

NO. 38589-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD MICHAEL AMARO,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY [Signature]

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

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's instructions failed to ensure that appellant was not convicted for a crime committed outside the statute of limitations period.

2. Trial counsel was ineffective in failing to propose appropriate instructions regarding the statute of limitations as to Count 1.

3. The trial court impermissibly commented on the evidence.

4. The no contact order exceeds the maximum sentence for the underlying offense and must be corrected.

Issues pertaining to assignments of error

1. The State charged appellant with first degree theft, alleging he committed a series of thefts under a common scheme or plan. Although the charging period extended beyond the three-year limitations period, the court did not instruct the jury that it had to find at least one act was committed within three years of the charging date. Where the instructions failed to ensure appellant was not convicted of a crime committed outside the statute of limitations, must his conviction be reversed? (Assignment of Error 1). Where trial counsel failed to propose instructions on the statute of limitations, did ineffective assistance of counsel deny appellant a fair trial? (Assignment of Error 2)

2. The State presented edited versions of appellant's interviews with the police, and defense counsel attempted to establish that the edited recordings did not fairly present appellant's statements. The court cut short the parties' questioning of the detective who edited the recordings, however, instructing the jury that the state's method of presenting the statements was appropriate. Where the court's comment on the evidence could have influenced the jury in evaluating appellant's credibility, is reversal required? (Assignment of Error 3)

3. Where the court imposed a no contact order which exceeded the statutory maximum sentence for the underlying offense, is remand necessary to correct the error? (Assignment of Error 4)

B. STATEMENT OF THE CASE

1. Procedural History

On February 21, 2008, the Clark County Prosecuting Attorney charged appellant Richard Amaro with 12 counts of first degree theft, three counts of contracting without a license, and two counts of second degree theft. CP 23-32; RCW 9A.56.030(1)(a); RCW 18.27.020(2)(b); RCW 9A.56.040(1)(a). The State alleged aggravating factors as to all of the theft counts. CP 23-32. The case proceeded to trial before The Honorable Robert Lewis, and the jury returned guilty verdicts on each count. The jury also found by special verdicts that the aggravating factors

had been proven as to each count of first degree theft. CP 196-224. The court imposed exceptional sentences of 110 months on the first degree theft convictions, standard range sentences on the second degree theft convictions, and suspended sentences on the convictions for contracting without a license. CP 231, 245. Amaro filed this timely appeal. CP 259.

2. Substantive Facts

Pamela Leibel met Richard Amaro in December 2002 when he knocked on her door and asked if she wanted her gutters cleaned. 3RP¹ 180-81. Leibel hired him for that job, as well as for many other large and small projects on her home. 3RP 211. Leibel came to care about Amaro and his family, and they became good friends. 3RP 214-15. Any time Leibel needed something done, she called Amaro. 3RP 215; 5RP 505. Over a five-year period, Amaro replaced the roof, installed vinyl siding, replaced the deck, installed a sprinkler system, painted the interior of the house, changed the trim and light fixtures, installed a chandelier, redid the kitchen and bathroom, cleaned the garage and carpet, and moved furniture. 3RP 181, 184, 186, 208, 214; 5RP 508-10. Amaro did many of the smaller handyman jobs at no cost to Leibel, but Leibel paid for the larger projects. 3RP 191, 212; 5RP 510. While Amaro suggested she obtain

¹ The Verbatim Report of Proceedings is contained in seven volumes, designated as follows: 1RP—10/24/2008; 2RP—10/27/2008; 3RP—10/28/2008; 4RP—10/29/2008; 5RP—10/30/2008; 6RP—10/31/2008; 7RP—11/12/2008.

other bids from time to time, Leibel chose to pay whatever price Amaro quoted. 3RP 184, 212; 5RP 514.

In 2002, Leibel had assets totaling \$872,157.41, but by 2007 she had spent everything and was in debt. 3RP 140-41. She was in danger of losing her house and her car, she was borrowing money from friends, and her church had provided her with food and monetary assistance. 3RP 151-52, 241; 5RP 554. When she told friends she needed to raise money to pay fees on a house she was purchasing, Leibel's friends became concerned about her situation and contacted the police. 3RP 238; 4RP 366-67.

