

NO. 35366-1
(CONSOLIDATED WITH 35574-4)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LAURA LEE SMITH, APPELLANT
MARK D. PETERSON, APPELLANT

STATE OF WASHINGTON
BY _____
DEPUTY
07/11/06
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 06-1-00352-9
No. 06-1-00353-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence adduced at trial to prove defendant Smith knowingly possessed stolen property when the officer testified the stolen van's VIN had been removed from the door to the van, the VIN on the dashboard had obviously been tampered with, and the ignition had been modified to start with a turn-key that was permanently fixed in the ignition?
2. Did defendant Peterson waive his objection to Tammy Kee's peer review testimony when the court granted defendants' request for a limiting instruction, but no limiting instruction was proposed to the court? If the court finds this issue is preserved for appeal, any error from Kee's testimony is harmless because 1) it was cumulative of other testimony, and 2) defendant Peterson's defense did not challenge the nature of the controlled substances, instead the defense focused on whether defendant Peterson had knowledge the substances were on his property.
3. Was the prosecutor's rebuttal argument proper when he argued the jury should apply the law to the facts of this case to determine if the State had met its burden of proving the elements on each crime beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

On January 23, 2006, the State charged Laura Lee Smith (hereinafter “defendant Smith”) with unlawful manufacturing of a controlled substance, methamphetamine; unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine; first degree possession of stolen property; and unlawful use of drug paraphernalia. SCP 1-4¹.

On August 22, 2006, defendant Smith appeared with her co-defendant Mark David Peterson (hereinafter “defendant Peterson”) before the honorable Frederick Fleming for consolidated trial. 8/22/06 RP 4². In defendant Smith’s case, without objection, the State filed an amended information adding a school bus enhancement to the unlawful

¹ Clerk’s Papers for defendant Smith are referred to as SCP. Clerk’s papers for defendant Peterson are referred to as PCP.

² The court reporter numbered verbatim report of proceedings 1-10. There are two volume 9 report on proceedings that took place on two separate dates. To avoid confusion for this court, I have referred to all record of proceedings by date.

Volume 1 of 10 is referred to as 8/22/06 RP

Volume 2 of 10 is referred to as 8/24/06 RP

Volume 3 of 10 is referred to as 8/28/06 RP

Volume 4 of 10 is referred to as 8/29/06 RP

Volume 5 of 10 is referred to as 8/29/06 RP

Volume 6 of 10 is referred to as 8/30/06 RP

Volume 7 of 10 is referred to as 8/31/06

Volume 8 of 10 is referred to as 9/1/06 RP

Volume 9 of 10 is referred to as 9/5/06

Volume 9 is referred to as 10/20/06 RP

Defendant Smith Sentencing Hearing is referred to as 9/15/06

manufacturing of a controlled substance, methamphetamine count. SCP 143-145; 8/22/06 RP 4-6. All other counts remained unchanged from the original information. SCP 143-145. In defendant Peterson's case, also without objection, the State filed an amended information adding a school bus enhancement to the unlawful manufacturing of a controlled substance, methamphetamine count and adding one count of unlawful possession of a controlled substance, cocaine. PCP 7-10; 8/22/06 RP 4-7. A 3.5 hearing was held on August 22, 2006, and the court found all of defendant Smith's and defendant Peterson's statements were admissible. SCP 114-115; PCP 111-112; 8/22/06 RP 21. Findings of fact and conclusions of law were filed on September 12, 2006. SCP 114-115.

On September 1, 2006, the jury returned verdicts on both defendants Smith and Peterson. 9/1/06 RP 608. The jury found defendant Smith guilty of unlawful manufacturing of a controlled substance, methamphetamine; unlawful possession of a controlled substance, pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine; second degree possession of stolen property; and unlawful use of drug paraphernalia. CP 108, 109, 111, 112; 9/1/06 RP 608. The jury also returned a special verdict, finding that defendant Smith was manufacturing methamphetamine within 1000 feet of a school bus route stop. SCP 113; 9/1/06 RP 609-10.

The jury found defendant Peterson guilty of unlawful manufacturing of a controlled substance, methamphetamine, and unlawful possession of a controlled substance, cocaine. PCP 107, 109; 9/1/06 RP 609. The jury also returned a special verdict finding defendant Peterson had manufactured methamphetamine within 1000 feet of a school bus route stop. PCP 110; 9/1/06 RP 609-10.

On September 15, 2006, defendant Smith appeared before the honorable Frederick Fleming and was sentenced to 110 months on the unlawful manufacture of a controlled substance, methamphetamine, plus 24 months on the school bus enhancement, for a total of 134 months incarceration. SCP 134-139; 9/15/06 RP 14. Defendant Smith was also sentenced to 120 months on unlawful possession of pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine; 22 months on second degree possession of stolen property; and 90 days on the unlawful use of drug paraphernalia. SCP 134-139, 147-152; 9/15/06 RP 14. Judge Fleming ordered all four counts to run concurrently with each other. SCP 134-139; 9/15/06 RP 14. This timely appeal followed. SCP119.

Defendant Peterson appeared before Judge Fleming on October 20, 2006, for sentencing. 10/20/06 RP 621. The court imposed a DOSA sentence of 41.75 in custody, and 41.75 DOSA community custody. PCP 128-139; 10/20/06 RP 636. On October 24, 2006, defendant Peterson's judgment and sentence was corrected to reflect that the DOSA sentence

only applied to the unlawful manufacturing of a controlled substance sentence, and that a standard range, six month sentence was imposed on the unlawful possession of a controlled substance count. PCP 142-144. It was also corrected to reflect 9-12 months community custody on the unlawful possession of a controlled substance count. PCP 142-144. This appeal followed. PCP 145-149.

Defendants Smith's and Peterson's appeals were consolidated by this court on January 19, 2007.

2. Facts

a. Iselin's stolen van.

On January 20, 2006, Pierce County Sheriff Deputy Simmelink-Lovely, along with other officers, served a search warrant on defendants Smith's and Peterson's property located at 17320 82nd Avenue East in Puyallup. 8/24/06 RP 64. Deputy Simmelink-Lovely contacted defendant Smith, advised her of her Miranda warnings, and read the search warrant to her. 8/24/06 RP 67. When Deputy Simmelink-Lovely read the search warrant to defendant Smith, defendant Smith said that someone had snitched them off. 8/24/06 RP 67-68. When asked what she meant, defendant Smith said she thought someone had snitched them off because of the detailed description of the van in the search warrant. 8/24/06 RP 67-68, 86.

On the defendants' property was a silver Astro van, which defendant Smith said was her van. Deputy Simmelink-Lovely recalled seeing defendant Smith washing the van when she drove by the property two days before the search warrant was served. 8/24/06 RP 69. The Astro van later was identified as Rand Iselin's stolen van. 8/29/06 RP 332-33.

Deputy Simmelink-Lovely testified that when she searched the van, the VIN plate that is typically affixed to the driver's side dashboard appeared to have been altered. 8/24/06 RP 74. The VIN plate was only attached by one rivet and was unreadable. 8/24/06 RP 74. She opened up the van's driver's side door to find a readable VIN, but the VIN plate normally attached there had been removed. 8/24/06 RP 74. She also noted that someone had tampered with the van's ignition. 8/24/06 RP 74. A device had been attached to the ignition so the van could be started without a key. 8/24/06 RP 74. In searching the van, she found a vehicle registration in the glove compartment for a black 1986 Chevy Astro van with a license plate number of A 21690 I. This license plate number matched the license plates that were currently on the van, but without the VIN she could not determine if they were the correct license plates for the van. 8/24/06 RP 71; 8/29/06 RP 337. Deputy Simmelink-Lovely called a detective to the scene to see if he could find a hidden VIN on the van. 8/24/06 RP 74, 83.

Detective Brian Stepp testified that he was called to the defendants' property to assist in identifying a van found. 8/29/06 RP 336. He identified the van as Iselin's stolen 1992 Chevy Astro Van by a VIN he located on the van. 8/29/06 RP 336-37. Based on the VIN, the license plates that were on the van were incorrect. 8/29/06 RP 338. The license plates that should have been on the van were 257 EHT. 8/29/06 RP 338. The current value of Iselin's stolen van is between \$450.00 and \$2,625.00, according to the Kelly Blue Book. 8/29/06 RP 339.

Rand Iselin testified that his Chevy Astro Van was stolen in November 1999. 8/29/06 RP 332. The stolen van was silver in color and in good condition. 8/29/06 RP 332. A set of keys to the van were in the ashtray when the van was stolen. 8/29/06 RP 334. At the time of the theft, the van was worth approximately \$7,000.00. 8/29/06 RP 333. Iselin identified the van found in defendant Smith's possession as his stolen van. 8/29/06 RP 332-33.

Defendant Smith's boyfriend, Kevin Stanton, testified for defendant Smith in her case in chief. 8/30/06 RP 432. Stanton testified that he purchased the Chevy Astro Van for defendant Smith and paid \$1,500.00 for it six to eight years ago. 8/30/06 RP 438, 442. After purchasing the van, he put the van in defendant Smith's name. 8/30/06 RP 438. The keys that came with the van were lost in 2005. 8/30/06 RP 439. Stanton testified that after the keys were lost, he modified the van's ignition so it would start with a permanently affixed key "like you wind a

clock with.” 8/30/06 RP 439. He did this to avoid having to start the van with a “screwdriver or something...” 8/30/06 RP 440.

On cross examination, Stanton admitted that had registered the stolen 1992 Astro Van in defendant Smith’s name using the VIN for a 1986 Astro Van. 8/30/06 RP 443-45.

b. Manufacturing Methamphetamine

Deputies Simmelink-Lovely, Darby, and Johanson, and Officer Hoag, were all part of a multi-jurisdictional clandestine lab team who served a search warrant on defendants Peterson’s and Smith’s property on 82nd Ave. East in Puyallup on January 20, 2006. 8/24/06 RP 63, 64; 8/28/06 RP 94, 95, 100, 128-29; 8/29/06 RP 342, 343. On the property was a mobile home, two camper trailers, and a large shop. 8/24/06 RP 78.

Deputy Simmelink-Lovely drafted the search warrant and served as a perimeter deputy while the search warrant was executed. 8/24/06 RP 62. Defendant Peterson was located inside the mobile home. 8/24/06 RP 66. Defendant Smith was located inside one of the camper trailers. 8/24/06 RP 66.

Defendant Smith told Deputy Simmelink-Lovely that she lived alone inside the camper trailer and that officers may find “some smoking pipes or drug pipes” left in the camper trailer by some of her friends who she allows to go in there and smoke. 8/24/06 RP 69. Defendant Smith was unable to recall the names of her friends who smoked their drugs in her house. 8/24/06 RP 69. Similarly, she said that she and her brother

allowed people to store items in the shop on the property, but again could not remember the names of those friends. 8/24/06 RP 69.

Defendant Peterson told Deputy Simmelink-Lovely that he was a self-employed mechanic and that he was the primary renter of the property. 8/24/06 RP 75. Defendant Peterson denied knowing anything about the manufacturing of methamphetamine. 8/24/06 RP 76. Like defendant Smith, defendant Peterson said friends stored belongings in the shop on the property. 8/24/06 RP 77. Also like defendant Smith, defendant Peterson could not remember the names of those friends. 8/24/06 RP 77.

Deputy Darby acted as a searching and finding officer for evidence in defendant Smith's trailer when the search warrant was executed on the defendants' property on January 20, 2006. 8/28/06 RP 95, 100. During his search, he located, among other things, numerous glass pipes that are the type commonly used to smoke narcotics; a digital gram scale; a box of Sudafed brand cold pills; a fuel additive called HEET; which is used as a precursor in manufacturing methamphetamine; and coffee filters. 8/28/06 RP 97, 98, 100, 101, 102-03, 106 107, 109, 113, 114. When he searched defendant Peterson, he found a red straw in his pocket. 8/24/06 77; 8/28/06 RP 96. This straw later tested positive for cocaine. 8/29/06 RP 288-89.

Deputy Johanson was a finding officer who participated in the execution of the January 20, 2006, search warrant. 8/28/06 RP 2006 128-29. At trial, he testified about the two main methods of manufacturing methamphetamine and the evidence he found on the property. 8/28/06 RP 124-129. Some of the items Deputy Johanson found during his search were: an acid kit; coffee filters with blue staining; coffee filters with red staining; coffee filters without staining; red substance believed to be iodine; denatured alcohol; an electric coffee grinder with white residue; a hand grinder; a respirator; an APR mask with an attached filter; a plastic milk carton with a reddish brown liquid inside it; a video camera attached to the exterior of the house; a propane tank containing anhydrous ammonia; muriatic acid; and a handbook of chemistry and physics. 8/28/06 RP 135, 136, 139-40, 142, 146, 149, 150, 159, 162, 164, 171, 176, 177, 181, 206, 208.

Officer Hoag testified he is part of the Pierce County Metro Lab Team. 8/29/06 RP 342. On January 20, 2006, he responded to defendants' property to assist in the investigation of a suspected methamphetamine lab. 8/29/06 RP 343. He was assigned to work as a sampling officer, which involved taking items of evidence that have already been located by the finding officer and deciding which items needed to be sampled for testing at the crime lab, which could be retained as evidence, and which should be photographed and destroyed. 8/29/06 RP 343.

Tammy Kee testified that she has been employed by the Washington State Patrol Crime Laboratory for more than ten years. 8/29/06 RP 279. She has a bachelor's of science in chemistry and in criminal justice. 8/29/06 RP 279. She has been trained to analyze suspected methamphetamine labs and has analyzed approximately 350 suspected clandestine laboratories. 8/29/06 RP 279. During her training, she manufactured methamphetamine several times. 8/29/06 RP 282. She described in detail the red phosphorus method of manufacturing methamphetamine. 8/29/06 RP 283-86. Ms. Kee testified that she analyzed evidence that was seized when the search warrant was served on defendants Smith's and Peterson's property, and that she prepared a report containing the results of her analysis. 8/29/06 RP 286. Ms. Kee tested a red plastic straw using two separate tests. 8/29/06 RP 287-88. Both tests showed the presence of cocaine. 8/29/06 RP 289. Ms. Kee tested numerous other substances seized during the execution of the search warrant using tests that are generally accepted in the scientific community. The results of these tests showed the presence of methamphetamine, pseudoephedrine, iodine, and red phosphorous. 8/29/06 RP 293, 294, 295, 296, 298, 299, 301, 302.

Ms. Kee testified that she did not analyze every substance that was seized during the search. 8/29/06 RP 304. Instead, she followed her normal practice of testing substances until she can determine a) what is

being manufactured; b) how is it being manufactured; and if possible c) how much is being manufactured. 8/29/06 RP 304. Once those questions are answered, she stops analyzing substances even if not all substances seized have been tested. 8/29/06 RP 304.

Finally, Ms. Kee testified about the peer review process in the Washington State Patrol Crime Laboratory. 8/29/06 RP 308-09. She explained that every case analyzed in her laboratory is subjected to peer review. 8/29/06 RP 308. During the peer review process, if the peer reviewer does not agree with her work, they work together to come to some agreement. 8/29/06 RP 308. If they can't reach an agreement, then a supervisor would get involved. 8/29/06 RP 308. In this case the peer reviewers agreed with the findings in her final report. 8/29/06 RP 309.

Defendant Peterson's attorney objected and moved to strike Ms. Kee's statement that peer reviewers agreed with her findings. 8/29/06 RP 309. The jury was excused. 8/29/06 RP 309. Defendant Peterson's attorney argued Kee's statement was "inadmissible opinion testimony." 8/29/06 RP 310. He asked for a mistrial and an opportunity to brief the issue over the lunch hour. 8/29/06 RP 310. The State asked the court to deny defendant Peterson's motion and requested a limiting instruction. 8/29/06 RP 310.

After lunch, when the parties returned, defendant Smith's attorney argued the motion for the defendants. 8/29/06 RP 316. He again argued Kee's statement was improper opinion testimony. 8/29/06 RP 316. The

trial court overruled the objection because Kee's testimony concerned the procedures followed by the Washington State Patrol Crime Lab and did not involve an opinion as to an ultimate fact. 8/29/06 RP 317. The defendants then asked for a limiting instruction; the State had no objection. 8/29/06 RP 319. The trial court ordered the defendants to prepare the limiting instruction. 8/29/06 RP 319.

Defendant Peterson's attorney then asked that the statement be stricken as hearsay. 8/29/06 RP 319. The court overruled the objection saying "You can address that in your limiting instruction." 8/29/06 RP 320. No limiting instruction was presented to the court.

c. Closing Arguments

Defendant Peterson had two main themes in his closing argument. The first was that defendant Peterson didn't know that illegal activity was occurring on his property. 8/31/06 RP 552-67. He didn't know methamphetamine was being manufactured on his property. He didn't know that anhydrous ammonia was being improperly stored on his property. He didn't know the straw he picked up and put his pocket had cocaine residue on it. 8/31/06 RP 552-67. The second theme was there was a lack of evidence because not all items seized by the police were tested by the Washington State Patrol Crime Lab. 8/31/06 RP 552-67.

With respect to the first theme, defendant Peterson argued that unnamed people had unfettered access to all areas of his property,

including the garage, laundry room, and kitchen. 8/31/06 RP 555, 556, 557, 558-59, 567. He argued the unnamed people must have put the “meth lab in a box” found in a blue tote in defendant Peterson’s garage. 8/31/06 RP 563. Those people with unfettered access to his house must have ground up Sudafed tablets in his coffee grinder. 8/31/06 RP 558, 559. He didn’t know who had done it, but it wasn’t him. 8/31/06 RP 559.

Similarly, defendant Peterson argued that he did not knowingly possess anhydrous ammonia. 8/31/06 RP 557. He argued that because he is licensed to use ammonia gas it would be illogical for him to have improperly stored ammonia in a propane tank when he had more appropriate containers in which to store it. 8/31/06 RP 557. Again, he pointed to the other people who had unfettered access to the garage in which the anhydrous ammonia was found. 8/31/06 RP 557.

To buttress his arguments that he didn’t know about the criminal activity on his property and other people must have done it, he repeatedly pointed to the fact that his fingerprints were not found on any of the items associated with the manufacturing of methamphetamine. 8/31/06 RP 556, 557, 559, 567.

Defendant Peterson’s second theme was there was a “lack of evidence” because the officers seized many items that were not tested by the Washington State Patrol Crime Lab. 8/31/06 RP.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE ADDUCED AT TRIAL FOR A REASONABLE JURY TO CONCLUDE DEFENDANT SMITH KNOWINGLY POSSESSED STOLEN PROPERTY WHEN THE STOLEN VAN'S VIN HAD BEEN REMOVED FROM THE DOOR, THE VIN ON THE DASHBOARD HAD BEEN TAMPERED WITH, AND THE IGNITION HAD BEEN MODIFIED TO START WITH A TURN KEY THAT WAS PERMANENTLY FIXED IN THE IGNITION.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). When a defendant challenges the sufficiency of the evidence in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Circumstantial evidence is just as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634,638, 618 P.2d 99 (1980). An appellate court defers to the trier of fact regarding issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Carmarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The essential elements of second degree possession of stolen property are actual or constructive possession of stolen property, and knowledge that the property is stolen. RCW 9A.56.140(1); RCW 9A.56.160(1)(d); State v. Jennings, 35 Wn. App. 216, 219, 666 P.2d 381, review denied, 100 Wn.2d 1024 (1983).

