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COURT OF APPEALS  
DIVISION II

NO. 37714-4-II

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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY     *lsc*      
DEPUTY

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY J. JOHNSON,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable Nelson Hunt, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENT OF ERROR**

1. Jeff Johnson did not receive effective assistance of counsel because his attorney did not object to evidence of a third party's independent efforts to intimidate a key witness.

2. Johnson did not receive effective assistance of counsel because his attorney did not object to evidence a key witness who was afraid for the safety of his three-year-old son because of a third party's effort to intimidate the witness.

3. Johnson did not receive effective assistance of counsel because his attorney failed to object to inadmissible testimony of other crimes/wrongs under ER 404(b).

4. Prosecutorial misconduct deprived Johnson of his due process right to fair trial by an impartial jury.

5. Cumulative error deprived Johnson of his due process right to a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. While evidence the defendant tried to intimidate or compel a witness not to testify is admissible to show consciousness of guilt, a third party's effects to intimidate or compel a witness not to testify are only admissible if the defendant encouraged or participated in the efforts. Was

defense counsel's failure to object to this inadmissible evidence deficient performance that prejudiced Johnson where the State's star witness Jeremy Duryea testified that a man had played the recording of an alleged drug deal to him a few days before trial, and that Duryea said the intent of the man's action was for him not to appear in court to testify, and where Duryea stated that he was scared for the safety of his three-year-old son, and where the State argued that it was an attempt to intimidate the witness? Assignment of Error No. 1.

2. Johnson's attorney did not object to inadmissible evidence Duryea was afraid for the safety of his son because a man had played the recording of the alleged drug deal in Count 2 to him a few days before trial. Was counsel's failure to object to this irrelevant and prejudicial evidence deficient performance that prejudiced Johnson? Assignment of Error No. 2.

3. Was counsel's failure to object under ER 404(b) to inadmissible testimony regarding the specifics of manufacturing methamphetamine—implying that Johnson was involved in cooking the drug—deficient performance that prejudiced Johnson? Assignment of Error No. 3.

4. The deputy prosecutor committed flagrant misconduct by (1) vouching for the credibility of the State's star witness; and (2) improperly

implying that Johnson not only sold methamphetamine to the police informant Duryea, but that Johnson was also involved in the manufacture of methamphetamine. Considered singly and cumulatively, do these instances of misconduct require reversal of the convictions in Count 2 and 3? Assignment of Error No. 4.

5. Did cumulative error, in the form of prosecutorial misconduct and ineffective assistance of counsel, deprive Johnson of a fair trial? Assignment or Error 5.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural history:**

Jeff Johnson [Johnson] was charged by amended information filed in Lewis County Superior Court with two counts of delivery of methamphetamine, and one count of unlawful use of drug paraphernalia. Clerk's Papers [CP] at 48-50.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on March 24, 2008, the Honorable Nelson Hunt presiding.

No objections or exceptions to the court's instructions to the jury were made. 2RP at 45.

The jury returned a verdict of guilty to Count 2 (delivery of

methamphetamine) and Count 3 (unlawful use of drug paraphernalia). CP at 27, 28, and 29. He was found not guilty of delivery of methamphetamine on March 1, as alleged in Count 1. Following the verdict, defense counsel moved for new trial pursuant to CrR 7.5 due to discrepancies in the testimony. Report of Proceedings [RP] (May 7, 2008) at 10-11. Defense counsel argued that a search warrant based on the alleged March 2 drug transaction did not mention that there was a period of approximately fifteen minutes when police informant Jeremy Duryea [Duryea] was not under police observation. RP (May 7, 2008) at 10. Counsel also argued that the police testified that they searched Duryea's vehicle, but he admitted during his testimony that he had a six pack of beer with him when he arrived at Johnson's house on March 2. RP (May 7, 2008) at 10-11. After hearing argument, the court denied the motion for new trial. RP (May 7, 2008) at 12.

The court imposed a standard sentence range of 20 months for Count 2 and 90 days for Count 3, to be served concurrently. RP (May 7, 2008) at 16.

Timely notice of appeal was filed on May 7, 2008. This appeal follows.

**2. Trial testimony:**

Jeremy Duryea arranged with Lewis County law enforcement officers to purchase drugs in exchange for payment. 1RP at 13. Duryea told police

that he would be able to buy methamphetamine from Johnson. 1RP at 13, 60. Duryea had previously cooperated with police as an informant in order to escape pending criminal matters. 1RP at 22, 61. Duryea stated that on this occasion, he contacted police in order to receive money for conducting drug transactions. 1RP at 61. Lewis County Deputy Sheriff Duncan Adkisson stated that Duryea was currently acting as an informant for police, and that he received \$100 per completed drug transaction. 1RP at 22-23. He stated that Duryea had received payment from the police for drug deals on previous occasions. 1RP at 23.

Duryea met with Adkisson at a building at a school in Onalaska, Lewis County, on March 1, 2007. 1RP at 13, 24. Adkisson and Detective Kevin Engelbertson searched Duryea using the following procedure: “[t]he informant is strip searched, all of his clothes are searched as well as the vehicle they arrive in.” 1RP at 12, 14. Adkisson stated that purpose of the search is “to ensure there is not contraband or moneys on the individual that could interfere with the evidence and/or the deal that will take place.” 1RP at 12-13. Engelbertson stated that he searched Duryea’s pickup truck by searching the entire vehicle, “under floor mats, visors, and “any pockets.” 1RP at 41. Adkisson stated that did not find any contraband on Duryea during the search. 1RP at 14. Adkisson gave Duryea “buy funds” for the

anticipated drug deal. 1RP at 14. Police then followed Duryea to Johnson's residence south of Chehalis, located at 1242 North Fork Road. 1RP at 14, 2RP at 17. Duryea went inside the house and was subsequently followed by police back to the school in Onalaska. 1RP at 14. At the school Duryea and his vehicle were searched a second time. 1RP at 14, 42. Adkisson stated that Duryea gave him a baggie that contained a white crystalline substance. 1RP at 15.

Duryea stated that on March 1, he met Adkisson by a shed by Onalaska School, was searched, and given money to buy methamphetamine from Johnson. 1RP at 51. He stated that he drove to Johnson's house and went to a barn on the property. 1RP at 51. He stated that he bought methamphetamine from Johnson, and that he was there was there for twenty to thirty minutes. 1RP at 52. Duryea stated that he went back to shed by the school and gave the baggie to Adkisson. 1RP at 54.

Based on that information, Adkisson filled out an affidavit for a warrant to record a drug deal that Duryea said was scheduled with Johnson for March 2. 1RP at 28, 29. Police obtained an order permitting them to record the anticipated drug deal. 1RP at 28.

Adkisson met with Duryea on the following day at the same school and Duryea was searched. 1RP at 16, 17. Duryea was given \$160.00 in "buy

funds.” 1RP at 18. Police gave Duryea a digital recording device, and he then drove to Johnson’s house on the North Fork Road. 1RP at 17, 20. Adkisson parked his vehicle in the “same general area” as Duryea, but did not see him enter the barn located on the property. 1RP at 29, 30. Duryea subsequently drove back to the school. 1RP at 18. Police met Duryea at the school and he and his vehicle were searched by Adkisson and Engelbertson. 1RP at 18, 19. Duryea gave police a baggie that contained a white crystalline substance. 1RP at 19. Exhibit 2. The substance in the baggie tested positive for the presence of methamphetamine. 2RP at 5, 6.

Adkisson stated that when Duryea went to Johnson’s house on March 2, they “lost him in traffic” for “exactly nine minutes.” 1RP at 30. He stated that during this time, the digital recorder continued to run. 1RP at 30, 31.

Adkisson stated that Duryea “might have had some beer in the car” when he got back. 1RP at 39.

Duryea stated that he bought methamphetamine from Johnson on March 2 after being given money by the police. 1RP at 55. He stated that he drove to Johnson's house without stopping or getting out of his truck. 1RP at 56. After arriving at the house, he stated that he went to a camper trailer and talked with someone who was at the door of the trailer. 1RP at 56. He stated that the person left and that he then bought methamphetamine from

Johnson while in the camper. 1RP at 56. After he left the camper, he went to his truck and drove back to the school. 1RP at 57.

Duryea testified that he brought beer with him on March 2, and when he got there, he “popped one open and walked in with it.” 1RP at 65. He later testified that he did not “even remember if [he] had a beer or not” with him. 1RP at 69, 71.

Contrary to the testimony of Adkisson, Duryea stated that this was the only time that he had bought drugs for the police for payment. 1RP at 73.<sup>1</sup>

After the recording of the alleged March 2 transaction was played in court, Duryea testified that he had heard the recording on a previous occasion. 1RP at 59. He said that he had been in Onalaska “a couple of days ago at a guy’s house I know,” and that “another gentleman that I know brought it in on a laptop he had and played it for me.” 1RP at 59. He stated that he thought the man had played it in order to “maybe to try to scare me into not coming here today.” 1RP at 59. Duryea stated that the man who played the recording on the laptop was in court and identified him as the man “[s]itting right over there with the sunglasses on.” 1RP at 59, 60. He stated that was

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<sup>1</sup>Adkisson testified that he had paid Duryea to buy drugs as a police informant “[m]ore times than just this [time.] 1RP at 23.

“scared for [his] three-year-old son . . . .” 1RP at 60.

Following the alleged drug deal on March 2, police obtained a warrant to search a travel trailer and a barn at 1242 Middle Fork Road. 1RP at 31, 32. The search did not result in additional charges against Johnson and no evidence obtained as a result of the search was introduced at trial. 1RP at 32.

Kyle Moseman testified that he lived on Duryea’s property for several months, from December, 2006 to March, 2007. 2RP at 9. He stated he was in the barn on March 2 working on his truck with Johnson when Duryea came into the barn. 2RP at 11. He stated that Duryea had a beer with him when he arrived and asked Johnson if he wanted a beer. 2RP at 12. Moseman stated that Duryea and Johnson went into a small travel trailer to get a Chilton auto repair book, but were in there for “just a few minutes, [it] seemed like.” 2RP at 13, 15. Moseman stated that during the time that he lived there he never saw Johnson sell drugs. 2RP at 13-14.

Johnson testified that on March 2, Duryea called him about buying “stuffing for car speakers.” Stuffing, he explained, is placed in speakers to make them sound better. 2RP at 23. Later in the day Duryea came to the barn. 2RP at 24. Johnson stated that Duryea had a beer in his hand when he walked into the barn. 2RP at 24. He said that he and Duryea talked about speakers and how to wire them. 2RP at 25. He said that during the

conversation about speakers, Duryea started talking about drugs and counting out money. 2RP at 26. Johnson stated that this occurred in the travel trailer and that he “wasn’t paying attention too much about what he was saying” and that he was getting the stuffing for the speakers while Duryea was talking. 2RP at 26. He stated that Duryea had “approached [him] several times” asking him to sell drugs. 2RP at 26. He said that Duryea counted out money because he “wanted to buy some stereo stuff” from him. 2RP at 27. He stated that he did not hear a comment by Duryea about an “eight ball” until he heard the recording played back to him later. 2RP at 27-28. He testified that he sold Duryea a speaker box and the stuffing for the box for \$30.00. 2RP at 28. Johnson testified that Duryea also talked about having a party because he had to report to jail for 30 days on Monday. 2RP at 28. He denied selling drugs to Duryea. 2RP at 29.

The State asked Jason Dunn, a forensic scientist employed at the Washington State Patrol Crime Laboratory, whether there was a stage in the methamphetamine manufacturing process where “you either gas or titrate a substance?” 2RP at 43. Defense counsel objected to the question and was overruled. 2RP at 43. Dunn then testified:

At the very end when you have extracted your methamphetamine from your reaction material, it’s in the form we call methamphetamine base. The form we usually

get in case work is methamphetamine hydrochloride. You somehow have to make your methamphetamine base methamphetamine hydrochloride. So the procedure to do this most often is bubbling hydrochloric acid gas into this organic liquid where the methamphetamine then becomes methamphetamine hydrochloride and can fall out of solution. So that would be called gassing.

The other method would be actually adding hydrochloric acid liquid directly to this organic liquid which would dissolve the methamphetamine into it which would then need to be evaporated off so you have your methamphetamine left behind.

2RP at 44.

#### D. ARGUMENT

1. **JOHNSON'S COUNSEL FAILED HIM IN A VARIETY OF WAYS. JOHNSON'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY DID NOT OBJECT TO TESTIMONY OF A THIRD PARTY'S ATTEMPT TO INFLUENCE DURYEA'S TESTIMONY OR PREVENT HIM FROM COMING TO COURT BY PLAYING THE RECORDING OF THE ALLEGED DRUG DEAL TO HIM, AND DID NOT OBJECT TO TESTIMONY THAT DUREYA WAS AFRAID FOR THE SAFETY OF HIS THREE-YEAR-OLD SON BECAUSE THE THIRD PARTY PLAYED THE RECORDING.**

Johnson's attorney did not object when the State elicited testimony about the attempt of a third party to influence Duryea's testimony or scare him from coming to court to testify. Duryea testified that he had previously

heard the recording of the alleged March 2 drug deal. He stated: "I was in Onalaska here a couple days ago at a guy's house I know, another gentleman that I know brought it in on a laptop he had and played it for me." 1RP at 59. Duryea said: "I don't know what his implication of it was at all, maybe to try to scare me into not coming here today." 1RP at 59. He stated that the man who played the recording on the laptop was in the courtroom, and the deputy prosecutor asked Duryea where he was. 1RP at 60. Duryea stated that the man was "[s]itting right over there with the sunglasses on." 1RP at 60. The deputy prosecutor asked Duryea if he was scared to be in court, and Duryea stated: "I'm scared for my three-year-old son, yes, I am." 1RP at 60.

The State elected testimony that the man in the courtroom wearing sunglasses played the recording of the alleged March 2 drug deal for Duryea a few days before the trial, even though the State could not tie Johnson to the incident. Johnson's attorney similarly failed to object when Duryea testified he was afraid for the safety of his three-year-old son because the man had played the recording. Competent defense counsel would have been aware of the evidence rules and law and voiced an objection to this inadmissible testimony and the prejudicial nature of the evidence presented.

Moreover, counsel's deficient performance prejudiced Johnson. Johnson's convictions for delivery of methamphetamine and unlawful use of

drug paraphernalia must be reversed.

**a. Johnson had the constitutional right to effective assistance of counsel.**

Persons accused of crimes have the constitutional right to counsel. U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. Counsel provides a critical role in ensuring a defendant receives due process of law and that the adversarial process is fair. *Strickland v. Washington*, 466 U.S. 558, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel necessarily includes the right to effective counsel. *Strickland*, 466 U.S. at 86; *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under this test, the reviewing court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must demonstrate "counsel's errors were so serious as to deprive

the defendant of a fair trial.” *Strickland*, 466 U.S. at 698.

**b. Defense counsel’s performance was deficient because he did not object to evidence of the effort of a third party to intimidate Duryea.**

When the accused encourages or threatens a witness not to testify against him, the defendant’s actions are admissible because they reveal a consciousness of guilt. *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945); *State v. Moran*, 119 Wn.App. 197, 218-19, 81 P.3d 122 (2003)(defendant’s letter to friend calling witness obscene names), *rev. denied*, 151 Wn.2d 1032 (2004); *State v. McGhee*, 57 Wn.App. 457, 788 P.2d 603 (threat against victim admissible to show both consciousness of guilt and to tie defendant to victim), *rev. denied*, 115 Wn.2d 1013 (1990).

However, evidence a third party threatened a witness or attempted to influence his testimony is not admissible to show the defendant’s guilty conscience in the absence of a connection between the defendant and the third party. In order to be admissible, however, the actions or statements must be made by the defendant or someone acting at his request or with his knowledge. *Kosanke*, 23 Wn.2d at 215. The actions of someone other than the defendant to discourage a witness’s attendance is not admissible in the absence of the link that he knew of or requested those actions. *State v.*

*Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997); *Kosanke*, 23 Wn.2d at 215.