Vancouver police began investigating Leibel's financial situation, and they interviewed Amaro at his place of employment on November 20, 2007. 4RP 371. Amaro consented to having the interview recorded, and he spoke to the detectives for an hour and a half. 4RP 372. Amaro talked about the work he had done on Leibel's house and admitted that some of his bids were higher than they should have been. He denied taking money from Leibel to "flip" houses, however. 4RP 373-74; Exhibit 45. Three months later Amaro was arrested at his home. 4RP 375. He again agreed to a recorded interview, in which he admitted his bids for the deck were higher than they should have been, and he said he was sorry for charging so much. 4RP 376-77; Exhibit 46.

At trial, Leibel testified that she and her husband built her house in 1987. Her husband died in 1994, and she has been living in the house alone since then. 3RP 176. Leibel described the various projects she hired Amaro to do on her house. When Amaro told her she needed a new roof, she hired him to replace it, and he removed the original roof and put a new one on. 3RP 181. Once the roof was replaced, Leibel decided the house would look better with new siding, and she hired Amaro to install vinyl siding. 3RP 184. Leibel testified that the deck was replaced twice, the second replacement being required because of defective lumber. 3RP 186-87. Leibel later learned that she had paid much more for these projects than other people paid. 3RP 239.

Leibel also testified that she may have discussed buying houses with Amaro, believing she would be repaid when the houses were sold. 3RP 191. She considered this an investment, although she never got any of her money back. 3RP 209. Leibel testified that she gave Amaro money to purchase a house on Fourth Plain, which was scheduled to be demolished so that a museum could be built. 3RP 192, 203. Leibel later learned that the house did not exist. 3RP 240. She also testified that she and Amaro invested in vending machines as a way to make money, although she saw no return on that investment. 3RP 208-09. In addition, Leibel loaned Amaro money for his business, and she invested in the

business so that he could create a video promo. 3RP 191, 225-26. She understood, however, that if his business failed, she would lose that money. 3RP 226.

Leibel could not remember many details of her transactions with Amaro, but she had kept notes of the amounts she paid and the purpose of the payments, which she turned over to the police. 3RP 191, 193, 201, 203, 205. Leibel's notes, as well as cancelled checks and bank records, were used in a forensic accounting, which attempted to track money from Leibel's accounts to Amaro. 4RP 276-77, 280-81.

The forensic accountant verified through bank records that from December 2002 through December 2007, \$482,001.70 was paid from Leibel's accounts to accounts owned by Amaro or his wife. 4RP 314; Exhibit 39. The accountant was unable to verify that the amounts relating to Counts 3, 5, 6, and 8 went into Amaro's accounts, and the amounts in Counts 2 and 10 were only partially verified. 4RP 327-28. When the forensic accountant was unable to verify transactions through bank records, he relied on Leibel's notes to determine where the money withdrawn from her accounts had gone. 4RP 285-88, 312, 326.

Considering both verified and unverified transactions, the forensic accountant determined that during the charging period for Count 1 Leibel paid Amaro \$90,948 for investment houses, \$22,035.80 for reroofing,

\$5,154 for painting, \$88,270 for siding, \$12,670.50 for windows, \$13,860 for the deck, \$114,748 in investments and loans, and \$376,685 in other payments. 4RP 305-07. From September 2006 through December 2007, Leibel spent an additional \$49,000 on investment houses and \$115,750 on replacing the deck. 4RP 312. The forensic accountant prepared spreadsheets summarizing his conclusions as to each of the transactions charged as first degree theft. 4RP 307-09; Exhibits 37 and 38.

The owner of a remodeling business inspected Leibel's house in March 2008 at the State's request. 3RP 159. From his inspection, he could not tell if the roof had needed replacing, although he found that the roof had been installed over the existing asphalt shingles. 3RP 164-65. He had no information about the original deck that was torn down, but he found that the existing support structure of the deck was inadequate. 3RP 165-66. He estimated he would charge \$7,050.31 to replace the roof and \$6,870.06 to rebuild the deck. 3RP 169-70. A siding contractor also inspected the house and testified that the original cedar and fir siding could have lasted 25 to 30 years. 4RP 257-58. From his inspection the house did not need to be resided. 4RP 264. He estimated he would charge \$10,495.40 for the siding job. 4RP 263.

