

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.

FILED
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APPELLATE DIVISION
TWO
SEATTLE, WA

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

The Honorable Frederick W. Fleming, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Admission of a non-testifying expert's opinion violated appellant's constitutional right of confrontation.

2. Prosecutorial misconduct during rebuttal argument denied appellant a fair trial.

Issues pertaining to assignments of error

1. Appellant was charged with manufacturing methamphetamine and unlawful possession of cocaine. The state's case depended on testimony from the forensic scientist who analyzed the suspected substances. The scientist testified that a peer reviewer had agreed with her conclusions, but the peer reviewer did not testify. Where appellant had no opportunity to cross examine the peer reviewer, and that expert's opinion was offered merely to bolster the witness's testimony, did the trial court's refusal to strike the testimony violate appellant's constitutional right of confrontation?

2. In response to defense counsel's argument that certain evidence presented at trial created a reasonable doubt, the prosecutor informed the jury it did not need to consider all the evidence in determining whether it was convinced of appellant's guilt beyond a reasonable doubt. The trial court approved this misstatement of the law by overruling defense counsel's objection. Where there is a substantial

likelihood the prosecutorial misconduct affected the verdict, is reversal required?

B. STATEMENT OF THE CASE

1. Procedural History

On January 23, 2006, the Pierce County Prosecuting Attorney charged appellant Mark Peterson with unlawful manufacturing of a controlled substance and unlawful possession of ammonia with intent to manufacture methamphetamine. CP 1-4; RCW 69.50.401(1)(2)(b); RCW 69.50.440(1). The information was amended on August 22, 2006, to add one count of unlawful possession of cocaine and to allege that the manufacturing offense was committed within 1000 feet of a school bus route stop. CP 7-10; RCW 69.50.4013(1); RCW 69.50.435.

The case proceeded to jury trial before the Honorable Frederick W. Fleming. The jury entered guilty verdicts on the manufacturing and possession of cocaine charges and found the school bus route stop allegation had been proven. CP 107, 109, 110. It found Peterson not guilty of possessing ammonia with intent to manufacture methamphetamine. CP 108. The court imposed a Drug Offender Sentencing Alternative on the manufacturing count and a standard range sentence on the possession count. CP 133, 142-44. Peterson filed this timely appeal. CP 145.

2. Substantive Facts

Mark Peterson lived in a mobile home in Puyallup for 15 years. He is a mechanic, and he maintained the property owner's heavy equipment and vehicles in exchange for his use of the property. 7RP¹ 470. Peterson had his home on the front portion of the 20 acres of property, along with a garage and several construction shacks the property owner stored there. 7RP 470-71. The back portion of the property was wooded, with many active trails running through it. 7RP 480.

Peterson's sister, Laura Smith, moved onto the property in the summer of 2005. 7RP 502. She initially stayed in a motor home while Peterson helped her refurbish a trailer, tearing it down to the frame and rebuilding and repainting the inside. 7RP 495, 505. She moved into the trailer sometime before December 2005. 7RP 506.

Peterson has done a considerable amount of remodeling in his mobile home as well, including painting most of the rooms. He also painted the vehicles and equipment on the property as part of the routine maintenance. 7RP 471-72, 511. He therefore stored painting supplies, thinners, and solvents in both the house and garage. 7RP 473-74.

¹ The Verbatim Report of Proceedings is contained in nine consecutively-paginated volumes, designated as follows: 1RP—8/22/06; 2RP—8/24/06; 3RP—8/28/06; 4RP—8/29/06(a.m.); 5RP—8/29/06 (p.m.); 6RP—8/30/06; 7RP—8/31/06; 8RP—9/1/06; 9RP—10/20/06.

In December 2005, Peterson was in the process of repainting his kitchen when he exacerbated a previously existing injury. 7RP 474, 476. He was almost completely bedridden for the next month. 7RP 476-77. During that time, a friend came to his house about every other day to bring him food and cook for him. 7RP 459. Peterson was unable to move much and spent his time in bed or on the couch. 7RP 458. He was not able to cook, clean, or do laundry. 7RP 460, 477.

