SUPREME COURT NO. 101841-0
COURT OF APPEALS NO. 56590-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW JOSEPH PERRON,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Matthew Joseph Perron, the appellant below, seeks review of the Court of Appeals decision State v. Perron, noted at ___ Wn. App. 2d ___, 2023 WL 2160477, No. 56590-1-II (Feb. 22, 2023).[1]

## B. ISSUES PRESENTED FOR REVIEW

1. Was Mr. Perron denied his Sixth Amendment and article I, section 22 rights to cross-examine a police witness and to present relevant evidence in his defense?

2. Does the Court of Appeals decision conflict with the constitutional precedent of the Washington Supreme Court regarding the framework used to assess the constitutional right to present relevant evidence in one's defense, such that review should be granted pursuant to RAP 13.4(b)(1) and (3)?

## C. STATEMENT OF THE CASE

The disputed issues at trial centered around whether Mr. Perron delivered heroin to the state's confidential informant,

[1] The slip opinion is appended to this petition.

Zachary Fulleton. Mr. Perron waived his right to jury and the matter proceeded to a bench trial. CP 14-15; RP 5-7.

Grays Harbor police officer Darrin King testified he was Mr. Fulleton's handler; Mr. Fulleton became a CI to work off his own drug charges. RP 31-32. Sgt. King's "handling" of Mr. Fulleton was demonstrably inept. Sgt. King was not aware of Mr. Fulleton's criminal history, including convictions for second degree burglary and bail jumping. RP 123. Sgt. King was not aware that Mr. Fulleton had recently been cited for driving with a suspended license, either. RP 125. Sgt. King also freely admitted that he did not thoroughly search Mr. Fulleton before or after the controlled buys at issue in the case, saying, "I don't get too private," and acknowledging that Mr. Fulleton could easily have hidden controlled substances or his use of controlled substances from the police. RP 112-13, 115. Sgt. King also acknowledged he never subjected Mr. Fulleton to urinalysis testing, even though Mr. Fulleton was not supposed to be using drugs as part of his contract, and, as Mr. Fulleton admitted at

trial, he continued using drugs while he worked for Sgt. King. RP 114-15, 171.

Mr. Fulleton participated in three controlled buys at the behest of Grays Harbor law enforcement. The first occurred January 13, 2021. The plan was for Mr. Fulleton to purchase a quarter ounce of heroin for $300, using prerecorded buy money. RP 36, 40. The plan included picking Mr. Perron up at the residence of his girlfriend, Patience, and transporting them to Mr. Perron's house. RP 42, 44, 46. Police followed Mr. Fulleton during these events and saw two unidentified people get into Mr. Fulleton's car, drive to Mr. Perron's house, and enter Mr. Perron's house. RP 46-47. Mr. Fulleton exited the house, drove the prearranged meetup location, and police claimed Mr. Fulleton gave them heroin and that they searched—albeit not thoroughly—Mr. Fulleton, finding no other drugs. RP 48-49, 52-53, 112-13. A crime lab witness testified she tested the substance delivered to the police, which weighed 5.4 grams and contained heroin. RP 179, 182.

The second buy occurred February 4, 2021. RP 53. Police again claimed to have searched Mr. Fulleton and claimed they would have seized any money or contraband they found on his person, which, again, is hypothetical as they did not "get too private" in conducting such searches. RP 54, 112-13. The plan was again to buy a quarter ounce of heroin, this time for $350. RP 54. Mr. Fulleton proceeded to Mr. Perron's house, but then communicated to law enforcement that Mr. Perron had to go elsewhere; Sgt. King testified that Mr. Perron and Patience, driven by Mr. Fulleton, went to the local Travelodge, Mr. Perron was in a room at the motel for five to 10 minutes, and then got back in Mr. Fulleton's car. RP 59-60. Police lost track of Mr. Fulleton, who informed them they stopped somewhere else near the high school; then Mr. Fulleton drove back to Mr. Perron's residence. RP 60-62. Mr. Fulleton then met up with police afterward and police did their post-buy "search." RP 64. Sgt. King claimed he found nothing other than what Mr. Fulleton claimed to have purchased, which was not a quarter ounce but

only about two grams because, as Mr. Fulleton explained, "the town's hella dry." RP 64. The crime lab witness testified she tested this item, which weighed 2.16 grams and contained heroin. RP 184-85.

The third buy occurred February 17, 2021. RP 70. The plan was to provide Mr. Fulleton with $200 to buy an eighth of an ounce of heroin. RP 73. Like the second buy, Mr. Perron and Mr. Fulleton had to go somewhere away from Mr. Perron's residence, picking Patience up at a minimart parking lot. RP 72. Mr. Fulleton explained they returned to Mr. Perron's residence, Mr. Perron weighed out the eighth of an ounce, and then Mr. Fulleton met with police. RP 76, 163-64. Police claimed to have conducted a post-buy search of Mr. Fulleton and his vehicle, finding nothing. RP 78. They sent the heroin Mr. Fulleton supplied to the crime lab, whose witness stated it weighed 2.9 grams and contained heroin. RP 77, 186.

In addition to the evidence about he controlled buys, the state presented testimony that Mr. Perron's address was within 1,000 feet of two school bus stops. RP 192-93, 203.

Based on the three buys, police applied for, obtained, and executed a search warrant in February 2021. RP 79. When they executed the warrant, Mr. Perron was not at home, but his teenage daughter was. RP 80. Police described the house as cluttered and stated drug paraphernalia was in every room; they seized documents, digital scales, and sharps containers. RP 86-89. They also found baggies, but not very many of the same size. RP 118-19. Police did not find any of the prerecorded money allegedly used in the buys, could not access Mr. Perron's telephone, and did not conduct any testing of any of the items from the house. RP 115-17.

The state charged Mr. Perron with three counts of delivery of a controlled substance, which included school bus stop aggravators for each count. CP 9-10.

In addition to pointing out what police failed to uncover during the investigation and challenging their handling of Mr. Fulleton, particularly their failure to search him thoroughly, another part of Mr. Perron's defense consisted of attacking the inconsistencies in the police reports prepared by Sgt. King, and inconsistencies in the dates provided in the reports compared to the dates included in the search warrant application. RP 104-05. Defense counsel specifically asked Sgt. King about discrepancies between Sgt. King's recording of who followed Mr. Fulleton, either Det. Tully or Sgt. King. RP 106. Sgt. King attempted to explain, "we do the . . . team follows and he [Det. Tully] probably had the eye then, I was still following. We followed together and he had the eye probably at that time when he pulled away, but we still both followed in separate cars." RP 106. Counsel then asked, "So you could have . . . written that one officer of the team or one detective followed?" to which Sgt. King responded, "I could have." RP 106. Counsel followed up, "Would that have been better than writing two different names in

two different reports?" RP 106. The state objected without specifying a basis for the objection and the trial court stated,

> Ms. Nogueira [defense counsel], really? What is it we're accomplishing right now? That February 4th is in the first week of February and February 17th is the third week of February? I don't understand. And now we're asking whether he could have written his report in a different way.
>
> Do you have something more relevant that you can ask him about, please.

RP 106.

The trial court determined that Mr. Perron was guilty of three deliveries of heroin and that these deliveries occurred within 1,000 feet of a school district designated bus stop. RP 269. It entered written findings of fact and conclusions of law to this effect. CP 16-19.

The trial court imposed a standard range concurrent sentence of 144 months for each of the counts, which included 24-month enhancements for the bus stop aggravator. CP 24-25; RP 282.

Mr. Perron appealed. CP 35-36. He contended the trial court violated his constitutional rights to present relevant defense evidence by refusing to allow him to cross-examine Sgt. King about the inconsistencies between the search warrant application and the police reports he wrote. Br. of Appellant at 13-22. The Court of Appeals rejected his argument, concluding that Mr. Perron established no evidentiary error or constitutional violation. Perron, slip op. 6-9.

D. ARGUMENT IN SUPPORT OF REVIEW

**The Court of Appeals decision conflicts with constitutional precedent regarding the accused's right to cross-examine witnesses and present evidence in his in defense, meriting review under RAP 13.4(b)(1) and (3)**

The Sixth Amendment and article I, section 22 guarantee the accused the right to offer testimony in his defense. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). While the right is not absolute, it extends to all defense evidence that is at least minimally relevant. Jones, 168 Wn.2d at

720. The "rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." Chambers, 410 U.S. at 294; accord State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77 (1982).

Consistent with Chambers, the Washington Supreme Court used to apply a three-part framework for the de novo review of a claimed violation of the Sixth Amendment right. Jones, 168 Wn.2d at 720-21; State v. Darden, 156 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). The questions of this framework were (1) was the evidence relevant? (2) did the state have a compelling interest in excluding it, i.e., has the state shown that the evidence would be so prejudicial so as to disrupt a fair fact-finding process? and (3) on balance of these considerations, has the state overcome the defense need for presenting the evidence? Jones, 168 Wn.2d at 720-21; Darden, 156 Wn.2d at 621; Hudlow, 99 Wn.2d at 15-16. If the state cannot demonstrate a compelling interest in excluding the evidence, then the analysis ends because there is nothing to

balance in the third step. State v. Orn, 197 Wn.2d 343, 356, 482 P.3d 913 (2021). Further, where the proffered evidence is of high probative value, "'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.'" Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16).

More recently, the Washington Supreme Court stated it now "adhere[s] to a two-step standard of review in State v. Clark, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017)." State v. Ardnt, 194 Wn.2d 784, 797, 453 P.3d 696 (2019). First, it reviews the excluded evidence under the evidence rules; second, it reviews the claimed constitutional violation de novo, determining "as a matter of law whether the exclusion violated the constitutional right to present a defense" under the original framework. Clark, 187 Wn.2d at 648-49. Regardless of whether the exclusion violates the evidence rules, a trial court necessarily abuses its discretion by denying a defendant's constitutional rights. Orn, 197 Wn.2d 351.

In its most recent case on the subject, the Supreme Court indicated that the evidence-rules-first, constitutional-review-second rubric is a constitutional avoidance mechanism: if the matter can be resolved in favor of the accused by first looking to the evidence rules, then reviewing courts need not reach the constitutional question. State v. Jennings, 199 Wn.2d 53, 59, 502 P.3d 1255 (2022).

