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Court of Appeals  
Division I  
State of Washington

NO. 72669-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON ROMERO,

Appellant.

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

The Honorable Elizabeth Berns, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's right to present a complete defense and confront the witnesses against him when it excluded defense evidence probative of a police officer's bias and credibility.

2. The trial court erred in finding officer Michael Baisch's testimony credible. CP 69-70.

3. The trial court erred when it sentenced appellant beyond the statutory maximum term.

Issues Pertaining to Assignments of Error

1. The court barred appellant from eliciting evidence that a police officer involved in the case had a sexual relationship with a State witness. The officer resigned his employment for lying about the relationship to his employer. Is reversal required where the State presented no compelling reason for excluding the evidence and the violation of appellant's constitutional rights to present a complete defense and confront his accusers was not harmless beyond a reasonable doubt?

2. Appellant was sentenced to the statutory maximum prison term on one count of second degree assault. The trial court imposed an additional exceptional sentence by running the second degree assault count consecutive to sentences for promoting prostitution and fourth degree assault. The trial court imposed 18 months of community custody,

concluding that “all matters” “calle[ed] for community custody.” 2RP<sup>1</sup> 947. The judgment and sentence does not specify which convictions the community custody applies toward. Where the combined terms of incarceration and community custody on a second degree assault count would exceeded the statutory maximum, is remand required to specify that a combined term of community custody and incarceration shall not exceed the statutory maximum?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Jason Romero with two counts of second degree assault, two counts of first degree promoting prostitution, two counts of fourth degree assault, and one count each of felony harassment, third degree assault, and unlawful display of a weapon for alleged incidents between May 12, 2012 and April 30, 2013. CP 42-46.

Romero waived his right to a jury trial. CP 36; 2RP 188-91, 199. Following a bench trial, the trial court found Romero guilty of two counts of second degree assault, two counts of first degree promoting prostitution, two counts of fourth degree assault, and one count each of felony

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – May 14, 2014; 2RP – May 21, 22, 29, 2014; June 3, 2014; July 18, 21, 22, 23, 24, 28, 30, 31, 2014; August 13, 21, 2014; and October 24, 2014.

harassment and first degree promoting prostitution. 2RP 890-95; CP 68-78. The trial court found Romero not guilty of third degree assault and unlawful display of a weapon. 2RP 893-95; CP 68-78. The trial court also found the second degree assaults, felony harassment, and promoting prostitution charges were part of an ongoing pattern of psychological, physical, or sexual abuse against the complaining witness or multiple victims manifested by multiple incidents over a prolonged period of time. 2RP 918-21; CP 68-78.

The trial court sentenced Romero as follows: 120 months on the first charged incident of second degree assault, 60 months on the felony harassment, 120 months on the first charged incident of first degree promoting prostitution, 84 months on the second charged incident of second degree assault, 120 months on the second charged incident of first degree promoting prostitution, and 364 days on each of the fourth degree assault convictions. CP 54-66, 79-82; 2RP 945-48. Based on the aggravating circumstances, the trial court imposed an exceptional sentence of 120 months on the first charged second degree assault conviction to run consecutive to the 120 months on the second charged incident of first degree promoting prostitution and the 364 days on the fourth degree assault, for a total of 240 months imprisonment. Supp. CP \_\_\_\_ (sub no. 108, Findings of Fact and Conclusions of Law for Exceptional Sentence,

dated 2/2/15); CP 54-63; 2RP 945-48. Romero's remaining convictions run concurrent to the exceptional sentence. CP 54-66.

The trial court also imposed 18 months of community custody for "violent offense[s]" based on RCW 9.94A.030. CP 57-58 (order 4.7(c)). Romero timely appeals.

2. Trial Testimony

Romero and N.G. met in eastern Washington in May 2012 while Romero was visiting his cousin. 2RP 496, 499-502, 711, 752-53, 767. They started dating shortly thereafter. 2RP 718. Romero invited N.G. to move to Seattle with him when he left eastern Washington. 2RP 499-500. N.G. agreed. 2RP 502.

Shortly thereafter, N.G. and Romero moved into a house in Federal Way. 2RP 503-04. N.G. started asking Romero for permission to do things such as drink alcohol. 2RP 505. Romero told N.G. he was the "boss." 2RP 497, 499-500, 505. Once, Romero pushed N.G. into a wall, put his hands on her throat, and told N.G. he would bury her in the backyard. 2RP 506-07. A different time, Romero pushed N.G. down on the bed and put his hands on her throat. 2RP 510-12. N.G. could not breathe and she was scared. 2RP 508, 512. N.G. did not contact police or seek medical treatment. 2RP 512, 758-59.

