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Court of Appeals
Division I
State of Washington

NO. 72669-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON ROMERO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ELIZABETH J. BERNIS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A criminal defendant enjoys a right to cross-examine adverse witnesses, but a trial court has discretion to limit or deny cross-examination based on relevance and other rules of evidence. In Romero's trial for domestic-violence assault, promoting prostitution and other charges — where the victim testified for more than two days about the horrors inflicted upon her — a patrol officer testified that he took a statement from the victim, collected evidence, and observed her demeanor and some physical injuries, all of which was corroborated by other eyewitnesses and investigating officers. Romero cross-examined the officer about his professional interactions with the victim, but the trial court did not allow Romero to cross-examine the officer about later lying about his relationship with the victim's work supervisor, which began after his involvement with Romero's case had ended. Did the trial court act within its discretion by excluding that evidence as irrelevant? Was any error harmless?

2. When terms of confinement and community custody combine to exceed the statutory maximum for an offense, the sentencing court must reduce the term of community custody to bring the total term within the statutory maximum, though it may

impose a variable community-custody term to account for early release. Four of Romero's felony offenses carried community custody, but for different terms that were not specified in the Judgment and Sentence, and the trial court did not reduce some of the terms to account for the statutory maximums. Should the case be remanded so the trial court can amend the Judgment and Sentence to properly specify the terms of community custody on each applicable offense?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Jason Castillo Romero was charged by Fourth Amended Information with nine crimes: (1) Assault in the Second Degree – Domestic Violence; (2) Felony Harassment – Domestic Violence; (3) Promoting Prostitution in the First Degree – Domestic Violence; (4) Assault in the Second Degree – Domestic Violence; (5) Promoting Prostitution in the First Degree – Domestic Violence; (6) Assault in the Third Degree – Domestic Violence; (7) Assault in the Fourth Degree – Domestic Violence; (8) Unlawful Display of a Weapon – Domestic Violence; (9) Assault in the Fourth Degree – Domestic Violence. CP 42-46.

Counts 1, 2, 3, 5 and 6 carried special allegations of the aggravating factor of being part of an ongoing pattern of abuse. Id. Count 1 also carried a special allegation of deliberate cruelty. Id.

The charges alleged that during different time periods from May 2012 through April 2013 in King County, Washington, Romero victimized his girlfriend, N.G., by strangling her; threatening to kill her and bury her in a back yard; selling her to two different men for sex; burning her with a hair-straightening iron; stabbing her with a knife; urinating in her mouth and on her face and body; holding a sawed-off shotgun to her head; and punching her in the eye. Id.; CP 72-76.

Romero waived his right to a jury. CP 36. After a bench trial, the court found Romero guilty of all counts except Count 6 (third-degree assault) and Count 8 (unlawful display of a weapon). CP 72-76. The court found the pattern-of-abuse aggravating factor for Counts 1, 2, 3 and 5. CP 68-78. The court rejected the deliberate-cruelty aggravating factor in Count 1. CP 76-77.

Romero had six prior adult felony convictions and five juvenile felony convictions. CP 60. The court imposed exceptional sentences totaling 252 months of confinement. CP 57. Romero timely appealed.

2. SUBSTANTIVE FACTS

In the spring of 2012, life for N.G. in Yakima County was little more than a string of menial jobs and short-term apartments. 5RP 494-96.¹ The product of a broken home, N.G. was two years out of Naches Valley High School, where she had noticed she was “slow,” and different from other kids, and was placed in “special ed.” 5RP 494-95, 565, 571; 7RP 808, 810. N.G. had played tennis and run track, but she also had run away from home a lot and dabbled in a “gang,” which was really just N.G. and two other schoolgirls who did “little girl stuff.” 5RP 494; 6RP 706-07, 772.

Now she was sharing an apartment with a friend in Union Gap. 5RP 495-96. She had worked at a retail store, did housekeeping at retirement homes, and got paid to take care of a friend’s paralyzed adult brother. 5RP 495.

