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DIVISION II

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STATE OF WASHINGTON

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NO. 37136-7-II  
Pierce County No. 07-1-03462-7

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHRISTOPHER SCALES**

**Appellant.**

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**BRIEF OF APPELLANT**

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 **ORIGINAL**

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**A. ASSIGNMENT OF ERROR**

**I. MR. SCALES WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

**I. MR. SCALES WAS DENIED A FAIR TRIAL BY REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT.**

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

The Pierce County Prosecuting Attorney charged Appellant Christopher Scales, by Amended Information, with Unlawful Delivery of a Controlled Substance while within 1000 feet of a school or school bus stop. CP 22. Mr. Scales represented himself at a jury trial and was convicted as charged, with an additional finding that the delivery occurred within 100 feet of a school or school bus stop. Report of Proceedings, CP 24-25. Mr. Scales was given a standard range sentence. CP 32. This timely appeal followed. CP 42.

**2. FACTUAL HISTORY**

The informant in this case, James Josey, was working with the Tacoma Police Department in an ongoing drug sting operation called Operation Hard Rock. RP Vol. II, p. 100-101. As part of Operation Hard Rock, Mr. Josey would drive through the Hilltop area of Tacoma in a car

provided by the Tacoma Police Department that was equipped with audio and visual recording equipment. RP Vol. II, p. 102. On April 24<sup>th</sup>, 2007 Mr. Josey was working for Operation Hard Rock with officers Quinn and Larsen. RP Vol. II, p. 103. Mr. Josey testified that he met officers Quinn and Larsen at a designated meeting place at which time he was searched. RP Vol. II, p. 103. He testified he had no money or drugs on him prior to the meeting, but was given money by the officers to go and make a drug purchase. RP Vol. II, p. 104. Mr. Josey couldn't remember if he was given \$20 or \$40. RP Vol. II, p. 104.

Mr. Josey drove to the area of Martin Luther King from 15<sup>th</sup> to 21<sup>st</sup>. RP Vol. II, p. 104. Mr. Josey testified that he would make himself visible by driving down the street and rolling his window down and giving a sign or a look, and would pull over when the sign is acknowledged. RP Vol. II, p. 105. On April 24<sup>th</sup>, he claimed he followed this procedure and was acknowledged, at which point he stopped his car. RP Vol. II, p. 105. Mr. Josey testified that a person got into the car and instructed him to drive a short distance, at which point this person got out of the car and another person got in and sold him crack cocaine. RP Vol. II, p. 105-06. Mr. Josey claimed that this person was the defendant, Christopher Scales. RP Vol. II, p. 110.

Mr. Josey testified that Mr. Scales then got out of his car and he returned to his designated meeting place with officers Larsen and Quinn. RP Vol. II, p. 107. This transaction was videotaped, and the video was played for the jury. RP Vol. II, p. 112-13. The video did not, evidently, show Mr. Scales by face, nor did it show the hand-to-hand exchange, but Mr. Josey was adamant that it was Mr. Scales and that there was a drug transaction. RP Vol. II, p. 112-13, 152. Mr. Josey claimed that he made no other stops, and contacted no other people, in between purchasing the drugs and returning to the designated meeting place. RP Vol. II, p. 107-08.

Officer Larsen testified that officers do not conduct drug tests on confidential informants, and they simply take a CI's word on whether he is clean. RP Vol. II, p. 85-86. Officer Larsen further testified, upon questioning by the prosecutor, that he never had any difficulties with Mr. Josey's "veracity" or "credibility." RP Vol. II, p. 86. The prosecutor and Officer Larsen had the following exchange:

Prosecutor: "The individual who sold the informant the controlled substances in this case, was that individual identified?"

Larsen: "Yes, he was."

Prosecutor: "Was that individual identified by an officer involved in the investigation who was on scene that day?"

Larsen: "Yes."

Prosecutor: "To your knowledge, was that individual identified as the defendant?"

Larsen: "Yes."

RP Vol. II, p. 75-76.

