

SUPREME COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania v. Rasheed Malcolm

No. 46 EAP 2024 · No. 46 EAP 2024 · Decided February 18, 2026

OPINION

Commonwealth v. Malcolm, R., Aplt.

MUNDY, SALLIE, J.

[J-10-2025]

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

COMMONWEALTH OF PENNSYLVANIA, : No. 46 EAP 2024

Appellee : Appeal from the Order of the : Superior Court at No. 954 EDA : 2022 entered on November 14, v. : 2023, affirming the Judgment of : Sentence of the Philadelphia County : Court of Common Pleas at No. CP- RASHEED MALCOLM, : 51-CR-0001309-2020 entered on : March 28, 2022. Appellant : : ARGUED: March 5, 2025

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE MUNDY DECIDED: February 18, 2026 I. Introduction In this appeal by allowance, Appellant Rasheed Malcolm challenges the Superior Court’s decision affirming the admission of several statements in Malcolm’s police interrogation video, in which detectives made accusatory statements and opinions regarding Malcolm’s guilt and involvement in a fatal shooting. For the reasons that follow, we agree that these statements were properly admitted, although our rationale differs from the Superior Court. We therefore affirm the Superior Court’s order.¹ 1 After oral argument, Malcolm filed two separate motions for post-submission communication pursuant to Pa.R.A.P. 2501. The first motion included a request to correct the oral argument record. The second motion alerted the court of additional persuasive authority. Rule 2501 prohibits the filing of briefs, memorandums, and letters to the Court following oral argument unless “expressly allowed at bar at the time of argument.” (...continued) II. Background This case stems from the shooting death of Kevin Harris (“the victim”). On December 22, 2018, the victim was out celebrating the birthdays of his twin aunts at Kif’s Bar located on Market Street in Philadelphia. When the bar closed, the partygoers gathered outside on the sidewalk to say their goodbyes, at which point the victim was fatally shot, once in the head and once in the chest. Another individual, Donny Williams, was also shot but survived his injuries. Ramona Harris, one of the victim’s aunts, recalled seeing two shooters, one of whom was tall, skinny, and wearing a gray hooded sweatshirt. Following the shooting, police officers processed the scene and recovered a total of eleven fired cartridge casings (“FCCs”) from two different guns.² They also recovered nearby surveillance

footage from three cameras in an attempt to identify the shooters. The video footage depicted one individual wearing a gray zipper hoodie, black boots, black pants, and wired white earbuds. This individual can be seen circling the block several times where the incident occurred in the moments leading up to the shooting. The video footage then shows that individual walk through the crowd that had exited the bar. He then approaches the victim from behind and shoots him twice at close range before fleeing. The shooter is then seen carrying a firearm in his right hand while running from the scene. Pa.R.A.P. 2501. It also permits parties to alert the Court of a change in status of authorities “[i]f any case or other authority relied upon in the brief of a party is expressly reversed, modified, overruled or otherwise affected so as to materially affect its status as an authoritative statement of the law for which originally cited in the jurisdiction in which it was decided[.]” Malcolm’s motions are denied, as neither of these requests fall under Rule 2501. 2 Six of the FCCs came from a .380-millimeter firearm, and the remaining five came from a 9-millimeter firearm. [J-10-2025] - 2 Detective James Burns of the Philadelphia Police Department’s Homicide Unit was assigned to the case. Following an investigation, Detective Burns was unable to identify the shooter and, consequently, sent out a patrol alert, which included a screenshot of the shooter from the surveillance footage.³ Malcolm was brought in for questioning as a result. Detective Burns and Detective John Harkins conducted a videotaped interview during which Malcolm consented to a search of his bedroom for items related to the incident. As a result of that search, officers discovered a gray hoodie, black boots, and a pair of white corded headphones. The gray hoodie and the black boots were consistent with that seen in the surveillance video. Malcolm denied ownership of the hoodie, claiming it belonged to a friend. The police submitted the gray hoodie for testing, which revealed the presence of particles consistent with gunshot residue on the right sleeve. The sweatshirt was also found to contain the DNA of three individuals, at least one of whom was male, but the test was inconclusive as to whether the DNA belonged to Malcolm. The boots and earbuds were also submitted for testing, the results of which were similarly inconclusive. Approximately one month after Malcolm’s interview, Officer Robert Lamanna was interviewed by police. He identified the suspect pictured in the patrol alert as Malcolm. Malcolm frequented Officer Lamanna’s assigned police district. Officer Lamanna had also seen Malcolm many times through social media. Once shown the surveillance footage, Officer Lamanna again identified Malcolm based on his facial features, beard, gate, and exceptional height. Malcolm was subsequently charged with first-degree murder and related offenses. On March 21, 2022, Malcolm proceeded to a jury trial. On the second day of trial, Officer 3 After the shooting, Detective Burns met with Williams, the surviving victim, in the hospital but was unable to locate or speak with him thereafter. Detective Burns was unsuccessful in locating other witnesses or getting them to provide any information helpful to the case. [J-10-2025] - 3 Lamanna testified regarding his identification of Malcolm. Officer Lamanna explained that he was assigned to a police district frequented by Malcolm, whom he had the opportunity to see in person more than approximately ten times. He also viewed Malcolm through social media hundreds of times. Based on these sightings, Officer

Lamanna believed Malcolm was the person depicted in the patrol alert. He additionally identified Malcolm as the individual in the surveillance footage based on his facial features, beard, gate, and exceptional height. N.T. Trial Vol. 3, 3/23/22, at 17-21, 25-40. Officer Lamanna was cross-examined by defense counsel, which included questions about the propriety of Officer Lamanna's identification. Id. at 41-52. Relevant to this appeal, the Commonwealth also sought to admit at trial select portions of Malcolm's videotaped police interrogation through the testimony of Detective Burns. The Commonwealth provided the interrogation video to the defense before trial and indicated which portions it intended to play for the jury. Defense counsel did not file a motion in limine challenging specific portions of the video or otherwise formally object to admission of the video prior to trial. It does appear from the record that both parties discussed those portions of the video that would be played at trial and those portions that would be excluded. See N.T. Trial Vol. 4, 3/24/22, at 31-33.⁴ At trial, the Commonwealth began playing the video, and defense counsel objected and moved to strike soon thereafter. It is unclear from the record the specific statement to which defense counsel objected or the basis for the objection.⁵ Id. at 29. The court 4 Malcolm filed a motion in limine seeking to preclude "narration of any video" but did not challenge any portions of the interrogation video at issue in this appeal. Motion in Limine, 3/1/21, at 1. ⁵ The transcript indicates that the Commonwealth began playing the video but does not reference the statement that gave rise to the objection. The corresponding video time stamp noted therein however appears to align with Detective Burns telling Malcolm: "You were picked up on surveillance footage." See N.T. Trial Vol. 4, 3/24/22, at 28-29; (...continued) [J-10-2025] - 4 overruled this objection without argument, and the Commonwealth continued playing the video for the jury. Shortly thereafter, the trial court stopped the video sua sponte and the following exchange took place: The Court: We are going to stop this here. I don't know how many times he will say this and nobody told me but, ladies and gentlemen, for our purposes, all you can consider is there is one person that came in and said that that was [] [Malcolm] on the video and that was the police officer who testified yesterday[,] [Officer Lamanna]. So[,] [] [D]etective [Burns] telling [Malcolm] people, plural, you are to disregard any of that. He is a detective. He is doing an interview. Sometimes – [Defense Counsel]: Well, not only that, [y]our Honor, it is not accurate at all because no one made an identification and [the detective] is telling them that they did. That is totally disingenuous and I think the jury should know that. The Court: There is a person who made an identification in the video. It was the witness who testified. It was a police officer. So[,] the detective is doing an interview and that is how the detective interviews go sometimes but forget the people, police. You can only rely on what came from the witness stand. That was one police officer you heard. Will [the video] keep doing this because no one told me [the detectives] will say people? Id. at 29-31. As illustrated above, the trial court found it problematic that Detective Burns indicated "people" had identified Malcolm as the suspect in the surveillance footage when only one witness, Officer Lamanna, would be offering such testimony at trial.⁶ The trial court dismissed the jury from the courtroom and the discussion continued: Interrogation Video, 4/11/19,

at 6:07:23 – 6:07:27. Because we have been able to discern which statement counsel objected to by reviewing the interview video at the time stamps provided in the transcript, we do not find waiver. We remind defense counsel, however, that it is not our duty to piece together the record and make assumptions about what evidence is being contested. 6 Relevantly, the Commonwealth had filed a motion in limine requesting that five different police officers be allowed to identify Malcolm as the suspect in the surveillance footage. The trial court denied the motion in part and granted the motion in part. Officer Lamanna was ultimately the only Commonwealth witness who identified Malcolm via the surveillance video at trial. [J-10-2025] - 5 The Court: Why didn't anybody tell me that it was on there? [The Commonwealth]: Your Honor, I gave [defense counsel] a transcript of this entire interview. I told him exactly what video times I was using. We discussed what he didn't want in there and I took everything he said he didn't want out. The Court: Start with relevance and then go to probative versus prejudicial, [c]ounsel. You are going to have to fix it. We can't have this detective sitting there in front of the jury saying and people and lots of police officers. Will he start naming witnesses that don't show up? [The Commonwealth]: No, [y]our Honor. The Court: Well, I don't know that. You will need, [defense counsel] and you, if you have to cut it in spots, go ahead. [The Commonwealth]: I literally did that. This is the e-mail I sent to [defense counsel] cutting out everything he said he didn't want in there. The Court: Well, you didn't cut that out. [The Commonwealth]: He didn't say he didn't want it. He told me he read the entire transcript. [Defense Counsel]: I got the transcription the other day, [y]our Honor. [The Commonwealth]: Last week. [Defense Counsel]: I went all through this. There was no thought that they were going to put this in at this time. I would think that that would be absolutely – [The Commonwealth]: I actually wrote in here what we discussed. The Court: All right. So[,] you two go back through it. If there are things in here he is saying – I don't want to hear him say names of witnesses' who didn't turn up into this courtroom or the person who was shot in the stomach, who didn't even turn up in this courtroom, and then he gets to put their statements in. [The Commonwealth]: No. He is going to say did the surviving victim identify him. He is going to ask that question. The Court: He can ask whatever he wants. I don't want any information coming from that detective's mouth or the one next to him that comes from [J-10-2025] - 6 somebody who didn't turn up in this courtroom to testify. Check it out real quick. [Defense Counsel]: All I am suggesting to [y]our Honor when you go through the transcript, there is a continuation of this about this is you, this is you. This is the witnesses – [Detective Burns] says there are witnesses who pointed [Malcolm] out. The fact of the matter is there is no witness – [The Commonwealth]: I am not playing any parts of that. The Court: Go through it. It's not my job. It's your job to go through it. Id. at 32-34. The Commonwealth and defense counsel took an opportunity to discuss what portions of the video would be played for the jury. Afterwards, the Commonwealth informed the trial court: [The Commonwealth]: Your Honor, [defense counsel] and I disagreed over one of the other rulings that you made. I believe that you said that the part of the statement where the detective said we believe it's you in the video, we believe we have the right person, we believe it's

