

No. 83308-7

SANDERS, J. (dissenting)—I firmly agree with the lead opinion that the trial court erred by allowing the State, during direct examination, to reference the truth-telling condition of the informant’s plea agreement; however, I cannot join the lead opinion’s ill-reasoned decision that this error was harmless.

Nathaniel Ish was deprived of a fundamental American right – the right to a fair trial before an impartial and untainted jury; by definition, loss of a protected right is not harmless.¹

“A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *In re Det. of Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). This court held “an error is presumed

¹ The state attempts to safeguard the life and liberty of its citizens by securing to them certain legal rights. These rights should be impartially preserved. They cannot be impartially preserved if the appellate courts make of themselves a second jury and then pass upon the facts. One of the first propositions of the orderly administration of law is that a defendant, either guilty or innocent, shall be accorded a fair trial.

prejudicial unless we conclude the error could not have rationally affected the verdict.” *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003); *State v. Clark*, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001). If a reasonable possibility exists, that in the absence of the error, the verdict might have been more favorable to the accused, it cannot be harmless. There is absolutely no way to determine if the prosecutor’s vouching for David Otterson enhanced his trustworthiness in the minds of the jurors, thereby increasing the likelihood that the jury would find his testimony on Ish’s state of mind more credible.

A reviewing court cannot determine what evidence or instruction influenced the jury’s decision. Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L. Rev. 277 (1995-96). “[N]o court knows what influenced a particular jury’s verdict of guilt in any particular case.” *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 647 (2d Cir. 1946) (Frank, J., dissenting). A jury is “made up of human beings, whose condition of mind cannot be ascertained by other human beings. Therefore, it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors.” *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). This court cannot possibly ascertain how much the prosecutor’s vouching for Otterson swayed the jury.²

² Whether and to what extent an error influenced a given jury verdict is

At least one member of the jury was likely tainted when the State asked Otterson about his promise to testify truthfully during direct examination. “[S]uch testimony suggests that the witness might have been compelled to tell the truth by the prosecutor’s threats and the State’s promises.” Lead opinion at 10 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). It is entirely for the jury to consider whether a witness has testified truthfully.³ *Id.* at 8; see *United States v. Ortiz*, 362 F.3d 1274 (9th Cir. 2004). “Evidence that a witness has promised to give ‘truthful testimony’ in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving, irrelevant, and may amount to vouching, particularly if admitted during the State’s case in chief.” Lead opinion at 10-11.

therefore necessarily an exercise in judicial speculation – perhaps principled or reasoned speculation, but nonetheless speculation, about what a jury would or would not have done with or without the offending evidence, instruction, or comment. While much has been written about what does or does not influence juries, what influences a particular case can simply never be discovered.

Sweeney, *supra*, at 280.

³ It is undisputed that the government is prohibited from placing the “prestige of the United States behind a witness by making personal assurances of credibility.” *United States v. Torres-Galindo*, 206 F.3d 136, 140 (1st Cir. 2000).

The State's case relied heavily on the testimony of Otterson. The sole issue at trial was Ish's mental state, and Otterson's testimony was offered to show Ish had admitted he was aware of his actions at the time of the assault. Lead opinion at 4. Otterson's testimony was an important part of the State's proof that Ish possessed the required mental state for both crimes.⁴ *Id.* at 3, 4. Other evidence presented by the State was corroborative of Otterson's testimony,⁵ but not highly probative of his mental state. We cannot ascertain whether the jury would have reached the same result had the prosecutor not

⁴ ““In capital murder cases, snitches are the No. 1 factor, being present in 45 percent of wrongful convictions identified since 1976.’ Warden said. ‘When I define snitch, by the way, I don't mean just anybody who's in jail, but anybody who has an incentive to testify a certain way.’” Tom McNamee, *New lessons from an old mystery*, Chicago Sun-Times, Jan. 1, 2006 (quoting Rob Warden, *Wilkie Collins's The Dead Alive: The Novel, the Case, and Wrongful Convictions* (2005)) (Rob Warden is executive director of the Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern University School of Law), available at <http://www.law.northwestern.edu/wrongfulconvictions/resources/readings/Sun-TimesReview.pdf> (last visited Sept. 27, 2010).

⁵ Even though the use of informants is widespread – the feds gave \$100 million to snitches in one recent year – their reliability is dubious. Many defendants, desperate to give up information in exchange for reduced sentences, provide cops with bogus leads. This results in the prosecution of innocents, many of whom plead guilty (out of fear) to crimes they did not commit. Those who fight such charges don't fare well: Nearly half of wrongful capital convictions can be traced to false testimony from informants, according to one Northwestern University study.

Ryan Blitstein, *The Inside Dope on Snitching*, Miller-McCune, Oct. 23, 2009, available at <http://www.miller-mccune.com/legal-affairs/the-inside-dope-on-snitching-3387/> (last visited Sept. 27, 2010).

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vouched for this jailhouse informant.

I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:
