

FILED
SUPREME COURT
STATE OF WASHINGTON
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NO. 95258-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYE GLEN WEST,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that the court deny review.

II. STATEMENT OF THE CASE

The facts of this case have been adequately outlined in the Brief of Respondent filed in the Court of Appeals, and in the Court of Appeals decision. The State relies on those two sources for the statement of the facts of the defendant's crimes.

Tye West was convicted by jury trial of trafficking in stolen property. The Court of Appeals affirmed his conviction in a decision issued on October 30, 2017. State v. West, 2017 WL 4883344. West filed a petition for review with this court. This court has directed the State to file an answer to the petitioner's motion for review.

III. ARGUMENT

A. THE COURT OF APPEALS DECISION APPROVING OFFICER TESTIMONY REGARDING INCONSISTENCIES IN A PRETRIAL INTERVIEW DOES NOT CONFLICT WITH THE DECISION OF THIS COURT.

1. Review Is Not Warranted Under RAP 13.4(b)(1).

Motions for discretionary review must demonstrate that the case meets at least one of the four grounds set forth in RAP 13.4(b)(1)-(4). The defendant asserts that his case merits review

under RAP 13.4(b)(1) by claiming that the Court of Appeals' decision affirming his conviction conflicts with this court's holding in State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). Pet. for Rev. 3-4. The defendant misstates the Court of Appeals decision as claiming Demery is overruled. Id. The decision here does not conflict with Demery and review is not warranted under RAP 13.4(b)(1).

The defendant repeats the arguments he made in the Court of Appeals. The Court of Appeals thoroughly addressed those arguments when it concluded that the detectives statements were properly admitted to help the jury understand what prompted West in the context of his interview to make additional statements and change his explanation. The Court of Appeals decision applies established law to the facts of this case. The State relies on the court's decision and the following argument as the basis for which this court should deny review.

2. The Detectives Statements At Trial Regarding the Defendant's Inconsistencies When Interviewed Did Not Constitute Impermissible Opinion Testimony.

The petitioner fails to appreciate that not all officer testimony of a defendant's inconsistent statements rises to the level of improper opinion testimony on veracity. In reviewing a claim of

improper opinion testimony, courts look to the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence before the court. Demery, 144 Wn.2d at 759, State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Testimony that does not directly comment on the defendant's guilt, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. Seattle v. Heatley, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011(1994).

The Court of Appeals applied the correct analysis above in determining that the officer testimony here was not improper opinion testimony. The Court's opinion includes the entire challenged testimony, which was only a brief part of otherwise lengthy descriptions of the overall investigation. Decision, at 8-10.

The officer testimony regarding the defendant's statements was made in the context of describing the police interview strategy and was helpful to explain why West changed some parts of his story and not others. For example, West claimed he traded his heroin for the (stolen) jewelry, and the detectives told him that seemed unlikely. 5/23/16 pm RP 86-87. When the officers told him they knew the jewelry came from a burglary, he then said the

codefendant gave him the jewelry as payment for driving (to the burglarized house). Similarly, West denied any female was present until challenged that the officers knew the homeowner chased a male and female out of the home. Id. at 86-88.

The testimony of the detectives here was admitted to help the jury understand what drove West during the interview to make additional statements and change his explanations. This was necessary context for the jury to evaluate the statements West made in the interview. Moreover, the detectives did not testify about their personal beliefs of the defendant's guilt or credibility, but instead recounted what was said during the interviews.

This context was especially clear given that the jury heard the partially recorded statement of West from the interview, which was admitted without objection. 5/23/16 pm RP 95-96, 5/24/16 RP 10-11. Opinion testimony is defined as testimony based on one's belief or idea rather than on direct knowledge of facts at issue. Demery, 144 Wn.2d at 760. The officers' testimony here did not comment on the defendant's guilt, and was helpful to the jury in evaluating whether West knew the jewelry he sold was stolen. The statements challenged West's interview responses that the officer's

knew were refuted by the evidence, such as the presence of a female burglar at the scene.

3. The Court Of Appeals Decision Does Not Conflict With Demery.

The Court of Appeals decision did not reject the holding of Demery, but rather rejected the petitioner's interpretation of that holding. Despite the petitioner's primary assertion, the Court of appeals decision here cited to Demery repeatedly. Decision at 5, 6, 7. The decision also relied on this court's holding of In re Per. Restraint of Lui, 188 Wn.2d 525, 555, 397, P.3d 90 (2017). With regard to the precise issue presented, the court said "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 at 759 (plurality opinion) ("No 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). (Emphasis in court's decision.) Decision, at 6.

The court's decision also relied the precedent of State v. Notaro, 161 Wn. App. 654, 255 P.3d 774 (2011), and Kirkman. The Notaro court affirmed the trial court's admission of detective

testimony that they told Notaro during interrogation that his story was not credible. Notaro, 161 Wn. App. at 661. Detective Wood testified four times over objection that he told Notaro that he did not believe him, and also told Notaro to tell him the truth. Id. at 664-666. Citing Demery, the Notaro court affirmed that in the context of statements made during the interrogation, the detective's testimony was not improper opinion testimony. Id. at 669-670.

