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COURT OF APPEALS
STATE OF WASHINGTON
2003 AUG 16
NO. 62279-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY PETERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GEORGE MATTSON

BRIEF OF RESPONDENT

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A. ISSUES

Has the defendant failed to establish ineffective assistance of counsel where the attorney concluded that the risks of calling a witness outweighed the benefits?

Has the defendant failed to establish ineffective assistance of counsel where the defendant's trial counsel did not call a witness to testify about the reputation for untruthfulness of a State's witness when that testimony would not have been admissible?

Can a defendant raise, for the first time on appeal, an argument that does not involve an error of constitutional magnitude?

Has the defendant failed to show ineffective assistance of counsel where trial counsel did not argue in a CrR 7.5 motion that the trial court erred by not allowing cross-examination of a State witness regarding a Myspace account?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Bradley Marshall Peters was charged by Information with the crime of Rape of a Child in the Second Degree (domestic violence) in Count I, Child Molestation in the Second Degree (domestic violence) in Count II, and Rape of a Child in the Third Degree (domestic violence) in

Count III. CP 1-2. He was tried by jury before King County Superior Court Judge George Mattson, and found guilty as charged on July 19, 2006. CP 8.

On November 20, 2006, Peters filed a CrR 7.5 motion for a new trial. CP 19-25. On December 8, 2006, the court denied the CrR 7.5 motion and imposed standard range sentences totaling 170 months. CP12; RP 951. Peters appealed his convictions, and this Court affirmed the trial court. CP 106-110.

On December 7, 2007, Peters filed a CrR 7.8 motion, with the trial court denied. CP 26-74; 111-17. Peters now appeals the denial of his CrR 7.8 motion. CP 150. The State will provide additional procedural facts as they relate to each argument.

2. SUBSTANTIVE FACTS.

a. Incident And Trial.

On July 13, 2005, Bradley Peters sexually abused his fourteen-year-old stepdaughter, J.P., in Renton, Washington. Peters had been sexually molesting J.P. since she was twelve years old.

J.P. was born on April 16, 1991. RP 334. For several years she had lived in Renton with her mother, Luz Peters,¹ the defendant, and her younger brother, Scott, at the home of her grandparents, Francis and James Peters. RP 337-40. She began living at her grandparents' home when she was in the third grade and eight years old, and continued to live there until July 13, 2005. RP 345, 353.

Beginning when J.P. was eleven or twelve years old, Bradley Peters started initiating discussions about sex. RP 361, 392. He would ask J.P. what she would do if her future husband came home and got in the shower with her and wanted to have sex. RP 361. He would discuss sexual positions with her, and touch her chest, legs and vagina. RP 364. Peters then initiated sexual contact with J.P. He would kiss her and put his mouth on her chest, and blow air on her stomach. RP 364. When he would try to go lower, J.P. would squirm and move. RP 364. He would touch her breasts with his hand or mouth. RP 364-65. At one point during their sex talks, Peters showed J.P. a vibrator that he took from a drawer in his bedroom. RP 439-40.

On other occasions, Peters made J.P. shower naked with him. RP 366-68. He touched her sexually in the shower. RP 368. He undressed J.P. before they got in the shower, and had her shave his back and scrub

¹ The State will refer to "Luz Peters" as "Luz."

him down. RP 368. He used soap and scrubbed J.P. down, and fingered her private area. RP 368. At times Peters had an erection when he was in the shower. RP 399.

Peters also put his finger inside J.P.'s vagina, hurting her. RP 396. One time, in Peters's bedroom, he asked J.P. if she had ever seen a penis before, pulled his pants down, and exposed himself. RP 396.

When Peters talked about sex with J.P., he touched her and removed her clothes. RP 363. The touching began when she was thirteen years old, and Peters continued to touch her and talk about sex and sexual positions. He ignored J.P. when she cried and said that she did not want her clothes removed and did not want to be touched. RP 363-64, 395. In November 2004, J.P. asked Peters to agree that they would just talk about sex, and that he would not remove her clothes or touch her anymore. RP 362, 395. Peters said he would agree that they would just talk about sex and he would not do those things anymore. RP 395. On the day they made the agreement, Peters had put his finger both inside and outside her vagina. RP 396.

On July 13, 2005, J.P.'s mother, shortly after six p.m., Luz left the house because she was helping a friend move. RP 354. J.P. had been crying because she did not want to take honors classes at school. RP 354. After her mother left, Peters pulled J.P. onto his lap, picked her up and

carried her downstairs to his bedroom. RP 353. He placed J.P. on the bed. RP 353. This was the room in which they always had their sex discussions. RP 355-56.

Peters had earlier told J.P. that the three things required for anal sex were to "relax, lube, and insert." RP 355-57, 441. In the bedroom on July 13, Peters again began asking J.P. what the three things were that were required for anal sex. RP 356. J.P. responded by saying that you need to relax and lubricate, but she could not remember the third thing (insert). RP 356. Peters then removed J.P.'s pants and underwear and kept asking her what the three things were that she needed to do. When she said she did not know what the third thing was, Peters undid her bra and took it off, along with her shirt. J.P. asked what he was doing and tried to squirm away. RP 357. Peters then stuck his thumb inside her vagina. RP 357. He took a jar of Vaseline off a windowsill, opened it, put some Vaseline on his hand, and rubbed it on her anus. RP 357. When J.P. started to cry, Peters said, "relax, lube, and insert." RP 357. After a while he put his thumb back inside her vagina and was moving it around. RP 358. J.P. told him she "couldn't do it" and he replied that yes, she could. RP 358. At that point, J.P. heard the front door to the house open and close. RP 358.

Peters jumped off the bed, threw blankets over J.P. and left the room. RP 359-60. Luz had walked into the house and seen Peters by the stairs, with an erection and a shocked look on his face. RP 167, 332. She asked Peters where her daughter was, but he did not answer her. RP 167. Luz came into the bedroom and asked J.P. what she was doing, pulling the sheets back. RP 360. J.P.'s bra and top were off and she was fumbling to get her pants on. RP 360. Luz closed the door and asked J.P. what was going on, but J.P. just cried. RP 168. When Luz asked why she was crying, J.P. said that they had been talking about sex. RP 168.

Luz told J.P. to get dressed and go to the car. She then picked up her son and began moving her belongings out of the house. RP 171, 360. J.P. described her mother as in shock, and heard her say to Peters, "what the fuck, you are sick, you are sick, you are disgusting." RP 360. Luz took J.P. and her younger son to the house of her sister, Nida Ethridge. RP 200. Ethridge, who is a nurse at Overlake, later accompanied them when they went to Harborview that evening. RP 201-03. The Renton police also responded to the hospital. RP 496.

At Harborview, J.P. was examined by Dr. Ellie Click, the attending physician. RP 543. J.P. described to Dr. Click a two-year history of "talks" with Peters about sex, including oral, vaginal and anal sex, and masturbation. RP 545. J.P. told Dr. Click that her stepfather had been

comforting her regarding her stress about taking honors classes, and then he took her to his room and said that they were "going into one of our talks." He asked J.P. what was needed for anal sex. RP 544. J.P. said that he took her clothes off, and she cried and tried to turn away, but he turned her back toward him and told her to look at him. RP 544. Peters answered his own question by saying that lubrication, relaxation, and penetration were needed. RP 544. He applied a lubricant to her anus, but did not digitally penetrate her anus. RP 544. He did a hair check, to make sure she had shaved her pubic hair, as he had done in the past. RP 544-46. He also inserted his finger in her vagina. RP 544. He then blew bubbles with his mouth on her stomach. RP 545. Peters left the room when her mother came home. RP 545.

During J.P.'s physical examination, swabs were taken from her mouth, vagina, and rectal areas. RP 550. The "rape kit" was later inadvertently destroyed due to poor communication between the police and hospital, and no testing of the swabs was ever performed. RP 301-05, 505-09.

Dr. Naomi Sugar, director of the Harborview Center for Sexual Assault and Traumatic Stress, met J.P. on July 25, 2005. RP 262. Dr. Sugar was familiar with the medical records and examination conducted

by Dr. Click. RP 259. Dr. Sugar was aware from police and social workers that there had been sexual contact for several years between J.P. and Bradley Peters. RP 286.

When J.P. spoke with Dr. Sugar, J.P. said that Peters had started talking to her about things that she thought her mother would talk about, like drugs, alcohol, and sex. RP 269. Peters had told J.P. that the three basics were oral, anal, and vaginal sex. RP 271. Peters did not touch her in the beginning when he talked about sex, but later did touch her and took her clothes off. RP 271. He would touch her vagina and touch her inside her anal area. RP 271. He did not use his penis or ejaculate. RP 272. The last time he put his finger in her vagina was on July 13, 2005. RP 272. On that occasion he had put Vaseline on her anus, but did not do anything because her mother came in. RP 272.

Dr. Sugar asked if Peters had at any time put anything in her mouth, and J.P. said no because she would bite it, although she did say Peters put his finger in her mouth. RP 273. She said he also made her shave his back and get in the shower with him, starting in the seventh grade. RP 273-74.

Dr. Sugar noted that Dr. Click's physical examination of J.P. was normal, which was not unusual under the circumstances. RP 280. Dr. Sugar had no opinion whether Vaseline would be present after the

incident, as it would depend on how much was used, whether it was rubbed in, and what the person did afterward. RP 301. She also described the procedure involving the "rape kit" and the inadvertent destruction of that evidence. RP 304-05.

Renton police searched the Peters residence the day after the incident. In the bedroom where the acts occurred, Detective Robert Onishi found a large bottle of Vaseline petroleum jelly on a windowsill, and a plastic dildo in a chest-of-drawers. RP 458-63. Another Renton Police Officer, Mark Day, searched Peters's vehicle and found a picture of J.P. above the driver's side window visor. RP 472-74. Peters was arrested on the morning of July 14. RP 446.

Bradley Peters testified at trial and denied any sexual abuse of J.P. He claimed that J.P. began asking him repeatedly about sexual matters and that he merely explained the different types of sex and sexually transmitted diseases and risk of pregnancy. RP 703-04. These conversations occurred in his bedroom so they could have privacy when they talked about it. RP 705-08. He admitted discussing anal sex with J.P., but only after she first asked him about it. RP 708, 755. He told her that for anal sex she needed to use a lubricant and a condom. RP 708. He denied ever telling her that the three rules of anal sex were to "relax,

lubricate, and insert.” RP 709. He denied touching her sexually in any way, taking her clothes off, taking a shower with her, or ever helping her shave her pubic area. RP 709-13, 738-39.

Peters testified that on July 13, 2005, J.P. was crying because she did not want to take honors classes, and he took her downstairs to talk privately with her. RP 722-25. She was dressed normally and there was no discussion about sex at that time, nor was there any sexual contact. His wife then returned home and he greeted her. RP 730-31. He claims that Luz asked where J.P. was, looked at him and said what did you do, and then took off. RP 731. He denied that he had an erection when he greeted his wife. RP 732. Peters said J.P. told her mother that nothing had happened. RP 736.

b. Myspace Account, Post-Trial Motions, And First Appeal.

Prior to trial, Peters’s attorney found a Myspace account that purportedly belonged to Luz Peters. RP 115-16. The Myspace account indicated that Luz was not married and did not want children. RP 116. Peters argued that he had a good-faith basis to ask Luz on cross-examination whether she said that she was not married and that she did not

want children. RP 117-18. Peters contended that this evidence was relevant to show Luz's dissatisfaction with her marriage. RP 117.

The trial court permitted Peters's counsel to inquire on this topic outside the presence of the jury. RP 190-92. Luz testified that she created the Myspace account so that she could gain access to J.P.'s account. RP 190. She denied, however, stating that she was not married or indicating that she did not want children. RP 190. The court then precluded Peters from examining Luz about this Myspace account. RP 197-98.

On November 20, 2006, Peters filed a CrR 7.5 motion for a new trial. RP 197-98.² In this motion, Peters argued that his trial counsel was ineffective for (1) arguing the incorrect legal standard on Peters's destructive of evidence motion and (2) failing to call an expert to opine as to the properties of Vaseline. CP 19-25. On December 8, 2006, the trial court denied the CrR 7.5 motion. CP 12.

Peters appealed his convictions. In his first direct appeal, Peters argued, albeit without analysis, that the trial court erred by not allowing him to cross-examine Luz about her Myspace account. CP 126-34. This Court affirmed the convictions in an unpublished decision, and the case was mandated on June 23, 2008. CP 105-110.

² Although the CrR 7.5 motion was filed late, the court allowed the motion.

On December 7, 2007, Peters filed a CrR 7.8 motion in the trial court arguing that (1) his attorney was ineffective for failing to present evidence that J.P. was pregnant at the time of her initial examination at Harborview; (2) his attorney was ineffective for failing to produce evidence that Luz has a known reputation for dishonesty; and (3) the trial court violated Peters's constitutional rights by preventing him from examining Luz about her Myspace account. CP 26-74.