Peterson maintained an open door policy at his house, and he allowed friends to use his kitchen and laundry room. 7RP 477-48. The back door, which opened into the laundry room, was always unlocked, and Smith and her visitors could come and go as they pleased. 7RP 478, 494. Peterson also allowed friends and acquaintances store items in the garage, which was an open structure with an inner locked room where Peterson stored his tools. 7RP 480, 484. Several people's belongings were stacked in the garage at any time, and Peterson did not keep track what was there or who had left it. 7RP 480, 485, 487.

In addition to friends and acquaintances coming and going, Peterson often caught trespassers in the outbuildings on the property. 7RP 482. He had found items dumped in the wooded areas and has had a hazmat team out to remove items more than once. 7RP 500-01.

On January 20, 2006, a multi-agency clandestine drug lab team executed a search warrant at Peterson's property. 2RP 64. Peterson was searched after he was escorted from his home to a patrol car, and a small straw was found in one of his pockets. The straw was placed into an evidence bag and turned over to the case officer. 3RP 95-96. Peterson was charged with unlawful possession of a controlled substance based on residue found on the straw. CP 8. Based on evidence found on the property, Peterson and Smith were charged with manufacturing methamphetamine. CP 7². Peterson's house was less than 1000 feet from a school bus route stop, and a special allegation relating to that location was included in the charging document. 6RP 368; CP 7.

At trial, Pierce County Sheriff's Deputy Robert Johanson described the two primary methods for manufacturing methamphetamine: red phosphorous and anhydrous ammonia. 3RP 124-29. He then described the process the clandestine lab team uses when searching the site of a suspected methamphetamine lab. Johanson explained that the team raids the property, detaining anyone present and securing the scene for processing. 3RP 130. A finding officer then searches the property, looking for items associated with methamphetamine manufacture. The finding officer relays a description of each item by radio to an alternate,

² Peterson was acquitted of a charge of unlawful possession of ammonia with intent to manufacture methamphetamine. CP 108.

who logs in the description. 3RP 130-31. Another officer photographs the items with evidence numbers in the location they are found, then takes the items and numbers to the sampling and printing station. 3RP 131, 133. A sampling officer takes samples of the items to be sent to the crime lab for analysis, and a printing officer processes the items for fingerprints. 5RP 343; 6RP 376.

Johanson served as the finding officer on January 20, 2006. 3RP 131. He described for the jury the items he seized, giving his opinion of how each item was evidence of methamphetamine manufacturing. 3RP 134, 135, 139, 140, 145, 146, 147, 148, 150, 155, 158, 159, 160, 162, 164, 166, 175, 182, 184, 188, 189, 190, 192, 194, 196, 197, 200, 203, 204, 208, 209, 210, 216.

In Peterson's house, Johanson found a test kit for acids and bases, used coffee filters, a sauce pan, denatured alcohol, and a solvent in the laundry room. 3RP 133-47. He found a coffee grinder with white residue, a Mason jar with a white substance, coffee filters, a can of acetone, and a plastic milk bottle in the kitchen. 3RP 154-61. In the bedroom, Johnson found a hand grinder, a respirator, a face mask, and a syringe filled with liquid. 3RP 161-66. There was a video monitor connected to a security camera and a handbook on chemistry and physics in the dining room. 3RP 175-81.

Johanson also found several items he believed were related to methamphetamine manufacture in the garage, including vinyl tubing connected to a modified garden sprayer, deteriorated coffee filters, a can of Coleman fuel, funnels, Mason jars, drinking glasses, and Red Devil lye. 3RP 182-93. Many of the items found in the garage were inside a closed blue tote. 3RP 231-32, 234. Johanson found evidence of all stages of methamphetamine manufacturing in this portable tote, which was located in the unlocked portion of the garage. 3RP 237-38. He had encountered such containers before and considered it a methamphetamine lab in a box. 3RP 254-55.