Conduct on the part of an accused person, or that of someone acting in his behalf at his request or with his knowledge and consent, having for its purpose the prevention of witnesses appearing and testifying at his trial, is a circumstance for the jury to consider as not being likely to be the conduct of won who was conscious of his innocence, or that his cause lacks truth and honesty, or as tending to show and indirect admission of guilt; but if the conduct is that of a third person, before the evidence is admissible it must be shown that such person was acting at the request of the accused, or that it was with his knowledge and consent.

*Id.* (Emphasis added). (Citations omitted). *Accord State v. Gonzales*, 93 N.M.445, 601 P.2d 78 (N.M.App. 1979); *State v. Hicks*, 535 S.W.2d 308, 312 (Mo.App. 1976).

**c. The State presented no evidence whatsoever that Johnson was responsible for the unidentified third party's independent attempt to intimidate Duryea.**

In direct examination of Duryea, the State elicited testimony that the unidentified man wearing sunglasses played the recording of the alleged drug deal to Johnson on a laptop at “a guy’s house” a few days before trial. 1RP at 59. Duryea pointed out the man, who was sitting in the courtroom during the first day of trial. 1RP at 59. The State presented no evidence as to the man's identity or whether he knew Johnson or had any contact with him whatsoever.

**d. Defense counsel's performance was deficient because he did not object to evidence of the unidentified man's independent efforts to intimidate Duryea.**

Without objection, the State elicited testimony of the man's attempt to influence Duryea's testimony. The State then used this information to argue that Duryea was "nervous because someone had played for him the wire the week before, essentially, intimidated him[,] but that Duryea "showed up anyway, told you what he knew and told it accurately." 2RP at 46.

As argued *supra*, the man's effort to intimidate Duryea was not admissible to show Johnson's guilt unless the efforts were linked to Johnson. Absolutely no evidence was presented as to the man's identity, how he obtained the recording, why Duryea was at the house in Onalaska where he heard the recording, or whether the man's action was linked to Johnson. Counsel utterly failed to object to any portion of Duryea's testimony or move to suppress the attempts to intimidate Duryea. Counsel did not cite any cases or prepare a memorandum on this issue. Thus, it appears he was not aware of and certainly had not read the relevant cases on this issue, such as *Kosanke* and *Bourgeois*.

Effective defense counsel is expected to understand the case law applicable to important issues at trial. See *Thomas*, 109 Wn.2d at 229 ("A

reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases). There can be no tactical reason not to move to exclude the man's independent effort to intimidate Duryea.

e. **Defense counsel was ineffective by failing to object to Duryea's fear for this three-year-old son.**

The State elicited Duryea's testimony that the unidentified man played the recording to intimidate him. 1RP at 59. In the course of his testimony, Duryea stated that he was afraid for the safety of his three-year-old son. 1RP at 60. Johnson's attorney, however, did nothing, and allowed this inadmissible testimony before the jury without objection.

i. **Duryea's fear for his son's safety was irrelevant and any relevancy was outweighed by its prejudicial effect.**

Only relevant evidence is admissible in Washington. ER 402; *State v. Kinchen*, 92 Wn.App 442, 452, 963 P.2d 928 (1998). Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." ER 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*Id.*

Duryea's fear for his son's safety was not relevant to any fact that was of consequence in this case. *See Kinchen*, 92 Wn.App. at 452-53 (inflammatory photographs were not relevant to unlawful imprisonment charges, tended to show defendant bad father, and put him on trial for uncharged crimes).

**ii. Evidence that Duryea was afraid for his son was improper character evidence.**

Evidence of the accused's character is generally not admissible to prove he acted in conformity with that character. ER 404(a). Similarly, evidence of the defendant's other misconduct may not be used to demonstrate the defendant is a dangerous person or the type of person who would commit the charged offense. ER 404(b); *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002).

Duryea stated that he was afraid for his son's safety following the incident where the man played the recording to him. 1RP at 60. Even if the State had presented evidence that the action of the unidentified man was

linked to Johnson, the testimony of Duryea's fear was improper character evidence, as it implied that Johnson was responsible and that he was a violent and dangerous person.