On February 15, 2008, the court denied the first argument (reputation evidence), ruling that the family was not a neutral community for purposes of reputation testimony. CP 96. The court, however, requested additional briefing on the other arguments. CP 96-97. On June 20, 2008, the court heard oral arguments on the motion, at which point Peters withdrew his argument regarding the pregnancy test after it became clear that J.P. was not pregnant at the time. 3RP 106.

On August 22, 2008, the court then denied the CrR 7.8 motion in its entirety. CP 111-17. The court ruled that the pregnancy test was the reason for considering the CrR 7.8 motion because it was newly discovered evidence. CP 114. Once Peters withdrew that argument, however, the court concluded that there was no basis to consider the

Myspace argument so far after CrR 7.5 deadline:

When the Defense withdrew the issue of the “new” pregnancy evidence there was really no basis to entertain, under CrR 7.8, an argument pertaining to an error of law which is only appropriately brought if filed in a motion under CrR 7.5 within 10 days of the verdict or decision.

CP 114.

In its ruling, however, the court went on to note that it likely by not allowing defense counsel to cross-examine Luz about a Myspace account.

CP 115. The court, however, noted that this exact issue was previously raised and rejected in Peters’s direct appeal. CP 115.

The court also said that even if trial counsel would have asked Luz about her Myspace account, this testimony would not have been particularly fruitful because the “excluded evidence obtained was essentially cumulative” because there was “considerable evidence and argument made by Defense counsel . . . about the dissatisfaction of [Luz] with the marriage.” CP 116. The court further emphasized that this evidence would not have affected the credibility of J.P., the State’s main witness. CP 116. Overall, the court concluded that even if the Myspace cross-examination of Luz had been allowed, “there is no reasonable likelihood that the outcome of the trial would have been different.” CP 116.

The State will provide additional facts as they relate to each argument.

C. **ARGUMENT**

1. **THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTION TO VACATE THE CONVICTION BECAUSE PETERS'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR DECIDING NOT TO CALL JOSEPHINE BAEBE.**

Peters argues that the trial court erred by not granting his CrR 7.8 motion to vacate on the basis that Peters's trial counsel was ineffective for failing to call Josephine Baebe to present evidence of Luz 's reputation for untruthfulness. This argument fails, as Peters failed to show that his attorney acted deficiently or that Peters suffered prejudice.

a. Relevant Facts.

In his CrR 7.8 motion, Peters argued that his attorney was ineffective for failing to call Josephine Baebe — the sister of Luz — to testify that Luz has a reputation for untruthfulness in their family. CP 26-74. Peters provided the trial court with an affidavit from the defense investigator indicating that she interviewed Baebe prior to the trial and that Baebe said that Luz had a reputation for lying within the family. CP 48-49. Peters also provided an affidavit from Peters's trial counsel

indicating that he was aware of Baebe's statement, but that he did not "call her as a witness to this reputation" because he "was concerned she was hostile to [Peters] in other ways." CP 73.

The trial court rejected Peters's argument that his counsel acted ineffectively, concluding that "one's family is not a neutral community," and, thus, Baebe could not have been called to provide reputation evidence. CP 76.

b. Standard Of Review.

This court reviews a CrR 7.8 ruling for an abuse of discretion. State v. Swan, 114 Wn.2d 613, 642, 790 P.2d 610 (1990). Further, this Court reviews challenges to the foundation of reputation testimony for an abuse of discretion. State v. Callahan, 87 Wn. App. 925, 935, 943 P.2d 676 (1997).

In order to demonstrate ineffective assistance of counsel, the defendant bears the burden to show (1) that trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that but for counsel's errors, the outcome would have been different. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). If the challenged action can be characterized

as legitimate trial strategy, then it cannot serve as a basis for a claim of ineffective assistance of counsel. Id. at 77-78.

c. Peters Has Failed To Show That His Attorney Acted Deficiently Or That He Suffered Prejudice.

The trial court properly exercised its discretion in ruling that the decision of Peters's trial counsel not to call Baebe did not constitute ineffective assistance of counsel. First, this was clearly a strategic decision by trial counsel. The defense attorney, in fact, indicated that he knew about Baebe's possibly testimony, and based on his investigation, concluded that Baebe would harm Peters in other ways if she were a witness. This is a quintessential tactical choice — that the possible damage from calling a witness will likely outweigh its benefits — and, thus, cannot form the basis of ineffective assistance of counsel.

Second, *even if* defense counsel were deficient for failing to call Baebe, Peters has failed to show how this failure prejudiced him. Indeed, as the trial court correctly noted, any reputation testimony from Baebe would have been inadmissible even if trial counsel *attempted* to call Baebe.

Reputation evidence is admissible only if the witnesses testify based on their “personal knowledge of the victim's reputation in a relevant

community during a relevant time period.” Callahan, 87 Wn. App. at 934. The party seeking to admit evidence must establish a foundation for it. State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). To establish a foundation for a person’s reputation in a community, that party must show that the community is both neutral and general. Id. Factors relevant to this determination include: “the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community.” Id. Determining whether the foundation is adequate is a matter of trial court discretion. Id.

The cases clearly state that a family is generally *not* considered a neutral or general community for purposes of reputation evidence. See, e.g., State v. Gregory, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006) (family members are likely neither neutral nor sufficiently generalized to constitute a community for the purposes of reputation evidence because the “inherent nature of familial relationships often precludes family members from providing an unbiased and reliable evaluation of one another”); State v. Lord, 117 Wn.2d 829, 874-75, 822 P.2d 177 (1991) (refusing to find a family as a neutral and general community); State v. Thach, 126 Wn. App. 297, 315, 106 P.3d 782 (2005) (finding that a family

did not constitute a community for purposes of reputation evidence).³

Because Peters did not lay the proper foundation that Baele's family was sufficiently neutral and generalized, reputation evidence from Beale would not have been allowed, and his claim of ineffective assistance fails.

Further, to the extent that a family could *possibly* be considered an appropriate community, Peters failed to make the requisite showing to the trial court during the CrR 7.8 motion. For example, Peters did not provide the trial court with information as to (1) how many members were in the family, (2) the frequency of the contact between the family members, (3) the amount of time Luz was known in the family, (4) the role of Luz within the family, and (5) how Baebe knows the reputation of Luz within the family. Land, 121 Wn.2d at 500 (citing these factors that courts should consider when deciding whether to allow reputation testimony); CP 48-49. Peters failed to lay the proper foundation for reputation evidence and, thus, has not shown that this testimony would have been admissible even if trial counsel had decided to call Beale.

³ Peters's main argument is that Thach is incorrect because it fails to consider the Land decision, a decision by the Washington Supreme Court where the court admitted reputation testimony based on the witness's reputation in the workplace community. Even though Land permits reputation testimony from any community that is sufficiently neutral and general, this does not mean that a family is neutral and general. To the contrary, based on post-Land cases, the clear indication is that a "family" is not neutral and general enough to constitute a community for purposes of reputation testimony. See, e.g., Gregory, 158 Wn.2d at 805.

Even if trial counsel called Baebe, and even if the court allowed her testimony about Luz's reputation for untruthfulness, there is no reasonable probability that this information would have changed the verdict. As the trial court recognized, this case rested almost entirely on the testimony of J.P., not Luz. CP 116 ("It was the child who so credibly testified to the strange facts involving her relationship with the defendant that was the center of the State's case."). So even if Baebe testified about Luz's reputation for untruthfulness, Peters still would not have been able to explain why J.P. would fabricate these allegations against Peters considering that the evidence showed that J.P. loved Peters, enjoyed the stability of Peters's family, and did not want to tear her family apart. RP 416, 428-29. Under the facts of this case, there is no reasonable probability that any additional impeachment of Luz would have made a difference.

2. THIS COURT SHOULD NOT REVERSE BASED ON PETERS'S FAILURE TO RAISE THE MYSPACE ISSUE IN PETERS'S CrR 7.5 MOTION.

Peters maintains that his attorney was ineffective for failing to argue in the CrR 7.5 motion for a new trial that the trial court erred by excluding questions to Luz about her Myspace account. This argument

fails. First, this issue is not properly before this Court. Second, Peters has failed to show ineffective assistance of counsel.

This is an appeal of the trial court's ruling on the CrR 7.8 motion. In this appeal, however, Peters does not challenge the court's ruling that the Myspace issue was not properly before it or that had the Myspace evidence been admitted, "there is no reasonable likelihood that the outcome of the trial would have been different." CP 116. Instead, Peters asserts that his counsel was ineffective for failing to raise the Myspace issue before the trial court in his CrR 7.5 motion.

This appellate issue, however, is not properly before this Court. And even if it were, it is without merit.

- a. The Argument That Peter's Counsel Was Ineffective For Failing To Raise The Myspace Argument In His CrR 7.5 Motion Is Not Properly Before This Court.