you in the video, that was okay because that is what the detective said. The Court: Yes, he can say that. [Defense Counsel]: Well, I object to that [y]our Honor. The Court: That's overruled. Id. at 35. Defense counsel interjected only once more during the course of the interrogation video being played for the jury.⁷ As the video continued to play, Detective Burns and Detective Harkins made various additional statements expressing their disbelief regarding Malcolm's account of events and his assertions of innocence. The specific statements with which Malcolm now takes issue are reproduced below. ⁷ Similar to the other statement challenged by defense counsel, the transcript does not reference the statement that gave rise to this objection, but the time stamp noted therein appears to align with Detective Burns telling Malcolm: "I'm telling you that I know this is you. That's what I'm telling you [Malcolm]." See N.T. Trial Vol. 4, 3/24/22, at 28-29; Interrogation Video, 4/11/19, at 6:18:15 – 6:18:40. [J-10-2025] - 7 At the conclusion of trial, the jury found Malcolm guilty of first-degree murder, violations of the Uniform Firearms Act, and possessing an instrument of crime. He was sentenced to life imprisonment without the possibility of parole for first-degree murder and no further penalty for the remaining offenses. Malcolm did not file post-sentence motions but did file a timely notice of appeal. On appeal, Malcolm argued, inter alia, that the trial court erred or abused its discretion by overruling defense counsel's objection to various statements in the interrogation video wherein the detectives expressed their opinions and beliefs regarding his assertions of innocence, in contravention with the Superior Court's decision in *Commonwealth v. Kitchen*, 730 A.2d 513 (Pa. Super. 1999). Those statements are as follows:

1. Detective Burns: "You were picked up on surveillance footage."
2. Detective Burns: "I don't believe that we [have the wrong guy]."
3. Detective Burns: "I'm telling you that I know that this is you. That's what I'm telling you [Malcolm]."
4. Detective Burns: "You were right on 62nd Street at this time."
5. Detective Burns: "I showed you the photo and you looked and you said no, that's not me, and I said it is you."
6. Detective Harkins: "We checked the cameras on 62 nd Street and you were out there."
7. Detective Burns: "I know that you were right there."
8. Detective Harkins: "Do you know how absurd that sounds."
9. Detective Burns: "You're not building a lot of points on your behalf."
10. Detective Burns: "You're a 25-year-old kid. I find it very suspicious that you wouldn't have a cellphone at some point."
11. Detective Burns: "Your story keeps evolving, changing, and everything else with your [phone] numbers." [J-10-2025] - 8
12. Detective Burns: "Another reason why you would have something on your head to cover up that [tattoo] on your head. That's exactly what I'm thinking."
13. Detective Burns: "We're quite confident we have the right person here."

Video Interrogation, 4/11/19.8, 9 The Superior Court affirmed Malcolm's judgment of sentence in a unanimous, unpublished memorandum. See *Commonwealth v. Malcolm*, 954 EDA 2022; 2023 WL 7548788 (Pa. Super. filed Nov. 14, 2023). The panel explained that it reviews a trial court's evidentiary decisions for an abuse of discretion, which "occurs when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence on record." *Id.* at *10 (quoting *Commonwealth v. Montalvo*, 986 A.2d 84, 94 (Pa. 2009)). The panel additionally noted that "a discretionary ruling cannot be overturned simply because a reviewing court disagrees with a trial court's conclusions." *Id.* (quoting *Commonwealth v. O'Brien*, 836 A.2d 966, 968 (Pa. Super. 2003)). The panel went on to consider Malcolm's reliance on *Kitchen*. The panel explained that *Kitchen*, discussed more fully *infra*, involved a similar challenge to the admission of accusatory police statements made in multiple interrogation videos. The *Kitchen* court relevantly determined that the Commonwealth was required to redact those statements in which troopers either directly or indirectly accused *Kitchen* of lying, reasoning such statements were akin to a "prosecutor's personal opinion, either in argument or via witnesses from the stand, as to the guilt or innocence of a criminal defendant, which is 8 These statements appear at the following intervals in the order in which they are listed:

(1) 6:07:23-6:07:27; (2) 6:14:25-6:14:31; (3) 6:18:15-6:18:23; (4) 6:20:02 6:20:08; (5) 6:31:22-6:31:30; (6) 6:39:39-6:39:43; (7) 6:49:53-6:50:07; (8) 6:52:58-6:53:03; (9) 7:14:20-7:14:29; (10) 7:15:53-7:16:00; (11) 7:38:02-7:38:07; (12) 7:46:14-7:46:20; (13) 13:25:14-13:25:44. 9 Malcolm challenged one additional statement before the panel but has since conceded it was permissible. [J-10-2025] - 9 inadmissible at trial." *Id.* at *11 (citing *Kitchen*, 730 A.2d at 521) (additional citation omitted). Applying the foregoing, the instant panel found Malcolm's contested statements distinguishable from those in *Kitchen*. Despite acknowledging that *Kitchen* found inadmissible statements containing direct and indirect accusations of untruthfulness, the panel reasoned that "none of the challenged statements directly accused [Malcolm] of lying or untruthfulness similar to the statements made in *Kitchen*[,] and therefore did not require redaction. *Id.* at *12. The panel also pointed out that Malcolm responded to these contested statements by repeatedly maintaining his innocence, making his responses and the circumstances around them properly before the jury for assessing Malcolm's credibility. *Id.* at *13. Lastly, the panel alternatively found that, to the extent the instant statements indirectly accused Malcolm of lying, their admission was harmless in light of Officer Lamanna's identification, the fact that Officer Lamanna was available for cross- examination, and the trial court's repeated reminders that the jury was the ultimate factfinder. *Id.* (citing *Commonwealth v. Williams*, 274 A.3d 722, 735 (Pa. Super. 2022) (explaining harmless error standard)). Accordingly, the Superior Court affirmed Malcolm's judgment of sentence. III. Issues Malcolm appealed to this Court, and we granted review to address the following:

(1) Did the Superior Court err in affirming the trial court's admission of

[Malcolm's] videotaped interrogation, over [Malcolm's] objection?

(2) Where videotaped interrogations are sought to be admitted at trial, what

steps should the parties and trial courts take to reduce undue prejudice while providing appropriate context so that jurors can appropriately weigh the evidence? *Commonwealth v. Malcolm*, 319 A.3d 503 (Pa. 2024) (per curiam). IV. Parties' Arguments [J-10-2025] - 10 Malcolm relies on the fact that prosecutors are prohibited from expressing personal beliefs regarding a witness's credibility to argue that police officers should be precluded from doing the same. Appellant's Brief at 21 (citing *Commonwealth v. D'Amato*, 526 A.2d 300, 309 (Pa. 1987); *Commonwealth v. DiNicola*, 468 A.2d 1078, 1081 (Pa. 1983)). He argues that there are similar dangers in allowing police officers to testify regarding a defendant's credibility. *Id.* at 24 (citing *Commonwealth v. McClure*, 144 A.3d 970, 977 (Pa. Super. 2016) (holding inadmissible detective's statement regarding defendant's credibility, reasoning it could allow jury to find "unwarranted appearance of credibility" and rejecting harmless error)). Malcolm also relies on the fact that the Kitchen panel identified two "forbidden categories" of evidence, specifically "instances where the police, either directly or indirectly, accused [the defendant] of lying" and "instances where the police offer 'an opinion as to the guilt of [the defendant].'" *Id.* at 25 (citing *Kitchen*, 730 A.3d at 521-22). Finally, Malcolm argues that our rigorous Rule 403 standard should accord significant weight to the detective's "unwarranted appearance of authority" against the marginal probative value of their "repetitive declarations of guilt and deceit." *Id.* at 25-26 (citing Pa.R.E. 403). Accordingly, Malcolm argues the statements in this case are the exact type that should be excluded due to their prejudice. Malcolm further disagrees with the panel's interpretation of *Kitchen*. The instant panel concluded the detectives' remarks were admissible because they did not contain specific, but rather implied, accusations of untruthfulness. Malcolm avers, however, that the statements at issue in this case are indistinguishable from those in *Kitchen*. *Id.* at 28. Malcolm additionally disagrees with the panel's alternative conclusion that admission of the contested statements was harmless. He notes that any curative instruction provided by the trial court was not directed specifically at Detective Burns or Detective Harkins' statements. According to Malcolm, the Superior Court also found that [J-10-2025] - 11 the detectives' statements in the video were based on Officer Lamanna's identification of Malcolm from the video. *Id.* at 33. He states that this cannot be true considering the interrogation occurred prior to Officer Lamanna's identification. Finally, though not a basis for the Superior Court's finding of harmless error, Malcolm maintains that the properly admitted evidence was not overwhelming, making the prejudice that resulted from these statements significant enough to contribute to the verdict. *Id.* at 33-34. Next, Malcolm maintains that "nothing short of complete redaction" is sufficient to ameliorate the prejudice caused by these accusatory police statements. *Id.* at 37. He alternatively suggests a balancing test under Rule 403, with certain exceptions. *Id.* at 57. Specifically, Malcolm argues that where an accusatory statement is not directly connected to a question or if the defendant's answer to an accusatory statement may be understood on its own, then the accusatory statement should be excluded. *Id.* at 57-58.

Malcolm also avers that ending a portion of a videotaped interrogation at the point of a police accusation is always unfairly prejudicial. *Id.* at 60. Finally, Malcolm believes a curative instruction is warranted where such statements are admitted. This instruction should tell jurors to disregard police opinions as to the guilt or credibility of the defendant and also inform the jury that police use a variety of interview techniques, including false statements, to elicit information. *Id.* at 62. Based on the foregoing, Malcolm asks this Court to reverse and remand for a new trial. The Commonwealth agrees with Malcolm that the above statements should have been excluded. Commonwealth's Brief at 10. It acknowledges that this is an issue of first impression for us but argues we should adopt the Superior Court's decision in *Kitchen*. *Id.* at 10-11 (citing *Kitchen*, 730 A.2d at 521-22). The Commonwealth additionally observes that many of our sister states have addressed this issue but have not adopted a uniform rule, understandably so considering "that the evidentiary rules in these various [J-10-2025] - 12 states differ significantly." *Id.* at 11 (citation omitted). Nevertheless, considering our rules of evidence and analogous precedent, the Commonwealth "agrees that instances in which the police accuse suspects of lying or opine that they are guilty must be redacted from videotaped interrogations introduced at trial." *Id.* at 11-12. As such, the bulk of the Commonwealth's argument addresses harmless error. The Commonwealth maintains that the trial court's instructions informing the jury that it is the ultimate factfinder and judge of credibility were sufficient to ameliorate any prejudice. According to the Commonwealth, these instructions made clear to the jury the opinions of the detectives and police officers regarding Malcolm's guilt "were irrelevant, and that it was the jurors' conclusions from their personal observations of the surveillance video that controlled their fact-finding." *Id.* 11-14. The Commonwealth continues that any prejudice was further minimized by untainted identification evidence by Officer Lamanna. *Id.* at 14. With respect to the second issue, the Commonwealth maintains that redaction is an appropriate solution in future cases where police personnel offer similar opinions and make accusations. *Id.* at 16-17. In doing so, the Commonwealth first makes clear that this solution does not apply when the opinions of guilt or accusations of lying appear in leading questions or open-ended questions. With respect to the latter, the Commonwealth believes it would be improper to redact Malcolm's "own freely spoken words." *Id.* at 18. It clarifies that "once [Malcolm] chose to respond, his response and the circumstances surrounding that response were admissible to evaluate the credibility of his statements." *Id.* at 18 (citing *Hawkins*, 701 A.2d at 509). Thus, the Commonwealth asks this Court to affirm Malcolm's judgment of sentence.¹⁰

¹⁰ The Defender Association of Philadelphia ("Defender") filed an amicus brief. It asks this Court to adopt the Superior Court's decision in *Kitchen* and "announce of bright line rule of per se inadmissibility, regardless of whether the statements are direct accusations of lying, or merely insinuations of lying" because both kinds of statements have the same prejudicial effect. *Defender Amicus* at 11. To illustrate this point, the Defender provides (...continued) [J-10-2025] - 13

V. Analysis Appellant's first issue before us concerns the admission of accusatory statements and opinions made by police officers during an

interrogation. “The threshold inquiry with admission of evidence is whether the evidence is relevant.” *Commonwealth v. Yale*, 249 A.3d 1001, 1022 (Pa. 2021) (citation omitted). “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Pa.R.E. 401(a), (b). A court may nevertheless “exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Pa.R.E. 403. “‘Unfair prejudice’ means a tendency to suggest decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.” Pa.R.E. 403, Comment. Significantly, “[t]he admission of evidence is solely within the discretion of the trial court, and a trial court’s evidentiary rulings will be reversed on appeal only upon an abuse of discretion.” *Id.* at 8-16. It then provides examples of the ways in which our courts have been “chipping away” at *Kitchen*. *Id.* at 16 (citing *Commonwealth v. Kratz*, 150 EDA 2020; 2021 WL 1725547 (Pa. Super. filed April 30, 2021) (unpublished memorandum); *Commonwealth v. Reeves*, 1566 WDA 2017; 2019 WL 3383703 (Pa. Super. filed July 25, 2019) (unpublished memorandum)). Put simply, the Defender argues: “If a detective cannot get on the witness stand, look at a factfinder, and utter the words that are on the videotapes recording, those statements should be kept out.” *Id.* at 17. The Pennsylvania Innocence Project and the Innocence Project also filed a joint amicus brief. They assert that accusatory interrogation techniques, like those in this case, are coercive, produce prejudicial content that is not useful in securing accurate information, and create a risk of false confession. *Innocence Project Amicus* at 7-12. They next ask this Court to adopt a policy of complete redaction where police make statements or provide opinions asserting or implying guilt or disbelief in a defendant’s denials. They alternatively propose curative instructions, while noting the limitations of such instructions. *Id.* at 13-27. [J-10-2025] - 14 of that discretion.” *Commonwealth v. Smith*, 325 A.3d 513, 518-19 (Pa. 2024) (citing *Commonwealth v. Le*, 208 A.3d 960, 970 (Pa. 2019)). “An abuse of discretion is not simply an error of judgment, but is an overriding misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will, or partiality.” *Id.* at 519 (citing *Commonwealth v. Talley*, 265 A.3d 485, 530 (Pa. 2021)). Both *Malcolm* and the Commonwealth maintain that admission of the statements recounted above was improper. *Malcolm*’s argument relies heavily on the Superior Court’s decision in *Kitchen*, which we have been asked to adopt. The Commonwealth acknowledges there is no clear consensus as to the admissibility of similar statements among our sister states and capitulates to *Malcolm*’s suggestions that we adopt *Kitchen*. We are not so convinced and decline the parties’ invitation to adopt *Kitchen*. As noted above, the *Kitchen* court extended the prohibition that prosecutors may not offer personal opinions as to the guilt of the accused either in argument or in testimony from the witness stand to also include statements made during police interrogations later admitted at trial. See *Kitchen*, 730 A.2d

at 521 (citing *Commonwealth v. Henry*, 706 A.2d 311 (Pa. 1997); *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994)). By way of background, Kitchen was charged with homicide and criminal conspiracy to commit homicide related to the killing of her paramour, Donald F. Reiman, Jr., who was discovered shot to death by a fishpond in Northampton County. *Kitchen*, 730 A.2d at 515. The police arrested Kitchen's other paramour, John Mead, who admitted to shooting Reiman but insisted the plan was orchestrated by Kitchen. *Id.* The police interviewed Kitchen during the course of their investigation, and the Commonwealth later sought to admit at trial three separate videotapes of this interview in their entirety. *Id.* at 516. Kitchen filed a motion in limine seeking to exclude the tapes, arguing that "the total effect of the videotapes was impermissibly inflammatory and prejudicial to the defense." *Id.* [J-10-2025] - 15 The trial court granted Kitchen's motion in part and invited the Commonwealth to redact the videotapes consistent with its ruling. *Id.* at 517. Relevant herein, the Superior Court agreed with the trial court's exclusion of several statements in which the police either directly or indirectly accused Kitchen of lying. In a cursory analysis, the Superior Court determined that these statements "were akin to a prosecutor offering his or her opinion of the truth or falsity of the evidence presented by a criminal defendant, and such opinions are inadmissible at trial." *Id.* at 521 (citing *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994)).¹¹ This Court has yet to address the propriety of Kitchen's holding in this regard. At the outset, it is important to recognize that the line of cases finding that prosecutors are prohibited from offering personal beliefs as to the truth or falsity of a defendant's evidence at trial were decided in the context of prosecutorial misconduct claims. See e.g., *Henry*, 706 A.2d 381-82; *Peterkin*, 649 A.2d at 128-29. Where there is an issue concerning prosecutorial misconduct on appeal, the improper statement does not constitute reversible error unless the "unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." *Commonwealth v. D'Amato*, 526 A.2d 300, 309 (Pa. 1987) (citations omitted). This Court has explained that "[t]he essence of a finding of prosecutorial misconduct is that the prosecutor, a person who holds a unique position of trust in our society, has abused that trust in order to

11 Kitchen also involved two additional categories of statements, neither of which are relevant here. One was accusatory police inquiries that prompted an answer by Kitchen, and the other was accusatory police inquiries to which Kitchen did not respond. The court held that the former did not need to be redacted from the video, but the latter did because such statements "constitute[d] an improper reference to [Kitchen's] pre-arrest silence." *Kitchen*, 730 A.2d at 522. Neither of these categories are relevant to this appeal. As such, we do not comment on the propriety of Kitchen's ruling in this regard. [J-10-2025] - 16 prejudice and deliberately mislead the jury." *Commonwealth v. Pierce*, 645 A.2d 189, 197 (Pa. 1994) (citations omitted). We decline to extend this framework to similar statements made by police personnel. Kitchen's rationale for extending this proposition and the manner in which it executes the same is shortsighted. To begin, Kitchen relies on the prohibition against vouching or bolstering but fails to undertake the test to

determine whether an improper prosecutorial comment meets the prejudice threshold to warrant a new trial. See *Kitchen*, 730 A.2d at 521. Instead, *Kitchen* appears to conclude that such statements are categorically inadmissible and, absent exclusion, always carve the way for a new trial. This is not to say that statements made by police offering opinions or making accusations about a defendant's involvement in a crime are automatically permissible, but we decline to create a categorical exclusion when the same does not apply in the context of prosecutorial misconduct. We find it more appropriate to assess the admissibility of these statements on a case-by-case basis under our existing rules of evidence, rather than draw a comparison with claims of prosecutorial misconduct. Variations of this approach have been adopted by some of our sister states' high courts. See e.g., *State v. Rocha*, 890 N.W.2d 178 (Neb. 2017); *People v. Musser*, 835 N.W. 2d 319 (Mich. 2013); *State v. O'Brien*, 857 S.W.2d 212 (Mo. 1993); but see *State v. Demery*, 30 P.3d 1278 (Wa. 2001). Applying our rules of evidence herein, particularly Rules 401 and 403, we decline to find that the admission of the above-noted statements constituted an abuse of discretion such that a new trial is warranted. The evidence presented to the jury in the form of the interrogation video was relevant to determining whether Malcolm was guilty of the offenses charged and to assess his credibility. We cannot say that the danger of these statements exceeded their probative value. Not only did the jury hear the contested [J-10-2025] - 17 statements, but it also heard Malcolm's repeated and unwavering assertions of innocence. In addition, the jury was clearly instructed on multiple occasions that it was the ultimate factfinder and arbiter of credibility, and the jury was presumed to follow that instruction. *Commonwealth v. Jones*, 289 A.3d 959, 1009 (Pa. 2023) (explaining "[a] jury is presumed to follow instructions the trial court provides"). Additionally, although we do not find waiver in this case, it is important to note that defense counsel made – at best – two to three broad and nonspecific objections during the entirety of the interrogation video being presented to the jury but nevertheless challenges thirteen statements on appeal. Thus, despite now asserting that the admission of these statements was so egregious as to warrant a new trial, counsel's failure to object robbed the trial court of a complete opportunity to consider specific statements or provide a curative instruction beyond that which it did provide. This said, we do find the trial court's instructions sufficient. During the course of the video being played, the trial court paused the video shortly after it began and instructed the jury: We are going to stop this here. I don't know how many times he will say this and nobody told me but, ladies and gentlemen, for our purposes, all you can consider is there is one person that came in and said that that was [Malcolm] on that video, and that was the police officer who testified yesterday. So[,] the detective telling him people, plural, you are to disregard any of that. He is a detective. He is doing an interview. Sometimes – There is a person who made an identification in the video. It was the witness who testified. It was a police officer. So[,] the detective is doing an interview and that is how the detective interviews go sometimes but forget the people, police. You can only rely on what came from the witness stand. That was one police officer you heard. Will [the video] keep doing this because no one told me he will say people? N.T. Trial Vol. 4, 3/24/22,

at 29-31. This instruction informed the jury that it was the ultimate factfinder. The trial court further emphasized that the jury was not to consider any information that either detective or any other individual, identified Malcolm as the [J-10-2025] - 18 suspect in the video. The trial court was clear that the only witness who was able to identify Malcolm from the video was Officer Lamanna. It logically follows that any assertion by Detectives Burns or Harkins that Malcolm was indeed the person in the surveillance video was not to be considered. We further observe that Malcolm's attorney had ample opportunity to probe Detective Burns and Officer Lamanna on this topic during cross-examination. Indeed, Malcolm's attorney cross-examined Officer Lamanna as to the propriety of his identification. N.T. Trial Vol. 3, 3/23/22, at 41-52. He additionally confronted Detective Burns about the use of false information during the interrogation as a means of obtaining accurate information, inquiring: [Defense Counsel]: During that time period, we heard and saw the video, that there were questions you were asking of [Malcolm] and him giving answers. In terms of the video that we saw of this interview, there was some questions about people at the scene had said it was him. You had no information of that at that time [of the interview], correct? [Detective Burns]: Not people, plural. [Defense Counsel]: That's what I am talking about? [Detective Burns]: Person. [Defense Counsel]: So, in essence, it is a technique that you utilize, you use some information that was inaccurate to see if you can get some information from [Malcolm] that may be accurate; correct? [Detective Burns]: That's right. [Defense Counsel]: So[,] all during that time, all that attempt by you to give information that may or may not be accurate, trying to get him to say something that was, in your mind, to you [sic] put him there as part of the homicide. He kept saying, no, it's not me. No, it's not me. No, it's not me. Right? I went through the transcript, went through this video, the entire video. He's saying it's not me. I didn't do it and he kept saying it for almost 72 times, 72 times and you, guys, were still there, asking him the same questions over and over again. Am I correct about that? [J-10-2025] - 19 N.T. Trial Vol. 4, 3/24/22, at 115-117. In so doing, defense counsel was able to convey to the jury that despite being faced with inaccurate information, Malcolm was steadfast in maintaining his innocence. Then, during the Commonwealth's redirect, when Detective Burns was shown screenshots of the surveillance video, the trial court again explained to the jury: "[Y]ou are the finder of facts[, s]o it doesn't matter what the detective believes he sees in the picture." Id. at 138. Lastly, in its final charge, the trial court again reminded the jury of its responsibility to "consider and weigh the testimony of each witness and give it such weight and importance as in your judgment [it] is fairly entitled to receive[.]" N.T. Hearing Vol. 1, 3/25/22, at 137-38. Based on the foregoing, we decline to find that the contested statements were so prejudicial as to warrant a new trial.^{12, 13} Because we decline to assign error to the admission of the detectives' statements in this case, it is not necessary to address the issue of harmless error.¹³ In a concurring opinion, Justice McCaffery states that today's decision implicitly suggests "that improperly admitted lay opinion testimony regarding the credibility of a defendant can be alleviated by a curative or cautionary instruction." McCaffery, J., Concurring Op. at 1. We disagree that such a broad

pronouncement is implicit in our decision and emphasize that our conclusion is limited to the unique set of facts before us. The concurrence goes on to disagree with our relevancy assessment of the at-issue statements. As explained above, we find these statements relevant to assessing Malcolm's credibility. However, even assuming the statements were only marginally relevant, exclusion is not required unless the probative value of the evidence is outweighed by a danger of, inter alia, unfair prejudice. See Pa.R.E. 403. Our decision hinges on this assessment. While we find that the curative instruction in this case did ameliorate any potential prejudice, so too did the jury's ability to hear Malcolm's responses to the detectives' questions. Malcolm also had ample opportunity to cross-examine Detective Burns about the statements, as well as Detective Lamanna about the propriety of his identification. These factors, in addition to Malcolm's minimal efforts at excluding these now purportedly improper statements does not convince us that a new trial is warranted. In his dissent, Justice Wecht similarly disagrees with our relevancy analysis and opines that, even assuming the detectives' statements are marginally relevant, they are highly (... continued) [J-10-2025] - 20 We agree that, in some cases, accusatory statements made by police officers could prove to be so prejudicial that exclusion is warranted. Where this is the case, we recommend resolving questions regarding admissibility through the filing of motions in prejudicial. Wecht, J. Dissenting Op. at 5. In so arguing, the dissent criticizes our decision not to extend the line of cases concerning prosecutorial misconduct for improper bolstering to the instant scenario. It asserts that the "danger of unfair prejudice" is the same regardless of whether the evidence "comes in through a prosecutor or a police detective," placing great weight on the detectives' appearance of authority and superiority as impacting the jury's assessment of the value of the statements. Id. at 8-11. The dissent has not cited, nor has our research uncovered, any caselaw extending the line of cases concerning prosecutorial misconduct to similar statements made by police officers based on those reasons highlighted by the dissent. The dissent's final critique involves our approval and assessment of the trial court's curative instructions. The dissent questions whether the erroneous admission of prejudicial opinion evidence is susceptible to cure via trial court instruction. Id. at 11. It alternatively contends that the trial court's specific instruction here "in no way addressed, let alone cured, the clear prejudice that attended the detectives' assertions regarding guilt and lack of credibility." Id. at 12. Although limited, our caselaw appears to directly contradict this position. See *Commonwealth v. Ramos*, 231 A.3d 955 (Pa. Super. 2020) (concluding jury was presumed to follow trial court's instruction to disregard unsolicited remark of detective commenting on credibility of complainant). The dissent also fails to recognize that in the context of vouching claims, which it finds analogous to the circumstances herein, curative instructions have also been utilized to ameliorate prejudice. See e.g., *Commonwealth v. Hernandez*, 230 A.3d 480 (Pa. Super. 2020) (holding trial court's issuance of curative instruction removed any danger of prejudice from alleged prosecutorial misconduct whereby prosecutor vouched for credibility of police officer in closing argument); *Commonwealth v. Collins*, 70 A.3d 1245, 1254 (Pa. Super. 2013) (finding trial court's curative instruction

sufficient to cure prejudice regarding prosecutor's remark during closing argument stating that a witness had "told the truth"). As for the sufficiency of the trial court's instruction, notably absent from the dissent's critique is an acknowledgment that any purportedly lackluster instruction was the direct result of Malcolm's failure to request a specific instruction or clearly object to the statements now being contested. Notwithstanding the foregoing, we believe the instruction sufficiently informed the jury of its role in assessing witness credibility and the value, or lack thereof, that should be placed on the detectives' statements. [J-10-2025] - 21 limine.¹⁴ A pretrial ruling regarding the admissibility of information contained in a police interview allows the trial court to shield the jury from harmful information before it is presented and avoid last-minute attempts to cure any negative effects mid-trial. Where the parties do not file pretrial motions, we find it necessary to remind defense counsel that it is of the utmost importance to lodge a specific and timely objection. We are confident that where this occurs, our trial courts are more than capable of assessing contested statements under our existing rules of evidence. We agree with both parties that redactions and curative instructions should also be utilized, but as these issues will likely need to be assessed on a case-by-case basis, we decline to implement any specific procedures at this time. VI. Conclusion We decline to adopt the Superior Court's decision in Kitchen and instead hold that our existing rules of evidence regarding relevancy should continue to be applied in determining the admissibility of accusatory statements made by police in interrogation videos. We therefore affirm the Superior Court's order denying Malcolm's request for a new trial. Justice Brobson joins the opinion announcing the judgment of the Court. Justice McCaffery files a concurring opinion in which Justice Dougherty joins. Justice Wecht files a dissenting opinion in which Chief Justice Todd and Justice Donohue join. ¹⁴ This was the manner in which the statements in Kitchen were challenged. Though we do not adopt the substances of Kitchen, it is clear from that case that proceeding via a motion in limine provided both the trial court and the intermediate court with more robust arguments in considering the admissibility of the contested statements. [J-10-2025] - 22

PER CURIAM.

