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SANDERS, J.* (dissenting)—“[U]nless the defendant offers affirmative testimony raising the issue of credibility,” a witness may not offer opinion testimony regarding the defendant’s veracity. *State v. Kirkman*, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007). “Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” *Id.* at 927. The majority concedes that Detective Tom Callas’s description of Timothy Hager as “evasive” was impermissible opinion testimony regarding Hager’s veracity. But because the majority holds this impermissible testimony did not violate Hager’s right to a fair trial, I dissent.

The majority recognizes that Detective Callas’s statement that Hager was “evasive” was an improper statement regarding Hager’s veracity. Majority at 7. And the majority concedes the statement violated Hager’s Sixth Amendment rights. *Id.* The majority also recognizes the especially

* Justice Richard Sanders is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

prejudicial nature of police testimony because ““an officer’s testimony often carries a special aura of reliability.”” *Id.* at 7-8 (quoting *Kirkman*, 159 Wn.2d at 928).

However, the majority’s assertion that a curative instruction preserved Hager’s right to a fair trial is problematic for two reasons. First, the majority claims because the detective’s statement regarding Hager’s evasiveness was brief and never mentioned again, there is only a “slight” chance it caused prejudice. Majority at 9. But “an error is presumed 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) (citing *State v. Clark*, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001)). 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).

Second, the majority claims we should trust the jury followed the trial judge’s instruction to disregard Detective Callas’s description of Hager as “evasive.” Majority at 8-9. But the majority later recognizes that the jury might not faithfully follow the judge’s instruction when it asserts instead that

the jury “might reasonably have interpreted Detective Callas’s comment as a description of Hager’s behavior rather than as an opinion about Hager’s credibility.” *Id.* at 10.

Prior to both of Hager’s trials, the respective trial judges ruled that Detective Callas could not testify that Hager was “evasive.” The statement was prejudicial and could not be cured by an instruction to the jury. “It is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). A defendant’s right to a jury trial “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” *Blakely v. Washington*, 542 U.S. 296, 305-06, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The right to a jury trial assures that the jury will make an independent determination of the facts of the case. Impermissible opinion testimony regarding the defendant’s guilt or veracity invades the province of the jury and violates the defendant’s constitutional right to a jury trial.

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Kirkman, 159 Wn.2d at 927.

“A ‘bell once rung cannot be unring.’” *State v. Easter*, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996) (quoting *State v. Trickel*, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)). Here, the jury impermissibly heard that Hager was “evasive,” a statement referring to his veracity, from a law enforcement officer with an “aura of reliability.” The statement prejudiced Hager, entitling him to a new trial.

I dissent.

AUTHOR:

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Tem. _____

WE CONCUR:
