

NO. 35366-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK D. PETERSON,

Appellant.

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

The Honorable Frederick W. Fleming, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

TRIAL COUNSEL'S OBJECTION TO ADMISSION OF
OPINION EVIDENCE FROM A NON-TESTIFYING EXPERT
PRESERVED THE ISSUE FOR APPEAL.

At trial, the state's forensic expert was permitted to testify that a peer reviewer had reviewed her work on this case and agreed with her conclusions. 4RP 309-08. Defense counsel objected and moved to strike the testimony, arguing that it was inadmissible opinion evidence and hearsay that had not been subject to cross examination. 4RP 309-10; 5RP 316. The court overruled the objection and agreed to give a limiting instruction if one was proposed. 5RP 319-20. No limiting instruction was presented or given.

It is well recognized that defense counsel may choose not to present a limiting instruction because doing so would re-emphasize damaging evidence. In re Personal Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). In fact, the court below noted that a limiting instruction might serve only to emphasize evidence the defense did not want emphasized. 5RP 319. Nonetheless, the state argues in its brief that Peterson did not preserve this issue for appeal because he did not propose a limiting instruction. Br. of Resp. at 18-19.

Contrary to the state's assertion, a challenge to the admission of evidence is preserved for appeal by a timely and specific objection to admission of the evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007, 917 P.2d 129 (1996); ER 103. Trial counsel's objections preserved the issue before this Court. Moreover, as the denial of Peterson's right to confrontation is a manifest constitutional error, it could be raised for the first time on appeal in any event. RAP 2.5(a)(3).

In support of its argument, the state cites to State v. Newbern, 95 Wn. App. 277, 975 P.2d 1041 (1999). Br. of Resp. at 19. In Newbern, the appellant argued that he was prejudiced by the trial court's failure to give a limiting instruction regarding the use of prior inconsistent statements. This Court held that, while appellant would have been entitled to such an instruction had he requested it, his failure to request a limiting instruction constituted a waiver of his right to the instruction, and he could not challenge the omission on appeal. Newbern, 95 Wn. App. at 295-96.

Under that authority, Peterson clearly cannot argue that the trial court erred in failing to give a limiting instruction regarding the non-testifying expert's opinion, because he did not propose such an instruction. That is not Peterson's argument, however. Peterson's argument on appeal is that admission of testimony about the non-testifying expert's conclusion

violated his constitutional right of confrontation. See Peterson Br. of App. at 13. This issue was preserved by trial counsel's timely objection that the hearsay opinion should be excluded because it had not been subject to cross examination. 5RP 316-20.

B. CONCLUSION

For the reasons stated above and in Peterson's opening brief, this Court should reverse Peterson's convictions and remand for a new trial.

DATED this 23rd day of July, 2007.

Respectfully submitted,



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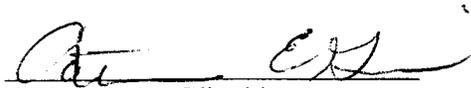
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,
properly stamped and addressed envelopes containing copies of the Reply Brief of
Appellant in *State v. Mark D. Peterson*, Cause No. 35366-1-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
July 23, 2007



A vertical stamp is located in the lower right quadrant of the page. It contains the text "JUL 23 2007" at the top, followed by a handwritten signature that appears to be "C. Glinski". Below the signature, there is some faint, illegible text.