[J-10-2025] [OAJC: Mundy, J.]

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 46 EAP 2024

Appellee : Appeal from the Order of the : Superior Court at No. 954 EDA : 2022 entered on November 14, v. : 2023, affirming the Judgment of : Sentence of the Philadelphia County : Court of Common Pleas at No. CP- RASHEED MALCOLM, : 51-CR-0001309-2020 entered on : March 28, 2022. Appellant : : ARGUED: March 5, 2025

CONCURRING OPINION

JUSTICE McCAFFERY DECIDED: February 18, 2026 Today, the Opinion Announcing the Judgment of the Court (OAJC) concludes that no new categorical rule is necessary to address the

problems created by the admission of out-of-court statements opining on the credibility of another person's out-of-court statements. I agree, but that is because it is clear under our existing Rules of Evidence that the trial court erred in admitting the out-of-court opinions of the detectives in this case. Implicit in the OAJC is the suggestion that improperly admitted lay opinion testimony regarding the credibility of a defendant can be alleviated by a curative or cautionary instruction. I disagree with this contention. I see no circumstances under which such testimony should be considered. Therefore, it should have been excluded. However, under the limited circumstances of this case, I agree that its admission did not constitute reversible error and would not have changed the jury verdict. The crux of the case before us is the video evidence shown to the jury and the corresponding identification of the defendant portrayed in it by Officer Lamana. Accordingly, I concur in the result only. Malcolm's issue is premised upon Rule 403 of our Rules of Evidence.¹ See Appellant's Brief at 20. Rule 403 provides that a court may exclude otherwise relevant evidence if the probative value of the evidence is outweighed by the danger that the evidence causes unfair prejudice, thereby allowing the jury's decision to be based on something other than the evidence. See Pa.R.E. 403 and Comment. Thus, any analysis of the issue must, at the very least, address: (1) the relevance of the evidence at issue; and (2) whether it poses a danger that the jury will decide the case on an improper basis. Only once we have identified these two concerns can we possibly begin to weigh them against each other. Malcolm objects to the statements of Detectives Burns and Harkins in his recorded interrogation, not the admission of his own statements. See Appellant's Brief at 21. In particular, Malcolm objects to the 13 statements detailed by the OAJC at page 8. At the outset, we must ask what, if any, relevance these out-of-court statements possess. The OAJC opines the detectives' statements are "relevant to determining whether Malcolm was guilty ... and to assess[ing] the credibility of not only Malcolm, but also the detectives." OAJC at 17. Simply stated, the OAJC identifies three distinct bases for relevance: (1) Malcolm's guilt; (2) Malcolm's credibility; and (3) the detectives' credibility. I will address these in reverse order. It is immediately obvious that Detective Harkins's credibility is not itself relevant to any issue at trial, because Detective Harkins did not testify at the trial. Detective Burns's credibility is at least arguably relevant, as he 1 Pa.R.E. 403 provides: "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." [J-10-2025] [OAJC: Mundy, J.] - 2 did testify. However, the OAJC makes no attempt to describe how the thirteen challenged statements affect Detective Burns's credibility. This failure is not surprising, given Detective Burns's concession that he sometimes misleads suspects to gain incriminating statements from them. See N.T., 3/24/2022, at 116. The challenged statements, grouped together, reflect Detective Burns's disbelief in Malcolm's answers to his questions. The OAJC makes no attempt to explain how the detective's beliefs about Malcolm's credibility are relevant to the jury's assessment of the detective's credibility. Nor can I conceive of any logical link between the detectives' opinions on

Malcolm's credibility and the jury's duty to assess Detective Burns's credibility. To the extent that the challenged statements are relevant to Detective Burns's credibility, then, their relevance is at most de minimis. A similar analysis applies to the OAJC's second proffered basis for relevance: Malcolm's credibility. The OAJC once again fails to connect the dots in its analysis. There is no legal basis under our precedent for the relevance of a witness's opinion about the credibility of another witness. Indeed, our courts have consistently prohibited such opinions, even when based upon scientific expertise. See *Commonwealth v. Alicia*, 92 A.3d 753 (Pa. 2014); *Commonwealth v. Yockey*, 158 A.3d 1246, 1255 (Pa. Super. 2017). Here, there is no allegation Detective Burns's opinion is grounded in any sort of expertise. Even worse, there is no assertion that the detective's opinion is grounded in personal knowledge. See Pa.R.E. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). To the extent the detective believed Malcolm was the perpetrator, such belief was grounded not in the detective's personal knowledge, but in statements made by others, primarily Officer Lamana. [J-10-2025] [OAJC: Mundy, J.] - 3 Thus, the detectives should have been precluded from offering such opinions from the witness stand. The OAJC fails to explain why testimony that is not allowed under oath in court is nevertheless admissible as substantively relevant when uttered out-of-court. One of the most fundamental tenets of Pennsylvania law is that: The veracity of a particular witness is a question which must be answered in reliance on the ordinary experiences of life, common knowledge of the natural tendencies of human nature, and observations of the character and demeanor of the witness. As the phenomenon of lying is within the ordinary capacity of jurors to assess, the question of a witness's credibility is reserved exclusively for the jury. *Alicia*, 92 A.3d at 761 (citations and brackets omitted; emphasis added). "The jury still have duties to perform. Inferences drawn from the ordinary affairs of life ought not to be drawn for them, and turned over under oath from the witness stand." *Commonwealth v. Seese*, 517 A.2d 920, 921 (Pa. 1986) (citation omitted). "[W]here the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible." *Auberle v. City of McKeesport*, 36 A. 212, 212 (Pa. 1897) (emphasis added). Under existing precedent, the detectives' statements have no probative value as to Malcolm's credibility. As the Supreme Court of Colorado explained, a witness's beliefs about the veracity of another person's statements are of little to no relevance: [A]sking a witness to comment on the veracity of another witness offers little or no probative value. This kind of questioning seeks information beyond the witness's competence. And, where the witness expresses a belief as to the veracity of another witness, that statement of belief is simply irrelevant; it does nothing to make the inference that another witness lied any more or less probable. *Liggett v. People*, 135 P.3d 725, 731 (Colo. 2006) (internal citations omitted). This leaves us with the OAJC's final assertion of relevance: Malcolm's guilt. Much as set out above, the OAJC does not explain how an out-of-court statement of lay opinion, [J-10-2025] [OAJC: Mundy, J.] - 4 not based on personal knowledge, is

admissible, let alone relevant. I cannot agree with the OAJC's conclusion that the detectives' statements, some of which Detective Burns admitted were inaccurate, are relevant to the question of Malcolm's guilt. At best, the detectives' out-of-court statements have de minimis relevance to the issues at trial. I thus turn to whether these statements create a risk the jury could decide the case on an improper basis. I conclude that statements — especially out-of-court statements made by people who appear to be neutral third parties — which opine on the credibility of out-of-court statements made by another person pose significant dangers that are well-recognized in Pennsylvania law. Our courts have consistently rejected the use of expert opinion to bolster or attack credibility, noting that such opinions create a risk that the jury will abandon its exclusive role as judges of credibility in deference to the opinion testimony. See *Alicia*, 92 A.3d at 761 (“expert testimony on the matter would infringe upon the jury’s ability and responsibility to assess the credibility of the child witness”); *Commonwealth v. Spence*, 627 A.2d 1176, 1182 (Pa. 1993) (“Whether the expert’s opinion is offered to attack or enhance, it assumes the same impact[—]an unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess.” (internal quotation marks and citation omitted)); *Commonwealth v. O’Searo*, 352 A.2d 30, 32 (Pa. 1976) (“To permit psychological testimony for th[e] purpose of determining the credibility of a witness] would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such a judgment.”). Here, the detectives were not qualified as experts on issues impacting credibility — they were merely expressing their own lay opinions on the subject.

[J-10-2025] [OAJC: Mundy, J.] - 5 While this Court has not recently addressed the relevance of lay opinion testimony regarding the credibility of another person, our precedent from over 100 years ago repeatedly devalued such testimony. See *Auberle*, supra; see also *Graham v. Pa. Co.*, 21 A. 151, 153 (Pa. 1891). Further, our Superior Court has addressed this precise issue in two precedential opinions in the last decade. In *McClure*, the panel cited to this Court’s decisions prohibiting expert testimony to support its conclusion that a detective’s opinion on the defendant’s credibility was inadmissible: Although [*Commonwealth v. Crawford*, 718 A.2d 768 (Pa. 1998)] and *Seese* involved experts inappropriately offering opinions on credibility, the same principle can be applied to a police officer whose testimony a jury could find an unwarranted appearance of authority in the subject of credibility, something ordinary jurors are able to assess. As the Commonwealth acknowledged, the fact [the detective] charged [the a]ppellant with the crimes suggests that he did not believe [the a]ppellant. However, allowing him to express opinions that neither he nor the CYS employee believed [the a]ppellant is not only irrelevant but also prejudicial. *Commonwealth v. McClure*, 144 A.3d 970, 977 (Pa. Super. 2016) (citations, internal quotation marks, and footnote omitted). For similar reasons, a later panel of the Superior Court concluded that questions seeking a witness’s opinion as to whether another person was lying “are generally prohibited in Pennsylvania.” *Yockey*, 158 A.3d at 1256. The Supreme Court of Colorado identified yet another problem caused by allowing a witness to opine that another person is lying:

[T]his form of questioning ignores alternative explanations for evidentiary discrepancies and conflicts that do not involve lying. There may be differences in opinion, lapses or inaccuracies in memory, differences in perception, a misunderstanding, or any other number of wholly innocent explanations for discrepancies between one witness's testimony and another's. ... [W]hile it is appropriate to juxtapose conflicting accounts of the facts and ask the fact-finder to resolve the dispute, it is not appropriate to compound that task by implying that the fact-finder must determine one or more of the witnesses is lying. This effectively distorts the government's burden of proof. In the criminal setting, this is particularly problematic as the fact-finder may assume that an acquittal turns upon finding that the other witness or witnesses lied. *Liggett*, 135 P.3d at 731-732 (citations omitted). Here, the opinions on Malcolm's credibility were not uttered by an expert witness. Thus, the danger of an unwarranted appearance of authority is admittedly lessened. But the danger of the jury abdicating its function as the sole assessor of credibility is not eliminated, especially when the declarant may be seen as a neutral third party, such as (but not limited to) a police officer. This danger is compounded by several factors addressed above. For example, while neither detective was proffered as an expert witness on credibility, it is also true that neither detective was under oath at the time they uttered their opinions. Further, Detective Burns conceded some of his statements in the recording were misleading. Moreover, Detective Harkins did not testify at trial and thus was not available for cross-examination regarding his out-of-court statements. These circumstances enhance the risk that his out-of-court statements will cause unfair prejudice. When examined carefully, it is apparent the unfair prejudice to Malcolm outweighed the de minimis probative value of these unsworn lay opinions on Malcolm's credibility. I agree fully with the analysis in *McClure* — while it is clear that the detectives did not believe Malcolm's account in light of the subsequently filed charges, their (admittedly not-always-truthful) unsworn opinions provide no probative value to balance against the significant danger of unfair prejudice. Thus, the admission of these unsworn statements was error. I acknowledge that Malcolm's statements in the video may be difficult to parse in the absence of the detectives' questions. Had Malcolm sought to present the video to the jury (and assuming the video was otherwise admissible), the Commonwealth would [J-10-2025] [OAJC: Mundy, J.] - 6 have had grounds to seek to present other parts of the video to the jury. 2 See Pa.R.E. 106. However, these issues are hypothetical under the facts of this case. In sum, despite my disagreement with the OAJC about the admissibility and relevance of the detectives' statements, I believe the jury's verdict would not have been different in any event.³ The crux of the factual dispute before the jury was the identity of the shooter. The primary component of this dispute was whether Malcolm was the man in the video recordings observed leaving the scene of the crime. The jury was able to observe Officer Lamana and judge his credibility. Officer Lamana identified Malcolm in the video and was cross-examined. The jury was able to watch the videos themselves and perform their own assessment of whether Officer Lamana's identification of Malcolm was credible. The trial court instructed the jury that it was their responsibility to evaluate

the video and determine what it showed. See N.T., 3/22/2022 at 105; 3/25/2022 at 166 (“During the trial you saw a video in this matter. Sometimes there was narration by the detective in this case. What you see in the video. You are the judge of the facts, so you make that determination.”). Under these circumstances, I conclude that the erroneous admission of the detectives’ opinions on Malcolm’s credibility did not affect the jury’s verdict. As such, I would affirm the judgment of sentence, albeit on different grounds from the OAJC. Justice Dougherty joins this concurring opinion. 2 Ordinarily, Malcolm would have to testify to present the video to the jury. I present this simplified hypothetical to point out the flaw in the Commonwealth’s argument. Relatedly, I am at a loss to understand why a prosecutor would choose to introduce a defendant’s exculpatory video statement where he denies involvement in a particular crime. Normally, a prosecutor would want such denials to come from the defendant, on the witness stand subject to cross-examination. 3 The Commonwealth argues in its brief that “[t]he admission of the unredacted interrogation was harmless in light of the curative instructions and the untainted identification evidence.” Commonwealth’s Brief at 12. [J-10-2025] [OAJC: Mundy, J.] - 8

WECHT, DAVID N, dissenting.

[J-10-2025] [OAJC: Mundy, J.]

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 46 EAP 2024

Appellee : Appeal from the Order of the : Superior Court at No. 954 EDA : 2022 entered on November 14, v. : 2023, affirming the Judgment of : Sentence of the Philadelphia County : Court of Common Pleas at No. CP- RASHEED MALCOLM, : 51-CR-0001309-2020 entered on : March 28, 2022. Appellant : : ARGUED: March 5, 2025

DISSENTING OPINION

JUSTICE WECHT DECIDED: February 18, 2026 On December 22, 2018, Kevin Harris was shot to death outside of a Philadelphia bar. The shooting was captured on video by a nearby surveillance camera. Philadelphia Police Detective James Burns was assigned to the case. He isolated an image of the shooter from the surveillance video and broadcasted the image to other on-duty police officers as part of a patrol alert. Officer Robert Lamanna saw the image and believed that the individual in the picture was Rasheed Malcolm. Detective Burns brought Malcolm in for questioning. Detective Burns and Detective John Harkins jointly interrogated Malcolm. The Commonwealth later played portions of the video of that interrogation for the jury at Malcolm’s murder trial. In addition to the interrogation video, the Commonwealth called Officer Lamanna as a witness, who, based upon his prior interactions with Malcolm, was able to identify Malcolm as the individual in the surveillance video. The jury found Malcolm guilty, and the Superior Court affirmed. Presently, Malcolm challenges the trial court’s admission of portions of the interrogation video, during which the jury heard numerous statements made by Detectives Burns and Harkins expressing their personal feelings about Malcolm’s answers to their questions.

The Opinion Announcing the Judgment of the Court (OAJC) rejects Malcolm's arguments and affirms the judgment of sentence. I respectfully dissent. The statements and opinions expressed by the detectives were not relevant or probative of any fact or issue at trial. Moreover, even if there were some marginal probative value, it was outweighed by the danger of unfair prejudice to Malcolm. In the interrogation video, the two detectives are seen facing Malcolm, asking questions, and making accusatory statements and assertions in order to elicit incriminating responses from Malcolm. Thirteen of those statements are expressions of the detectives' personal opinions and beliefs about the evidence against Malcolm, and about Malcolm's guilt and veracity.¹ For example, the detectives asserted that the surveillance video captured Malcolm as the shooter and that Malcolm was at the location of the shooting at that time. The detectives insisted that they did not have "the wrong guy," that Malcolm was guilty, that, despite Malcolm's assertions to the contrary, they knew that Malcolm was present at the scene on the night of the shooting, that Malcolm's assertions were absurd, suspicious, and inconsistent, and that they believed Malcolm to be guilty of the shooting. The detectives' repeated statements of this nature demonstrated over and over that they believed Malcolm to be guilty and a liar. Worse, their verbal tactics suggested to the jury that there existed other, inculpatory evidence that was not presented to the jury by the Commonwealth. All throughout the interrogation, Malcolm steadfastly asserted his innocence. Although Malcolm never confessed, the 1 See OAJC at 8-9. [J-10-2025] [OAJC: Mundy, J.] - 2 detectives continuously overrode his denials of involvement by adamantly professing that Malcolm was, in fact, guilty, and was not believable. The OAJC is correct about one thing. Our Rules of Evidence regarding the admission of relevant, probative evidence that is not unfairly prejudicial, as currently written, govern the admission of out-of-court statements by individuals opining about the credibility and guilt of the defendant. No new rule is necessary. Thus, in this respect, I agree not only with the OAJC,² but with the Concurrence as well.³ However, faithful application of those Rules of Evidence compels a result contrary to that reached by the OAJC. Those rules plainly prohibit the Commonwealth from playing for the jury the unredacted interrogation video of Malcolm that was infused with the detectives' opinions about Malcolm's guilt and veracity. It was error for the trial court to conclude otherwise. Law enforcement officers' opinions about the quality, nature, or credibility of the evidence against a defendant are not relevant or probative at a criminal trial. They also carry a likelihood of unfair prejudice. They suggest to the jury an evidentiary basis for the detectives' opinions that was unknown to the jury, and suggest that the jury likewise should view the evidence in the Commonwealth's favor. Any analysis must begin by addressing the relevance of the detectives' on-video statements and accusations. "All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible."⁴ Relevant evidence is that which "has any tendency to make a fact more or less probable than it would be without the evidence," where "the fact is of consequence in determining the action."⁵ The 2 OAJC at 17. 3 Concurring Op. at 1. 4 Pa.R.E. 402. 5 Pa.R.E. 401. [J-10-2025] [OAJC: Mundy, J.] - 3 OAJC holds that the

thirteen statements are relevant to the assessment of Malcom's guilt and credibility.⁶ I am not persuaded.⁷ The interrogation video does nothing to aid the jury in assessing Malcolm's credibility or guilt. It is the jury's role to assess the evidence against a criminal defendant and to determine whether the Commonwealth met its burden of proving guilt beyond a reasonable doubt. It is also exclusively the jury's function to determine issues of credibility.⁸ As the Concurring Opinion observes, it is a fundamental tenet of the law that the veracity of a witness is resolved through reliance upon ordinary life experiences and common knowledge of human tendencies.⁹ "As the phenomenon of lying is within the ordinary capacity of jurors to assess, the question of a witness's credibility is reserved exclusively for the jury."¹⁰ The opinions of law enforcement officers, who are lay fact witnesses, about Malcolm's guilt and veracity are not relevant to the jury's assessment of Malcolm's guilt and veracity. To allow those opinions to influence the jury's determination is to undermine and usurp the jury's exclusive authority to make credibility decisions. But, let us assume, *arguendo*, that the detectives' statements had even some marginal relevance. Our analysis would not be at an end. Under Rule 403, relevant evidence must be excluded "if its probative value is outweighed by a danger of," *inter alia*, 6 OAJC at 17. ⁷ Accord, Concurring Op. at 2-5. ⁸ *Commonwealth v. Whack*, 393 A.2d 417, 419 (Pa. 1978) ("It is a basic tenet of our system of jurisprudence that issues of credibility are properly left to the trier of fact for resolution."). ⁹ Concurring Op. at 4; *Commonwealth v. Alicia*, 92 A.3d 753, 761 (Pa. 2014) ("[T]he veracity of a particular witness is a question which must be answered in reliance on the ordinary experiences of life, common knowledge of the natural tendencies of human nature, and observations of the character and demeanor of the witness."). ¹⁰ *Alicia*, 92 A.3d at 761. [J-10-2025] [OAJC: Mundy, J.] - 4 "unfair prejudice."¹¹ This test would require us to identify the probative value of the interrogation video and then to balance that value against the danger of unfair prejudice. The detectives' statements had no probative value. The challenged statements presented the jury with nothing but the detectives' repeated assertions about Malcolm's guilt and deceit. These statements amounted to nothing but irrelevant and repeated assertions of the interrogating detectives' purported beliefs. Indeed, the sole purpose of playing the interrogation video was to present the jury with the opinions that the interrogating detectives expressed concerning Malcolm's denials of their accusations. That is not probative of Malcolm's guilt, nor of any other issue at trial. Moreover, the detectives' statements unnecessarily and unfairly prejudiced Malcolm's trial. I do not share the Concurring Opinion's belief that jurors would view interrogating detectives as neutral third parties.¹² Police officers play a critical role in criminal trials. During *voire dire*, each juror is asked whether he or she would believe a police officer solely because he or she is a police officer. This question evidences the fact that society naturally views police officers differently than other persons who testify at a criminal trial. Moreover, the lead detective or arresting police officer sits at counsel's table with the prosecutor during a criminal trial. There is, of course, nothing improper or unethical about that. But it cannot reasonably be said that jurors somehow would believe that law enforcement officers are merely

