5-10; Reply Brief, at pp. 1-3; Decision, at pp. 8-10.

v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). Decision, at pp. 6-7 and n. 1. In that case, a majority of justices held that inadmissible police opinions as to the defendant's credibility during an interrogation are not rendered admissible by virtue of the evidence being presented in the form of a *tape-recording* of the interrogation, rather than by means of live courtroom testimony. Plainly, live testimony of this sort is inadmissible, and was inadmissible in this case. Review is warranted under RAP 13.4(b)(1), because the Court of Appeals decision is in conflict with Demery. See Part 2, infra.

2. Live, in-court testimony by police officers telling the jury their opinions that the defendant was lying or otherwise commenting on his credibility remains improper under *Demery*.

(a). The Court of Appeals concluded that the officers' testimony was permissible, relying on its own reasoning that conflicts with Demery.

In this case, the Court of Appeals approved the testimony of the police officers, relying on its own reasoning and its previous decision in State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). Decision, at pp. 5-6.

In that case, the trial court allowed two detectives to testify at trial that they told Notaro during an interrogation that his story was not credible. Notaro, 161 Wn. App. at 661. The Court of Appeals, citing

Demery, held that the trial court properly admitted this evidence because the detectives' trial testimony, taken in context, "described the police interrogation strategy and helped explain to the jury why Notaro changed some parts of his story—but not others—halfway through the interview." Notaro, 161 Wn. App. at 669 (citing State v. Demery, 144 Wn.2d at 758).

But in Demery, a majority of justices strongly disapproved of police opinion testimony being interjected into a jury trial under the rationale of relating the context of the defendant's police interrogation.

Demery was a plurality opinion in which four justices would have drawn a distinction between clearly inadmissible live testimony in which officers recount their accusations of the defendant lying, *versus* tape recordings of a defendant's interview – played for the jury as an exhibit -- in which officers can be heard expressing their opinions to the accused. However, five justices held that police statements of opinion on guilt or credibility are inadmissible whether through live testimony describing the interview or through recordings of the police interview. See Demery, 144 Wn.2d at 760 (four-justice lead opinion); id. at 767 (four-justice dissent); id. at 765 (concurring justice agrees with dissent except as to harmless error analysis).

Given that Demery merely involved the playing of a *recording* of the defendant's pre-trial interview – a circumstance that a mere 4 members of this Court concluded was not error, for that reason, live officer testimony in the courtroom, relating to the jury directly and face-to-face how they did not believe Mr. West in his interview and told him so, is obviously inadmissible. See Demery, at 760 and note 4; see AOB, at pp. 5, 9, 18.

The decision in Mr. West's case clearly departs from the principles of Demery.

(b). This Court's 2017 decision in In re PRP of Lui, an ineffective assistance case, does not represent a departure from Demery.

In deeming Demery to no longer be good law, the Court of Appeals relied on this Court's decision in In re Pers. Restraint of Lui, 188 Wn.2d 525, 555, 397 P.3d 90 (2017). There, as quoted in this case, this Court stated:

> Police officers are generally not permitted to testify about a defendant's veracity. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion) ("[N]o witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant."). But an officer may repeat statements made during interrogation accusing a defendant of lying if such testimony provides context for the interrogation. Id. at 763–64 (discussing State v. O'Brien, 857 S.W.2d 212, 221 (Mo. 1993), and Dubria v. Smith, 224 F.3d 995, 1001–02 (9th Cir. 2000)):

> see also State v. Kirkman, 159 Wn.2d 918, 931, 934, 155 P.3d 125 (2007).

Decision, at p. 6 (quoting In re Pers. Restraint of Lui, 188 Wn.2d at 555).

This isolated passage from Lui, and in particular its seeming approval of "context" testimony, does not represent a departure by this Court from the principles of Demery.

The Lui case was a personal restraint petition, in which the petitioner had argued ineffective assistance of counsel based on his lawyer's failure to object to the testimony of the witnesses in question. The witnesses, two detectives Bartlett and Peters, had described their opinions of Lui's credibility, from his interrogation following arrest for the alleged murder of his fiancé, Ms. Boussiacos. PRP of Lui, 188 Wn 2d at 536, 555-5

In Lui, this Court first noted the prejudice showing that was jointly required by the claim of ineffective assistance, and by the fact that Lui's arguments were brought on collateral attack. PRP of Lui, 188 Wn 2d at 538 (citing In re Pers. Restraint of Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012)).

The Court first emphasized that its analysis began with the presumption that defense counsel's trial decision to not object was

competent, strategic, and reasonable. PRP of Lui, 188 Wn 2d at 539 (citing State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)).

Under this standard, the Court determined that Lui's counsel reasonably deemed much of the detectives' testimony to be entirely *consistent* with his own trial strategy of showing a rush to judgment by the police, and his tactic of casting Lui's interview statements as the product of biased police badgering. Detective Bartlett testified that Lui was inconsistent and that he had lied in the interrogation, but Lui's "own counsel" conceded in closing argument, tactically, that Lui had lied to the police about the whereabouts of Boussiacos's engagement ring. PRP of Lui, at 555-56 and n. 10.

As to Detective Peters, it was defense counsel who elicited, for tactical reasons, the detective's testimony that her goal in the interrogation was to the get the "truth" that she thought Lui was not confessing to. PRP of Lui, at 556. This Court found that the lack of objections and the eliciting of certain testimony were in fact in furtherance of the defense strategy of showing that "the detectives targeted Lui early on as a suspect and manipulated him throughout their

interrogation" PRP of Lui, at 556 (also stating that the testimony "support[ed] the defense theory that the detectives had fixated on Lui as a suspect.").

Understanding the case in this manner, the Lui case simply stands for case-specific reasoning that there was no ineffective assistance in not objecting to police opinion testimony where counsel had strategic reasons for *wanting* to show that the detectives conducted the investigation and the interrogation while unduly and stubbornly convinced of the defendant's guilt. See PRP of Lui, at 536 (noting defense counsel's strategy of portraying the detectives as "so determined in their pursuit to convict Lui that they failed to test" certain evidence and "ignored all exculpatory" evidence).

(c). The Lui decision approved of "context" testimony solely in the case-specific circumstance of the absence of an objection, and for tactical reasons.

The Court's decision must also be understood in the context of the requirements, on appeal, for successfully challenging testimony as an improper opinion on credibility. Where a defendant does not object at trial – plainly the case in Lui – he or she, in order to appeal in the first instance, must show that the witness in question uttered an "explicit or almost explicit" opinion on the credibility of another. State

v. Kirkman, 159 Wn.2d 918, 928, 936, 155 P.3d 125 (2007) (holding that showing the *manifest* constitutional error necessary to raise the issue for the first time on appeal under RAP 2.5(a)(3) requires that the alleged improper opinion testimony must be "explicit or almost explicit," rather than indirect).

The Court misread Kirkman, interpreting the case as authorizing police testimony that opines on credibility so long as it can be justified as evidence of the interview's protocol. See Decision, at pp. 6-7. But Kirkman involved a witness who described expert interview techniques employed to determine child victims' ability to understand truth versus falsity, while this case involves witnesses who told the jury their opinions that the accused was not credible in his interview.

In fact, where there was no objection, it is reasonable to assume that, in the context of the trial, the witnesses' testimony did not carry the danger and prejudice of the jury accepting police officers' judgment of the accused's believability and guilt.

Here, of course, Mr. West properly objected before trial to the police giving direct, or indirect, opinion testimony, and lost. CP 51; 5/23/16RP at 10-11; Decision, at pp. 4-5, 7-8.

Where there is an objection, witnesses should be instructed that they "may not testify as to the guilt of defendants, either directly or by inference." (Emphasis added.) State v. Olmedo, 112 Wn. App. 525, 530, 533, 49 P.3d 960 (2002) (holding that such testimony invades the province of the jury and violates the defendant's constitutional right to a trial by jury); Demery, at 767-78. That is the general rule.

(d). This Court's disapproval of opinions on credibility, consistent with Demery, was more clearly shown in Lui by its analysis of the two officers' testimony.

Despite the fact that the Court found no ineffective assistance in Lui, the Court took pains to carefully scrutinize, and criticize, a number of portions of the two detectives' testimony as violative of the prohibition on opinions.

As to Detective Bartlett, the Court, as an evidence matter, would have excluded her statement that she told Lui that she wanted him to explain lies he had told in previous questioning:

> Bartlett initially testified that she interviewed Lui in 2006 because she wanted him to explain the "lies" he told during earlier interviews, but she immediately clarified that she was referring to inconsistencies in the file, rather than actual lies told by Lui.

PRP of Lui, at 555-56. The Court felt that Bartlett's clarification of her testimony, changing it to describe Lui's previous answers only as "inconsistencies," mitigated any evidentiary error.

But the Court concluded that Detective Peters' testimony, contrastingly, went too far over the line:

> She [Peters] testified that "the object of [the] interview was to get more information, on specifics that had never been answered and [her] goal was to get the truth and a confession," and explained she "would have loved to have a confession, the truth." Together, Peters's statements implied a belief on the detective's part that Lui was guilty.

(Citation to record omitted). PRP of Lui, at 556. The Court also found it improper for Bartlett to testify that "[Lui] clearly did lie to me several times." PRP of Lui, at 556 n. 10 (and holding that the absence of an objection was tactical).

This analysis shows that the principles of Demery survive. ER 608(a) and the right to a jury trial are violated where a witness offers testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial and it invades the exclusive province of the jury. City of Seattle v. Heatley, 70 Wn. App.

573, 577, 854 P.2d 658 (1993) (citing State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)); U.S. Const., amend. 6; ER 608(a).[2]

> [T]his court has held that there are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. Demery, 144 Wn.2d at 759, 30 P.3d 1278; Kirkman, 159 Wn.2d at 927, 155 P.3d 125; State v. Farr–Lenzini, 93 Wn. App. 453, 463, 970 P.2d 313 (1999).

(Footnote omitted.) (Emphasis added.) State v. Montgomery, 163 Wn.2d 577, 589, 591-92, 183 P.3d 267 (2008) (citing U.S. Const. amend. 6).

In Demery, even the four justices who concluded that a tape recording of a pre-trial post-arrest interrogation, in which police could be heard accusing the defendant of "not tellin' the truth" and "lying," should be admissible for context of the interview, agreed that live testimony from officers relating such statements carries special

---

[2] ER 608(a) restricts attacks on credibility to evidence of reputation for untruthfulness.

> **Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness[.]

ER 608(a). The drafters of the rule specifically rejected the notion of allowing opinions on credibility. ER 608 cmt. (impeachment by use of opinion is too prejudicial); see Demery, at 768-69 (Sanders, J., discussing rule).

prejudice. Demery, 144 Wn.2d at 763 (lead opinion of Owens, J.) (stating that a taped interview is essentially different from an officer's live testimony offered during trial, which carries an "aura of special reliability and trustworthiness.") (quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir.1987)).

For these four justices, it was crucial to their conclusion of admissibility that the evidence was placed before the jury in a recorded format -- that is, verbatim – representation of a past interrogation. In that form, jurors will understand that they are listening to a past event, witnessing police interrogation techniques, as contrasted to an officer uttering expressions of disbelief live in the courtroom, under *oath*. Demery, 144 Wn.2d at 759-64 and n. 4.

And yet, the even stronger reasoning that carried the day with five justices was that any evidence, in which the jury hears police officers opining that the defendant is lying, does violate the rule against opinions on credibility. Demery, 144 Wn.2d at 767-73. Justice Sanders and the other justices concluded that these opinions invade the province of the jury, notwithstanding that the opinions were heard in a taped, pre-trial interrogation.

> Although these statements were made in the context of a custodial interrogation of a criminal defendant, the

> actual words clearly and simply state the officers' belief that Demery was lying.. . . There is no meaningful difference between permitting the jury to hear an officer directly call a defendant a liar in open court and permitting the jury to hear an officer call a defendant a liar on a tape recording. If we quite clearly forbid the former there is no reason to tolerate the latter.

Demery, 144 W.2d at 771, 773 (opinion of Sanders, J., joined by Johnson, J., Madsen, J., and Chambers, J.); see also Demery, at 765 (concurring opinion of Alexander, J., agreeing that "the officer's accusation was opinion evidence regarding Demery's veracity that would not have been admissible pursuant to ER 608(a) in live testimony and, consequently, should not have been admitted in recorded form.").

Under Demery, where a defendant timely and properly objects, police officers may not testify to their opinions that the accused was not credible, whether directly, or by inference.

Importantly also, the rule of Demery is easily applied.

3. This Court should make clear that redaction and a limiting instruction are required means of excising and limiting the prejudice of impermissible opinion testimony.

(a). Redaction is required.

Of course, it would be difficult for a detective or police officer to describe a properly Mirandized interview of the defendant if the

witness were not allowed in some manner to tell the jury that "questions" were asked, which in turn prompted certain answers given. However, the notion of "context" for these interviews cannot be license for police officers to exponentially heighten the outsize credence and authority they are already given by juries, to opine on the defendant's truthfulness.

Thus, even if the jury is allowed to hear a limited amount of evidence for purposes of showing the context of the interview, the officers' questions should be redacted pursuant to Demery, meaning that the opinion nature of the questions must be deleted or sanitized, and the questions generically described. In Demery, a majority of justices of this Court agreed with the Court of Appeals' reasoning that the trial court should not have denied the defendant's motion to redact the transcript of the tape recording of the police interrogation, to remove the officers' opinions on Mr. Demery's credibility. Demery, 144 Wn.2d at 765. The decision of the Court of Appeals in Demery, holding that the police officer opinions on credibility in the interrogation should have been redacted, represents a proper and correct statement of the law. See State v. Demery, 100 Wn. App. 416, 423, 997 P.2d 432, 436 (2000) (Court of Appeals decision) (reversing

"because the case against Demery turned primarily on the comparative credibility of the victim and the defendant, [and] we cannot say without a reasonable doubt that the inadmissible comments on the audiotape did not affect the jury.").

This redaction process allows the probative value of the context of the interrogation to be shown, but removes unfair prejudice. Nothing desired by the prosecution is lost. If the defendant's version of events indeed 'changes' over the course of the interrogation, the jury will be able to assess that fact. The jury's assessment of any change in the defendant's account will not be hampered by proper redaction and limiting of the officer's personal pronouncements of the accused's truthfulness. Rather, this process will simply – but vitally -- remove the unfair, and unnecessary prejudice that such police opinion evidence carries. Redaction is a required aspect of the Demery doctrine, and this Court should so emphasize.

(b). There must be a limiting instruction.

Additionally, this Court should make clear that the trial court must give a limiting instruction, particularly if admitting some of the officers' questions in redacted form is inadequate to prevent prejudice. The Demery Court held that the trial court, to the extent it felt it

necessary to admit certain questions by the police officers that could impermissibly be taken as opinion evidence, "should give a limiting instruction to the jury, explaining that only the defendant's responses, and not the [officers'] statements, should be considered as evidence." Demery, 144 Wn.2d at 753.

Together, redaction and a proper limiting instruction are tools required by the Demery Court to exclude improper opinions on credibility from police and other law enforcement witnesses, from being heard by the jury. Juries place too much weight on police testimony already.

Unfortunately, in this case, there was no redaction and no limiting instruction. Then, on appeal, the Court of Appeals tolerated what none of the nine justices in Demery would tolerate - a trial court giving police officers permission to tell the jury, live in court, that they "don't think you're [Mr. West] telling the truth," and the two detectives accordingly testifying that Mr. West "finally made up something that matched a little better," and testifying, "we confronted him that we didn't believe he was being completely truthful with us." 5/23/16RP(am) at 11 (ruling), 5/24/16RP at 10, 47 (testimony). All of this resulted in the prosecutor being allowed to argue to the jury that the

police officers, based on their experience on the street, sagely assessed that Mr. West was lying in his explanation for how he obtained the jewelry that he pawned. 5/24/16RP at 60. This was error under Demery. This Court should accept review, and should reverse Mr. West's trafficking conviction for the error, as argued below. AOB, at pp. 21-23; Reply Brief, at pp. 4-6.

E. CONCLUSION

Based on the foregoing, Mr. West asks that this Court grant review and reverse, affirm the rule of Demery, and emphasize the importance of redaction, and a limiting instruction, as necessary safeguards in order to prevent the violations of ER 608(a) and the Sixth Amendment that result when juries are allowed to be regaled with police officers' opinions on the defendant's credibility.

Respectfully submitted this 28th day of November, 2017.

s/ OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TYE GLEN WEST, Appellant.	DIVISION ONE No. 75465-3-I UNPUBLISHED OPINION FILED: October 30, 2017

DWYER, J. – Tye West appeals from the judgment entered on a jury's verdict convicting him of one count of trafficking in stolen property in the first degree. On appeal, West contends that the trial court erred by permitting two detectives to testify that they told West during an interrogation that his explanation of how he came into possession of stolen jewelry did not make sense. The trial court erred, West asserts, because the detectives' testimony amounted to an impermissible opinion regarding his credibility in violation of ER 608(a). We conclude to the contrary. The detectives' testimony was properly admitted on the ground that it aided the jury in understanding how the detectives' statements resulted in West changing his explanation of how he came into possession of the stolen jewelry.