Mr. Josey testified that he is paid for his work as a CI, generally \$80 per hour. RP Vol. II, p. 109. During closing argument, the prosecutor argued that Mr. Josey was credible because Officer Larsen testified he was reliable. RP Vol. II, p. 146. The prosecutor also gave his personal opinion to the jury that it would not have been worth it to Mr. Josey to have lied or been anything less than candid in his testimony. RP Vol. II, p. 147. The jury found Mr. Scales guilty of unlawful delivery of a controlled substance, and found that the delivery had occurred within 1000 feet of a school or school bus stop. CP 24-25.

#### **D. ARGUMENT**

##### **I. MR. SCALES WAS DENIED A FAIR TRIAL BY REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT.**

The deputy prosecutor committed repeated instances of misconduct when he solicited testimony from Officer Larsen in which Officer Larsen gave an opinion about James Josey's credibility; when he introduced, through Officer Larsen, hearsay to the effect that another

officer had positively identified Mr. Scales as the other person involved in the drug transaction; and when he personally vouched for James Josey's credibility during closing argument.

The deputy prosecutor asked Officer Larsen whether the confidential informant, upon whose testimony the case hinged, was reliable and credible, and Larsen replied that he was. In *State v. Kirkman*, 159 Wn.2d 918, 928-931, 155 P.2d 125 (2007), the Supreme Court reiterated the well-settled prohibition on witnesses, particularly police officers, expressing an opinion about the veracity of another witness. The court stated: "This is significant because a police officer's testimony may particularly affect a jury because of its 'special aura of reliability.'" *Kirkman* at 931, citing *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes independent determination of the facts by the jury." *Kirkman* at 927; citing *Demery* at 759; *State v. Farr-Lenzini*, 93 Wn.App. 453, 462, 970 P.2d 313 (1999). Such error is of constitutional magnitude and can be raised for the first time on appeal. *Kirkman* at 927. However, admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as "manifest" constitutional error. *Kirkman* at 936. There

must be an explicit or almost explicit statement by a witness on an ultimate issue for it to be found manifest constitutional error when not objected to. *Kirkman* at 936.

In *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), the court outlined five factors a reviewing court should look at to determine whether testimony constitutes impermissible opinion testimony. Those factors are: (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. *State v. Demery*, 144 Wn.2d at 759.

Turning to the first factor, the type of witness here was a police officer. In *Kirkman*, the court noted the problematic nature of such testimony being offered through police officers, noted above, because of the special aura of credibility police officers have.

Regarding the second factor, the nature of the testimony was that Mr. Josey, on whose testimony the State's case depending, was truthful and credible. Unlike in *Kirkman*, where the testimony was couched in terms of a doctor testifying about the results of a physical exam which *neither confirmed or negated* the claim of the victim Officer Larsen in this case just came right out and said it: He believed Mr. Josey was believable.

Regarding the third factor, the nature of the charge was drug deal

involving a confidential informant in the seemingly permanent employ of the Tacoma Police Department and a videotape that was less than optimal, according to the State's admission. Mr. Josey's credibility was a critical factor in this case.

Regarding the fourth factor, the type of defense was a general denial by way of Mr. Scales' not guilty plea and him requiring the State to prove its case beyond a reasonable doubt. Again, this made Mr. Josey's credibility a crucial factor. Mr. Scales made no statements and did not testify.

Regarding the fifth factor, the other type of evidence before the jury, the jury had the videotape which did not explicitly show a hand to hand transaction between Mr. Scales and Mr. Josey. The jury also had the improper hearsay testimony by Officer Larsen, discussed below, that another officer identified Mr. Scales as the seller of the cocaine. Here, Mr. Josey's credibility was central to the case, and it was repeatedly and improperly bolstered by the State.

Mr. Scales, admittedly, did not object to this testimony. Although normally a discussion on the failure to register an objection would center on whether it was a tactical decision, here it was clearly because Mr. Scales is not an attorney and didn't know this material was objectionable. Absent an objection, this Court must be persuaded this was an explicit, or

almost explicit, comment on the credibility of Mr. Josey. Mr. Scales submits that it was an explicit statement about Mr. Josey's credibility.