disinterested third parties instead of part of the governmental body seeking to convict the defendant. The simple fact is that the police officers included in the case are an arm of the prosecution. They must be treated as such for purposes of the instant legal analysis. Here, the purpose of Detectives Burns and Harkins using these interrogation techniques was to wear down a suspect and to elicit 11 Pa.R.E. 403. 12 Concurring Op. at 5. [J-10-2025] [OAJC: Mundy, J.] - 5 incriminating statements that could be used to secure a conviction, all to the benefit of, and on behalf of, the Commonwealth. Their statements include accusations, assertions, and opinions that are not based upon facts that were made known to the jury. They are made with certainty and finality, leaving no room for persuasive denials by Malcolm. By design, the detectives acted with an appearance of authority and superior knowledge of the evidence against Malcolm, even though there was a substantial likelihood that their assertions were deliberately false or deceptive. Of course, an interrogating police officer may use coercive techniques, such as bluffing or lying to the suspect about evidence, or playing upon a suspect's religious or moral beliefs, in order to induce the suspect into making a confession. Detective Burns testified that he often misleads suspects, hoping to obtain a confession. Further, Malcolm had no opportunity to cross-examine Detective Harkins, and neither detective was under oath during the interrogation. The firmness and confidence with which these detectives made their accusations, disbelieved Malcolm, and opined about guilt and credibility, all of which was done while carrying a significant likelihood of falsity or deception, was highly and unfairly prejudicial. Let us for a moment assume that the Concurring Opinion is correct that the detectives could be viewed as neutral third parties, as opposed to interested state agents. Their statements still would be highly and unduly prejudicial. The detectives were not experts. Nor did they offer anything other than their own personal opinions. Not only is there is a likelihood that the jury would consider the detectives' opinions as substantive evidence against Malcolm, but the likelihood of unfair prejudice was even more enhanced because the interrogation video suggested to the jury that the detectives had access to secret evidence, beyond what the Commonwealth presented at trial, that demonstrated [J-10-2025] [OAJC: Mundy, J.] - 6 Malcolm's guilt and lack of credibility to a sufficient degree to create certainty in the detectives. The result is unfair prejudice. Under Rule 403, the risk of unfair prejudice resulting from the opinions of the detectives, with their appearance of authority and apparent special knowledge of the evidence against Malcolm, outweighed whatever probative value these statements may have had. This is particularly so in a case where identification of the perpetrator was a challenge for the jury because Malcolm denied any participation and because the surveillance video was not clear. During deliberations, the jury requested to view a side- by-side comparison of the image extracted from the surveillance video and Malcolm. Allowing the introduction of irrelevant and prejudicial opinion evidence by the interrogating detectives, as they weighed in on whether it was Malcolm who appeared in the surveillance video, and as they accused Malcolm of lying when he said that it was not him, created unfair prejudice that plainly outweighed the probative value of the evidence. To permit the jury to consider irrelevant evidence

that has no probative value and is highly prejudicial is to create a high likelihood that the jury will defer in its assessment of guilt and credibility to nonfactual, untested, and possibly deceptive opinions of law enforcement officers. Because it is exclusively the province of the jury to evaluate the evidence of guilt and the credibility of witnesses, the trial court has no discretion to permit a detective's opinion evidence to influence such matters. Given that settled law precludes a witness from offering an opinion on the credibility of another witness,¹³ there is no basis for a trial court to permit the introduction of such opinions through an interrogation video. There is no material difference between permitting a detective to take the witness stand and opine upon the veracity and guilt of the defendant, and playing a video recording of the detective offering the same opinions. Both instances invade the province of the jury, ¹³ See, e.g., *Alicia*, 92 A.3d at 761; Concurring Op. at 3-4. [J-10-2025] [OAJC: Mundy, J.] - 7 which is the exclusive factfinder and arbiter of credibility. The trial court admitted these statements in error, and that error was an abuse of the court's discretion. This Court has held that accusations made during an interrogation of the defendant, when introduced as evidence at the criminal trial, were prejudicial, deprived the defendant of a fair trial, and amounted to a denial of due process. In *Commonwealth v. Bolish*, the Commonwealth introduced a recording of an interrogation that was conducted by the district attorney, who several times accused the defendant of lying and who opined that the defendant was guilty.¹⁴ We considered the interrogation comments to be "wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice."¹⁵ We held that this was so prejudicial as to warrant a new trial. In the context of claims of prosecutorial misconduct, this Court has held that a prosecutor may not offer his or her personal opinion on the guilt of the accused. ¹⁶ Nor may a prosecutor express a personal belief or opinion regarding the credibility of a witness.¹⁷ A prosecutor may not do so directly or through the testimony of a witness.¹⁸ ¹⁴ 113 A.2d 464, 477 (Pa. 1955). ¹⁵ Id. (quoting *Viereck v. United States*, 318 U.S. 236, 247 (1943)). ¹⁶ *Commonwealth v. D'Amato*, 526 A.2d 300, 309 (Pa. 1987) ("[A] prosecutor may not offer his personal opinion as to the guilt of the accused either in argument or in testimony from the witness stand."); *Commonwealth v. Kuebler*, 399 A.2d 116, 118 (Pa. 1979) ("Our cases leave no doubt that prosecuting attorneys of this Commonwealth may not inject highly prejudicial personal opinion" of a defendant's credibility "into evidence, thereby clearly and improperly intruding upon the jury's exclusive function of evaluating the credibility of witnesses." (internal quotations omitted)). ¹⁷ *D'Amato*, 526 A.2d at 309. ¹⁸ *Commonwealth v. DiNicola*, 468 A.2d 1078, 1081 (Pa. 1983) ("[A] prosecutor may not offer his personal opinion as to the guilt of the accused either in argument or in testimony from the witness stand."). [J-10-2025] [OAJC: Mundy, J.] - 8 This prohibition exists in our law because of the undeniably prejudicial impact that such an authority figure's personal opinions will have on the jury and on jurors' ability to consider the evidence. In *Commonwealth v. Maloney*, we stressed that a district attorney's personal opinion prejudicially engrafted that attorney's "experience and judgment [onto] the issue of guilt[.]"¹⁹ Because the jury was required to make decisions about credibility,

the district attorney's opinion about guilt "necessarily reflected his opinion as to credibility."²⁰ Because this opinion could have affected the jury's deliberations, we found it so prejudicial as to warrant a new trial. In *Commonwealth v. DiNicola*, the Commonwealth elicited testimony from a police officer recounting a conversation between the defendant and a prosecutor. The police officer indicated that, in response to a question by the defendant, the prosecutor indicated his personal belief that the defendant was guilty. We held that the prosecutor's statement, introduced through the police officer, was irrelevant opinion evidence. A prosecutor cannot offer opinion testimony about the guilt of the accused, even if it comes into evidence through the testimony of a witness.²¹ "Damage that may be done by an impermissible argument is compounded, not ameliorated, when a prosecutor's opinion as to guilt comes in as testimony[.]"²² When this occurs, jurors must then "decide the weight of this evidence as compared with other evidence in the case."²³ Our cases make clear that there is no meaningful difference between opinions regarding a suspect's guilt or 19 365 A.2d 1237, 1243 (Pa. 1976). 20 *Id.* 21 *DiNicola*, 468 A.2d at 1081-82 ("[I]t would be anomalous to hold that the prosecutor's opinion as to the guilt of the accused may be legitimized if it comes in as testimony, and is, thus, evidence, rather than argument.").

22 *Id.* at 1082.

23 *Id.* [J-10-2025] [OAJC: Mundy, J.] - 9 veracity that is presented to the jury through argument and that which the jurors receive through evidence. Nor is there any difference in the prejudicial impact when that opinion comes from a prosecutor or from another law enforcement officer. Indeed, situations where the jury is permitted to hear a police detective's opinion about the defendant's guilt or veracity carry the same risk of prejudicing the defendant. It is exclusively the function of the jury to consider the evidence and to decide whether to believe the Commonwealth's version of events or the defendant's.²⁴ Just as a prosecutor's personal opinion about guilt or credibility is highly prejudicial, a police detective's opinion about the same likewise intrudes upon the jury's exclusive functions. In both scenarios, the risk that the jury will afford significant weight to those opinions is impermissibly high. There is an undeniable danger that both a prosecutor and a police officer will be viewed by the jury as carrying an unwarranted appearance of authority regarding not only the defendant's credibility but also to the strength of the evidence against the defendant. Whether through the prosecutor or through a police officer, the jury will hear extraneous, irrelevant, and prejudicial personal opinions.²⁵ 24 *Commonwealth v. Crawford*, 718 A.2d 768, 772 (Pa. 1998) ("The determination of the credibility of a witness is within the exclusive province of the jury."); *Whack*, 393 A.2d at 419. 25 The OAJC insists that cases arising in the context of prosecutorial misconduct cannot be extended to statements made by police personnel. OAJC at 17 & 20-21, n.13. In evaluating the prejudicial impact of opinion evidence upon the jury, it matters not whether the evidence comes in through a prosecutor or a police detective. In either scenario, the personal opinions intrude upon the province of the jury and create the same danger of unfair prejudice. Our recognition of this kind of prejudice in