West also contends that the State did not present sufficient evidence at trial to prove that he had knowingly trafficked in stolen property. We conclude

that sufficient evidence was, in fact, adduced at trial to support the jury's verdict. Accordingly, we affirm.

I

West was arrested after a police investigation determined that he had sold several pieces of stolen jewelry that had been reported missing after a residential burglary. During the burglary, a man and a woman entered a residence in rural Snohomish County. When the male burglar was discovered in the residence, he and the female burglar fled, grabbing whatever possessions were at hand.

They ran to a car parked on the road next to the end of the residence's long driveway. The car was parked behind a line of trees. A third individual was waiting in the car's driver seat. The burglars entered the car and the car drove away. Among the items that were later reported stolen from the residence were unique pieces of jewelry, including a horseshoe-shaped ring that was faceted with multi-colored stones, a yellow-gold chain bracelet, and a small yellow-gold hoop earring.

Detective Margaret Ludwig conducted a search for the stolen jewelry using an electronic records database of commercial businesses who buy and sell valuable items, including jewelry. Her search identified sales records relating to pieces of jewelry that had been reported stolen during the burglary. Her search further indicated that West was the person who had sold the jewelry to the businesses.

West was arrested and brought in for questioning. Detective Ludwig and Sergeant James Maples conducted the interrogation and began by asking West

general questions about himself. West said that his grandmother's death and being shot by his brother had left him feeling despondent. West said that, as a result, he started using drugs.

Immediately thereafter, Detective Ludwig told West about the jewelry sales records and asked West to tell her how he had acquired the jewelry. West replied that he had traded his heroin for the jewelry. The detectives responded that his explanation did not make sense. They said that it was unlikely that, as a heroin user, he would trade his heroin for jewelry. West replied that he had extra heroin to spare and that he had been willing to trade for it.

Detective Ludwig then told West that she knew that he had sold the jewelry on the same day that it had been reported stolen. At that juncture, West replied that he was tired of being a drug addict and the lifestyle that it involved. West then gave a different explanation to the detectives as to how he came into possession of the jewelry.

West said that on the day in question he had picked up two individuals, named David and Roshell, in his car. West said that David suggested that they go to a house where David used to live so that he could "grab some stuff." West said that he drove to the location that David had selected and parked his car on the road near the end of the residence's long driveway. West said that David and Roshell got out of the car and walked down the driveway while he waited in the car. Sometime later, David and Roshell came running back to the car. When David entered the car, he said to West, "Get out of here. I got in a fight with somebody." West drove away.

West said that, thereafter, David gave him several pieces of jewelry in exchange for driving David and Roshell around in his car. West said that, on the same day, he drove to two different businesses and sold jewelry that David had given him. The jewelry that West sold that day included a horseshoe-shaped ring, a yellow-gold chain bracelet, and a small yellow-gold hoop earring.

West also recounted that he had engaged in this behavior with David in the past. West said that he would drop David off at the end of a residence's driveway and that David would return later with a laptop or a television set. West said that, on these occasions, he never asked David about the items upon David's return. West said that he later sold those items on David's behalf.

Upon prompting by the detectives, West said that he would be willing to provide them a tape-recorded statement of the narrative that he had just given. Near the end of the taped session, West became more emotional than he had been at the beginning of the interrogation.

West was charged, upon amended information, with one count of trafficking in stolen property in the first degree and one count of residential burglary. Before trial, West moved to exclude the proposed testimony of the interrogating detectives regarding their statements to West during the interrogation to the effect that his narrative did not make sense. The State replied that the detectives' statements were important in helping "the jury to understand why he changed his story."

The trial court ruled that the detectives "may not offer an opinion as to whether or not [West] was lying or not telling the truth," but that the detectives

may testify as to what they "said to the defendant to prompt him to then make additional statements."

At trial, the State called several witnesses, including the interrogating detectives, the victims of the residence from which the jewelry was stolen, a police officer who had investigated the burglary, and employees from the businesses to which pieces of the stolen jewelry had been sold.

The jury convicted West of one count of trafficking in stolen property in the first degree and acquitted him on the charge of residential burglary.

II

West contends that the trial court erred by permitting the detectives to testify that during an interrogation they told West that his initial explanation of how he came into possession of the stolen jewelry did not make sense. The trial court erred, West asserts, because the detectives' statements constituted an impermissible opinion on his veracity, in violation of ER 608(a). We disagree.

"We review a trial court's decision to admit or exclude a law enforcement officer's statements during an interrogation for an abuse of discretion." State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011) (citing State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (lead opinion); State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002)). "A witness may not offer testimony in the form of an opinion regarding the guilt or veracity of the defendant." Notaro, 161 Wn. App. at 661 (citing Demery, 144 Wn.2d at 759 (lead opinion); City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). "Such testimony is irrelevant and invades the defendant's right to a jury trial and invades the jury's

exclusive fact-finding province." Notaro, 161 Wn. App. at 661 (citing State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); Demery, 144 Wn.2d at 759 (lead opinion); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003)).

With regard to the precise issue presented, a recent Supreme Court decision is instructive.

> Police officers are generally not permitted to testify about a defendant's veracity. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion) ("[N]o witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant."). *But an officer may repeat statements made during interrogation accusing a defendant of lying if such testimony provides context for the interrogation.* Id. at 763-64 (discussing State v. O'Brien, 857 S.W.2d 212, 221 (Mo. 1993), and Dubria v. Smith, 224 F.3d 995, 1001-02 (9th Cir. 2000)); see also State v. Kirkman, 159 Wn.2d 918, 931, 934, 155 P.3d 125 (2007).

In re Pers. Restraint of Lui, 188 Wn.2d 525, 555, 397 P.3d 90 (2017) (emphasis added).

The Lui decision is consistent with this court's decision in Notaro, 161 Wn. App. 654. The Notaro court held that the trial court properly allowed two detectives to testify at trial that they told Notaro during an interrogation that his story was not credible. 161 Wn. App. at 661. The trial court properly admitted this evidence, the appellate court concluded, because the detectives' trial testimony, taken in context, "described the police interrogation strategy and helped explain to the jury why Notaro changed some parts of his story—but not others—halfway through the interview." Notaro, 161 Wn. App. at 669.

Both Lui and Notaro relied upon our Supreme Court's decision in Kirkman, 159 Wn.2d 918. The court therein addressed a distinct, but related, circumstance—whether a detective's testimony regarding an interview protocol

administered to a child concerning the child's ability to tell the truth constituted impermissible opinion evidence. The court answered in the negative, concluding that, "[b]y testifying as to this interview protocol, [the detective] 'merely provided the necessary context that enabled the jury to assess the reasonableness of the . . . responses.'" Kirkman, 159 Wn.2d at 931 (third alteration in original) (quoting Demery, 144 Wn.2d at 764 (lead opinion)).[1]

Thus, adhering to the underlying reasoning of Kirkman, our Supreme Court and this court have each held that a detective "may repeat statements made during interrogation accusing a defendant of lying if such testimony provides context for the interrogation" without those statements constituting impermissible opinion testimony. Lui, 188 Wn.2d at 555 (citing Demery, 144 Wn.2d at 763-64 (lead opinion)); Kirkman, 159 Wn.2d at 931; see also Notaro, 161 Wn. App. at 669.

Here, before trial began, West moved to exclude the detectives' proposed testimony that they told West during the interrogation that his initial explanation of how he came into possession of the stolen jewelry did not make sense. The State replied that it offered the detectives' statements to explain why West changed his story midway through the interrogation.

The trial court denied West's motion, ruling that the detectives "may not offer an opinion as to whether or not [West] was lying or not telling the truth" but

[1] The parties spar over what they view as an uncertainty in the law arising from Demery, 144 Wn.2d 753, a divided decision (4-1-4) of our Supreme Court. However, in light of the court's decisions in Kirkman and Lui, and this court's decision in Notaro, any ambiguity caused by the fractured opinion has been resolved.

that they may testify as to what they "said to the defendant to prompt him to then make additional statements."

At trial, the State elicited testimony from Detective Ludwig showing how West changed his story during the interrogation. Detective Ludwig testified that, after she and Sergeant Maples brought West in for questioning, they inquired into how he came into possession of the jewelry that he had sold. West said that he had traded drugs in exchange for the jewelry. The following exchange then took place:

> Q. Okay. And did you ask him anything more about this exchange of drugs for jewelry?
> A. *Well, I told him that I felt that was an unlikely scenario; that he would give away his drugs in exchange for jewelry. So . . .*
> Q. What was his response to that?
> A. He said that he had extra; so he made the trade.
> . . . .
> Q. Okay. So initially -- I'm going to try to make sure I don't keep interrupting you, and I'm getting things off track. So initially when he's in the interview room with you, he is telling you he exchanged the jewelry for drugs. He got -- he got the jewelry in exchange for drugs at the casino.
> A. Yes.
> Q. What happened at that point to switch the conversation to the burglary?
> *A. Well, at that -- like I said, I didn't think it was a likely scenario. It's not one that I have heard come up. So that's when I confronted him and told him that I didn't think that was -- that he was telling us everything that he knew about what happened or where he got this jewelry from.*
> Q. Who brought up the burglary?
> A. I did.
> Q. So tell us about the conversation then.
> A. I told him this stuff came from somebody's house. The stuff that he sold, he sold the same day that it came out of somebody's house.
> . . . .
> Q. After you confronted him with the fact that -- you told him you didn't believe this is what happened, the story he told you, what was his response?

A. Oh, okay. He -- he told me that he was sick of his lifestyle and he was done with being an addict, and his whole -- the whole lifestyle that goes with it.

Q. Okay. So what did he tell you about it after that?

A. What he told me was that he had picked up David and Roshell -- he wouldn't tell me where he picked them up because at this point I'm obviously interested in finding -- finding out where David and Roshell are at. But he wouldn't tell me where he picked them up at. He said they drove around, they ended up [in] the Warm Beach area, and ended up at some old man's house, and smoked some dope, and then that's when David told him, "Hey, let's go to this house. I want to grab some stuff. I used to live there." And so he drove him there, and he waited in the vehicle, and then he said the next thing he knew was that David came running to the car saying, "Get out of here. I got in a fight with somebody."

(Emphasis added.)

Later, Sergeant Maples testified similarly:

Q. When you said Detective Ludwig confronted him with pawning the jewelry, at that point did you mention that it had been associated with a burglary?

A. No.

Q. So when she confronted him, what did he tell her?

A. That he had met some guy and sold him heroin for the jewelry. *We told him that it doesn't really work that way. Most heroin users aren't going to give up heroin to get jewelry in exchange for it. It's the other way around.* And continued to talk to him regarding the pawning of it. He was admitting the pawning portion, but was only saying that he had met this person who he exchanged the heroin for the jewelry.

. . . .

This wasn't a quick conversation. This was a lengthy conversation that took place. *We kept interviewing him, pointing out his inconsistencies. Things that he was saying just didn't make sense.* And at some point when he wouldn't come from the story that he was just given the jewelry for heroin, we confronted him at that point about where the jewelry had come from, that it had come from a burglary that involved a fight taking place with the homeowner.

. . . .

Q. So after -- you've explained that he mentioned the name David now after you confronted him with the burglary, what happened after that?

> A. I asked him who the female was. He initially denied anything about a female. *Again, we confronted him that we didn't believe he was being completely truthful with us.*

(Emphasis added.)

The trial court did not abuse its discretion. The detectives' statements were properly admitted to help the jury understand what prompted West during the interrogation to make additional statements to the detectives and change his explanation. Indeed, akin to the properly admitted testimony in Notaro and Lui, Detective Ludwig's and Sergeant Maples' statements provided necessary context to the statements that West made during the interrogation.

There was no error.[2]

III

West next contends that insufficient evidence supports the jury's verdict. This is so, he asserts, because the State did not prove that he knowingly trafficked in stolen jewelry. We disagree.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. I, § 3; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could

---

[2] West contends that, in determining whether trial testimony regarding statements made during an interrogation constitutes impermissible opinion testimony, the issue is whether an officer's trial testimony closely approximates a taped recording of an interrogation.

West is incorrect. For the reasons addressed herein, the proper inquiry is whether the testimony was offered in order to "provide[] context for the interrogation." Lui, 188 Wn.2d at 555.

reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of evidentiary insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Thus, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. We defer to the jury on questions of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

West was charged with one count of trafficking in stolen property in the first degree. The pertinent statute provides that "[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who *knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree*." RCW 9A.82.050(1) (emphasis added). "'Traffic' means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.'" RCW 9A.82.010(19). With its prohibition on trafficking stolen property, "the legislature clearly intended to prohibit any commercial transaction involving property known to be stolen." State v. Hermann, 138 Wn. App. 596, 604, 158 P.3d 96 (2007).

