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STATE OF WASHINGTON  
2010 JAN 21 PM 3:50

NO. ~~XXXXXX~~

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES STEVENS,

Appellant.

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

The Honorable Bruce I. Weiss, Judge

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REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT  
Attorney for Appellant

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A. ARGUMENT IN REPLY

FORCING STEVENS TO CHOOSE BETWEEN THE RIGHT TO PRESENT WITNESSES FOR HIS DEFENSE AND THE RIGHT TO A TRIAL FREE FROM OPINION TESTIMONY THAT INVADES THE PROVINCE OF THE JURY WAS MANIFEST CONSTITUTIONAL ERROR.

- a. Testimony that Stevens Was a Drug Dealer Is an Explicit Opinion on Guilt, and the Court Erred in Ruling It Admissible.

As the State notes, under State v. Kirkman, admission of opinion testimony is manifest constitutional error when it is an “explicit or almost explicit witness statement on the ultimate issue of fact.” State v. Kirkman, 159 Wn.2d 918, 938, 155 P.2d 125 (2007). Stevens was charged with possession of a controlled substance with intent to deliver and the court ruled a witness could tell the jury Stevens is a drug dealer. Aside from actually using the word “guilty,” it is difficult to imagine a more explicit opinion on guilt.

The statements in Kirkman that were determined not to be manifest constitutional error bear little resemblance to the proposed testimony in this case, and Kirkman does not support the State’s argument. The two consolidated child rape cases in Kirkman involved four instances of opinion testimony. First, Dr. Stirling testified the child gave “a very clear history” with “lots of detail,” “a clear and consistent history of sexual touching . . . with appropriate affect” and that “[t]he physical examination doesn’t really

lead us one way or the other, but I thought her history was clear and consistent.” Id. at 929. In the case of the other defendant, Dr. Stirling testified, “to have no findings after receiving a history like that is actually the norm rather than the exception.” Id. at 932.

The detectives in each case testified that, as part of the interview protocol, they determined the child appeared able to distinguish the truth from a lie and had promised to tell the truth. Id. at 930, 933. The Kirkman court held there was no manifest constitutional error because the testimony only indirectly reflected an opinion on the complaining witness’s credibility. Kirkman, 159 Wn.2d at 936.

By contrast, testimony that Stevens was a drug dealer essentially pronounced him guilty as charged. This was not testimony about interview protocols or scientific evidence that indirectly supported an inference of witness credibility or guilt. It was an outright statement of guilt. The outcome of Kirkman would likely have been different had a witness testified the defendants were rapists or pedophiles. That is what the court proposed to do in this case.

b. This Error Was Preserved Because It Implicates Constitutional Concerns.

Rehak did not need to testify to preserve this issue for review. See State v. Greve, 67 Wn. App. 166, 169-70, 834 P.2d 656 (1992). The

defendant in Greve opted not to testify after the trial court ruled that previously suppressed evidence could be used to impeach him. Id. at 168-19. On appeal, this Court held the evidence was admissible to impeach Greve. Id. at 167. However, it rejected the State's argument that the error had not been preserved. Id. at 169-70. The Court held that, when the impeaching evidence flows from a constitutional violation, the defendant need not testify to preserve the argument for appeal. Id. at 169.

Like the suppressed evidence in Greve, Rehak's opinion testimony that Stevens was a drug dealer, "does raise constitutional concerns." Id. at 169; State v. Montgomery, 163 Wn.2d 577, 590-91, 596, 183 P.3d 267 (2008). Just as Greve had a constitutional right to testify on his own behalf, Stevens had a constitutional right to present Rehak's testimony in his defense. As in Greve, this Court should reach the merits of Stevens' claim because the trial court's ruling discouraged, and indeed prevented, the exercise of Stevens' constitutional right to present witnesses.