In the present case, defendant Smith challenges the sufficiency of the evidence adduced at trial to prove she knowingly possessed Iselin's stolen van. Defendant Smith does not dispute she possessed the stolen van, only whether the State proved defendant Smith knew it was stolen. Defendant Smith's Brief of Appellant at 22. Generally, the State must rely upon circumstantial evidence to prove knowledge. State v. Martin, 73 Wn.2d 616, 626, 440 P.2d 449 (1968). A person acts with knowledge when she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense. RCW 9A.08.010(1)(b)(ii).

Knowledge may be inferred when the defendant's conduct indicates the requisite knowledge as "a matter of logical probability." State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41, review denied, 117 Wn.2d 1012, 816 P.2d 1225 (1991).

Here there was substantial evidence adduced at trial with which a reasonable jury could find defendant knew the van she possessed was stolen. There was evidence adduced at trial that 1) the van defendant possessed was stolen in 1999; 2) a spare set of keys were in the van when

it was stolen; 3) the VIN numbers on the stolen van had been tampered with in two places; 4) the keys defendant used to operate the vehicle were lost and, instead of replacing them, defendant's boyfriend modified the van's ignition to start with a permanently affixed turn-key; 5) defendant registered and insured the stolen 1999 van using the VIN of a 1992 van; and 6) when Deputy Simmelick-Lovely read defendant Smith the portion of the search warrant dealing with the van, defendant Smith said "someone snatched them off." 8/24/06 RP 67-68, 86.

When the above evidence is viewed in the light most favorable to the State, a reasonable jury could have found beyond a reasonable doubt that defendant knowing possessed Iselin's stolen van. Defendant Smith's claim is without merit.

2. DEFENDANT PETERSON HAS NOT PRESERVED THE ISSUE OF KEE'S PEER REVIEW TESTIMONY FOR APPEAL BECAUSE DEFENDANT PETERSON FAILED TO PROPOSE A LIMITING INSTRUCTION AFTER THE COURT INVITED HIM TO DO SO, ALTERNATIVELY, KEE'S PEER REVIEW TESTIMONY DID NOT AFFECT THE RESULT AT TRIAL BECAUSE THE UNTAINTED EVIDENCE OF THE DEFENDANT'S GUILT WAS OVERWHELMING.

The failure of a court to give a limiting instruction is not error when no instruction was requested. State v. Athan, ___ Wn.2d ___, 158 P.3d 27 (2007); see, State v. Newbern, 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999) ("A party's failure to request a limiting instruction constitutes

a waiver of that party's right to such an instruction and fails to preserve the claimed error on appeal.”)

Here, at the end of Kee’s direct, Kee testified to the peer review process that is in place at the Washington State Patrol Crime Lab. Defendant Peterson objected to Kee’s testimony that “[the peer reviewers] agreed with my conclusion.” 8/29/06 RP 309. Defendant Peterson initial objection was that the statement was impermissible opinion evidence. 8/29/06 RP 310. The court overruled defendant Peterson’s objection because Kee’s testimony was about the process of peer review and the trial court did not think that it rose to the level of being an inadmissible comment on the credibility of the witness. 8/29/06 RP 319. Defendant Smith’s attorney (who argued the motion for both defendants) then asked for a limiting instruction, which the trial court granted. 8/29/06 RP 319. The State agreed to a limiting instruction. 8/29/06 RP 319. The trial court ordered the defendants to prepare a limiting instruction and he would give it in the court’s instructions. 8/29/06 RP 319. Defendant Peterson then asked that Kee’s statements be stricken as hearsay. 8/29/06 RP 319. The court denied that motion and advised defendant Peterson to address the issue in his limiting instruction. 8/29/06 RP 320. Neither defendant Peterson nor defendant Smith offered a limiting instruction. Because defendant Peterson failed to propose a limiting instruction as the

court directed, his objection to the admission of Kee's peer review testimony was not preserved for appeal. See, State v. Newbern, 95 Wn. App. 277, 295-96 ("A party's failure to request a limiting instruction constitutes a waiver of that party's right to such an instruction and fails to preserve the claimed error on appeal.")

Assuming *arguendo* that defendant Peterson did preserve this issue for appeal, his argument still fails because Kee's statement is not hearsay and it did not affect the outcome of the trial. The standard of review for admission of testimony is abuse of discretion. Kirk v. Washington State Univ., 109 Wn.2d 448, 459, 746 P.2d 285 (1987). To constitute grounds for reversal, an error must be prejudicial. State v. Eaton, 30 Wn. App. 288, 295, 633 P.2d 921 (1981). For the error to be prejudicial it must affect or presumptively affect the final result of the trial. State v. Eaton, 30 Wn. App. 288, 295.

A harmless error under the constitutional standard occurs if the reviewing "court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). To determine whether error is harmless, this court utilizes "the 'overwhelming untainted evidence' test." Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Under that test, where the untainted evidence admitted is so overwhelming

as to necessarily lead to a finding of guilt, the error is harmless. Id. citing State v. Guloy, 104 Wn.2d 412, 426.