**iii. Defense counsel's failure to object to evidence of Duryea's fear was deficient.**

Defense counsel is presumed to understand the rules of evidence and relevant cases. Duryea's testimony that he was afraid for his son's safety because the man in the courtroom played the recording was not simply irrelevant, it was highly prejudicial. Competent defense counsel would have made an objection to Duryea's fear for his son's safety.

**f. Johnson was prejudiced by his attorney's deficient performance.**

Johnson's defense that the alleged March 2 drug deal was actually an innocuous sale a speaker box and speaker stuffing to Duryea was based in substantial part upon his credibility over Duryea's, who claimed that Johnson sold methamphetamine to him. Johnson's defense was seriously damaged when the State produced testimony and argued that the man in court wearing sunglasses had "intimidated" Duryea. 2RP at 46. Defense counsel's failure to object to this evidence was highly prejudicial to Johnson's case. Because defense counsel did not move to suppress the testimony, or ask for a mistrial

once the testimony came in, the jury was free to use the unidentified man's actions and presence in court as substantive evidence against Johnson. Johnson's convictions for delivery of methamphetamine and use of drug paraphernalia must be reversed. *Thomas*, 109 Wn.2d at 232.

2. **JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO OBJECT PURSUANT TO ER 404(b) TO TESTIMONY THAT HE MANUFACTURED METHAMPHETAMINE.**

Defense counsel was ineffective in failing to object to admission of evidence that Johnson was involved in the manufacture of methamphetamine under ER 404(b). Reversal on Counts 2 and 3 is required because there is a reasonable probability that the improper admission of the testimony regarding manufacture of methamphetamine affected the outcome of the trial.

The State's case in Counts 2 and 3 was based in large part upon a digital recording made by Duryea on March 2. The State asserted that the recording was the sound of a drug deal between Johnson and Duryea. Johnson, on the other hand, submitted that he was selling a speaker box and speaker stuffing to Duryea, not drugs, and that it was Duryea who was talking about drugs. 2RP at 26, 27. The State played to the jury portions of the recording Duryea made on March 2. Part of the conversation Duryea

recorded was a section in which Johnson said: “I titrate, I don’t guess . . . .” 2RP at 38. Without defense objection, the prosecution asked Johnson on cross-examination regarding the word ‘titration’: “[t]hat’s how you make this methamphetamine, isn’t it?” 2RP at 38. Johnson stated: “I have heard that, but that doesn’t mean that—I don’t make meth.” 2RP at 38.

The deputy prosecutor called forensic scientist Jason Dunn as a rebuttal witness. The deputy asked Dunn if there is a point during the manufacture of methamphetamine in which a person making the drug “gas[ses] or titrate[s] a substance.” 2RP at 43. Dunn testified at length about the process of manufacturing methamphetamine, including describing a process he described as “gassing.” 2RP at 43-44.

Johnson was charged with two counts of delivery of methamphetamine; the State did not allege that he manufactured methamphetamine.

ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

“The purpose of the rules of evidence is to secure fairness and to

ensure that truth is justly determined.” *State v. Wade*, 98 Wn.App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404(b) prohibits the admission of evidence designed simply to prove bad character. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). “ER 404(b) forbids such inference because it depends on the defendant’s propensity to commit a certain crime.” *Wade*, 98 Wn. App. at 336.

In response to the State’s question about gassing or titration during the methamphetamine cooking process, Dunn testified “the procedure to do this most often is bubbling hydrochloric acid gas into this organic liquid where the methamphetamine then becomes methamphetamine hydrochloride and can fall out of solution. So that would be called gassing.” 2RP at 43-44.

The deputy prosecutor’s question and Dunn’s response implied that Johnson manufactured methamphetamine. Despite this, defense counsel did not object to the State’s question about titration or Dunn’s testimony.

The trial court could not conduct the required balancing test for admissibility under ER 404(b) due to defense counsel’s failure to object.

Johnson received ineffective assistance of counsel due to his attorney’s failure to object to the deputy prosecutor’s question to Dunn on rebuttal, and Dunn’s testimony. Johnson asserts that in this day and age competent defense counsel must be fully aware of the requirements under ER

404(b). Moreover, any attorney practicing in the area of indigent criminal defense is grossly negligent if he is not aware of the applicable provisions of the United States Constitution and the Washington State Constitution relating to the right of a criminal defendant.

