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NO. 67827-2-I

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

REC'D

MAY 23 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DATHAN McCRARY,

Appellant.

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

The Honorable Palmer Robinson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

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 detective's credibility.

Issue Pertaining to Assignment of Error

The court barred appellant from eliciting evidence that a detective involved in the case had a history of disciplinary proceedings. One incident resulted in a suspension without pay because the detective "omitted facts when reporting the theft of personal property during a burglary of his residence." Pre-Trial Ex. 1 at 3. 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?

B. STATEMENT OF THE CASE

1. Trial Testimony

Appellant Dathan McCrary and Tanya Mapp-Bynum were introduced by mutual friends in early 2010. RP¹ 511-13, 573, 944-45.

¹ This brief refers to the verbatim report of proceedings as follows: RP – July 21, 25, 26, 27, 28, 29, 2011, August 1, 2, 3, 4, 24, 2011, and October 18, 2011.

Mapp-Bynum found McCrary attractive and contacted him again several months later. RP 514-15.

In December 2010, Mapp-Bynum drove to Portland to pick up McCrary and drive him back to Seattle. RP 516, 954-55. Terry Meyers and another friend of McCrary's rode with Mapp-Bynum. RP 518-19, 575, 956, 982-83. Mapp-Bynum was "frustrated" that McCrary asked her to pick him up in the parking lot of a strip club. RP 519-20, 577-78, 955, 986. She became "really offended" when McCrary did not give her his undivided attention. RP 523, 960, 987. Mapp-Bynum responded by being quiet during the ride home. RP 520, 578. She said "things were kind of heated" from "the get-go." RP 578.

Mapp-Bynum dropped off McCrary's friends in Federal Way and continued with McCrary to her apartment. RP 578-79, 961. Mapp-Bynum and McCrary went to sleep at her apartment. RP 521, 579-80, 962-63. Mapp-Bynum woke McCrary the following morning and told him to leave because she was going to work. RP 521-22, 580. McCrary began yelling about being stranded and twice grabbed Mapp-Bynum by the throat. Mapp-Bynum felt something "pop" in her neck and was unable to breath and became lightheaded. RP 523-28. She was uncertain how long the incident lasted. RP 526.

After the incident, McCrary said he was sorry and told Mapp-Bynum, "we'll work it out." RP 532. Mapp-Bynum told McCrary she would give him money if he let her go to work. RP 529, 532, 580. McCrary rode with Mapp-Bynum to an ATM machine located in the parking lot of her work. RP 532, 965-66. She gave McCrary money and agreed to let him sit in her car until his friends picked him up. Mapp-Bynum told McCrary not to take the car anywhere. RP 529, 533, 582-83, 668, 673.

Ten minutes after arriving at work, Mapp-Bynum noticed the car was gone. She called McCrary and told him to bring the car back. Twenty minutes later she called 911 and said McCrary had choked her and taken her car. RP 533-34, 537, 543-46. The 911 operator asked whether McCrary had permission to drive the car. Mapp-Bynum said, "He asked but he wasn't supposed to take it. It's a long story [.]" RP 544.

Des Moines police officer Jay West responded to Mapp-Bynum's 911 call. RP 484-85. Mapp-Bynum acknowledged the keys were in the car when she left it with McCrary. RP 489. West spoke with McCrary on Mapp-Bynum's cell phone. McCrary told West where the car was located but West could not find it. RP 487-88, 490-91. West did not interview Mapp-Bynum about the alleged choking incident because she said it did

not occur in Des Moines. RP 485-86. West did not refer the alleged assault to other police departments. RP 488.

King County deputy sheriffs Aaron Thompson and Benjamin Wheeler also responded to the 911 call. RP 546, 548, 551, 590-95, 777-78. Thompson saw "fresh bruising" on Mapp-Bynum's neck. RP 596. Wheeler observed fingernail scratches and abrasions on Mapp-Bynum's neck that he believed were consistent with choking. RP 779. He did not observe any hemorrhaging on Mapp-Bynum's neck. RP 798-99. Mapp-Bynum did not report any pain or request medical attention. RP 667, 672. Thompson looked for but could not find Mapp-Bynum's car. RP 597-98.