In the present case, defendant Peterson alleges Kee's testimony that the peer reviewers agreed with her findings was hearsay and admitted in violation of Crawford v Washington³. To support his argument, defendant Peterson relies on State v. Nation, 110 Wn. App. 651, 51 P.3d 1204 (2002), State v. Wicker, 66 Wn. App. 409, 832 P.2d 127 (1992), and State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982). Defendant Peterson's reliance on these cases is misplaced.

In State v. Nation, the forensic technician who tested the controlled substances was on vacation and unavailable for trial. Nation, 110 Wn. App. 651, 656. At trial, the State called the forensic technician's supervisor to explain the types of testing the absent expert witness performed and the results of each test. Id. Division III held that the supervisor's testimony was inadmissible hearsay and the court abused its discretion in allowing him to testify to the test results. Id. at 666. Importantly, the court found the error was prejudicial because without supervisor's testimony, the State had produced no evidence from which a rational trier of fact could find each element of the possession of marijuana and methamphetamine charges beyond a reasonable doubt. Id. In contrast, the only forensic witness the State presented in the present

³ 541 U.S. 36, 124 S. Ct 1354 (2004).

case was Kee, who testified about work she had done, the processes she followed, and the conclusions she reached. Unlike Nation, if the challenged testimony is removed, the State still had overwhelming and uncontroverted evidence that defendant Peterson was manufacturing methamphetamine and possessed cocaine.

Defendant Peterson's reliance on State v. Wicker is similarly misplaced. Wicker was convicted of one count of second degree burglary based upon a single fingerprint found on some sheet metal near the point of entry into the victim building. Wicker, 66 Wn. App at 128. The only eye witness to the burglary failed to identify Wicker in a police lineup. Id. At trial, the State's fingerprint expert testified that his conclusion that one of the latent prints from the metal sheeting matched Wicker's inked print was verified by a senior technician, Karen Tando. Id. Wicker testified that senior technician Karen Tando agreed with his conclusions as was demonstrated by her initials on the fingerprint card. Id. The court held that the expert's statement that Karen Tando verified his conclusion was inadmissible hearsay in the context of this case. Id. at 129. It was prejudicial because there was no evidence other than the single fingerprint linking Wicker to the burglary. Id. at 414. The Wicker court distinguished between drug testing, where "the result and identification is...a fact as to which all experts would agree" and fingerprint analysis, which is subjective. Id. at 413.

The third case cited by defendant Peterson is State v. Towne. This Vermont case is clearly distinguishable on its facts. In Towne, the issue was whether the defendant was insane at the time the crime was committed. Towne, 142 Vt. 241, 243. The State's expert testified at trial to his opinion that Towne was sexually disturbed, but not mentally ill, and he also testified to the opinion of another nontestifying expert in the field. Id. at 243-44. The State's expert referred to the nontestifying expert as the person in the United States who knows the most about the sexually disturbed offenders, and referenced the nontestifying expert's book on the subject. Id. at 244. The State also referred to the nontestifying expert's concurrence with the State's witness' testimony in his closing. Id. Towne's expert went outside his agency to contact a leading expert in the field to consult about the facts in that case. This is clearly distinguishable from the present case where Kee participated in a mandatory, in-house peer review process.

In Wicker and Towne, unlike the present case, the challenged testimony went to the heart the defense. Identity was an issue in Wicker because the sole eyewitness failed to pick Wicker out of a lineup, and the only evidence linking Wicker to the burglary was a fingerprint found outside the victim's business. Similarly, in Towne, the challenged testimony directly contracted the defendant's insanity defense.

In contrast, Kee's peer review statements did not go to the heart of defendant Peterson's defense. On the contrary, defendant Peterson

conceded that methamphetamine was being manufactured on his property. 8/31/06 RP 556. He acknowledged there was a “meth lab in a box” found in a blue tote in his garage. 8/31/06 RP 556. His defense was that he did not know it was there and that many people had unfettered access to his garage. 8/31/06 RP 556. Defendant Peterson concedes there was Sudafed ground up in his coffee grinder in the kitchen. 8/31/06 RP 559. But he argued he did not know it was there and many people had unfettered access to his house. 8/31/06 RP 559. To buttress this argument, defendant Peterson repeatedly reminded the jury that his fingerprints were not found on any item associated with the manufacturing of methamphetamine. 8/31/06 RP 556, 567.

Similarly, defendant Peterson conceded anhydrous ammonia was improperly stored on his property. 8/31/06 RP 557. His defense was that he was licensed to handle materials like anhydrous ammonia, and had three tanks that were appropriate for storing that substance. 8/31/06 RP 557, 564. He argued that because he knew how to properly store anhydrous ammonia and had appropriate tanks in which to store it, it was illogical that he would have chosen to improperly store anhydrous ammonia. 8/31/06 RP 564, 567. Defendant Peterson argued “[h]e did not knowingly possess anhydrous ammonia. It was stuck in the garage by somebody. I don’t know who, and it doesn’t matter who. That’s reasonable doubt. Right?” 8/31/06 RP 557.