Deputy Shaun Darby testified that he found precursors to manufacturing methamphetamine in Smith's trailer, including two bottles of a fuel additive, packages of Sudafed, and coffee filters. 3RP 106-107, 109. Believing these items related to a methamphetamine lab, he alerted the finding officer about the items. 3RP 119. Johanson then searched Smith's trailer and seized the coffee grinder, a pair of rubber gloves, a can of acetone, coffee filters, and pills in a blister pack. 3RP 209-13.

Officer Gary Backus was the printing officer. He lifted fingerprints from ten items brought to the processing table, including items from Peterson's kitchen, laundry room, bedroom, and garage. 6RP 374, 376-81. Steven Mell, a forensic investigator for the Pierce County

Sheriff's Department, analyzed the prints. Three matched known prints from Smith. 6RP 392. None of the lifted prints matched Peterson's. 6RP 399-400.

Robert Hoag was the sampling officer. He decided which items needed to be sampled for testing at the crime lab, which needed to be retained intact, and which needed to be documented and discarded as hazardous. 5RP 343. He sampled most items for analysis, because the finding officer had already determined they were significant. 5RP 351.

Tammy Kee, a forensic scientist at the Washington State Patrol Crime Lab, testified that she received the items submitted for testing in this case. 4RP 286. She identified the substance found on the straw removed from Peterson's pocket as cocaine. 4RP 289. Kee also described her experience analyzing suspected methamphetamine labs, the manufacturing process, and the tests she uses to analyze samples from a suspected methamphetamine lab. 4RP 279-86, 292.

Kee testified that 15 items were submitted for testing, including one item which contained several different samples. 4RP 289. Of the 14 individual items, Kee tested seven. She determined that the baggies found in Smith's trailer contained methamphetamine; the pills found in Smith's trailer contained pseudoephedrine; the coffee grinder found in Peterson's kitchen contained sugar, starch, and pseudoephedrine; red-stained coffee

filters found in Peterson's laundry room contained pseudoephedrine and a sugar starch; a plastic bottle contained iodine; a plastic baggie from the laundry room contained red phosphorous; and coffee filters from the laundry room contained red phosphorous, iodine, methamphetamine, and byproducts. 4RP 292-99.

The final item submitted was a metal can containing several glass vials of samples taken from the scene. 4RP 300. Of the numerous samples submitted, Kee tested only 16. 4RP 301. Twelve of those contained no controlled substances or precursors or byproducts of methamphetamine manufacturing. 5RP 322. In the other four she found sugar starch, pseudoephedrine, iodine, red phosphorus, and manufacturing byproducts. 4RP 301-03.

Kee testified that she did not analyze all the items submitted by the state for testing, and in fact there were several samples she did not analyze. 4RP 304; 5RP 326. She explained that once she determines that methamphetamine is being manufactured, she stops her analysis. 4RP 304.

After Kee detailed her conclusions, the prosecutor asked her to explain the peer review process at her lab. Kee testified that in every case, another forensic scientist reviews the case file, notes, and data to determine whether that person agrees with the conclusions reached. If an

agreement cannot be reached, a supervisor then mediates. Kee explained that peer review was a quality assurance measure. 4RP 308-09. The prosecutor then asked what conclusion the peer reviewer reached in this case, and Kee answered that they agreed with her findings. 4RP 309.

Defense counsel objected and moved to strike, and the jury was excused from the courtroom. 4RP 309. Counsel then argued it was inadmissible opinion testimony for one expert to say another expert agreed with her work, and he moved for a mistrial. 4RP 310. The court responded that it was appropriate for the expert to explain the peer review process but that for the state to go further and ask what her peers said may have been improper. 4RP 310. It gave the parties an opportunity to research the issue over the lunch break. 4RP 310-11.

