

NO. 42312-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KRYSTAL MARIE TURNER,

Appellant.

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

The Honorable Barbara Johnson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Admission of a police officer's opinion regarding appellant's veracity invaded the province of the jury and denied appellant her constitutional right to a jury trial.

Issue pertaining to assignment of error

A police officer was permitted to testify over defense objection that he suspected appellant was lying from her reaction to his accusation, and he then told her to be honest with him. Where admission of this impermissible opinion as to appellant's veracity was not harmless beyond a reasonable doubt, must her conviction be reversed?

B. STATEMENT OF THE CASE

1. Procedural History

On March 8, 2011, the Clark County Prosecuting Attorney charged appellant Krystal Turner with taking a motor vehicle without permission in the first degree. CP 3-4; RCW 9A.56.070(1)(a). The case proceeded to jury trial before the Honorable Barbara Johnson, and the jury returned a guilty verdict. CP 82. The court imposed a sentence of six months, and Turner filed this timely appeal. CP 86, 95.

2. Substantive Facts

In February 2011, Clark County Sheriff's Deputy Bill Sofianos was investigating information from an anonymous source that Krystal Turner and Matthew Coonce were in possession of a stolen vehicle. 2RP<sup>1</sup> 139-40, 194. He first located the car at their residence, and when he ran the license plate through the Department of Licensing, it came back registered to Turner. 2RP 140. While Sofianos was waiting for another detective to arrive so that he could make contact with Turner and Coonce, Turner drove away in the car. Sofianos pulled her over. 2RP 141.

Turner provided her driver's license and registration, and when Sofianos asked her if the car was hers, she said it was. Sofianos asked her how long she had owned it, and she said a little over three years. Turner said her bother had given her the car, and she acknowledged that the car had been painted several times. 2RP 142-44.

Sofianos then told Turner that he suspected the car might have been stolen. He said he knew she owned a similar car at one point, but he suspected this was not the same car. 2RP 144. According to Sofianos, Turner began to tear up, and when he told her to be honest with him, she admitted she had bought the car a year earlier and knew that the license

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<sup>1</sup> The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—5/31/11; 2RP—6/1/11; 3RP—6/2/11(a.m.); 4RP—6/2/11(p.m.) and 6/3/11; 5RP—6/24/11.

plates and the vehicle identification number (VIN) on the dashboard had been replaced with the ones from her old car. 2RP 145-46.

Turner gave Sofianos permission to search the vehicle, and he discovered that the VIN inside the driver's door had been sanded down, the car had been painted, and the VIN stamped onto the firewall under the hood came back to a car that had been reported stolen. 2RP 147-49. Turner told Sofianos that her original car was breaking down, so she bought this one from a friend. 2RP 150.

Sofianos impounded the car, and Coonce was called to the scene to pick Turner up. 2RP 151. After initially telling Sofianos that they had owned the car for eight years, Coonce stated that they had bought it from a friend a year earlier. 2RP 153-54. He believed the car could not be registered because of an insurance problem, so he helped the friend replace the license plates and VIN and painted the car. 2RP 155. Both Turner and Coonce told Sofianos that they did not know the car was stolen. 2RP 156. According to Sofianos, however, they said they suspected there was a possibility it could have been. 2RP 156.

Turner and Coonce were arrested at their home a month later and charged with taking a motor vehicle without permission in the first degree. 2RP 162; CP 3. Coonce was also charged with possession of a controlled substance and possession of an incendiary device. CP 7-8.

Prior to trial, Turner moved to exclude Sofianos's testimony that he told Turner to be honest with him. Counsel argued that such testimony would be a comment on Turner's veracity, which is a question for the jury, not for another witness. 2RP 124; CP 9. Counsel also objected to testimony from Sofianos that Turner started to tear up during his interrogation. 2RP 124; CP 9. The court denied the motion to exclude Sofianos's testimony, saying it was simply part of the interrogation and not excludable under case law. 2RP 129.

At trial, Sofianos testified that he asked Turner if the vehicle she was driving was hers, and she said that it was. 2RP 143. When he told Turner he knew she had owned a similar car in the past but he did not believe this was the car, he "noticed that tears began to form in her eyes." 2RP 144. The court overruled defense counsel's objection, and the prosecutor asked Sofianos what he did when Turner started tearing up. Sofianos responded, "I suspected that I was probably more on point and I asked her to be honest with me." 2RP 145. Again, defense counsel objected, and the court responded that the objection had been ruled on previously. 2RP 145.