Stevens' choice not to present Rehak's testimony does not waive the error because it was a constitutional violation to force him to make that choice. The State cites State v. Warren, 134 Wn. App. 44, 138 P.3d 1081 (2006), aff'd 165 Wn.2d 17 (2008). But Warren is not on point. First, Warren stated that the error in excluding evidence was not preserved, but the court also held the trial court's rulings were not an abuse of discretion. By

contrast here, the trial court's ruling permitting a witness to testify, in a trial on charges of possession with intent to deliver, that the defendant was a drug dealer, was error. See Montgomery, 163 Wn.2d at 594 (officer's opinion on defendant's intent was improper opinion testimony). Second, the rulings at issue in Warren involved routine application of the rules of evidence, not, as here, constitutional protections safeguarding the right to trial by an impartial jury. 134 Wn. App. at 65-66. Warren does not dictate the outcome of this case because Warren was not forced into a Hobson's choice between two different violations of his constitutional rights.

c. This Error Placed Stevens in a No-Win Situation and Violated His Right to Present Witnesses for His Defense.

The State argues that because Rehak did not testify, the harm is speculative. Brief of Respondent at 15-16 (citing Luce v. United States, 469 U.S. 38, 41-42, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)). This argument should be rejected because the substance of Rehak's opinion testimony and its impact on the trial are evident in the record.

First, the import of Rehak's opinion testimony was evident from the record. The trial court ruled on the precise question the State could ask "whether or not he has any knowledge about whether or not the defendant is a drug dealer, and then you could take it down whatever road it leads you to." RP 25. Rehak told the State in his pre-trial interview that he and

Stevens used to deal methamphetamines together. RP 21. It is not reasonable to presume the State would not have asked the question; it was the State that brought up the issue because it intended to elicit the testimony to attack Rehak's credibility based on bias or a motive to lie. RP 22. Stevens could not have structured his direct examination to prevent this testimony because questions going to bias or motive to lie are permissible impeachment of a witness, regardless of the scope of direct examination. See ER 611(b) ("Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."). The record demonstrates that if Stevens had called Rehak as a witness, he would have testified Stevens was a drug dealer.

The record also shows the impact of this ruling. The trial court recognized its ruling would likely impact Stevens' decision to call the witness. RP 26. And indeed, counsel then chose not to call the witness. RP 75. The record also contains the defense's summary of Rehak's expected testimony. CP 89. "Mr. Rehak will testify that he saw the defendant on the night of September 30, 2008, or early on the morning of October, 1, 2008, and that the defendant had won several hundred dollars in cash." CP 89. Thus, the record shows with reasonable specificity the nature of the testimony Stevens was forced to forego.

As noted in the opening Brief of Appellant, Rehak's testimony would have substantially corroborated Stevens' defense. The State's argument that this testimony would have contradicted Stevens' defense is spurious. See Brief of Respondent at 17-18. Stevens testified he did not win personally, but that his friends were playing for him, with his money, in an attempt to help him win money for rent and child support. RP 78, 86-87. Rehak's proffered testimony that Stevens had won several hundred dollars in cash is perhaps less precise, but it is far from contradictory.

Stevens' conviction should be reversed because he had a right to call witnesses for his defense without risking that they would be permitted to express direct opinions on guilt. Luce does not support the State's argument to the contrary because the Luce opinion is limited to cases where the trial court's ruling does not impact constitutional concerns. Luce, 469 U.S. at 43; United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994). As discussed above, that is not the case here.

The State seems to argue, without any authority, that the existence of other witnesses to the events of that evening somehow vindicates Stevens' right to present witnesses. Brief of Respondent at 11. But the right to present a defense would be illusory indeed if it did not include the right to decide which witness to call. Additionally, Stevens explained at trial that he was no longer able to contact the other witnesses. RP 107-08, 118, 122.

Thus, the court's erroneous ruling permitting the opinion testimony effectively deprived Stevens of the opportunity to present any corroboration of his defense, a weakness that the State fully exploited in closing argument. RP 167-69. Forcing Stevens into this no-win scenario violated his right to present a defense and requires reversal of his conviction.

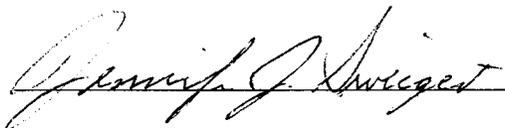
B. CONCLUSION

For the foregoing reasons and the reasons presented in the opening Brief of Appellant, Stevens requests this Court reverse his conviction.

DATED this 21<sup>st</sup> day of January, 2010.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63432-1-I
	)	
JAMES STEVENS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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EVERETT, WA 98201

[X] JAMES STEVENS  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF JANUARY, 2010.

x 