The State also presented evidence that Amaro was not licensed as a contractor until May 8, 2007, and his license was suspended on August 25,

2007, when his insurance was cancelled. 4RP 359; 5RP 417, 419. In October 2007, Evelyn Logie and Marlys Johnston hired Amaro to paint their houses. 5RP 432, 452. They made down payments to cover the paint, but Amaro did not deliver the paint, return the money, or paint the houses. 5RP 433-34, 449, 456.

Amaro testified that he started a construction business in Vancouver in 2002, but he did not become licensed until 2007. 5RP 496-97. Although he worked for other people during that time, Leibel was his primary customer. 5RP 499-500. Since he was new to the business, Amaro relied on advice from his more experienced brothers-in-law when bidding on projects. 5RP 501. Amaro agreed that the amounts he charged Leibel for the siding and deck were too high, but if she had told him it was too much he would have charged less. 5RP 541-42. Most of the work he did for Leibel was by oral agreement. He would tell her how much the work would cost, and she would agree to pay. If she changed her mind and asked him to do more work, he would orally increase the bid. 5RP 502-04.

Amaro testified that Leibel became very involved in his family. She met his wife, children and brothers, and they celebrated holidays and family occasions together. 5RP 506. Over the years Leibel gave him several generous gifts, including Seahawks playoff tickets and cash to buy

a new car. 5RP 517-22. She also loaned him a substantial amount of money for his business. Amaro expected to repay these loans, although they never discussed the terms, but his company went under in November 2007. 5RP 516-17.

In closing, defense counsel reminded the jury that Amaro denied taking money for investment houses. 5RP 617. Counsel argued that the projects Amaro did for Leibel were overpriced, but the money was still earned. 5RP 622. There was no deception involved. Amaro quoted a price, and Leibel willingly paid it. 5RP 623. The fact that Leibel made a bad deal did not make Amaro a thief. 5RP 625. Nor was he a thief because Leibel chose to give him gifts or invest in his business. 5RP 626-27.

C. ARGUMENT

1. THE COURT'S INSTRUCTIONS FAILED TO ENSURE THAT AMARO'S CONVICTION ON COUNT 1 WAS FOR ACTS COMMITTED WITHIN THE STATUTE OF LIMITATIONS PERIOD.

In this case, the state alleged that Amaro committed first degree theft by a series of acts connected together by a common scheme or plan. CP 36. The statute of limitations for this offense is three years. RCW RCW 9A.04.080(1)(h); State v. Reid, 74 Wn. App. 281, 290-91, 872 P.2d 1135 (1994). The original charge was filed on February 21, 2008, but the

charging period extended back to December 1, 2002, well beyond the three year limitations period. CP 8.

A person may only be convicted for an offense when the State charges that offense within the statute of limitations period. RCW 9A.04.080(1). A criminal statute of limitations is jurisdictional and creates an absolute bar to prosecution. State v. Eppens, 30 Wn. App. 119, 124, 633 P.2d 92 (1981); State v. Glover, 25 Wn. App. 58, 61-62, 604 P.2d 1015 (1979). The same rule applies to require reversal of a conviction where the State alleges a charging period that includes dates outside the limitations period but fails to specifically prove that the charged offense occurred within the limitations period. State v. Novotny, 76 Wn. App. 343, 345-46, 884 P.2d 1336 (1994). If it is “impossible to determine whether the jury relied on an act that occurred beyond the limitations period”, the conviction must be reversed. Novotny, 76 Wn. App. at 346-47.

The State alleged here that Amaro committed a series of acts under a common scheme or plan, constituting a single theft. Where successive takings are the result of a single, continuous criminal impulse or intent pursuant to a general larcenous scheme or plan, the crime is not complete until the criminal impulse has ended, and the statute of limitations does not begin to run until the crime is complete. State v. Mermis, 105 Wn.