One day in May, N.G. was on the street outside her apartment when Jason Romero walked up. 5RP 496. “Hi, my name is Jason,” he said. 5RP 496. He told N.G. she was beautiful and did not need makeup. 5RP 497-98. He took her picture and gave her his number. 5RP 496-97. No man had ever shown her

¹ The verbatim reports of proceedings are sequentially numbered but broken into several volumes. The State has numbered these as follows: 1RP (May 14, 2014); 2RP (Volume I); 3RP (Volume II); 4RP (Volume III); 5RP (Volume IV); 6RP (Volume V); 7RP (Volume VI).

that kind of attention before. 5RP 502. N.G. instantly “fell in love with him like I had never felt.” Id.

She was 20 years old; Romero was 32. 5RP 502.

The next evening, Romero made it clear how the new relationship would work: “I’m the boss and you’re going to give me all your money and you’re not going to tell nobody.” Id. A few days later, N.G. agreed to go to the Seattle area to live with him. 5RP 500. They moved into a house in Federal Way with Romero’s cousins. 5RP 504. N.G. knew no one in the area; she did not even know the geography enough to find her way back to Yakima. 5RP 562-64.

For a couple of weeks, Romero was “really sweet.” 5RP 505. Then everything changed. Id. Already, N.G. understood that she had to ask Romero’s permission to do almost everything, even to go to the bathroom. 5RP 501-02, 505. One night, Romero got angry at N.G. and yelled that he was going to “bury her in the backyard.” 5RP 506. He slammed her against a wall and choked her. 5RP 506-07. N.G. thought she was going to die. 5RP 508. N.G. blamed herself because “I didn’t use my brain ... before I spoke.” Id. She learned that she “should really think about it before I open my mouth.” 5RP 508.

But one night soon afterward, N.G. forgot to ask permission to go to the bathroom. 5RP 510. Romero pushed her down on the bed and choked her until she could not breathe. Id. Seconds passed. 5RP 512. N.G. thought, "Maybe I'll die today." Id.

Following that episode, Romero found an electrical cord and kept it as a whip to punish N.G. 5RP 514. One day, she was not getting ready fast enough, so Romero beat her with the cord and held the flame of a cigarette lighter to her finger. 5RP 515-16. Then he took N.G.'s hair-straightening iron and seared a scar into her hip. 5RP 517-19.

Another night, Romero came into the kitchen with \$100 in his hand, and announced that N.G. was going to have sex with a man related to Romero's cousin. 5RP 521-23. N.G. resisted; Romero insisted. 5RP 523. N.G. figured, "If I don't, he's probably going to hit me or he might beat me." 5RP 522. She wept silently as Romero's relative violated her. 5RP 525. "I felt like I was being raped." Id.

After a couple of months in Federal Way, N.G. and Romero moved to a motel. 5RP 534. One night, they had been drinking, and Romero uncharacteristically allowed N.G. to leave alone to buy candy. 5RP 536-37. She was drunk. 5RP 538. N.G. met a couple

in another motel unit who offered her money for sex. Id. N.G. accepted because she wanted finally to have some money of her own. Id. But she returned to her motel room in tears. 5RP 538. Romero locked N.G. in the bathroom, forced his finger into her vagina, punched her twice in the face, and told her she was never to have sex for money without his say-so. 5RP 535, 540.

By August 2012, the couple had moved in with Romero's mother in Kent. 5RP 549. During this time and later, Romero coerced N.G. into letting him urinate in her mouth, once while video-recording it with his phone. 5RP 547-48; Ex. 13. One night he was playing with a knife, poking it at N.G.'s buttocks, when the blade sliced into her body. 5RP 550. At the emergency room, N.G. made up a story about accidentally sitting on a sharp object. 5RP 552.

Another night, Romero took N.G. to hang out with one of his ex-girlfriends and her friends. 5RP 555. For fun, Romero held a sawed-off shotgun to N.G.'s head and posed for a photo. 5RP 558; Ex. 4.

By August 2012, N.G. had had enough, so she told Romero she was leaving. 5RP 561. Romero pointed out that she had no idea how to get out of Kent, let alone home to Yakima. 5RP 562.