N.G. testified that while in the federal way house Romero would hit her with a black wire. 2RP 513-16. N.G. explained that sometimes Romero and she were just “playing around,” with the wire and the hits were not “serious.” 2RP 514, 517, 675, 678. Once, Romero burned N.G.’s finger with a lighter. 2RP 516. Romero also burned N.G.’s right hip with a hair strengthener. 2RP 518-19, 804. N.G. did not seek medical treatment for the burns. 2RP 804-05.

Once, while “super drunk,” N.G. told Romero he was an “asshole.” 2RP 530. Romero grabbed N.G. by the throat, pulled her hair, and punched her in the face. 2RP 530-31. Another time, Romero took a picture of himself pointing a gun at N.G.’s head. 2RP 556-58, 658-59, 735. N.G. explained the incident was “just for fun,” and was not “abusive at all.” 2RP 556.

While living at the federal way house, N.G. had sexual intercourse with one of Romero’s acquaintances in exchange for \$100. 2RP 520-25. N.G. did not want to have intercourse. Romero told N.G. she had to because Romero had already been paid. 2RP 521, 523. N.G. agreed to have intercourse because Romero was the “boss.” 2RP 523-24, 526.

On another occasion, Romero asked N.G. if he could urinate in her mouth. 2RP 545-46. N.G. said no. Romero told N.G. it would not be as bad as she thought. 2RP 546. N.G. consented to Romero urinating in her

mouth three times because she did not want to get hit. 2RP 545-48, 634-35, 660. The incidents were recorded on a cell phone camera. 2RP 210-14, 636-38.

At some point, Romero and N.G. moved from the Federal Way house into a hotel. 2RP 529, 534. At the hotel, Romero told N.G. to follow him to the bathroom. Romero stuck his finger in N.G.'s vagina then punched her in the face. 2RP 535-36, 782. Romero told N.G. he was the "boss." 2RP 535.

While living at the hotel, N.G. had sexual intercourse in exchange for \$100. N.G. made the decision herself. 2RP 538, 715, 781. When she returned to the hotel, N.G. told Romero she was raped. Romero called police and N.G. told police she was raped. 2RP 538-39, 715-16.

After leaving the hotel, Romero and N.G. moved in with Romero's mother. 2RP 547-49. In July 2012, N.G. went to the emergency room for a cut on her left buttocks. 2RP 370-71. Romero was not with N.G. at the emergency room. 2RP 377. N.G. told physician assistant, Jeffrey Goon, she sat on a sharp object on a park bench. 2RP 372-73, 377. Goon believed the injury looked like a knife wound. N.G. denied the injury was intentionally caused. 2RP 373-76, 379-80. N.G. was given antibiotics and a tetanus shot. 2RP 374. Goon explained N.G. did not seem uncomfortable or unwilling to talk about the injury. 2RP 377-78.

At trial, N.G. explained Romero accidentally stabbed her buttocks with a knife. 2RP 550, 552, 661-62, 778. N.G. said Romero took her to the emergency room and told N.G. to say that she sat on something sharp at the park. N.G. testified she had to get stitches for the injury. 2RP 552.

In August 2012, Romero told N.G. he was planning on moving them to Las Vegas so N.G. could work as an escort. 2RP 561. N.G. decided to end her relationship with Romero. 2RP 560-61, 564-66, 666.

After ending the relationship, N.G. moved to Yakima to live with her stepmother. 2RP 565-67. N.G. continued to text message Romero and send him money while living in Yakima. 2RP 568-69. N.G. eventually moved to Kentucky to live with her mother. N.G. continued to send Romero money. 2RP 571-72. N.G. also exchanged letters with Romero and told him she still loved him. 2RP 572-74, 671. N.G.'s mother evicted her when she found out N.G. was sending money to Romero. 2RP 575.

N.G. returned to Seattle in January 2013 and reunited with Romero. 2RP 577-80. Shortly thereafter, Romero took N.G. to Déjà Vu dance club to audition for amateur night. N.G. won amateur night and began dancing at Déjà Vu full time. 2RP 320-21, 412, 466, 581-83, 707-09, 728, 773.

Déjà Vu general manager, Leta Whitney, noticed bruises and bite marks on N.G.'s arms and legs when she came in for work. 2RP 322, 327,

331. Dancer Tara Makepeace also noticed bruises and burn marks on N.G.'s body. 2RP 418-20, 425-26, 457-58. N.G. appeared scared and would fidget with her hands when confronted about the bruises. N.G. denied to Whitney and Makepeace that her injuries were the result of violence. 2RP 335, 417. Whitney and Makepeace did not see Romero hit N.G. 2RP 342-43, 471.

Once, N.G. showed up for work with a black eye. 2RP 332, 343, 429, 444-46, 468. N.G. testified Romero punched her in the eye. 2RP 615-18, 761-62. At the time of the injury however, N.G. declined help from Whitney and Makepeace. 2RP 332, 343, 625-28. N.G. did not seek medical treatment for the injury. 2RP 761, 790.

Whitney contacted Tukwila police officer Michael Baisch after N.G. came to work with the black eye. Whitney believed N.G. was being abused and asked Baisch to speak with N.G. Baisch spoke with N.G. on March 29, 2013. 2RP 279-80, 336. Baisch did not see any injuries on N.G. 2RP 285, 309-10. Baisch described N.G.'s demenaor as nervous, "closed off," and scared. 2RP 281-83. Baisch told N.G. about resources available for domestic violence. He provided N.G. with domestic violence pamphlets. 2RP 283-84, 336, 449-50. N.G. declined assistance from Baisch. 2RP 281-83, 337, 787-88. Whitney was also present during N.G. and Baisch's meeting. 2RP 281, 336.

Shortly thereafter, Makepeace offered to let N.G. stay at her apartment. N.G. called Romero to ask for permission. 2RP 429-30. N.G. left money with Romero before going to Makepeace's apartment. 2RP 434-37, 464, 630-31. N.G. fell asleep at Makepeace's apartment and missed several calls from Romero. 2RP 437-38, 632-34. When N.G. and Romero finally spoke, Makepeace heard Romero call N.G. derogatory names. 2RP 439.

Around the same time, Romero and N.G. moved to a house in Enumclaw. While at the house, N.G. twice had sexual intercourse with one man in exchange for money. 2RP 679-80, 716-17, 783-85. N.G. agreed to have intercourse with the man because he had already paid and because Romero was the "boss." 2RP 521-22, 679.

On April 16, 2013, N.G. came to Whitney's office crying and explained she was ready to speak with police. 2RP 337-38. Whitney called Baisch the next day. 2RP 285, 338. Baisch met with N.G. at the police station. 2RP 286-87. Baisch described N.G. as scared but willing to talk with him. 2RP 286-87. Baisch took a recorded statement from N.G. 2RP 289, 311, 657-58, 660-61, 682. Baisch took pictures of bruises and a burn mark on N.G. 2RP 289-91, 298. Baisch obtained N.G.'s cellphone and a signed a medical release from her. 2RP 303. Baisch took

another statement from N.G. on April 19, 2015. 2RP 303. N.G. ended her relationship with Romero a short time later. 2RP 634.

After speaking with N.G., Baisch realized none of the alleged incidents occurred within the city of Tukwila. 2RP 300-01, 398-401. Baisch explained this did not stop him from helping N.G. 2RP 301. Based on Baisch's reports, the case was assigned to Detective Dale Rock. 2RP 382-86. Rock obtained written statements from Whitney and Makepeace. 2RP 386. Rock did not find the men who allegedly had sexual intercourse with N.G. in exchange for money. 2RP 403.

### 3. Impeachment Evidence

The State moved in limine to prohibit the defense from impeaching officer Baisch with evidence that he had a sexual relationship with Whitney and then resigned from the Tukwila Police Department for lying about the relationship.

The State maintained the relationship between Whitney and Baisch started after Baisch took a recorded statement from N.G. 2RP 182-83. Some time later, the Tukwila police department began an internal investigation and asked Baisch whether he had a sexual relationship with Baisch. The prosecutor acknowledged Baisch "wasn't truthful when they initially asked him if he had, in fact, had a relationship with her

[Whitney].” 2RP 183. Baisch later resigned from the police department because of his untruthful statements. 2RP 185-86.

The prosecutor argued Baisch’s relationship with Whitney and subsequent untruthful statements about that relationship was “not relevant to the facts in this particular case[.]” because Baisch was never convicted of a crime and “it’s not relevant to what [N.G.] is going to say happened.” 2RP 183-84.

Defense counsel argued evidence of Baisch’s untruthfulness was relevant for several reasons. Counsel noted that as a sworn officer Baisch had a duty to be truthful and he was not. Counsel also noted that Baisch continued to investigate the case even though none of the alleged crimes occurred within his jurisdiction. Thus, as counsel explained, Baisch’s “conduct during the investigation is-is critical. His conduct included his- his readiness and willingness prior to being termination or and/or resigning to testify in this case[.]” 2RP 185; CP 22. Defense counsel noted that Baisch’s credibility was relevant, especially since he would testify about his impression of N.G.’s demeanor. 2RP 185; CP 22.

The trial court permitted the State to call Baisch as a witness to explain his contact with N.G., the statement that she gave, and his impressions of N.G.’s demeanor at the time of that statement. 2RP 187. The trial court excluded evidence of Baisch’s relationship with Whitney,

untruthful statements to his employer about that relationship, and subsequent resignation. The court explained, “the fact of an incident that occurred after the interview regarding Officer Baisch and another individual or manager at this business, the Court does not find that that’s relevant at all and that will not be allowed in terms of any questioning.” 2RP 187. Romero subsequently waived his right to a jury trial. CP 36; 2RP 188-91, 199.

C. ARGUMENT

1. THE ERRONEOUS EXCLUSION OF IMPEACHMENT EVIDENCE DEPRIVED ROMERO OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND CONFRONT ADVERSE WITNESSES.

Evidence that Baisch had a sexual relationship with a State witness and then resigned for making untruthful statements to his employer about that relationship could have been used to impeach his credibility. The trial court undermined Romero’s ability to defend himself by excluding evidence of Baisch’s misconduct. Reversal is required because this constitutional error was not harmless beyond a reasonable doubt.

a. Romero was Entitled to Elicit Evidence Probative Of Baisch’s Credibility.

Due process requires an accused be given “a meaningful opportunity to present a complete defense.” State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). “The right to offer the testimony

of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Criminal defendants also have a right under the Sixth Amendment and Article I, section 22 of the Washington Constitution to confront the witnesses against them. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Defense counsel exercises a defendant's right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. 683, 689-690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

A defendant's right to confrontation includes the right to engage in otherwise appropriate cross-examination to show that a witness is biased. Delaware v. Van Ardsall, 475 U.S. 673, 680, 106 S.Ct. 1431 (1986); Davis, 415 U.S. at 316-18. Bias refers to "the relationship between a party and a

witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.” United States v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); See State v. MacDonald, 183 Wn.2d 1, 14, 346 P.3d 746 (2015) (recognizing investigating officers “function as a substantial arm of the prosecution.”). Bias may be shown by a witnesses conduct. State v. McDaniel, 37 Wn. App. 768, 772-773, 683 P.2d 231 (1984) (citation omitted). Bias may also be established by introducing extrinsic evidence, including third party testimony. Abel, 469 U.S. at 49.

A claimed violation of a defendant’s Sixth Amendment right to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

b. No Compelling Interest Justified Exclusion Of Defense Evidence That Impeached Baisch’s Credibility.

ER 607<sup>2</sup> allows any party to attack the credibility of a witness. Similarly, ER 608 permits the credibility of a witness to be attacked by evidence in the form of evidence of the witness’s reputation for untruthfulness. K. Tegland, 5A Wash. Pract., Evidence, § 608.1, at 419 (5<sup>th</sup> Ed. 2007). ER 608 (b) admits evidence relevant to conduct at the time

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<sup>2</sup> ER 607 states: “The credibility of a witness may be attacked by any party, including the party calling the witness.”

of trial under the rationale that prior lying shows present lying. ER 608(b) provides in part:

Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

Evidence of Baisch's false statements to his employer was impeachment evidence under ER 608 (b) because it was probative of his character for untruthfulness.

A trial court's ruling on the admissibility of evidence and limitation on the scope of cross-examination is reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997).

Failing to allow cross-examination of a crucial state's witness is an abuse of discretion if the alleged misconduct is the only available

impeachment evidence. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001), cert. denied, 534 U.S. 1000 (2001). Criminal defendants are entitled to extra latitude in cross-examination to show bias and credibility, especially when the particular prosecution witness is essential to the State's case. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

Defense evidence need only be relevant to be admissible. Darden, 145 Wn.2d at 622. If relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Darden, 145 Wn.2d at 622; Hudlow, 99 Wn.2d at 15-16. That is, the State must demonstrate a compelling state interest to exclude a defendant's relevant evidence. Hudlow, 99 Wn.2d at 15-16; Darden, 145 Wn.2d at 621. Even so, relevant defense evidence will rarely be excluded, even where there is a compelling state interest. State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978). The threshold to admit

relevant evidence is low and even minimally relevant evidence is admissible. Darden, 145 Wn.2d at 621.

Witness credibility is not collateral when it is the very essence of the defense. York, 28 Wn. App. at 36. In York, the defendant was convicted for two counts of delivery of a controlled substance primarily upon the testimony of an undercover officer, who testified he bought two bags of marijuana from York. York, 28 Wn. App. at 34. The defense sought to elicit on cross-examination that the investigator had been fired from another sheriff's department because of irregularities in his paperwork procedures and his general unsuitability for the job. York, 28 Wn. App. at 34. The trial court granted the State's motion in limine to exclude cross-examination on this issue on the ground that the issue was collateral. York, 28 Wn. App. at 34. This was reversible error. York, 28 Wn. App. at 37. The investigator's credibility was not a collateral issue. York, 28 Wn. App. at 36. The defense was entitled to impeach the credibility of a witness essential to the State's case. York, 28 Wn. App. at 36-37.

The facts in York are different but the legal principle established in that case applies here. Baisch's credibility was not a collateral issue. His misconduct was relevant to his credibility. Romero wanted to use this evidence to advance its theory that Baisch was not truthful about what he

did and observed in relation to his investigation of the alleged incidents in this case. 2RP 185; CP 22. The defense was therefore entitled to cross-examine him on this issue.

The State did not have a compelling reason to prevent admission of the evidence. On the contrary, the purpose of cross-examination is to test the credibility of witnesses. Darden, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Darden, 145 Wn.2d at 620. The court erred in excluding probative defense evidence without a compelling interest.

c. Error In Excluding Evidence Probative Of Baisch's Credibility Was Not Harmless.

The denial of the right to present a defense and the right to confront witnesses is constitutional error. Crane, 476 U.S. at 690; State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), rev. denied, 131 Wn.2d 1011 (1997). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). "The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its

independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained.” State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

Admission of evidence that Baisch had a relationship with a State’s witness and lied about it would have impeached his credibility. Cf. State v. Portnoy, 43 Wn. App. 455, 462-63, 718 P.2d 805 (1986) (denial of right to confront and cross-examine harmless beyond a reasonable doubt where excluded evidence would not have impeached witness’s credibility), rev. denied, 106 Wn.2d 1013 (1986). It cannot be said beyond a reasonable doubt the error was harmless. “Credibility determinations ‘cannot be duplicated by a review of the written record, at least in cases where the defendant’s exculpatory story is not facially unbelievable.” State v. Holmes, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (quoting State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988), rev. denied, 110 Wn.2d 1032 (1988)). Although the State tried to minimize the relevance of the issue, it was of sufficient importance to obtain pretrial suppression. York, 28 Wn. App. at 37.

This Court cannot determine the same result would have been reached if the trial court had properly heard, and considered, evidence tending to impeach Baisch’s believability. Baisch was an essential

witness. His contact with Whitney, with whom he later had a sexual relationship, started the investigation in this case. 2RP 279-80, 384. Baisch thrice interviewed N.G., took a recorded statement from her, took pictures of N.G.'s alleged injuries, and obtained N.G.'s cell phone. 2RP 280, 285, 289-91, 303-05, 385-86, 397. In short, Baisch was the main investigative officer in this case. Indeed, as the State acknowledged, "there's not a lot of police intervention in this case besides him." 2RP 184.

The defense theory was that Baisch's testimony and conduct was unreasonable. 2RP 184-85. Baisch investigated the case despite realizing none of the alleged incidents occurred within his jurisdiction. 2RP 184-85, 300-01, 398-401. The State nonetheless portrayed Baisch as a "hero" for his work on the case. 2RP 842. Evidence that Baisch had a relationship with a State witness and then lied about it would have impeached his credibility. Instead, without the impeachment evidence the trial court had little reason to discount Baisch's testimony. Indeed, the trial court found Baisch's testimony credible. CP 69-70.

The evidence was not otherwise overwhelming. Only N.G. testified to witnessing the alleged incidents happen. 2RP 310, 342-43, 471. N.G. initially denied her injuries were the result of alleged domestic violence. 2RP 373-74, 376, 379-80, 417, 627-28. N.G. waited about a

year before reporting any of the alleged incidents. 2RP 680-81, 862. N.G. acknowledged some of the incidents were actually Romero and N.G. just “playing around.” 2RP 514, 517, 626, 672-75, 677-78, 731. For example, N.G. explained Romeo’s pointing of the gun at her head was not “abusive at all.” 2RP 556-58, 658-59, 735.