After the recess, the defense argued that Kee's testimony that her peers agreed with her conclusions was impermissible opinion and hearsay offered to bootstrap Kee's testimony, and it was objectionable because that second opinion was not subject to cross examination. 5RP 316. The court responded that the witness was merely describing a procedure, and, in any event, the opinion expressed did not go to the ultimate fact in issue. It therefore overruled the objection. 5RP 317-18. While the court acknowledged that Kee's testimony that her peers agreed with her conclusions went beyond a description of the procedure and was a

comment on her credibility, it did not believe the comment reached the level of being inadmissible. 5RP 319. Smith's attorney then asked for a limiting instruction, and the court agree to give one if presented, although it believed such an instruction might emphasize evidence the defense would not want emphasized. 5RP 319.

Peterson's attorney then asked if the court would strike the testimony as hearsay. 5RP 319. The court again stated that it would have felt more comfortable with Kee just describing the peer review procedure, but defense counsel was quarreling with the fact that she went further and said her peers agreed with her. The court ruled that defense counsel could deal with that in the limiting instruction. 5RP 319-20. No limiting instruction was presented or given.

In the defense case, Peterson testified that he did not know methamphetamine was being made on the property or that methamphetamine-related material was stored there. 7RP 492-93. He did not know anything about the blue tote in the garage. He did not remember ever seeing it, and he did not open it or handle any of the items inside. 7RP 488-89. Peterson explained that the chemistry and physics book was one of several reference books he had received from his mother when she died, the chemical test kit came with a hot tub he had purchased but had not yet installed, the solvents and thinners and filters found in his house

and garage were used for painting, and the fuel additives and alcohol were used to remove water from fuel systems. 7RP 473-74, 490-91, 505, 508.

Defense counsel argued in closing that since the garage was an open structure, and Peterson allowed people to store items out there, it was reasonable to believe he did not know everything that was in the garage. 7RP 555. The evidence of manufacturing in the garage was confined to the blue tote, a portable lab in a box, which did not contain Peterson's fingerprints. 7RP 556. His fingerprints were not found on anything removed from the kitchen or laundry room either, rooms which were open to other people and which Peterson had not used for a month due to his injury. 7RP 558-59.

Counsel also criticized Kee's failure to test most of the items sent to the lab, arguing that her failure to do so left significant unanswered questions which created a reasonable doubt. 7RP 560-61. Moreover, 12 of the 16 samples tested had nothing to do with controlled substances, precursors, or byproducts. 7RP 562.

In rebuttal, the prosecutor argued that the jury did not need to consider the fact that some items were not tested, if it was convinced beyond a reasonable doubt by the tests that were conducted. Addressing the concept of reasonable doubt, the prosecutor argued,

If ... I set up a telescope and said, look out the window. And you look out the window and ... you see a mountain. And I tell you ... you're in Tacoma or Seattle. And then I say to you, you're in Seattle, and you're going to say to me, wait a minute, I don't believe that beyond a reasonable doubt. I can see that same mountain from Tacoma. Okay? I move the telescope. You ... see the mountain, you see a body of water. I say, hey, I showed you enough evidence, you're convinced beyond a reasonable doubt now that you're in Seattle. And you're going to say, wait a second, I can see water from Tacoma, as well. If I go just a little bit farther and I show you ... the Space Needle. I've shown you three items. You have an abiding belief now ... you are in Seattle. But, if I showed you that first, you would have that same abiding belief. If I show you this evidence and it's enough to convince you beyond a reasonable doubt, *you don't need to consider the other things*, the white sludge that wasn't tested. Well, I didn't tell you to consider the white sludge that wasn't tested. Look at –

7RP 586-87. Defense counsel objected that “the instruction says otherwise,” but the court overruled the objection and allowed the argument. 7RP 587.