Mapp-Bynum agreed to tell police whenever she spoke with McCrary. RP 551-52. During a later telephone call, McCrary told Mapp-Bynum he wanted to return to the car but did not want to be arrested. McCrary said he would return the car if Mapp-Bynum drove him back to Portland and returned the possessions he left at her apartment. RP 549-557. Mapp-Bynum agreed to meet McCrary at a park and ride. RP 557. Based on this information, police set up surveillance at the park and ride intending to arrest McCrary when he arrived to meet with Mapp-Bynum. RP 600, 608-09.

McCrary arrived at the park and ride in a car that was not Mapp-Bynum's. RP 610-11. The car was not registered to McCrary. RP 670-

71. It was not reported stolen. RP 674-75. Police arrested McCrary outside the car. RP 613-14. McCrary was cooperative and police found no weapons. RP 110, 188, 669.

While McCrary was arrested, deputy sheriff Keith Martin blocked the car with his police car and ordered the remaining occupants to show their hands. RP 695. He could not see inside the car because of tinted windows. Martin searched the car when no one responded to his commands. RP 696-97. No one was in the car but Martin saw a handgun under the backseat. RP 696-98, 705. Martin explained he “poked” his head under the four-to-six-inch raised backseat because “um, in my 15 years, I’ve found people hiding just about everywhere [laughs].” RP 698. Thompson and deputy sheriff Gregory Smith observed the gun through the car windshield after Martin told them where it was located. RP 620-21, 629-30, 668, 698.

Meanwhile, Wheeler arrived at the park and ride as McCrary was being arrested. Wheeler saw a person walking away from the area, but did not contact him. RP 780-81, 795. Wheeler found Mapp-Bynum’s car keys in McCrary’s pocket. RP 782, 796. Police later found Mapp-Bynum’s car about three miles from her apartment. RP 712-13, 727-28.

After McCrary’s arrest, police contacted a towing company to remove the car McCrary arrived in. RP 621-22, 698-99. Terry Meyers

approached police and asked “why you towing my car.” RP 701. Meyers became “a little agitated, pissed off” when told about the gun. RP 702-03, 706. Meyers had “fresh mud” on his shoes and pants. Martin believed Meyers had “gone off and hid somewhere” when police arrived. RP 702-03.

Later that evening, police took property from Mapp-Bynum’s apartment that she identified as McCrary’s. RP 650, 719, 725, 728, 784. Police did not ask McCrary whether the property was his. RP 729. A gun box, loaded handgun magazine, and spare handgun grips were among the items removed from the apartment. RP 719-722.

The serial number on the gun box matched the serial number on the handgun removed from Meyers’ car. RP 792. No fingerprints were found on the gun or gun box. RP 751, 755, 758-59, 761. McCrary’s fingerprints were found on the gun record of sale along with another unidentified print. RP 746-47, 754-55, 760, 763.

McCrary was booked into King County Jail. During this time, several telephone calls were made to his fiancé’s number. RP 651-53, 871-72, 880, 889. The calls originated from McCrary’s assigned jail pin number. RP 835-41, 889, 897-98. The conversations were about the arrest and alleged assault. CP 177-270. One call stated, “it’s lookin’ bad

for me right now...they found my...they...they found my thang, man.”
RP 852-53.

Based on this evidence, the state charged McCrary with one count each of second degree assault, second degree taking a motor vehicle without permission, and first degree unlawful possession of a firearm. CP 56-57.

McCrary testified that Mapp-Bynum told him he could stay at her apartment while she went to work. RP 964-65. McCrary rode with Mapp-Bynum to work because he did not want to stay at the apartment all day and had cleaning to do at his former automotive shop. RP 965, 987-88. McCrary did not take his property with him because he believed he would return to the apartment. RP 966.