As the sole judge of witness credibility, the trial court should have considered evidence of Baisch’s misconduct and untruthful statements so it could make an informed judgment regarding his credibility. Davis, 415 U.S. at 317.

The trial court wrongly prevented the defense from cross-examining Baisch about his misconduct and untruthful statements to his employer. Baisch lied about having a relationship with one of the State witnesses. His willingness to lie in his official capacity was relevant to his credibility. Instead of constricting the scope of Romero’s cross-examination, the trial court should have allowed the wide latitude mandated by due process and the right to confrontation. The denial of these constitutional rights corrupted and distorted the fact-finding process. Reversal of the convictions is required.

2. THE TRIAL COURT ERRED IN IMPOSING CONFINEMENT AND COMMUNITY CUSTODY IN EXCESS OF THE STATUTORY MAXIMUM.

The trial court sentenced Romero as follows: 120 months on the first charged incident of second degree assault, 60 months on the felony harassment, 120 months on the first charged incident of first degree promoting prostitution, 84 months on the second charged incident of second degree assault, 120 months on the second charged incident of first degree promoting prostitution, and 364 days on each of the fourth degree assault convictions. CP 54-66, 79-82; 2RP 945-48. Based on the aggravating circumstances, the trial court imposed an exceptional sentence of 120 months on the first charged second degree assault conviction to run consecutive to the 120 months on the second charged incident of first degree promoting prostitution and the 364 days on the fourth degree assault, for a total of 240 months imprisonment. Supp. CP \_\_\_ (sub no. 108, Findings of Fact and Conclusions of Law for Exceptional Sentence, dated 2/2/15); CP 54-63; 2RP 945-48.

The court also imposed 18 months of community custody on “all matters[.]” 2RP 947. The judgment and sentence however, reflects the court imposed 18 months of community custody for offenses qualifying as a “violent offense” under RCW 9.94A.030. CP 57-58 (order 4.7(c)). Of the five felony offenses for which Romero was convicted, only the two

second degree assaults are “violent offense[s]” under RCW 9.94A.030. RCW 9.94A.030(55)(viii). Second degree assault is a class B felony. RCW 9A.36.021(2)(a). The statutory maximum for second degree assault is 120 months. Former RCW 9A.20.021(1)(b).

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Sentencing courts must ensure that the combination of incarceration and community custody does not exceed the statutory maximum sentence. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) (citing RCW 9.94A.701 (9)).

Here, the judgment and sentence does not indicate which counts the 18 months of community custody for a “violent offense” applies toward. The trial court’s oral sentence suggests the community custody term applies to “all matters[.]” 2RP 947. Only two of Romero’s five felony convictions however, qualify as “violent offense[s]” under RCW 9.94A.030. Moreover, the court sentenced Romero to 120 months incarceration on the first count of second degree assault. An 18 month sentence of community custody on that count would mean Romero was sentenced to a total of 138 months on a crime with a 120-month statutory maximum.

Where a sentence is insufficiently specific, remand for amendment of the judgment and sentence is the proper remedy. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). This court should remand to the trial court to specify a combined term of community custody and incarceration that does not exceed the statutory maximum. Boyd, 174 Wn.2d at 473; State v. Land, 172 Wn. App. 593, 295 P.3d 782, 786-87 (2013).

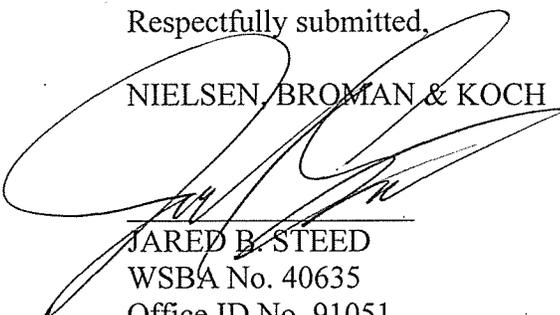
D. CONCLUSION

For the reasons stated above, Romero respectfully requests this Court reverse his convictions. In the alternative, this court should remand to the trial court to specify a combined term of community custody and incarceration that does not exceed the statutory maximum.

DATED this 20<sup>th</sup> day of July, 2015.

Respectfully submitted,

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Attorneys for Appellant

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

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STATE OF WASHINGTON/DSHS	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72669-2-1
	)	
JASON ROMERO,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JULY, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON ROMERO  
NO. 819506  
MONORE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JULY, 2015.

x *Patrick Mayovsky*