N.G. walked off penniless, with no belongings, to an insurance office where she asked to use the phone. 5RP 563. She called police, who helped her retrieve a few of her things. 5RP 563-64. Later that night, her stepmother came and took her back to Yakima. 5RP 565-66.

Back home, N.G. got a caregiving job but was so weak from the months of Romero's abuse that she could not lift her elderly patients. 5RP 566. She moved to a YWCA women's shelter, but within a month she called Romero and begged him to take her back. 5RP 568. She told him she was sorry that she "wasn't listening," and promised that she could "listen better this time." Id. Romero said she could come back to him, but only if she first got a job in Yakima and sent him all the money. 5RP 569.

N.G. did as she was told, but that left her broke, and her father refused to let her move home; so she moved to Kentucky to live with her mother. 5RP 570-71. There, N.G. got a job and secretly sent Romero most of the wages, along with letters and photos. 5RP 574-75; Ex. 4. But N.G.'s mother kicked her out because she wasn't helping with the bills. 5RP 575. In January 2013, N.G. got on a bus back to Romero. 5RP 577.

For a couple days, Romero was “very sweet.” 5RP 580. But then they moved to a Tukwila motel, and Romero decided N.G. would become a stripper. 5RP 581. N.G. wanted to work as a caregiver, but Romero told her that she was going to dance naked or she could go back to Yakima. Id.

N.G. got a job at the Déjà Vu club in Tukwila, after convincing herself that stripping “does kinda look fun.” 5RP 582. It was not. 5RP 588. N.G. was shy and a poor dancer, and Romero would beat her for not bringing home enough money. 4RP 413-14; 5RP 588-89. Romero would force her to fellate him until she vomited, and then laugh. 5RP 600-01. She became afraid to go home, and got so depressed she chopped her hair off. 5RP 588. For Valentine’s Day, Romero made her snort cocaine, then made her clean the room and do the laundry before she went to work. 5RP 594-95. When she got home at four in the morning, Romero forced her to eat three rocks of methamphetamine, and she could not sleep for three days. 5RP 597.

In the spring of 2013, Romero moved N.G. to a tiny converted shed in Enumclaw. 4RP 606-07; Ex. 4 at 27. One night, an older, overweight man arrived and handed Romero \$40 and a baggy of cocaine. 5RP 604. Romero ordered N.G. to take her

clothes off and have sex with the stranger. 5RP 608. N.G. did not want to, and claimed she was having her period. Id. Romero insisted, and left. 5RP 608-09. N.G. remembered the beatings she had received whenever she disobeyed. 5RP 609. She figured she had “better use my brain and listen to him before I get myself in trouble.” 5RP 611. “I didn’t want to get hit.” Id. As the man violated her, N.G. “felt like I was raped.” 5RP at 610.

Romero forced N.G. to have sex with the same older man at least one other time — in the bushes behind their Enumclaw shack. 5RP 612. It was like being raped again. 5RP 613. But it “was nothing I could stop,” N.G. recalled. “If I wouldn’t have done it, I probably would’ve get hit or something worse.” Id.

Meanwhile, at Déjà Vu, N.G.’s manager and coworkers noticed that “Fancy,” as she was known on stage, usually had bruises and other injuries all over her body. 4RP 322, 412, 415. Many of the contusions were clearly handprints and bite marks. 4RP 322, 415. The manager, Leta Whitney, counseled N.G. on domestic violence and urged her to escape Romero. 4RP 326. Whitney “was concerned that if she (N.G.) did not end the relationship ... that she would die.” 4RP 334. Whitney even had a Tukwila Police patrol officer, Michael Baisch, talk to N.G. and offer

to help. 4RP 280-83, 336-37. But N.G. said she wasn't ready to leave Romero. 4RP 332, 335. "He's my first love," N.G. told her coworkers. "I'm not ready to leave him. It's going to get better." 5RP 622.

But it did not get better, and in early April, as her 21st birthday approached, N.G. was feeling sad, so she mumbled something under her breath. 5RP 614-15. Romero erupted and punched her in the eye. 5RP 615. It swelled up "like a baseball." 5RP 618. Romero ordered N.G. to go to work anyway. Id. N.G.'s coworkers helped cover her black eye with makeup, but they also took photos. 4RP 446.