If this Court finds manifest constitutional error, the error may be harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). This is the "overwhelming untainted evidence test," meaning the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt *Id.*

Here, the evidence cannot be considered harmless. The prosecutor emphasized Officer Larsen's opinion about Mr. Josey's credibility in closing argument to drive home the point that Mr. Josey was credible because Officer Larsen said so. The prosecutor then took his misconduct further by personally vouching for Mr. Josey's credibility by opining that he (the prosecutor) didn't think Mr. Josey would lie or mislead the jury. It is improper for a prosecutor to express a personal opinion or vouch for the credibility of a witness. *State v. Stith*, 71 Wn.App. 14, 21-23, 856 P.2d 415 (1993). These types of cases, i.e. hand to hand drug transactions conducted through paid CIs, are dependent upon the credibility of the CI. It was improper for the State to bolster that credibility and invade the

province of the jury. Mr. Scales was denied a fair trial and should be granted a new one.

The prosecutor committed further misconduct when it elicited testimony from Officer Larsen which called for him to state hearsay from another, unidentified officer who allegedly identified Mr. Scales as the seller in this drug transaction. Mr. Scales, again, was not aware that this testimony is objectionable because he is not a lawyer and did not object. This was a particularly insidious example of a prosecutor taking advantage of a pro se defendant.

Division II was faced with a case in which the prosecutor made repeated references to inadmissible hearsay which had not been admitted at trial. In *State v. Boehning*, 127 Wn.App. 511, 111 P.3d 899 (2005) the prosecutor argued that the victim had made out-of-court statements which were consistent with her trial testimony, thereby improperly bolstering her credibility and “instilling inadmissible evidence in the juror’s minds...” *Boehning* at 521-23. Further, the Court held that by repeatedly arguing that Boehning’s counsel had failed to establish the victim’s out-of-court statements about the abuse were inconsistent with her trial testimony, “the jury could infer that H.R.’s hearsay statements were consistent with her trial testimony and that she was a credible witness.” *Boehning* at 521-23.

This, the Court ruled, improperly shifted the burden of production to present evidence from the State to the defense. *Id.*

Here, the State similarly bolstered Mr. Josey's testimony by introducing an out-of-court statement, which was clearly offered for its truth, which purported to be a second, corroborative identification of Mr. Scales as the drug seller. Further, the corroborative identification supposedly came from another police officer, who wasn't named and didn't testify. This is flagrantly ill-intentioned and improper. If there was a corroborative eyewitness identification, the State should have presented that through the actual eyewitness, not Officer Larsen. This is the type of testimony that cannot be cured by a curative instruction because once it is said it is of such moment it cannot be ignored or forgotten. This misconduct, combined with the misconduct of improperly vouching for Mr. Josey and calling upon Officer Larsen to vouch for Mr. Larsen, combined to deprive Mr. Scales a fair trial and he should be granted a new trial.

**E. CONCLUSION**

Mr. Scales should be granted a new trial.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of September, 2008.

*Anne M. Crusier*

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ANNE M. CRUSER, WSBA# 27944  
Attorney for Mr. Scales

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DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER SCALES,

Appellant.

) Court of Appeals No. 37136-7-II  
) Pierce County No. 07-1-03462-7

) AFFIDAVIT OF MAILING

ANNE M. CRUSER, being sworn on oath, states that on the 17<sup>th</sup> day of September  
2008, affiant placed a properly stamped envelope in the mails of the United States  
addressed to:

Gerald Horne, Pierce County Prosecuting Attorney  
Appeals Unit  
930 Tacoma Ave. South, Room 946  
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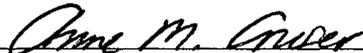
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Mr. Christopher Scales  
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Airway Heights, WA 99001

and that said envelope contained the following:

- (1) APPELLANT'S BRIEF
- (2) VRP (TO MR. HORNE)
- (3) RAP 10.10 (TO MR. SCALES)
- (4) AFFIDAVIT OF MAILING

Dated this 17<sup>th</sup> day of September, 2008

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: September 17, 2008, Kalama, WA

Signature: Anne M. Cruser