Coonce testified at trial that he had bought the car Turner was driving from a friend, who was supposed to use parts from the car to fix Turner's old car. 4RP 412. The friend took both cars to work on, and

Coonce believed the car he returned was Turner's original car with new parts. 4RP 414. He painted the car because it was several colors after the parts replacement. 4RP 417. He never had any idea that the car he bought was stolen. 4RP 416.

Turner did not testify at trial. Her defense counsel argued in closing that the State's case against her rested on Sofianos's testimony that she admitted she knew the VIN and license plates had been changed. 4RP 426. Counsel argued that Turner was in a tough position, trying to be loyal to Coonce. She made inconsistent statements and became emotional when talking to Sofianos because she was trying to protect Coonce. But there was not enough evidence to show she knew the car was stolen or she had committed a crime. 4RP 526-30.

C. ARGUMENT

IMPROPER ADMISSION OF THE POLICE OFFICER'S  
OPINION AS TO TURNER'S VERACITY VIOLATED HER  
RIGHT TO A JURY TRIAL AND REQUIRES REVERSAL.

"Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Improper opinion testimony violates the defendant's

constitutional right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

Whether testimony constitutes an improper opinion depends on the circumstances of each case, including the type of witness, the nature of the charges, the defense presented, and the other evidence in the case. Demery, 144 Wn.2d at 759. While a trial court has discretion to determine what evidence is admissible, it is well established that a witness may not testify about the credibility of another witness. Demery, 144 Wn.2d at 758-59; State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). When the jury learns the witness's opinion of the defendant's credibility, reversal may be required. Id. "Particularly where an opinion on the veracity of a defendant is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and deny the defendant of a fair and impartial trial." State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011) (citing Dolan, 118 Wn. App. at 329).

In Jones, the prosecutor questioned the arresting officer extensively about his interview with defendant Jones. The officer testified that he told Jones during the interview that he did not believe him and that events could not have transpired as Jones claimed. Jones, 117 Wn. App. at 91. This Court held that the officer's testimony that he did not believe

Jones's claims constituted an impermissible comment on Jones's credibility. Jones, 117 Wn. App. at 92 (holding that prosecutor's misconduct in eliciting the opinion required reversal).

Here, Sofianos was permitted to testify over defense objection not only that he told Turner he did not believe what she was telling him, but also that when she started to tear up, he suspected he was right, so he told her to be honest with him. 2RP 144-45. As in Jones, Sofianos's testimony that he did not believe Turner's statements constituted an impermissible comment on Turner's credibility. See also Demery, 144 Wn.2d at 765 (Alexander, J., concurring).

In Demery, the trial judge admitted a tape recording of the defendant's interview with the police, during which the police officers suggested Demery was lying. One of the detectives testified at trial that when he made these statements to Demery, he was employing a common interrogation technique designed to see if Demery would change his story. Demery, 144 Wn.2d at 757. The Court of Appeals reversed Demery's conviction, concluding that the officers' statements constituted impermissible opinion testimony regarding the veracity of the defendant. Demery, 144 Wn.2d at 755.

The Washington Supreme Court reversed the Court of Appeals opinion. Four justices concluded that the officers' statements were not

impermissible opinion testimony but merely placed the defendant's statements during the police interview into context. Demery, 144 Wn.2d at 764 (plurality opinion). Another four justices concluded that, although the officers' statements were made in the course of an interrogation, their words clearly stated their belief that the defendant was lying. They therefore constituted impermissible opinion as to the veracity of the defendant and should have been excluded. Demery, 144 Wn.2d at 771 (Sanders, J., dissenting). Justice Alexander agreed with the dissent that the accusation that Demery was lying was opinion evidence regarding the defendant's veracity which should not have been admitted. Demery, 144 Wn.2d at 765 (Alexander, J., concurring). He concluded that the error was harmless, however, and concurred with the plurality only as to the result. Id.

Applying the majority holding in Demery to this case, Sofianos's testimony that he did not believe Turner and he told her to be honest with him was improper opinion as to the veracity of the defendant which should have been excluded.