C. ARGUMENT

1. ADMISSION OF THE OPINION OF A NON-TESTIFYING EXPERT VIOLATED PETERSON'S CONSTITUTIONAL RIGHT OF CONFRONTATION.

The Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. 6; see also Const. art. 1, § 22. Confrontation is a fundamental bedrock protection in a criminal case and requires evidence to be tested by the adversarial process. Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 158

L. Ed. 2d 177 (2004). The Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” Crawford, 541 U.S. at 61. Thus, testimonial statements of witnesses who do not testify at trial may only be admitted if the defendant has had the prior opportunity to cross-examine the declarant. Id. at 59. Admission does not depend on whether the statements fall within a hearsay exception. The only method for satisfying the Confrontation Clause is cross-examination. Id. at 59.

In this case, Tammy Kee testified that she analyzed the residue from the straw found in Peterson’s pocket and concluded it contained cocaine. 4RP 289. She also analyzed samples collected from Peterson’s property and concluded they contained methamphetamine, its precursors, and its byproducts. 4RP 294-302. In addition, Kee testified that her conclusions had undergone a peer review process and that the peer reviewer agreed with her conclusions. 4RP 308-09. The peer reviewer was not called as a witness, however, and Peterson had no prior opportunity to cross examine that expert. Thus, admission of this testimonial statement violated Peterson’s right of confrontation. See Crawford, 541 U.S. at 59.

Crawford did not definitively explain the scope of “testimonial evidence.” 541 U.S. at 68 (“We leave for another day an effort to spell out

a comprehensive definition of ‘testimonial.’”). But the Court set out the “core class of ‘testimonial’ statements”, which includes not only formal affidavits and confessions to police officers, but also “pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 51. The Clause’s “common nucleus” includes “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.” *Id.* at 52.

As the Court explained in *Crawford*, statements are embraced by the confrontation clause when a reasonable person would think they might be used in a criminal investigation. *Crawford*, 541 U.S. at 52; see *State v. Rivera*, 268 Conn. 351, 844 A.2d 191, 202 (2004) (finding Supreme Court interpreted “testimonial” to include statements made under circumstances where a reasonable person would know they would be available for use by the police or prosecution). The peer reviewer’s opinion in this case falls within that category.

Here, the law enforcement clandestine drug lab team submitted evidence collected from Peterson’s person and residence to the Washington State Patrol Crime Lab for analysis to determine whether they contained evidence of controlled substances violations. 4RP 289; 5RP 343. Kee’s analysis of the submitted samples and her conclusions as to

their contents were thus intended for use in a criminal prosecution. Moreover, Kee could not submit her final report until her conclusions were subject to peer review. 4RP 308. The peer reviewer's opinion that Kee's conclusions were correct was clearly intended to be used prosecutorially. It was therefore testimonial.

Furthermore, testimony about the peer reviewer's opinion was classic hearsay and should have been stricken at defense counsel's request. Hearsay statements repeating opinions of third parties are not subject to any hearsay exception and are inadmissible. State v. Nation, 110 Wn. App. 651, 661, 41 P.3d 1204 (2002), review denied, 148 Wn.2d 1001 (2003). One expert may not relay the opinion of a non-testifying expert without running afoul of the hearsay rule. Nation., 110 Wn. App. at 662; State v. Wicker, 66 Wn. App. 409, 411-12, 832 P.2d 127 (1992).

In Wicker, the defendant was charged with second degree burglary. The only evidence connecting him to the crime was testimony that his fingerprints were found near the point of entry. A fingerprint identification technician testified that he analyzed the lifted fingerprints and concluded that they matched the defendant's. He also testified that it was standard procedure for his analysis to be verified by another senior technician and that the comparison is verified if the other technician agrees with his conclusions. The technician testified that his identification

was verified, as indicated by the initials of the other technician on the fingerprint card. The verifying technician did not testify, however. Wicker, 66 Wn. App. at 411.

The defendant's hearsay objection to the testimony about verification was overruled. The Court of Appeals held, however, that the verifying technician's initials, together with the witness's testimony regarding the verification process, amounted to an assertion of opinion that the two sets of fingerprints matched. As such, the evidence was classic hearsay. Id. at 411-12. The objection to and motion to strike the testimony should have been granted, and its admission violated the defendant's confrontation rights. Id. at 414.