If defense counsel had raised an objection to the deputy's question about titration and Dunn's testimony, the trial court would have been required to conduct a balancing test under ER 404(b).

Johnson maintains that Dunn's testimony regarding titration and gassing made it clear that the State was implying that Johnson not only sold methamphetamine to Duryea on March 2, but that he was involved in the manufacture of methamphetamine. The connection between the reference to "titrate" in the recording and manufacturing methamphetamine is so tenuous that the outcome of the trial may well have been different if the evidence was not admitted. Removing the incriminating testimony regarding titration eliminates a major linchpin in the State's closing argument and its argument that Johnson "knew exactly what he was talking about." 2PR at 50.

Regarding the testimony, the State argued in closing:

That the defendant knew the substance delivered was a controlled substance. Interesting thing about his is that he own testimony, Mr. Johnson's own testimony, then you heard the rest of the wire, where he talked about things such as how he makes nectar, he knew what an eight ball was because he

sold him an eight ball. He actually had some knowledge about how you make the stuff, the titrate, which is the gas you heard from Mr. Dunn told you that's one method of making methamphetamine. Mr. Johnson knew exactly what he was talking about.

2RP at 50.

Defense counsel's failure to object adversely impacted Johnson's case further because he was cross-examined by the prosecuting attorney, without objection, on the same subject. 1RP at 38.

Evidence of prior bad acts is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "Doubtful cases should be resolved in favor of the defendant." *Wade*, 98 Wn.App. at 334. The trial court would likely have sustained an objection to the manufacturing testimony on ER 404(b) grounds because the State did not use this evidence for any permissible purpose and it was unduly prejudicial.

The outcome of this case depended on the credibility of the parties; Johnson denied providing drugs to Duryea. Admission of evidence that the State argued showed Johnson "knew what he was talking about" materially affected the outcome by confirming that Johnson was the type of person who would sell drugs to Duryea because, after all, according to the State, he was the type of person who would cook methamphetamine. This testimony wrecked Johnson's credibility with the jury. Counsel's failure was of major

significance and undermined confidence in the outcome of the case. Johnson submits that counsel's failure to object to the testimony constitutes ineffective assistance of counsel, and that he was prejudiced by counsel's deficient performance. Reversal on Counts 2 and 3 is required.

3. **TWO INSTANCES OF PROSECUTORIAL MISCONDUCT VIOLATED JOHNSON'S RIGHT TO A FAIR TRIAL BY IMPARTIAL JURY.**

The prosecutor, as an officer of the court, has a duty to see an accused receives a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. *Id.* at 664. A defendant's due process right to a fair trial and the right to be tried by an impartial jury are denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. *Charlton*, 90 Wn.2d at 664-65; *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amends. 5, 6, and 14; Wash. Const. art. 1, § 22. A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To determine whether misconduct warrants reversal,

the court considers its prejudicial nature and its cumulative effect on the jury. *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996); *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). The cumulative effect of errors may be so flagrant that no instruction can erase their combined prejudicial effect. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); *State v. Henderson*, 100 Wn. App. 794, 804, 998 P.2d 907 (2000).

**a. The deputy prosecutor personally vouched for Duryea's credibility.**

The State's key witness was Duryea. Duryea claimed that he bought methamphetamine from Johnson on March 1 and again on March 2. The State argued that the recording made on March 2 documented a drug deal between Duryea and Johnson. The theme of the prosecutor's closing argument was that although someone played the recording for Duryea a few days before trial, "essentially, intimidated him[,] . . . [h]e showed up anyway, told you what he knew and told it accurately." 2RP at 46. The theme of defense counsel's closing argument was that Duryea was not credible, that he was lying about getting drugs from Johnson, and that the recording reflects not a drug transaction but the mere sale of a speaker cabinet and speaker stuffing to Duryea for \$30.00, and that it was only Duryea who was talking about drugs. 2RP at 59, 60.

The jury alone determines issues of witness credibility. *State v. Jungers*, 125 Wn. App. 895, 901, 106 P.3d 827 (2005). It is improper for a prosecutor to personally vouch for the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Here, the prosecutor exhorted the jury to believe the State's chief witness, claiming that Duryea, despite being intimidated, nevertheless showed up to testify and that he testified "accurately". 2RP at 46. The deputy prosecutor in this manner improperly bolstered Duryea's credibility in a case that turned on whose story the jury believed. The deputy's argument about Duryea's "accurate" testimony was an unmistakable expression of personal opinion about how he viewed Duryea's credibility. *See Brett*, 126 Wn.2d at 175 (prejudicial error will be found when counsel expresses a "clear and unmistakable" opinion about the credibility of a witness).

**b. The deputy prosecutor argued facts not in evidence.**

A prosecutor also commits misconduct when he encourages a jury to render a verdict on facts not in evidence. *State v. O'Neal*, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007). The prosecutor's statement that "Mr. Johnson knew exactly what he was talking about" because he "actually had some knowledge about how you make the

stuff” implied that he made methamphetamine. 2RP at 50. The remark was improper because Johnson was not charged with manufacturing methamphetamine and no evidence was presented to the jury that he manufactured methamphetamine. In this manner the prosecutor attempted to convince the jury that Johnson was not only guilty of delivery, but that he manufactured drugs as well. The deputy's reliance on “titration” and “gassing” as proof that Johnson had to be guilty of delivery because he “knew exactly what he was talking about” was particularly flagrant misconduct because the defense theory was not that Johnson handled the methamphetamine Duryea gave to the police but didn’t know what it was, or some form of ‘unwitting delivery.’ Instead, the defense was that Johnson did not handle the drugs, did not deliver the drugs to Duryea, and that Duryea was lying about where he obtained the methamphetamine that he gave to the police. Therefore, it was unnecessary and irrelevant whether Johnson “knew what he was talking about.”

The deputy prosecutor impermissibly bolstered the credibility of Duryea’s testimony and attacked Johnson’s credibility by referring to facts not in evidence.

The jury’s verdict turned on whether they believed Johnson was being truthful in testifying he did not deliver methamphetamine to Duryea. Both sides debated the credibility of their respective witnesses during closing

arguments. The jury sided with the defense argument regarding Count 1, the first alleged delivery. Under these circumstances, there is a substantial likelihood that the prosecutor's improper comment on Johnson's credibility influenced the verdict on Counts 2 and 3.

Defense counsel did not object to the prosecutor's improper arguments. But the cumulative effect of errors may be so flagrant that no instruction can erase their combined prejudicial effect. *Henderson*, 100 Wn.App. at 804. The prejudicial influence of the prosecutor's improper bolstering argument, in combination with his wholly improper inference that Johnson manufactured methamphetamine, resulted in enduring prejudice.

4. **REVERSAL IS REQUIRED BECAUSE A COMBINATION OF ERRORS CUMULATIVELY PRODUCED AN UNFAIR TRIAL**

Every criminal defendant has the constitutional due process right to a fair trial under Article 1, § 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. *State v. Greiff*, 141 Wn.2d

910, 929, 10 P.3d 390 (2000). Even where some errors are not properly preserved for appeal, the Court retains the discretion to examine them if their cumulative error denies the defendant a fair trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. *State v. Ermert*, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

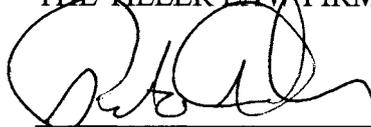
As set forth above, a number of errors in the form of prosecutorial misconduct and ineffective assistance occurred. Even if one of these errors, standing alone, did not affect the outcome of Johnson's trial, there is reasonable probability their cumulative force influenced deliberations for the reasons set forth above.

**D. CONCLUSION**

For the reasons stated, the Court should reverse the convictions in Counts 2 and 3 and remand for new trial.

DATED: October 22, 2008.

Respectfully submitted,  
THE TILLER LAW FIRM

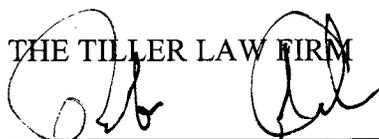


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CERTIFICATE OF  
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