On the way to work, Mapp-Bynum stopped at an ATM and gave McCrary money for repairs he did to her car. RP 966-67. Mapp-Bynum got out of the car at work and asked McCrary to pick her up when she got off. RP 967. About 20 minutes later McCrary received a text message from Mapp-Bynum that said, “calling it stolen.” RP 968, 991. McCrary immediately parked the car and walked the rest of the way to his shop. RP 968-69. Meyers picked McCrary up at his shop and they drove around while McCrary tried calling Mapp-Bynum. She did not answer his calls. RP 969, 971-73.

McCrary spoke with West and told him he had the keys. RP 969-70. McCrary declined to meet with West because he had outstanding warrants. RP 970-71. McCrary told Mapp-Bynum he wanted to meet to get his property back and return her keys. RP 973-74, 994-99. She told him to meet her at the park and ride. RP 974. McCrary denied choking Mapp-Bynum or taking her car without permission. RP 965, 977, 1008. He acknowledged he did not tell police or Mapp-Bynum where to find the car until after he was arrested. RP 990-93.

After hearing the above, a King County jury found McCrary guilty of second degree taking a motor vehicle without permission, first degree unlawful possession of a firearm, and a lesser offense of fourth degree assault. CP 92-94; RP 1153-54, 1160-66.

The trial court imposed concurrent sentences of 67 months on the unlawful possession, 18 months on the taking a motor vehicle, and 364 days on the fourth degree assault. CP 128-38; RP 1215-1216. McCrary timely appeals. CP 140-52.

2. Impeachment Evidence

The State moved in limine to prohibit the defense from impeaching detective Martin with evidence of prior sheriff's office disciplinary proceedings. CP 161; RP 20. The State disclosed two incidents of misconduct. RP 21-23.

In March 1999, Deputy Martin reported his car had been stolen and his apartment burglarized. Pre-Trial Ex. 1 at 2-30; RP 23. Martin received a suspension without pay because, in the language of the personnel order, “he omitted facts when reporting the theft of personal property during a burglary of his residence.” Pre-Trial Ex. 1 at 3.

Specifically, “Martin acknowledged he gave a false statement regarding his personal vehicle being stolen.” Pre-Trial Ex. 1 at 12, 30. He admitted his ex-girlfriend had his vehicle with his consent. Pre-Trial Ex. 1 at 15, 24; RP 26, 269. Based on Martin’s false report, police identified the ex-girlfriend as a suspect, detained her, and extensively questioned her. Pre-Trial Ex. 1 at 14-15, 18-23, 26-29.

The second incident of misconduct occurred in July 2000, when Deputy Martin called a juvenile arrestee a “monkey boy” or “monkey butt.” Pre-Trial Ex. 2 at 5-34; RP 28, 270. One of the two juvenile arrestees was African American. Pre-Trial Ex. 2 at 6, 9, 15-17. Martin received a written reprimand for conduct unbecoming an officer and was required to attend sensitivity training. Pre-Trial Ex. 2 at 2; RP 23.

Following the disclosure of misconduct, defense counsel filed a motion to compel Martin to answer questions regarding the disciplinary proceedings. CP 153-55. Judge Theresa Doyle ordered Martin to answer questions regarding his disciplinary and criminal history, including, “the

factual, procedural, outcome and sanctions imposed regarding a 1999 Sheriffs [sic] internal investigation regarding false reporting claim[.]” CP 156; RP 21-22. When interviewed, Martin repeatedly told the defense investigator he had no memory of the facts regarding the 1999 disciplinary proceeding. RP 24.

During a pre-trial CrR 3.6 hearing, defense counsel questioned Martin about his interview with the investigator. RP 142-57. Martin maintained he did not remember the facts of the 1999 disciplinary proceeding. RP 142-43, 145-156. He did acknowledge making statements that the 1999 proceeding involved a stolen car report and that he was suspended for one day without pay. RP 143-44, 148.

The State argued the misconduct was too remote and that unfair prejudice outweighed any probative value under ER 403. CP 161; RP 272. The State further argued the 1999 disciplinary hearing was inadmissible given Martin’s “limited memory” and because ER 608 prohibited extrinsic evidence. RP 270-71.