Moreover, the constitutional error was not harmless. The fingerprints taken from the crime scene were the sole basis of the state's case, and the jury heard two opinions that they matched the defendant's. Although the prosecutor did not stress the erroneously admitted opinion in closing argument, the evidence was still before the jury. Under the circumstances, the court could not conclude beyond a reasonable doubt that the jury would have reached the same result solely on the basis of the properly admitted opinion. Id.

Here, just as in Wicker, the technician who provided testimony necessary to convict Peterson testified that her conclusions were verified

through the peer review process. When the prosecutor asked Kee what conclusion the peer reviewer reached, Kee testified that they agreed with the findings in her final report. 4RP 309. This assertion of opinion by a non-testifying expert was classic hearsay, it fell within no exception to the hearsay rule, and the trial court should have granted Peterson's motion to strike it. Peterson had no opportunity to cross examine the peer reviewer, the constitutionally prescribed method for testing reliability. See Crawford, 541 U.S. at 61. Thus, the court's abuse of discretion in allowing the jury to consider the improper evidence violated Peterson's right to confrontation. See Wicker, 66 Wn. App. at 414; State v. Towne, 142 Vt. 241, 246-47, 453 A.2d 1133 (1982) (witness's testimony that non-testifying expert agreed with his conclusion was clearly hearsay and violated defendant's confrontation rights).

It is also clear that the testimony did not meet the requirements for admission under ER 703 and ER 705. Under ER 703, a trial court may admit an expert's opinion that is based on facts or data which are not otherwise admissible, if those facts or data are of the type reasonably relied upon by experts in that field in forming opinions other than for purposes of litigation. ER 703; Nation, 110 Wn. App. at 662-83; State v. Ecklund, 30 Wn. App. 313, 317-18, 633 P.2d 933 (1981). An expert may be required to disclose the facts or data underlying his or her opinion on

cross examination. ER 705. This rule should not be construed so as to bootstrap into evidence hearsay that is not necessary to help the jury understand the expert's opinion, however. State v. Martinez, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995), review denied, 128 Wn.2d 1017 (1996).

Kee's testimony made it clear that the challenged opinion in this case was given solely for the purpose of preparing for litigation. Kee was assigned to analyze items relevant to a criminal prosecution, and she could not finalize her report until it was verified through the peer review process. There was no suggestion that the peer reviewer's opinion contained facts or data Kee relied upon in reaching her conclusions. She did not refer to the peer reviewer's opinion in an effort to assist the jury in understanding her conclusions. Rather, she was acting as a conduit for the opinion of the peer reviewer. The testimony served only to bolster Kee's opinion, and it therefore did not meet the requirements for admission under ER 703 and ER 705.

The court's improper admission of a non-testifying expert's opinion violated Peterson's confrontation rights. This constitutional violation is presumed prejudicial, and the state bears the burden of proving it was harmless beyond a reasonable doubt. The error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a

finding of guilt. State v. Davis, 154 Wn.2d 291, 304-05, 111 P.3d 844 (2005). That is not the case here.

As in Wicker, the expert testimony identifying the substances submitted for analysis was necessary to convict Peterson. Without that testimony, the jury could not find that Peterson possessed cocaine or that he manufactured methamphetamine. Because of the court's error, the jury heard that not one, but two, experts had reached the same conclusions. Although defense counsel argued in closing that Kee's conclusions might have been suspect, since she did not test every item submitted, those conclusions were unfairly bolstered by the peer reviewer's concurring opinion. Under these circumstances, this Court cannot find beyond a reasonable doubt that the jury would have reached the same result if only Kee's opinion had been admitted. See Wicker, 66 Wn. App. at 414. The court's error was not harmless, and Peterson's convictions must be reversed.

2. THE PROSECUTOR'S MISSTATEMENT OF THE LAW AS TO REASONABLE DOUBT IN REBUTTAL ARGUMENT DENIED PETERSON A FAIR TRIAL.

As a quasi-judicial officer, a prosecutor is duty bound to act impartially in the interests of justice. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v.