App. 738, 745-46, 20 P.3d 1044 (2001); Reid, 74 Wn. App. at 290; State v. Carrier, 36 Wn. App. 755, 758, 677 P.2d 768 (1984). “Whether a criminal impulse continues into the statute of limitations period is a question of fact for the jury.” Mermis, 105 Wn. App. at 746. Where it is possible for the jury to find the criminal impulse ended more than three years before the information was filed, the jury must be instructed regarding the statute of limitations. Mermis, 105 Wn. App. at 746, 752.

In Mermis, the defendant was charged with theft by deception in obtaining a car from the victim. The jury could have found the theft was complete when the victim gave the defendant the car keys, which occurred more than three years before the information was filed. But the jury could also have found that the defendant’s criminal impulse continued for another three weeks until the victim signed over the title to the car, which was within the limitations period. Mermis, 105 Wn. App. at 744. On appeal, the Court held that the conviction could not stand because the jury instructions failed to ensure that the defendant was convicted of a crime committed within the available charging period. Mermis, 105 Wn. App. at 752.

An example of appropriate instructions when the state charges a series of thefts extending beyond the limitations period is presented in State v. Garman, 100 Wn. App. 307, 984 P.2d 453 (1999), review denied.

141 Wn.2d 1030 (2000). In Garman, the defendants were charged with theft based on a common scheme or plan. Although the charging period extended more than three years before the charges were filed, the jury was instructed that to convict the defendants it must find the defendants' acts were part of a common scheme or plan and that at least one of the acts occurred within the three year limitations period. Garman, 100 Wn. App. at 314-17 (holding no unanimity instruction required where there was no danger the jury found acts separate and distinct but nonetheless convicted).

When the defendant is charged with theft under a common scheme or plan which begins more than three years before the information is filed, the jury instructions must ensure that the defendant is convicted only if the criminal impulse driving the plan continues into the limitations period. As in Mermis, none of the instructions given in this case referenced the limitations period. Unlike the to convict instruction in Garman, the instructions in this case did not inform the jury that it could convict Amaro only if at least one of the charged acts occurred after February 21, 2005.²

² Instruction No. 15 provides as follows:

To convict the defendant of the crime of theft in the first degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between December 1, 2002 and September 21, 2006, the defendant by color or aid of deception, obtained control over property of another;

The instructions in this case failed to ensure that Amaro's conviction on Count 1 was for a crime committed within the available charging period.

Count 1 was based on several transactions which the State alleged were deceptive. The jury was instructed that while the State alleged Amaro committed acts of first degree theft on multiple occasions, it need not unanimously agree that Amaro committed all the alleged acts of first degree theft in order to convict him. CP 167³. The prosecutor argued in closing that for Count 1, if there was a scheme going on during that timeframe, it was all one big theft. The jury had to decide whether Amaro committed theft during that time period, and if they found Amaro deceived

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- (2) That the defendant obtained control of the property by a series of acts which were connected together as part of a common scheme or plan;
 - (3) That the property exceeded \$1500 in value;
 - (4) That the defendant intended to deprive the other person of the property; and
 - (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 165.

³ Instruction No. 17 provides as follows:

The State alleges that the defendant committed acts of Theft in the First Degree on multiple occasions. To convict the defendant on any count of Theft in the First Degree, one particular act of Theft in the First Degree must be proved beyond a reasonable doubt, any you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Theft in the First Degree.

Leibel as to any one of the transactions, he was guilty. 5RP 606-07. Thus, under the court's instructions and the prosecutor's argument, the jury could have convicted Amaro based on a series of transactions completed any time within the charging period. There was nothing to ensure that Amaro was convicted only if the jury found the crime continued into the limitations period.

In Reid, the Court of Appeals rejected a challenge based on the statute of limitations, where there was no question that the final act in a series of thefts occurred within the limitations period. Reid, 74 Wn. App. at 291. Similarly in Carrier, the statute of limitations was not violated when the defendant pleaded guilty to a series of acts which terminated within the limitations period. Carrier, 36 Wn. App. at 757-58. Here, as the prosecutor argued, the jury was not required to find that every transaction constituted theft. The jury could have found, for example, that some of Amaro's representations about the roof and siding projects were deceptive but concluded the State failed to prove that replacement of the original deck constituted theft. The State presented no evidence that the original deck did not need to be replaced. While there was evidence that Amaro charged more than other contractors would charge, as defense counsel pointed out, Leibel's decision to make a bad deal did not convert Amaro's actions into theft. This Court cannot determine from the

instructions given below whether the jury based its verdict on Count 1 solely on acts outside charging period, and the conviction on that count cannot stand. See Mermis, 105 Wn. App. at 752.

Defense counsel did not raise the statute of limitations issue below. Nonetheless, because a criminal statute of limitations is jurisdictional and creates an absolute bar to prosecution, the issue may be raised for the first time on appeal. Novotny, 76 Wn. App. at 345, n.1. Counsel also did not propose an instruction regarding the statute of limitations or object to the instructions given by the court. 5RP 567; CP 46-65. If counsel's actions failed to preserve the challenge to the instructional error, Amaro was denied effective assistance of counsel.

The federal and state constitutions guarantee criminal defendants the right to effective representation. U.S. Const. Amend. 6; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1994).

The Washington Supreme Court has recognized that counsel may be ineffective for failing to propose a jury instruction. State v. Thomas,

109 Wn.2d 222, 226, 743 P.2d 816 (1987) (counsel was ineffective in failing to propose an instruction that would have allowed counsel to argue that defendant's intoxication negated mens rea element of felony flight). Here, counsel was ineffective in failing to propose instructions regarding the statute of limitations for Count 1. As discussed above, Amaro was entitled to an instruction which ensured he was not convicted for a crime committed outside the limitations period. See Mermis, 105 Wn. App. at 752. Because the jury instructions were defective without such an instruction, counsel's failure to propose the necessary instruction constituted deficient performance. See Thomas, 109 Wn.2d at 232. Finally, because the jury could have concluded that the theft charged in Count 1 was completed outside the limitations period and nonetheless convicted Amaro of that offense under the instructions given, counsel's deficient performance prejudiced the defense and denied Amaro a fair trial.

2. THE COURT'S COMMENT ON THE EVIDENCE IN VIOLATION OF THE STATE CONSTITUTION PREJUDICED THE DEFENSE AND REQUIRES REVERSAL.

The court below commented on the evidence when it sua sponte instructed the jury that the state's method of presenting evidence was appropriate. At trial, one of the detectives who had participated in

Amaro's recorded interviews testified that he had edited the recordings to a more manageable length for use at trial. 4RP 396. On cross examination, defense counsel established that the first interview lasted almost 90 minutes, but the recording was edited to 48 minutes. The second interview, which lasted about 75 minutes, was condensed to 15 minutes for the jury. 4RP 398. The detective characterized the omitted portions as times when they were belaboring certain points and not getting anywhere, and "some parts that's debatable as to whether or not it was beneficial to him or not, and a person that listens to them." 4RP 398-99. He agreed that an adversarial interrogation technique was used in which Amaro was interrupted numerous times during the interviews, which was not apparent in the edited versions to be played for the jury. 4RP 399-401. On redirect, the detective testified that he was asked to narrow down the interviews so the jury did not have to spend two and a half hours listening to the same material over and over again, but the jury would have the entire recordings available. 4RP 401-02.

The court then interrupted, instructing the jury as follows:

Exhibits 45 and 46 are complete copies of the recorded information. It's appropriate for the parties, referring to exhibits, to refer to portions of the exhibits to highlight those portions, just as if they wish to highlight portions of documents, they can do that. Either side can play to you or highlight for you those portions of the exhibits that they think benefit them.

4RP 402.

The Washington Constitution provides: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. art. IV, § 16. The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge’s opinion from influencing the jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The explanation offered by the Washington Supreme Court in 1900 rings true today:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900); see also Lane, 125 Wn.2d at 838 (quoting Crotts). Since a comment on the evidence violates a constitutional prohibition, the issue may be raised for the first time on appeal. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

“A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement.” Lane, 125 Wn.2d at 838. A jury instruction can constitute a comment on the

evidence if it reveals the court's evaluation of a disputed issue. State v. Hermann, 138 Wn. App. 596, 606, 158 P.3d 96 (2007)(citing Lane, 125 Wn.2d at 838).