prosecutorial misconduct cases supports an acknowledgement that it is irrelevant whether it is a prosecutor or an interrogating police detective who is making the prejudicial accusations. The prejudice that was apparent in the interrogation video in Bolish did not turn upon the profession of the interrogator, but upon the prejudicial impact of the accusations contained therein. Bolish, 113 A.3d at 477 (“We have reread several times the district attorney’s interrogations of the defendant and considering them in their entirety we are convinced that the district (continued...) [J-10-2025] [OAJC: Mundy, J.] - 10 We entrust jurors every day across the Commonwealth to assess evidence and credibility. We diminish that trust, and we undermine jurors’ role, by permitting them to consider inflammatory, irrelevant opinion evidence. Whether it was the detective’s reference to the prosecutor’s opinion in DiNicola or the prosecutor’s presentation of the detectives’ opinions in this case, the jury is being asked to hear and consider the irrelevant personal opinions of others. Because the decision to believe the Commonwealth’s version of events, or that of the defendants, is exclusively for the jury,²⁶ there are no circumstances—including video evidence—in which such opinion evidence is admissible.²⁷ I question whether the erroneous admission of such opinion evidence is capable of being ameliorated through the administration of curative instructions.²⁸ Even if an instruction somehow could mitigate the prejudice of this type of evidence, the trial court’s “lackluster” instructions in this case did no such thing.²⁹ They were not even constructed to direct the jury how it should receive and consider the interrogation video. In response attorney, in his overzeal, unintentionally went too far, and that the admission of these interrogatories or statements deprived defendant of a fair trial and amounted to a denial of Due Process.”). ²⁶ Kuebler, 399 A.2d at 118. ²⁷ Accord, Concurring Op. at 1. ²⁸ Although we generally hold that a jury is presumed to follow a trial court’s instruction to disregard prejudicial remarks, see OAJC at 21, n. 13, limiting instructions are not always effective in curing jurors’ exposure to unfairly prejudicial evidence. See, e.g., *Bruton v. United States*, 391 U.S. 123, 135-36 (1968) (acknowledging that there are some contexts in which the risk that the jury will not or cannot follow instructions is too great to be ignored); Mitchell J. Frank & Dr. Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237, 248 (2006) (“Recent social science research has demonstrated empirically that juror comprehension of instructions is appallingly low.” (internal citation omitted)). ²⁹ OAJC at 21, n. 13. [J-10-2025] [OAJC: Mundy, J.] - 11 to Detective Burns’ false statement in the interrogation video that multiple “people” had identified Malcolm from the surveillance video, the trial court instructed the jury that there was only one witness (Officer Lamanna) who had identified Malcolm from the screenshot taken from the surveillance video, and that the jurors should disregard Detective Burns’ reference to “people.”³⁰ This instruction was not directed at the detectives’ assertions regarding their opinions of the evidence or of Malcolm’s credibility, nor was it an attempt to limit or explain that evidence. The trial court instead was correcting Detective Burns’ false assertion that multiple people had identified Malcolm from the surveillance video. This instruction in no way addressed, let alone

cured, the clear prejudice that attended the detectives' assertions regarding guilt and lack of credibility. The OAJC asserts that it "logically follows" from this instruction that the jury was not to consider any opinions or accusations by Detective Burns or Detective Harkins that Malcolm was the individual in the surveillance video.³¹ Even if true, "logically follows" is not the same as the clear direction necessary to remove the prejudice. Inference is not the same as instruction. Moreover, the OAJC's assertion is in any event incorrect. The trial court instructed the jury to consider only Officer Lamanna's testimony identifying Malcolm from the surveillance video, instead of the detectives' assertions in the interrogation video to the effect that "people" had made this identification. It does not logically follow from this limited instruction that the jury was told to disregard every accusatory statement or opinion voiced by Detectives Burns and Harkins in the interrogation video. It is not even in the realm of logic to extend the limited instruction to such a broad directive. To do so is to construct a post-hoc revision of what actually occurred on the record. Detectives Burns and Harkins emphatically and repeatedly ³⁰ OAJC at 5 (citing N.T., 3/24/2022, at 29-31). ³¹ OAJC at 19. [J-10-2025] [OAJC: Mundy, J.] - 12 accused Malcolm of being deceitful and of being guilty. The detectives' statements suggested to the jury that there was other evidence implicating Malcolm beyond Officer Lamanna's identification, evidence that the jury was led to believe was so convincing that the detectives believed it over Malcolm's assertions of innocence. The prejudice resulting from these statements could not have been minimized by an instruction that did not even mention these statements, let alone address them in any substantive way. When Detective Burns testified about the surveillance video, the trial court instructed the jurors to recall that they were the fact-finders, and that what Detective Burns believed that he observed in the surveillance video was not determinative. The OAJC conceives this instruction as mitigating the prejudice caused by the interrogation video.³² This instruction was limited by its very terms to Detective Burns' in-court testimony. It was in no way directed at the accusations that the detectives made in the interrogation video. Rather, the trial court was telling the jurors that they had to determine for themselves what the surveillance video depicted and that they did not need to defer to Detective Burns' testimony as to what he observed. The OAJC also relies upon the trial court's final charge to the jury, in which the trial court instructed the jury that it had to consider and weigh the testimony of each witness and give that testimony such weight and importance "as in your judgment [it] is fairly entitled to receive[.]"³³ The difficulty with this instruction is that the detectives' interrogation accusations were not presented through the testimony of witnesses, as that plainly would not be permitted.³⁴ Rather, the same opinions and accusations that would have been inadmissible had they been offered through a witness came into evidence ³² OAJC at 20 (citing N.T., 3/24/2022, 138). ³³ Id. (citing N.T., 3/25/2022, 137-38). ³⁴ Alicia, 92 A.3d at 761. [J-10-2025] [OAJC: Mundy, J.] - 13 inside the Trojan Horse of the interrogation video. The trial court's instruction regarding witnesses had no connection to the detectives' statements in the interrogation video. It is unreasonable and erroneous to determine conclusively that the jurors somehow understood that this instruction about testimony also was

meant to govern how they interpreted the untested accusations and opinion presented through video evidence. The OAJC's attempts to remold these instructions into something they are not, and were not meant to be, is unavailing and unpersuasive.³⁵ The tactics employed during interrogation, such as repeatedly telling the suspect that the investigators do not believe the suspect's assertions, certainly can be effective interrogation techniques. But that does not make them evidence fit for a criminal trial. These tactics may convince a defendant that the detectives believe what they are saying. They also may convince the jury that the detectives believe what they are saying. Like Malcolm, the jurors were able to see for themselves the confidence with which the detectives spoke and the conviction in their accusations and opinions. An instruction reminding the jurors that they were the final arbiter of witness testimony would do nothing to confront the accusations of deceit and guilt that were presented to the jury as evidence, nor would it inform the jurors how they should receive that information. And instruction provided in connection with other evidence did not apply by its terms to the detectives' accusations and opinions. The trial court's error in this case may be harmless if there is no "reasonable possibility that an error might have contributed to the conviction[.]"³⁶ An error is harmless if the record demonstrates any of the following: 35 The OAJC's attempts in this regard do not become availing or more persuasive by dint of repetition. See OAJC at 21, n.13. 36 *Interest of J.M.G.*, 229 A.3d 571, 580 (Pa. 2020). [J-10-2025] [OAJC: Mundy, J.] - 14

(1) the error did not prejudice the defendant or the prejudice was de minimis; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.³⁷ It is the Commonwealth's burden to establish beyond a reasonable doubt that any error was harmless.³⁸ The Commonwealth argues that any error in the admission of the interrogation video was harmless because the trial court's instructions removed any prospect of prejudice and Officer Lamanna's in-court identification of Malcolm was untainted. As articulated above, the trial court's instructions could not, and did not, remove the prospect of prejudice. Nor can it be said that the erroneously admitted evidence—the interrogating detectives' opinions and statements about Malcolm's guilt and veracity—was cumulative of Officer Lamanna's in-court identification of Malcolm from the surveillance video. Neither Detective Burns nor Detective Harkins was able to identify Malcolm from the surveillance video. The detectives had no personal knowledge of whether Malcolm was in the surveillance video. Their assertions that they knew Malcolm to be lying and to be guilty are not cumulative of Officer Lamanna's in-court identification of Malcolm from the surveillance video screenshot. Moreover, the jury would have received the detectives' interrogation assertions as separate pieces of evidence, not as cumulative of Officer Lamanna's identification. The detectives' emphatic assertions that Malcolm was lying, that he was guilty, and that they knew he was at the shooting, were not predicated solely upon Officer Lamanna's

identification. 37 *Commonwealth v. Hairston*, 84 A.3d 657, 671-72 (Pa. 2014). 38 See, e.g., *Commonwealth v. Story*, 383 A.2d 155, 162 n.11 (Pa. 1978) (“[T]he burden of establishing that the error was harmless beyond a reasonable doubt rests with the Commonwealth.”). [J-10-2025] [OAJC: Mundy, J.] - 15 The sole issue in this criminal trial came down to identity. The only image of the shooter was that shown in the surveillance video. The trial court described the video as unclear due to poor conditions. The perpetrator’s face was hidden. The only identification evidence connecting that image to Malcolm was that offered by Officer Lamanna. The jury asked to see this image in order to compare it to Malcolm during deliberations. The identify of the shooter was central to the Commonwealth’s case. I cannot say that the error of permitting the jury to hear the detectives’ opinions about identity and Malcolm’s guilt and veracity under such circumstances was harmless beyond a reasonable doubt. The trial court committed legal error in admitting the irrelevant and prejudicial statements and opinions by the interrogating detectives as to Malcolm’s guilt and truthfulness. The prejudice caused by this error was not capable of being remedied by curative instructions. Nor can this error be considered harmless. Admission of the interrogation statements, in my view, constitutes prejudicial and reversible error. Accordingly, I dissent. Chief Justice Todd and Justice Donohue join this dissenting opinion. [J-10-2025] [OAJC: Mundy, J.] - 16