Defense counsel argued evidence that Martin had been the subject of two disciplinary hearings was relevant to his credibility.² RP 25-27. Specifically, counsel argued the 1999 disciplinary hearing was probative

² Defense counsel agreed the specific facts of the 2000 disciplinary hearing were not relevant as to Martin’s credibility. RP 28-29.

of Martin's untruthfulness because it involved his intentional omission of facts relevant to a police investigation. RP 25-27, 267-69, 273-74. Counsel argued Martin's "limited memory" regarding the 1999 hearing was further evidence of his untruthfulness. RP 25-27, 267-69, 279-80. Counsel noted that although Martin could not remember the facts of the 1999 disciplinary hearing because "it was 12 years ago," he could recall events from 1997 or earlier, including his police academy training. RP 272-74.

Acknowledging counsel's argument was "appealing" on "many levels," the trial nonetheless excluded substantive evidence of the disciplinary hearing, ruling as follows:

I don't, uh, know of any authority for basically saying Evidence Rule 608(b) doesn't apply to law enforcement. Or why, uh, the, um, in terms of Tegland's comments about, you know, Sub Comment 11 or, yeah, comment about, uh, if the witness denies a specific incidence inquires in the end [phonetic] the cross-examiner must take the answer and may not call a second witness to contradict the first to prevent, you know, re-litigating that issue. Uh, I don't know that doesn't apply here, Um, and I think, uh, you know, were this a conviction, which it isn't, uh, and then under 609 you still got the 10 year old iss --, 10 year issue. Uh, and you've still got, uh, the requirement, um, well, you, you've still got some requirements that, that, that aren't here. So I'm, um, not going to allow, uh, going beyond whatever Detective Martin's answers are to the questions, I guess. Or, uh, I'm not, I'm not going to allow the Defense to cra --, well, now I don't remember exactly what the Motion was, but, uh, but go in to the details of the allegations or even finding, the Internal Affairs findings.

RP 274-75.

Defense counsel attempted to clarify the court's ruling, inquiring whether she could ask Martin the following questions: 1) were you subject to disciplinary proceedings?; 2) were you suspended one day?; 3) did you make a false report?; and 4) were you court ordered to answer those questions and denied remembering the allegations? RP 275-77. The State argued the questions would not lead to admissible evidence because "this disciplinary proceeding is only relevant if, if Counsel can, can show that it has to do with dishonesty, and Counsel can't based on his [Martin's] testimony." RP 278-79. Defense counsel maintained that Martin's "limited memory" claims were themselves not credible, but acknowledged that if Martin answered "'no' then I'd have to sit down." RP 280-81.

The trial court denied defense counsel's proposed questions, ruling as follows:

All right. I, I, I understand your argument I'm going to, um, grant the State's Motion in Limine that there not be any questions about, uh, the incidents reflected in either Pre-Trial Exhibits 1 or 2.

RP 281.

Before Martin testified, defense counsel renewed her request to question him regarding the 1999 disciplinary proceeding, stating "it's key

to his testimony in terms of credibility and lack thereof[.]” RP 690. The trial court denied the request for reconsideration. RP 690.

C. ARGUMENT

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

Evidence that Martin was disciplined for making a false criminal report to police could have been used to impeach his credibility. The trial court undermined McCrary’s ability to defend himself by excluding evidence of Martin’s misconduct. Reversal is required because this constitutional error was not harmless beyond a reasonable doubt.

a. McCrary was Entitled to Elicit Evidence Probative Of Martin’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 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 Martin's Credibility.

ER 607³ 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

³ ER 607 states: "The credibility of a witness may be attacked by any party, including the party calling the witness."

untruthfulness. K. Tegland, 5A Wash. Pract., Evidence, § 608.1, at 419 (5th Ed. 2007). ER 608(b) admits evidence relevant to conduct at the time 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 Martin's false reporting was impeachment evidence under ER 608(b) because it was probative of his character for untruthfulness.