In Lane, a fellow inmate testified that the defendant had made statements implicating him in the charged offense. The defense asserted that the witness had received favorable treatment for his testimony. The witness denied this assertion, and the defense called other witnesses to support it. The state proposed to recall the witness in rebuttal, but instead, the court instructed the jury regarding the reasons for the witness's early release. Lane, 125 Wn.2d at 836-37. The Court of Appeals and Supreme Court held that the trial court impermissibly commented on the evidence. The trial court's instruction put before the jury the court's opinion on an important fact relating to the witness's credibility, which was a key issue in the case. Lane, 125 Wn.2d at 838.

At issue here was whether Amaro's statements were being presented in a fair light or whether they were taken out of context. As in Lane, the court put an end to this line of inquiry by injecting its opinion in the form of an instruction. Instead of letting the parties fully explore the issue, the court cut short the questioning and instructed the jury that the State's method of presenting the evidence was appropriate. In doing so, the court conveyed the message that the defense was wasting the jury's

time in challenging the edited versions of the statements. While the court's opinion was not conveyed as explicitly as in Lane, the court's personal feelings need not be expressly conveyed to the jury to constitute a violation. Mere implication will suffice. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); Lampshire, 74 Wn.2d at 892.

A trial judge's comment on the evidence is presumed prejudicial, and the State had the burden of establishing that no prejudice occurred. Lane, 125 Wn.2d at 838-39. "Even if the evidence commented upon is undisputed, or 'overwhelming,' a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury." State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

In this case, the evidence commented upon related directly to Amaro's credibility. At trial, Amaro detailed the substantial sums of money Leibel gave him as gifts, and he explained that these gifts did not come up in his interviews with the detectives because he just answered the detectives' questions about construction projects. 5RP 517-23. Amaro also admitted he never told the detectives Leibel had invested in his business, even though he knew he was being investigated for theft, and he explained that he was nervous when the police interrogated him. 5RP 543. The defense wanted to encourage the jury to listen to the entire interviews

and consider Amaro's statements in context, so that it could fairly evaluate his credibility. Because the court conveyed the message that the defense was making too much of this issue, however, the jury could have been influenced to disregard the defense's concerns about the edited versions of the interviews. Under these facts and circumstances, the State cannot prove that the court's comment did not prejudice the defense, and reversal is required.

3. THE TEN-YEAR NO CONTACT ORDERS AS TO LOGIE AND JOHNSON EXCEED THE STATUTORY MAXIMUM TERM FOR THE OFFENSE, AND THEY MUST BE CORRECTED.

In addition to the counts of first degree theft involving Leibel, the jury convicted Amaro on two counts of second degree theft as to Evelyn Logie and Marlys Johnston. CP 221, 223. As a condition of Amaro's sentence, the trial court imposed 10-year no contact orders as to Leibel, Logie, and Johnston. CP 244. A sentencing court is authorized to impose no contact orders as crime related prohibitions. RCW 9.94A.505(8). A no contact order imposed under this provision may not exceed the statutory maximum for the underlying offense, however. State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201(2007).

A ten-year order was appropriate as to Leibel, because the maximum sentence for first degree theft is ten years. See RCW

9A.56.030(2); RCW 9A.20.021(1)(b). The statutory maximum sentence for second degree theft is only five years, however. RCW 9A.56.040(2) (second degree theft is class C felony); RCW 9A.20.021(1)(c) (maximum sentence for class C felony is five years). Because the ten-year orders imposed by the court as to Logie and Johnston were not authorized by statute, remand is necessary to correct the orders.

D. CONCLUSION

The court's instructions failed to ensure that Amaro's conviction on Count 1 was for acts committed within the limitations period, and that conviction must be reversed. Moreover, the trial court's unconstitutional comment on the evidence prejudiced the defense, and this Court should reverse and remand for a new trial. In addition, the excessive no contact orders must be corrected.

DATED this 22nd day of May, 2009.

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 Designation of Exhibits and Brief of Appellant in *State v. Richard Michael Amaro*, Cause No. 38589-9-

II directed to:

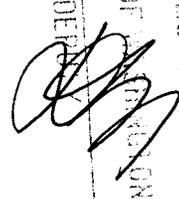
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 22, 2009

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