With respect to cocaine, defendant Peterson did not challenge Kee's conclusion that there was cocaine on the straw found in defendant Peterson's pocket. 8/31/06 RP 565. Instead, he argued that the straw was something he found and placed in his pocket. 8/31/06 RP 565. Like the methamphetamine and anhydrous ammonia, defendant Peterson concedes Kee's conclusions were correct and that there was cocaine on the straw. 8/31/06 RP 565. Instead, his defense was that he did not know the straw had cocaine on it when he picked it up off the ground and put it in his pocket. 8/31/06 RP 565.

Defendant Peterson's second theme in his closing argument was that there was reasonable doubt because not all the items seized from his property were analyzed by the Washington State Patrol Crime Lab. 8/31/06 RP 556. You have an acetone can with an unknown liquid, a Xylol can with an unknown liquid, and a muriatic acid bottle with an unknown substance. 8/31/06 RP 560, 561. Defendant Peterson argued there were 37 items not tested. 8/31/06 RP 560. "You don't know what's in those cans. That is reasonable doubt." 8/31/06 RP 560.

If this court finds that this issue was preserved for appeal, this court should find that Kee's testimony was not hearsay because she was explaining the process of peer review in her laboratory and that she had complied with that process. Alternatively, if hearsay, this court should find that the trial court did not abuse its discretion by admitting Kee's peer review testimony because it was cumulative of other testimony and its

admission was harmless beyond a reasonable doubt because defendant Peterson did not dispute Kee's findings, only whether he knowingly committed the crimes charged. Unlike Wicker and Towne, Kee's testimony did not go to the heart of defendant Peterson's defense.

3. THE PROSECUTOR'S STATEMENTS REGARDING REASONABLE DOUBT IN REBUTTAL ARGUMENT WERE PROPER IN RESPONSE TO DEFENSE COUNSELS' CLOSING ARGUMENTS.

Defendant Peterson asserts the deputy prosecuting attorney committed misconduct when he argued reasonable doubt to the jury in his rebuttal argument. Defendant Peterson's Brief of Appellant at 22. Defendant Peterson argues that the deputy prosecuting attorney's analogy to using a telescope to identify a city through various landmarks contradicted the court's instructions on reasonable doubt. Defendant Peterson, however, misperceives the deputy prosecuting attorney's argument.

The court instructed the jury on reasonable doubt in Instruction No. 3.

Each defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

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.

PCP 70. Emphasis added.

The deputy prosecuting attorney's arguments were designed to explain reasonable doubt and were in response to the defense argument that there was insufficient evidence to convict because not all samples taken from the scene were tested. 8/31/06 RP 552-587. The deputy prosecuting attorney's arguments were not improper and did not prejudice the defendant.

Claims of prosecutorial misconduct are reviewed under an abuse of discretion standard. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). The prosecutor is afforded wide latitude in closing argument in drawing and expressing reasonable inferences from the evidence. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747

(1994). The challenged remarks are viewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Russell, 125 Wn.2d 24, 85-86. Improper comments are not deemed prejudicial unless “there is a *substantial likelihood* the misconduct affected the jury’s verdict.” State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. State v. Binkin, 79 Wn. App. 284, 293-94, 902 P.2d 673 (1995). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

In the present case, defense argued in closing that the State had not proved its case beyond a reasonable doubt because many of the items seized from the defendants’ property were not tested and, as a result, there was a lack of evidence. Defendant Peterson’s attorney argued in closing

[W]hen you’re looking to see if a crime has occurred or if each element of a count has been proven, you can look at the evidence or the lack of evidence. And that’s an important thing because a lot of times that’s where the reasonable doubt comes in. There’s lack of evidence of

knowledge, for instance, lack of evidence of actually being a participant. Those are lacks of evidence that tend to show reasonable doubt.

8/31/06 RP 554.

Now, the bulk of these coffee filters, there were a couple that were tested by the lab and said they had red phosphorous, but most of them were never tested. The ones that turned blue or whatever from maybe Coleman fuel, that's one of the items, wasn't tested by the lab. All told, when I count, there's 37 items that the lab chose not to test...

8/31/06 RP 560.

There's a lot of other things that they didn't test. I asked the police officer, "Why do you take a sample of a can that says acetone? Why don't you just believe its acetone?" And he said, "It's an open can. Anything could be in it." Right? Same with the Xylol. Same with the muriatic acid. All of those sampled, all of those collected diligently and given to the lab. What did the lab do with it? Ignored it. They didn't look at it. They didn't even sample it. They didn't even check to see what it was, okay?

So, really, what you have is...an acetone can with an unknown liquid. You got a Xylol can with an unknown liquid. You got a muriatic acid bottle with an unknown substance. You don't know what that is.

8/31/06 RP 560-61.

Defendant Peterson's attorney later argues "...**you don't know what is in those cans. That is reasonable doubt.**" 8/31/06 RP 561.

(emphasis added).