RAP 2.5(c)(2) allows an appellate court to "review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review. RAP 2.5(c)(2). The courts have interpreted this rule to "allow review of a previous

decision when the decision is erroneous and when justice would best be served by review.” Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 652, 935 P.2d 555 (1997). Based on this rule, the courts have frequently refused to consider claims that the court had already decided in the same case. See, e.g., id. (refusing to reconsider the court’s previous decision in the same case because “Sintra has not established our prior decision was erroneous or shown sufficient prejudice to overcome the law of the case doctrine”); State v. Meas, 118 Wn. App. 297, 303, 75 P.3d 998 (2003) (rejecting defendant’s argument that he was denied a fair trial because this Court already “resolved that issue on [his] first appeal” and “he presents no argument as to why we should revisit that decision”).

This Court should reach the same conclusion here. In his first direct appeal, this Court already considered the argument that the court erred by excluding cross examination of Luz as to her Myspace account. Although this Court did not analyze the issue in its opinion, the claim was submitted and decided on the merits. Now Peters raises the same issue on his second direct appeal, but fails to present any argument as to why this Court should revisit that decision. For this reason alone, this Court should affirm the trial court.

Further, an appellate court will not consider an issue raised for the first time on appeal unless the issue involves an error of constitutional

magnitude. State v. Schwab, 141 Wn. App. 85, 97, 167 P.3d 1225 (Wn. App. 2007) (refusing, in an appeal of a CrR 7.8 motion, to consider issues that were not raised to the trial court in the CrR 7.8 motion).

Currently before this Court is an appeal of the trial court's denial of Peters's CrR 7.8 motion. In the CrR 7.8 motion, Peters never once argued that his attorney was ineffective for failing to bring the Myspace issue in the CrR 7.5 motion, and the trial court did not rule on this issue. Since this issue was not brought before the trial court, it is not properly raised before this Court here.⁴

- b. Peters's Has Failed To Show That His Attorney Provided Ineffective Assistance Of Counsel For Failing To Raise A Myspace Argument In His CrR 7.5 Motion.

Even if this Court considers this argument, the trial counsel was *not* ineffective for failing to bring this motion on a CrR 7.5 motion. Trial counsel had already raised the issue during the trial and lost, and there was no reason to believe that the court would have changed its mind after trial.

⁴ It appears that Peters is attempting to get around the rule that does not allow courts, in a ruling on a CrR 7.8 motion, to grant relief for legal errors. State v. Robinson, 153 Wn.2d 689, 695, 107 P.3d 90 (2005). Peters's argument in the CrR 7.8 motion — that the trial court erred by excluding the examination into Luz's Myspace account — was not a proper argument for a CrR 7.8 motion, and this Court should reject his attempt to raise that argument here.

Under these circumstances, raising this issue in a 7.5 motion would have detracted from his other, more forceful arguments regarding the expert and the Vaseline.

Peters also cannot show that he suffered prejudice from his trial counsel not bringing the issue in a CrR 7.5 motion. In short, the trial court would not have granted his CrR 7.5 motion because Peters would not have been able to show any prejudice from the exclusion of this cross-examination. Even if the cross-examination were admissible, the only evidence at trial would have been the defense attorney asking Luz whether she said that she had no children, and Luz responding that she never put that into the Myspace account. Considering her denial, it is difficult to see how this evidence would have changed anything.

Further, the trial court explicitly held that even if cross-examination regarding Luz's Myspace account were admissible, it would not have changed the verdict. This conclusion makes sense. First, as the trial court noted, the evidence was cumulative of other evidence showing Luz was not happy in her marriage with Peters (e.g., Luz was distant, would frequent bars after work, and would often not return home at a reasonable hour, RP 666-68). Second, this cross-examination would not have altered the credibility of J.P., or explain why J.P. would possibly fabricate these sordid allegations against someone that she loved. The trial

court correctly reasoned that even if this evidence had been admitted
“there is no reasonable likelihood that the outcome of the trial would have
been different.” CP 116. This Court should come to the same conclusion
here.

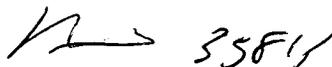
D. CONCLUSION

For these reasons, the State respectfully asks this Court to affirm
the trial court.

DATED this 11th day of August, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa Lee, the attorney for the appellant, at Washington Appellate Project, 1511 Third Ave., Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in State v. Bradley Peters, Cause No. 62279-0-1, in the Court of Appeals, Division I. of the State of Washington.

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

W Brame

Name

Done in Seattle, Washington

8/12/09

Date

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