By contrast, the detective's statements to West here were far more innocuous, essentially challenging answers that did not make sense in light of known evidence. The court's decision recognized this was also consistent with the reasoning of Kirkman and Demery. Decision at 7. Kirkman challenged the detective's testimony that the child victim was competent and truthful in her interview as impermissible opinion evidence. The court here relied on the reasoning of Kirkman (which cited Demery) that the detective's trial testimony was proper in providing the necessary context for the jury to assess the reasonableness of the responses. Kirkman, 159 Wn.2d at 931.

Despite the petitioner's interpretation of Demery, this court has recognized that officers may testify at trial to statements made during interrogation accusing a defendant of lying if such testimony

provides context for the interrogation. In re Lui, 188 Wn.2d at 555, citing Demery, 144 Wn.2d at 763-64. This court's own citation to that part of the Demery decision refutes the petitioner's primary assertion that officers can never testify at trial to disbelieving a defendant's interview statements. It further refutes the contention that the Court of Appeals decision "overruled" or conflicted with Demery.

The decision in fact relied on Demery for the same precedent that this court applied in In re Lui¹. That case cited the Demery discussion of O'Brien, 857 S.W.2d at 221, Dubria, 224 F.3d at 1001-02, and Kirkman, 159 Wn.2d at 931, 934 as correct statements of law regarding trial testimony which repeats officer statements accusing a defendant of lying in an interrogation. These do not constitute impermissible opinion testimony, if they provide useful context for the jury to assesses what prompted the responses of the defendant. Decision, at 7.

¹ The petitioner's claim that Lui approved of context related testimony solely when tactical reasons dictate not objecting is without merit. Petition at 6-10. This claim misreads the direct statement of this court that "an officer may repeat statements made during interrogation accusing a defendant of lying if such testimony provides context for the interrogation." In re Lui, 188 Wn.2d at 555, citing Demery, 144 Wn.2d at 763-764.

This Court in Demery cited Dubria as holding that juries typically understand that officers do not believe the defendant's story during interviews, and attach no special aura of reliability to officer statements in that context. Demery at 763, citing Dubria 224 F.3d at 1002. The court also cited the O'Brien holding that an officer testifying at trial that he accused the defendant of lying in an interview was not error because the witness was not offering his opinion that the defendant was a liar; but instead he described the give and take of the interrogation. Demery at 763-764, citing O'Brien, 857 S.W.2d at 221.

Because the challenged testimony here was offered to provide context for the jury to assess what statements police made to West which elicited the changing responses he gave in the interview, the Court of Appeals decision was correct in applying Demery and the aforementioned precedent to the facts here.

4. The Petitioner's Argument Regarding Redaction And Limiting Instruction Should Be Stricken Because It Was Not Properly Raised As Required By RAP 13.7(b) And 13.4(c)(5).

The defendant asks the Court to review whether redaction and a limiting instruction should have been required regarding the detective testimony at issue. Petition at 15-19. However, he failed to list these issues in his concise issues presented for review as

required by RAP 13.4(c)(5). The rule requires a concise statement of the issues presented for review. Failure to do so is not overcome by presenting an issue in the argument section of a petition that was not first properly listed in the concise statement of issues as required by RAP 13.4(c)(5). State v. Korum, 157 Wn.2d 614, 623-24, 141 P.3d 13 (2006), State v. Collins, 121 Wn.2d 168, 178-79, 847 P.2d 265 (1987). RAP 13.7(b) limits review to only those issues properly raised in the petition as directed by RAP 13.4(c)(5). Korum, 157 Wn.2d at 624, citing State v. Coria, 146 Wn.2d 631, 655 n.9, 48 P.3d 980 (2002).

Because the defendant failed to properly raise the redaction and limiting instruction issues as required by the aforementioned rules, this court should strike those issues and refuse to consider them according to Korum. Furthermore, the defendant did not raise these issues below, and did not request a limiting instruction at trial. Well settled authority establishes that a trial court is not required sua sponte to give a limiting instruction which was not requested by a party. State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 118 (2011); State v. Noyes, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966).

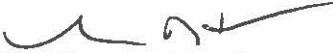
IV. CONCLUSION

For these reasons, the State respectfully requests that this Court deny the defendant's Motion for Discretionary Review.

Respectfully submitted this 16TH day of March, 2018.

MARK K. ROE
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By:



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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

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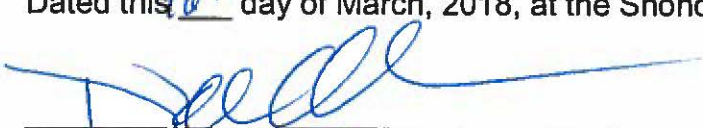
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ANSWER TO PETITION FOR REVIEW

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

Dated this 16th day of March, 2018, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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