The trial court did not exclude the false reporting evidence because it was not probative of untruthfulness. Indeed, as the trial court acknowledged, defense counsel's argument regarding the admissibility of the evidence was "appealing" on "many levels." RP 274. Rather, the trial court excluded the evidence because it assumed he would claim he could not remember the details of the 1999 disciplinary proceeding, a claim McCrary would be stuck with under ER 608(b). RP 274, 279-81.

The trial court's assumption ignored Martin's testimony that the 1999 proceeding involved a stolen car report and that he was suspended

for one day as a result. RP 143-44, 148. Thus, even if Martin denied recalling the details of the 1999 disciplinary proceeding during trial, defense counsel could have used his prior inconsistent statements as impeachment evidence to show Martin was not being truthful. ER 613(b).⁴ Instead, the trial court's refusal to allow McCrary to ask Martin "any questions" about his false reporting prevented the defense from impeaching Martin with evidence probative of his honesty. RP 281.

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).

⁴ ER 613(b) states in relevant part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."

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 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. Martin's credibility was not a collateral issue. His

misconduct was relevant to his credibility. McCrary wanted to use this evidence to advance its theory that Martin was not truthful about what he did and observed in relation to the gun. The defense was therefore entitled to cross-examine him on this issue.

It is the province of the jury to weigh the evidence to determine the credibility of witnesses. State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). The trial court, acting as evidentiary gatekeeper, deprived the jury of fairly judging the credibility of Martin's testimony.

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 Martin'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 Martin had lied before 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 jury would necessarily have reached the same result if it had heard evidence tending to impeach Martin's believability. Martin was an essential witness. He discovered the gun inside the car, alerted other officers to its location, and was the main source of information relied on to obtain the search warrant. CP 169-175.

Martin testified he found the gun under the backseat of Meyers' car during a search for officer safety. RP 696-97. He testified he "poked" his head under the four- to six-inch raised backseat because "um, in my 15 years, I've found people hiding just about everywhere [laughs]." RP 698. The defense theory was that Martin's testimony and conduct was unreasonable. RP 169. Evidence that Martin had lied before would have impeached his credibility. Instead, without the impeachment evidence the jury had little reason to discount Martin's testimony.

The evidence was not otherwise overwhelming in relation to the firearm charge. McCrary was never seen in possession of the gun and his fingerprints were not found on the gun itself. The gun was found in a car Meyers acknowledged was his. Meyers fled as police arrived, but later returned and asked police why they were "towing his car." Although

Mapp-Bynum gave police a gun box identified as McCrary's and which matched the serial number on the gun, McCrary's fingerprint was found only on the bill of sale. The bill of sale also contained another unidentified fingerprint.

As sole judges of witness credibility, jurors should have been allowed to consider evidence of Martin's 1999 wrongdoings so they could make an informed judgment regarding his believability. Davis, 415 U.S. at 317.

The trial court wrongly prevented the defense from cross-examining Martin about the false report. Martin lied about his vehicle being stolen. His willingness to fabricate in an official disciplinary proceeding was relevant to his credibility. Instead of constricting the scope of McCrary'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.

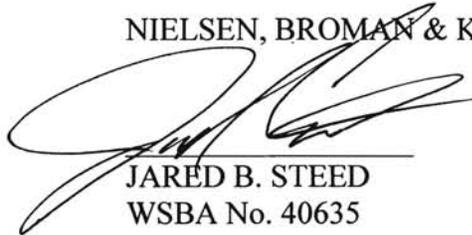
D. CONCLUSION

For the reasons stated above, McCrary respectfully requests this Court reverse his convictions.

DATED this 23rd day of May, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is stylized and cursive.

JARED B. STEED
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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 67827-2-1
)	
DATHAN McCrARY,)	
)	
Appellant.)	

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 23RD DAY OF MAY, 2012, 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] DATHAN McCrARY
DOC NO. 822901
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

FILED
COURT OF APPEALS, DIV. I
STATE OF WASHINGTON
2012 MAY 23 PM 4:18

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF MAY, 2012.

x 