Defendant Smith's attorney made similar argument regarding the lack of evidence and reasonable doubt. 8/31/06 RP 568.

The deputy prosecuting attorney responded to the defense attorneys' arguments that the untested items show reasonable doubt as follows:

Yesterday the defense moved to admit all of these photos. And you are going to have them all. And you might be wondering, geez, why didn't the State admit those? When you are considering evidence versus lack of evidence, consider the evidence I admitted. When you're determining whether or not I met my burden of proof, say, "Mr. Odell admitted this stuff. Why should we look at it?" Look at that. Did I prove my case with the evidence I admitted? I'm not trying to hide anything from you by not showing you this, but look at this and say, okay, Mr. Silverthorn is right, that's a pile of crap in the backyard. How is it relevant? A picture of a lamp in a kitchen. The State didn't prove anything was going on near that lamp. He's right, I didn't show you this, and I didn't make that argument, I didn't waste your time. Consider it. Consider the evidence that's been presented to you.

8/31/06 RP 585-86.

The deputy prosecuting attorney went on to explain reasonable doubt to the jury using an analogy. 8/31/06 RP 585-87. He asked the jury to imagine looking through a telescope to determine whether they were in Tacoma or Seattle. 8/31/06 RP 585. The first image seen through the telescope was a mountain, the second image was a body of water, and the final image was the Space Needle. 8/31/06 RP 586. The deputy prosecuting attorney argued that the first two images don't prove beyond a reasonable doubt which city the jury was in because the mountain and a

body of water can be seen from both Seattle and Tacoma. 8/31/06 RP 587. However, once the image of the Space Needle was shown, the jurors knew beyond a reasonable doubt that they were in Seattle. 8/31/06 RP 587.

The deputy prosecuting attorney argued that if he had shown the jury the image of the Space Needle first, then the jury would still have the same abiding belief that they were in Seattle as they did after seeing all three images. 8/31/06 RP 587. Applying this analogy to the facts of his case, the deputy prosecuting attorney argued “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 --”. 8/31/06 RP 587. At this point defendant Peterson’s attorney objected saying the State was arguing contrary to the jury instructions. 8/31/06 RP 587. The court overruled the objection saying “It is argument. I’m going to allow it.” 8/31/06 RP 587.

The deputy prosecuting attorney returned to his argument:

Like I said, you can look at one piece of evidence and you could be satisfied. I didn’t have to show you Pike Place Market, the EMP, Pacific Science Center or anything else. You were able to form an abiding belief based on the evidence, and that’s what you need to remember.

Look at this evidence, look at the elements, because this is the law. This is what governs. There’s only two

things that matter now. This is the law that you all promised as officers of the court...to go into the back and apply this to the evidence. Has the State met its burden for proving each element beyond a reasonable doubt? It is not beyond a shadow of a doubt. It is not beyond all doubt. It is beyond a reasonable doubt. Is it reasonable? Do you believe it? Have you seen enough to convince you? I am going to ask you to find the defendants each guilty charged of each and every crime...

8/31/06 RP 587-88.

When the deputy prosecuting attorney's argument is looked at in the context of the whole argument, it is clear his argument was entirely proper. The deputy prosecuting attorney properly asked the jury to look at the evidence presented at trial to determine if the State had met its burden. 8/31/06 RP 588. He told the jury to review the jury instructions and apply the law to the facts of this case. 8/31/06 RP 588. The fact that some items seized during the execution of the search warrant were untested did not diminish the value of the tested items. If the jury was convinced beyond a reasonable doubt, then the State had met its burden. 8/31/06 RP 588.

If the court were to find the deputy prosecuting attorney's argument improper, any impropriety was cured by the instructions to the jury. Jurors are presumed to follow the court's instructions. State v. Kirkman, ___ Wn.2d ___, 155 P.3d 125 (2007). Here the trial court instructed the jury, "The lawyers' remarks, statements and arguments are

intended to help you understand the evidence and apply the law. It is important for you to remember the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions." PCP 67. The court also instructed the jury

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.

PCP 70. Even if the court were to find the State's comments improper, defendant Peterson's claim fails because he has not demonstrated that the deputy prosecuting attorney's comments prejudiced the verdict in any way. In fact, the evidence is to the contrary. This jury did not convict defendant Peterson as charged. They found him not guilty of unlawful possession of ammonia with the intent to manufacture. PCP 108. Because the jury convicted defendant Peterson of some, but not all counts, it is clear the jury followed the court's instructions and were not swayed by

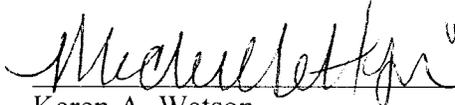
improper argument, if any. The trial court did not abuse its discretion when it overruled defendant Peterson's objection to the deputy prosecuting attorney's reasonable doubt argument.

D. CONCLUSION.

For the reasons stated above, defendants Smith's and Peterson's convictions should be affirmed.

DATED: June 25, 2007.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/25/07 Marese K
Date Signature

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