This Court recently addressed a fact pattern similar to Demery in Notaro, 161 Wn. App. 654. In that case, the trial court ruled that Notaro's statements to police confessing to the crime were voluntary and admissible. Notaro, 161 Wn. App. at 657-58. In addition, one of the

detectives who interviewed Notaro testified that Notaro confessed after they told him that his initial story was not credible. Notaro, 161 Wn. App. at 659. On appeal, Notaro argued that the detectives' statements during the interrogation constituted opinion as to his credibility, and the admission of that improper opinion denied him his right to a jury trial. Notaro, 161 Wn. App. at 661.

Relying on the plurality opinion in Demery, this Court held that because the detective recounted statements made during an interrogation, which was not opinion testimony, there was no error. Notaro, 161 Wn. App. at 661, 668-69. The detective's testimony described the police interrogation strategy, which was designed to see whether Notaro would change his story. In this context, the detective did not testify about his personal beliefs but rather recounted the entire interrogation. Notaro, 161 Wn. App. at 669. Moreover, the detective's testimony describing his interrogation tactics adequately informed the jury that he was not expressing his personal opinion as to Notaro's veracity. Id.

Even under the Notaro Court's application of Demery, Sofianos's testimony should have been excluded, because he expressly gave his personal opinion that Turner was not telling the truth. Sofianos testified that he told Turner he suspected the car she was driving was not hers as she claimed, and when she started to tear up, "I suspected that I was

probably more on point and I asked her to be honest with me.” 2RP 145. Sofianos was not describing an interrogation technique, and he made no claim that he accused Turner of lying simply as a tactic to see if she would change her story. Rather, Sofianos told the jury that Turner’s reaction when he accused her of lying confirmed his suspicion that she was. This is a clear expression of personal belief regarding Turner’s veracity, and as such it should have been excluded.

Admission of improper opinion evidence violates the constitutional right to a jury trial and requires reversal unless the error was harmless beyond a reasonable doubt. Dolan, 118 Wn. App. at 330 (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Demery, 144 Wn.2d at 759; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

In Demery, the improper admission of opinion testimony was deemed harmless because the officers’ accusation during the interrogation that the defendant was lying did not play a significant role in the State’s case. From the way it was presented at trial, it was clear that the officer was not expressing a judgment about the defendant’s veracity, but merely trying to trick the defendant into changing his story. Demery, 144 Wn.2d

at 766 (Alexander, J., concurring). Given this context and the strength of the State's other evidence, the error was harmless. Id.<sup>2</sup>

Here, on the other hand, the only evidence presented by the State to prove Turner knew the car she was driving was stolen<sup>3</sup> was Sofianos's testimony. Sofianos testified that Turner said she suspected there might be a possibility the car was stolen. But even after admitting she knew the car she was driving was not the one registered to her, she denied knowing the car was stolen. 2RP 156. The State's case depended on the jury finding Turner's statements lacked veracity, and Sofianos's testimony that he reached that very conclusion likely had a significant impact on the jury. Testimony from a law enforcement officer regarding the veracity of a defendant is especially prejudicial because it carries a "special aura of reliability." Demery, 144 Wn.2d at 765 (distinguishing statements made as part of an interrogation technique, which do not have the same effect). The State cannot prove that the improper admission of Sofianos' opinion as to Turner's veracity was harmless beyond a reasonable doubt, and her conviction must be reversed.

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<sup>2</sup> Justice Alexander applied the non-constitutional harmless error standard, because neither party in that case asserted that the error was of constitutional magnitude. Demery, 144 Wn.2d at 765-66 (Alexander, J., concurring). The plurality opinion recognized, however, that admitting impermissible opinion testimony violates the constitutional right to a jury trial. Demery, 144 Wn.2d at 759.

<sup>3</sup> To convict the defendant of taking a motor vehicle without permission, the State must prove the defendant knew the car was stolen. State v. C.M.C., 110 Wn. App. 285, 287-88, 40 P.3d 690 (2002); RCW 9A.56.070.

D. CONCLUSION

Admission of the officer's impermissible opinion regarding Turner's veracity invaded the province of the jury and denied Turner her right to a jury trial. Her conviction must therefore be reversed.

DATED this 1<sup>st</sup> day of November, 2011.

Respectfully submitted,



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Certification of Service

Today I delivered a copy of the Brief of Appellant in *State v.*

*Krystal Marie Turner*, Cause No. 42312-0-II as follows:

Via U.S. Mail to:  
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I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
November 1, 2011

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