Finally, on April 16, 2013, nearly a year after meeting Romero on that Union Gap street, N.G. decided she was done. 6RP 685. She was done with "being hit, choked out, punched," done with being pimped out and forced to do drugs. Id. "It was just too much pain ... I couldn't handle it anymore." Id. She called Romero and told him she was "never coming home." Id.

N.G. went to her coworkers in hysterics and said she was ready to go to the police. 4RP 337-38. Whitney called Officer Baisch. 4RP 338. A fellow dancer and confidant, Tara Makepeace, drove the shaking N.G. to the police station and sat

with her as she gave a statement to Baisch. 4RP 285-88, 451.

Photos were taken and N.G. voluntarily handed over her cell phone for the photos and text messages it held. 4RP 307; 6RP 654.

Baisch, a patrolman, delivered his report to a sergeant, who assigned the case to Detective Dale Rock of the major-crimes unit. 4RP 299-300, 381. Rock reviewed N.G.'s statement, took statements from Whitney and Makepeace, and then decided to arrest Romero. 4RP 384-88.

More than a year later, N.G. still lived with constant physical pain from Romero's torment. 6RP 668. Even so, she blamed herself for all the abuse: "I would have left if I was smart enough, but I wasn't." 6RP 670.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED CROSS-EXAMINATION WITH IRRELEVANT EVIDENCE.

Romero contends that the trial court violated his right to cross-examination when he was not allowed to question Officer Baisch about lying about a relationship Baisch had with Leta Whitney, the Déjà Vu manager, which began after Baisch's involvement with Romero's case had ended. To the contrary, the trial court acted with sound discretion in finding the episode

irrelevant. Romero greatly inflates Officer Baisch's role in the trial as "the main investigative officer in the case," when his testimony was actually insignificant. Romero ignores the fact that he was able to thoroughly cross-examine Baisch about his actual interactions with N.G. and his handling of the case. Romero's argument should be rejected. Any error was harmless.

a. Additional Relevant Facts.

Sometime after Officer Michael Baisch took statements from N.G. and submitted his reports to his sergeant, Baisch had a sexual relationship with Leta Whitney, the manager of Déjà Vu. 3RP 182-83. Baisch later denied having the affair when asked by internal investigators. 3RP 183. Baisch either resigned or was fired.² 3RP 185, 186.

Pretrial, the State moved to preclude cross-examination on the episode. 3RP 181-84. The court ruled that "within the context" of Baisch's anticipated testimony, "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

² The record is unclear about some specifics surrounding Officer Baisch's affair with Whitney, including exactly how long after his involvement with Romero's case it began, when he made false statements to internal investigators, and whether he resigned or was terminated.

that's relevant at all and will not be allowed in terms of any questioning." 3RP 187.

At trial, Baisch testified to the following: He first met N.G. in late March, 2013, when Whitney told him of her concerns about N.G. 4RP 278-80. N.G. seemed nervous and did not want to talk. 4RP 281-82, 284. Baisch explained options and provided a domestic-violence flier. 4RP 283. He did not see injuries then. 4RP 285. After N.G. decided to report Romero to police, Baisch met with N.G. at the police station and took a recorded statement while Tara Makepeace sat with N.G. 4RP 286-88. Baisch did not testify about what N.G. told him. Id. Baisch said N.G. seemed scared and reluctant. Id. Baisch asked a female police staffer to take photos. 4RP 289. Baisch saw no injuries on N.G. but saw photographs that appeared to show injuries. 4RP 289-93. Baisch met with N.G. again to get a medical release, take an additional statement about text messages N.G. had received from Romero, and collect her phone. 4RP 303-04. Baisch noticed the alleged crimes appeared to have occurred outside Tukwila, but he felt obliged to submit everything to a sergeant to decide what to do. 4RP 299-301.

On cross-examination, Romero's lawyer drilled into Baisch about having no training in domestic-violence cases; about failing to try to verify N.G.'s allegations or to ask for Romero's side of the story; about not forwarding the case to other police departments; about not personally seeing any injuries; and about not having any personal knowledge of the alleged incidents. 4RP 308-10. He also grilled Baisch about being sympathetic to N.G. as a victim; and got Baisch to agree that sometimes people make false allegations. 4RP 313-14.

Baisch was far from the only witness:

- A State Patrol forensic examiner authenticated dozens of photos and text messages found on the phones of Romero and N.G., including the video of Romero urinating in N.G.'s mouth. 3RP 202-59. Ex. 13.
- Leta Whitney testified in stark detail about N.G.'s visible injuries, N.G.'s fear of Romero, and N.G.'s ultimate decision to go to police. 4RP 318-46.
- A jail sergeant authenticated a jail phone call from Romero in which Romero acknowledged that police had his phone and suggested it could be incriminating. 4RP 348-58.

- Another Tukwila patrol officer testified about finding Romero's phone in his pocket incident to arrest. 4RP 359-63.
- A physician's assistant who treated N.G.'s stab wound testified to her unlikely story about its cause. 4RP 368-79.
- Detective Rock testified about taking over the investigation; interviewing Whitney, Makepeace and other potential witnesses; reviewing the reports; deciding to arrest Romero; and then doing follow-up investigation that included taking another complete statement from N.G. 4RP 381-406.
- Tara Makepeace testified in lengthy detail about N.G.'s injuries and her fear, and about N.G. seeming frightened during her statement to Officer Baisch. 4RP 410-29. Makepeace also testified to witnessing specific instances of Romero's alarming psychological abuse of N.G.; she described helping N.G. hide money from Romero, and ultimately helping N.G. to escape. 4RP 430-77.
- Finally, N.G. testified for more than two full days about every terrifying instance of physical, sexual, psychological and emotional abuse that she could remember. 5RP 488-642; 6RP 653-780; 7RP 808-11. On many occasions during the testimony, she took blame for Romero's punishments, and even downplayed some of his sadistic behavior as just "playing around." 5RP 508, 513-14, 530, 534, 550, 558, 568-69, 570, 578-79; 6RP 670, 678. At one moment in the

middle of her first day of testimony, N.G. stopped and addressed Romero directly in court: “I forgive you for everything,” she said. She apologized for lying to him about hiding money, “because that was wrong of me.” 5RP 580, 642.

b. Standards Of Review.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing U.S. Const. amend. VI; Const. art. I, § 22). The primary and most important component of the Confrontation Clause is the right to conduct a meaningful cross-examination of adverse witnesses. Darden, 145 Wn.2d at 620. Confrontation’s “purpose is to test the perception, memory, and credibility of witnesses” in order to help assure the accuracy of the fact-finding process. Id. at 620.

But the right to cross-examine is not absolute. Id. Reviewing courts apply basic rules of evidence to determine whether the trial court violated a defendant’s confrontation rights. Id. at 624. A criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

A trial court's ruling on evidence admissibility is reviewed for abuse of discretion. Darden, 145 Wn.2d at 619. Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." Id. Similarly, a trial court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion. Id.

- c. The Trial Court Exercised Sound Discretion In Excluding Questions About The Officer's Later Affair.

ER 608(b) provides that:

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, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ER 608(b) (emphasis added). Under ER 401, "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401.

Failing to allow cross-examination of a State's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). The need for cross-examination on misconduct diminishes with the significance of the witness in the State's case. Id.

Here, the trial court carefully considered the context of Officer Baisch's involvement with Whitney, the Déjà Vu manager, as it related to Baisch's prior professional interactions with N.G., and properly concluded that the episode had no relevance to Romero's case. The relationship did not exist at the time Baisch took statements and evidence from N.G. It began after Baisch had concluded all involvement in the case by referring his reports to a supervisor to decide what to do. There was no evidence that Baisch re-inserted himself into or meddled with Romero's case subsequent to his liaison with Whitney. Baisch's untruthfulness about his relationship with Whitney and subsequent departure from the police department was completely attenuated from his work on Romero's case.

The fact that Baisch later lied about his affair with Whitney did not make any fact of his testimony about N.G. less probable.

See ER 401. It was not “probative of the truthfulness or untruthfulness” of whether Baisch took statements from N.G., collected her phone, and saw that she was scared. ER 608(b). The court was well within its discretion to exclude that line of questioning.

Furthermore, Baisch’s testimony was far from “crucial.” See Clark, 143 Wn.2d at 766. Romero asserts that Baisch was “the main investigative officer on the case.” Brief of Appellant (BOA) at 20. Actually, his testimony was hardly needed at all. Virtually every fact introduced by Baisch’s testimony was repeated by other witnesses: N.G.’s co-workers testified about her nervousness and fear, including during the interview with Baisch; her extensive visible injuries; her receiving a domestic-violence flier; and her decision to go to police. 4RP 318-46, 410-77. N.G. established the authenticity of her phone, photos and text messages. 6RP 653-54, 697-701, 789. Detectives Rock and Doughty and Officer Allen Baalaer also established the authenticity of the cell phones and their contents. 3RP 202-59; 4RP 360-63, 389, 394. Detective Rock established that the decision to investigate further was made by his sergeant, and Rock made the decision to arrest Romero. 4RP 384, 388-89, 399.

Moreover, the subject of Baisch's lying about his after-the-fact affair with Whitney was hardly the "only available impeachment" of Baisch. See Clark, 143 Wn.2d at 766. Romero challenged Baisch's competence in handling domestic-violence cases and his failure to try to verify N.G.'s allegations. 4RP 308-14. Romero was able to challenge Baisch on not seeing injuries and not doing more investigating. Id. And Romero was able to challenge Baisch's credibility by showing him as sympathetic to N.G. Id.

Still, Romero contends that questioning of Baisch on his later affair and dishonesty should have been allowed because it was the "very essence of the defense." BOA at 17. Romero looks to State v. York for assistance on this point, but that case actually shows why Romero's claim fails. 28 Wn. App. 33, 621 P.2d 784 (1980).

In York, a defendant was convicted of selling drugs to an undercover sheriff's detective. York, 28 Wn. App. at 34. The trial court excluded cross-examination of the detective about a prior dismissal from another sheriff's office for general incompetence. Id. But the detective was "the only witness to the sale," and "the importance of [his] testimony cannot be overstated." Id. at 35. Additionally, the detective's credibility, "based on his apparent

unsullied background” was “stressed heavily by the prosecution.”

Id.

Here, Baisch was a minor, even unnecessary, witness. Unlike in York, where the undercover detective was the sole witness to York’s crime, Romero’s guilt did not turn on whether Baisch really met with N.G., saw that she was scared, and took her statement. Id. Romero’s fate turned on N.G.’s two-plus days of harrowing, horrifying and heartbreaking testimony about her virtual enslavement, plus corroboration from her friends, other police officers and physical evidence. York confirms that Romero’s argument is baseless.

Additionally, Romero contends that questioning on Baisch’s affair and dishonesty should have been allowed because the State did not have a “compelling interest” in its exclusion. BOA at 16, 18. Romero cites Darden for this proposition. 145 Wn.2d at 621 (citing Hudlow, 99 Wn.2d at 15). But this rule does not apply here. Per Darden:

Under Hudlow, the confrontation right is subject to the following limitations: **(1) the evidence sought must be relevant;** and **(2) the defendant’s right to introduce relevant evidence must be balanced against the State’s interest in**

precluding evidence so prejudicial as to disrupt the fairness of the trial.

Id. (emphasis added).

Here, the analysis stops at the first step, because the trial court concluded that Baisch's after-the-fact affair and dishonesty was *wholly irrelevant* to the case at hand. 3RP 187. Whether the State has a compelling interest in excluding certain topics of cross-examination matters only when the evidence is actually relevant, but might be excluded because the unfair prejudice outweighs its probative value, or other interests. Darden, 145 Wn.2d at 621-22; ER 403. That analysis does not apply here because the trial court found the evidence irrelevant and never reached the next question.

Romero cannot show that the trial court manifestly abused its discretion in finding that Baisch's affair and subsequent dishonesty was irrelevant to Romero's case. Romero cannot show that his confrontation right was violated, given the insignificance of Baisch's testimony and Romero's ability to cross-examine Baisch on issues of actual relevance. Romero's argument fails.

d. Any Error Was Harmless.

It is well-established that even constitutional errors may be so insignificant as to be harmless. State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). "A constitutional error is

harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” Id. (quoting State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986)).

In determining whether an error infringing a defendant’s right to cross-examine was harmless, this Court considers (1) the importance of the witness’s testimony; (2) whether the evidence was cumulative; (3) the extent of corroborating and contradicting testimony; (4) the extent of cross-examination otherwise permitted; and (5) the strength of the State’s case. State v. Buss, 76 Wn. App. 780, 789, 887 P.2d 920 (1995), overruled on other grounds by State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999).

The insignificance of Baisch’s testimony in Romero’s case is detailed extensively in the previous section. Applying the harmless-error considerations articulated in Buss:

- (1) Baisch’s testimony was of little actual substance in determining Romero’s specific acts that constituted the crimes charged, while N.G.’s heart-rending and comprehensive testimony was all that was needed for any reasonable factfinder to convict Romero. Still, the factfinder also heard from many other witnesses and had a multitude

of physical exhibits, from photos and text messages to video of Romero urinating into N.G.'s mouth. Ex. 4, 8, 13, 14, 25.

- (2) Baisch's testimony was entirely cumulative. Every fact of significance also was provided by other witnesses and evidence. For example, N.G. herself testified that she gave Baisch a statement and her phone. 6RP 654.
- (3) Similarly, everything to which Baisch testified was corroborated by other witnesses, including Makepeace, who saw that N.G. was scared when she spoke to Baisch. 4RP 451.
- (4) Romero took advantage of numerous avenues of cross-examination, and was aggressive in attempting to portray Baisch as incompetent and biased.
- (5) The State presented a very strong case. N.G.'s gripping testimony, which cannot be overstated, was corroborated by numerous witnesses, and the physical evidence corroborated her accounts.

The inescapable fact here is that Baisch's testimony was basically meaningless amid all the other evidence and N.G.'s testimony. Romero's conclusion that without Baisch, "the evidence was not otherwise overwhelming," is astonishing. BOA at 20.

Allowing Romero to question Baisch about the later affair with Whitney and his subsequent denial would have had no effect

on the outcome of the trial, even assuming that the topic resulted in the factfinder's complete disbelief of everything Baisch said. The corroboration on every salient point, combined with the explicit, specific and prolific testimony of N.G., leaves no reasonable doubt that any error in excluding this area of cross-examination from Romero's trial was harmless.

2. THE CASE SHOULD BE REMANDED TO CORRECT AND CLARIFY THE SPECIFIC TERMS OF COMMUNITY CUSTODY.

Romero notes that his Judgment and Sentence, and the oral record of sentencing, is insufficiently specific about the terms of community custody and does not account for Romero's statutory-maximum terms of confinement. The State agrees, and notes other deficiencies in the imposition of community custody. The case should be remanded to amend the Judgment and Sentence to expressly provide for the correct terms of community custody.

a. Additional Relevant Facts.

For the felony offenses, the sentencing court imposed the following terms of confinement:

- Count 1 (second-degree assault): 120 months (statutory maximum).
- Count 2 (felony harassment): 60 months (statutory maximum).
- Count 3 (first-degree promoting prostitution): 120 months (statutory maximum).

- Count 4 (second-degree assault): 84 months (36 months below the statutory maximum).
- Count 5 (first-degree promoting prostitution): 120 months (statutory maximum).
- Counts 1 and 5 and Count 7 (a misdemeanor sentence of 364 days) were ordered to run consecutively, for a total of 252 months. All other counts were ordered to run concurrently.

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The sentencing court addressed community custody by simply saying orally that it was imposing 18 months on Counts 1 through 5. 7RP 947. Those counts include the second-degree assault convictions (Counts 1 and 4), the promoting prostitution convictions (Counts 3 and 5), and felony harassment (Count 2). CP 54. Romero's Judgment and Sentence does not individually specify the terms of community custody for each applicable count. Only the "Violent Offense" box is checked, with no other notations.