"[B]are possession of recently stolen property alone is not sufficient to justify a conviction." State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967) (citing State v. Portee, 25 Wn.2d 246, 170 P.2d 326 (1946)). "However, possession of recently stolen property in connection with other evidence tending to show guilt is sufficient." Couet, 71 Wn.2d at 775. Indeed, circumstantial evidence, as reliably as direct evidence, can support that a suspect "knowingly" trafficked in stolen property in violation of RCW 9A.82.050(1). See, e.g., Killingsworth, 166 Wn. App. at 287. "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

The State presented the following evidence at trial. West, upon David's request, drove David and Roshell to the residence in question. David explained to West that he used to live there and wanted to "grab some stuff." Upon their arrival, West did not park his car in the front of the residence or in its long driveway but, rather, parked his car behind a line of trees on the road adjacent to the residence's driveway. West waited in the car for David and Roshell. After a time, David and Roshell ran to West's car with David cradling items in his hands as he ran. David told West to drive away, saying that he "got in a fight with somebody." West complied and drove away. That same day, David gave West jewelry in appreciation for driving them around in West's car.

Later, during West's interrogation, West gave one explanation of the circumstances under which he obtained the jewelry—that he traded his drugs for it. But West subsequently changed his story when the detectives confronted him

with statements that his explanation did not make sense and that they knew that the jewelry that West had sold had been stolen that same day. Thereafter, in his tape-recorded retelling, West became more emotional than he had been earlier during the interrogation.

West's knowledge that he had sold stolen jewelry can reasonably be inferred from the direct and circumstantial evidence adduced by the State at trial. First, a reasonable inference can be drawn that West knew that David had stolen possessions from the residence in question. This can be plainly inferred given the distance that West parked away from the residence (rather than parking in front of the residence), that West parked behind a line of trees on the road (rather than parking in the driveway), that West waited in the car for David and Roshell to return (rather than entering the residence with them), that West saw David and Roshell run from the residence toward West's car, that David was carrying possessions with him as he ran, that, upon getting into West's car, David told him to "get out of here", and that David told West that he got into a fight with someone in the residence.

Furthermore, based upon the evidence adduced at trial, a reasonable inference can be drawn that West knew that the jewelry that David had given him had been stolen from the residence in question earlier that day. This is so given that David gave West the pieces of jewelry on the same day that the burglary had occurred, that David gave West the jewelry *after* it had been stolen from the residence, and that, in appreciation for driving them around, David gave West jewelry—an earring, bracelet, and a ring—rather than some other form of

remuneration. Further supporting these inferences is West's admission that he and David had engaged in this process in the past, with items as large as television sets and laptops.

Moreover, considering that West changed his story and became more emotional during the interrogation when the detectives confronted him with both the inconsistencies in his story and the connection between the burglary and the jewelry that he had sold, the jury could also reasonably infer that West had a guilty conscience arising from these events, thereby showing that he knew that he had sold stolen jewelry.

Thus, viewed in a light most favorable to the State, a reasonable inference can be drawn from the State's direct and circumstantial evidence that West had knowingly sold stolen property. Accordingly, the State presented sufficient evidence to support the jury's verdict.

IV

The State has indicated that it will not seek appellate costs in this appeal. Accordingly, we direct that no such costs be imposed. RAP 14.2.

Affirmed.

We concur:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75465-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent J. Scott Halloran, DPA
[shalloran@co.snohomish.wa.us]
Snohomish County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 28, 2017

WASHINGTON APPELLATE PROJECT

November 28, 2017 - 4:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75465-3
Appellate Court Case Title:	State of Washington, Respondent v. Tye Glen West, Appellant
Superior Court Case Number:	15-1-02590-7

The following documents have been uploaded:

- 754653_Petition_for_Review_20171128163216D1385586_4150.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.org_20171128_160510.pdf

A copy of the uploaded files will be sent to:

- diane.kremenich@snoco.org
- lila@washapp.org
- shalloran@co.snohomish.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Oliver Ross Davis - Email: oliver@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20171128163216D1385586