United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934). A prosecutor who acts as a heated partisan, seeking victory at all costs, violates the duty entrusted to him by the people of the state whom he is supposed to represent. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). The prosecutor in this case committed misconduct in closing argument by misstating the law on reasonable doubt.

One of the defense arguments was that, although officers seized and sampled numerous items suspected of pertaining to the manufacture of methamphetamine, Kee failed to test most of those items. Counsel argued that the state's failure to answer questions regarding the method of manufacturing and the contents of the submitted samples, as well as the fact that many of the items tested were completely unrelated to controlled substances, created reasonable doubt. 7RP 560-62. In rebuttal, the prosecutor argued that the jury did not need to consider all the evidence, including evidence that Kee failed to test most of the items submitted, in order to be convinced beyond a reasonable doubt. 7RP 587.

Reasonable doubt may properly arise not only from the evidence admitted, but also from questions about lack of evidence. See State v. Castle, 86 Wn. App. 48, 51, 60, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997). The court's reasonable doubt instruction was consistent with this principle. It informed the jury that

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and *carefully considering all of the evidence or lack of evidence*. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.”

CP 70 (emphasis added).³ The state’s argument that the jury need not consider all the evidence when determining whether it was convinced beyond a reasonable doubt contradicted the court’s instruction and misled the jury by misstating the law as to reasonable doubt. It is serious misconduct for a prosecutor to make statements which mislead the jury as to the law. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

This misconduct was not trivial. The concept of reasonable doubt is the foundation upon which our entire criminal justice system rests, because it “provides concrete substance” for the presumption of innocence all accused citizens have. In re Winship, 397 U.S. 358, 363, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). The correct standard of reasonable doubt is so crucial that improper instruction on it is “grievous constitutional error.” State v. McHenry, 88 Wn.2d 211, 214, 588 P.2d 188 (1977).

³ The jury was also instructed, “In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all that evidence, whether or not that party introduced it.” CP 66.

In determining whether prosecutorial misconduct is harmless, appellate courts will consider whether the trial court sustained an objection and whether a curative instruction was given. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990) (prosecutorial misconduct in closing argument harmless where court instructed jury to disregard); State v. Fisher, 130 Wn. App. 1, 20, 108 P.3d 1262 (2005) (same), review denied, 156 Wn.2d 1012 (2006). Here, when defense counsel objected to the prosecutor's misstatement of the law, the court simply stated, "It is argument. I'm going to allow it." 7RP 587. The court did not correct the misleading impression created by the prosecutor's argument. Rather, its failure to sustain the objection implicitly informed the jury that the prosecutor's characterization of the law was correct.

The prosecutor's misconduct cannot be deemed harmless unless the record shows there would have been a conviction regardless of the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). The record in this case does not support such a finding.

A significant portion of the state's case consisted of Johanson's descriptions of the items he seized and his opinion as to how each of those items was significant to the process of manufacturing methamphetamine. See 3RP 133-213. Defense counsel responded to this evidence by pointing out that most of the items Johanson described had never been

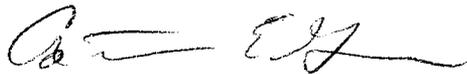
subjected to forensic analysis. The fact that Johanson's suspicions about the items he seized had not been confirmed considerably weakened the state's case. Moreover, the evidence showed that none of the items that were tested and found to contain methamphetamine-related substances had Peterson's fingerprints. There is a substantial likelihood that the prosecutor's improper argument, informing the jury it need not consider that evidence, affected the verdict. Reversal is therefore required.

D. CONCLUSION

Improper admission of a non-testifying expert's opinion violated Peterson's right of confrontation, and prosecutorial misconduct in rebuttal argument denied him a fair trial. This Court should reverse Peterson's convictions and remand for a new trial.

DATED this 23rd day of March, 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 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
March 23, 2007

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