- b. The Case Should Be Remanded To Specify The Terms of Community Custody For Each Applicable Offense.

As relevant here, community custody must be imposed for violent offenses, defined under RCW 9.94A.030(55), and crimes against persons, defined under RCW 9.94A.411(2). For violent offenses, the term is 18 months. RCW 9.94A.701(2). For crimes against persons, the term is 12 months. RCW 9.94A.701(3)(a).

Second-degree assault is a violent offense, carrying a community-custody term of 18 months. RCW 9.94A.030(55)(a)(viii); RCW 9.94A.701(2). First-degree promoting prostitution is a crime against persons, carrying a community-custody term of 12 months. RCW 9.94A.411(2)(a); RCW 9.94A.701(3)(a). Felony harassment is not a community-custody offense. RCW 9.94A.701; RCW 9.94A.030; RCW 9.94A.411.

The sentencing court, not the Department of Corrections, must reduce the term of community custody whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime. RCW 9.94A.701(9); State v. Boyd, 174 Wn.2d 470, 473, 475 P.3d 321 (2012). However, a sentencing court may note on the Judgment and Sentence that the community-custody period is variable, to account for community custody in lieu of earned early release under RCW 9.94A.729(5)(a). State v. Bruch, 182 Wn.2d 854, 870, 346 P.3d 724 (2015).

Here, the sentencing court made a number of errors, including those that Romero notes. In oral imposition of sentence, the court improperly assigned 18-month terms to the promoting-

prostitution counts and improperly applied community custody to Count 2 (felony harassment). The Judgment and Sentence does not have the crimes-against-persons box checked to account for the promoting-prostitution convictions. And the court did not properly follow RCW 9.94A.701(9) and Boyd by reducing the fixed-term community custody periods on the convictions with statutory-maximum terms of confinement. RCW 9.94A.701(9); 174 Wn.2d at 473.

Where a sentence is insufficiently specific about the period of community custody required by law, the proper course is remand for amendment of the judgment and sentence to expressly provide for the correct period. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363, 373 (1997). In this case, it may seem like an academic exercise to amend the Judgment and Sentence to impose no fixed community custody on most counts. But the Judgment and Sentence should be legally accurate, and being specific will avoid confusion by the Department of Corrections years from now, when Romero's term of confinement is nearing an end. The trial court should specify each term of community custody for each count separately.

Meanwhile, the trial court will have an opportunity, if it chooses, to make it clear on the Judgment and Sentence that any earned early release on Counts 1, 3, 4 and 5 should be transferred to terms of community custody as required by RCW 9.94A.729(5)(a), notwithstanding the setting of zero fixed community-custody time for some counts. Bruch, 182 Wn.2d at 867. The trial court could emulate the language in Bruch and add to each term of community custody, “plus all accrued earned early release time at the time of release.” Id. at 857. Or, it could note for Counts 1, 3 and 5 that community custody is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentences. See Bruch, 182 Wn.2d at 867-88 (fixed period of community custody under RCW 9.94A.701 is not a maximum, so community custody in lieu of earned early release under RCW 9.94A.729(5)(a) is added to the fixed period).

The proper assignment of fixed community custody would be as follows (with the optional language):

- Count 1 (second-degree assault): Zero months (plus all accrued earned early release time at the time of release).
- Count 3 (promoting prostitution): Zero months (plus all accrued earned early release time at the time of release).

- Count 4 (second-degree assault): 18 months (plus all accrued earned early release time at the time of release).
- Count 5 (promoting prostitution): Zero months (plus all accrued earned early release time at the time of release).

This case should be remanded so the Judgment and Sentence can be amended to clarify and specify the proper terms of community custody.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Romero's convictions, and remand his case for amendment of the Judgment and Sentence as to the terms of community custody only.

DATED this 8th day of October, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jared Steed, the attorney for the appellant, at Steedj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Jason Castillo Romero, Cause No. 72669-2, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 8th day of October, 2015.

W Brame

Name:

Done in Seattle, Washington