Turning first the evidence rules, the trial court erred. When defense counsel attempted to ask Sgt. King about various inconsistencies between his report and his warrant application, the trial court disallowed it, instructing counsel to ask "more relevant" questions. RP 106.

ER 613 allows a witness's inconsistent statements to be considered to determine the witness's credibility. State v. Garland, 169 Wn. App. 869, 886, 282 P.3d 1137 (2012). Any form of inconsistent statement is admissible for the purpose of impeachment. State v. Campbell, 103 Wn.2d 1, 19, 691 P.2d 929 (1984) (citing E. Cleary, MCCORMICK ON EVIDENCE § 34, at 67

n.7 (2d ed. 1972)); Sterling v. Radford, 126 Wash. 372, 375, 218 P. 205 (1923) ("Inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done." (quoting 2 WIGMORE ON EVIDENCE § 1040)).

Counsel was, consistent with her role as defense advocate, exploiting Sgt. King's various inconsistencies in the dates provided in his reports and the dates provided in the warrant application he submitted. RP 104-05. Counsel was also attempting to exploit inconsistencies about Sgt. King's reports of which officer supposedly followed Mr. Perron, pointing out that his trial testimony differed from what he put in writing in his reports. RP 106. The officer's inconsistent statements were admissible under the evidence rules; they were relevant to assessing his credibility as a witness.

In response to the defense questioning, the trial court asked, "really? What is it we're accomplishing right now?" RP 106. But it was obvious what counsel was trying to accomplish:

she was trying to point out that Sgt. King said one thing on the stand and wrote another thing in his reports and warrant application. He was not believable because of these inconsistencies. The trial court wrongly refused to allow defense counsel to accomplish this.

Cross-examination is the "principal 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). "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Id. (emphasis added).

Even the trial court recognized that the defense questioning of Sgt. King was relevant, asking counsel if she had "something *more relevant* that [she] could ask him about[.]" RP 106 (emphasis added). The trial court offered no evidentiary basis to exclude evidence that it recognized as relevant. The trial court

excluded relevant evidence because it erroneously believed the evidence was not relevant enough.

The Court of Appeals decision holds there was no evidentiary error, despite also recognizing that the evidence was relevant. Perron, slip op. at 7-8. According to the Court of Appeals, the lack of specificity in Sgt. King's reports that the defense attempted to adduce to attack Sgt. King's credibility and the quality of the investigation "was cured by trial testimony from the detectives who were subject to cross-examination." Id. at 8. Thus, the Court of Appeals reasoned, "The trial court's decision to sustain the objection was reasonable and was not an abuse of discretion." Id.

A piece of evidence is either relevant or it isn't. Mr. Perron is unaware of any authority to support the notion that excluding relevant evidence can be "cured" by admitting other relevant evidence, and the Court of Appeals cited none. Both the trial and Court of Appeals recognized that the excluded cross-examination contained relevant evidence. No basis or authority

was cited by either court under the evidence rules to support the exclusion of the evidence. Therefore, excluding a portion of the defense's cross examination of Sgt. King was evidentiary error.

The Court of Appeals decision fails to actually consider the claimed error under the evidence rules—it cites no evidence rule that the exclusion of relevant evidence may be "cured" by the admission of other evidence, as no such rule exists. The decision fails to complete the first step of the new two-step Ardnt process to review claimed violations of the constitutional right to present relevant evidence, conflicting with that decision. RAP 13.4(b)(1) and (3) review is appropriate on this basis.

The Court of Appeals decision also errs in its application of the second step—de novo review under the three-part constitutional framework. The decision again recognizes that the excluded evidence was at least minimally relevant, which satisfies the first Jones/Darden/Hudlow consideration. Perron, slip op. at 9. But the Court of Appeals did not address the second consideration at all: nowhere in the decision does the Court of

Appeals discuss whether the state met its burden of showing a compelling interest in excluding the evidence or determine that the admission of the evidence was so prejudicial that it would disrupt a fair factfinding process. Orn, 197 Wn.2d at 353; Jones, 168 Wn.2d at 720-21; Darden, 156 Wn.2d at 621; Hudlow, 99 Wn.2d at 15-16. The decision's failure to engage in the correct analysis to assess the claimed constitutional violation conflicts with these cases. Review should be granted under RAP 13.4(b)(1) and (3).

Rather than applying the correct analysis, the Court of Appeals decision relies principally on Jennings, which it cited for the proposition that "[w]here the defendant's evidence is minimally relevant, but he had the opportunity present his version of the incident, even if some evidence was excluded, a defendant's right to present a defense is not violated." Perron, slip op. at 9.

Contrary to the Court of Appeals, Jennings does not stand for this broad proposition. The Jennings court did in fact

distinguish between evidence that merely bolsters credibility and evidence that is truly necessary to present a defense, noting that Mr. Jennings was still able to provide his version of the events to the factfinder. 199 Wn.2d at 66-67. But the Jennings court made these statements as it considered the second and third steps of the constitutional framework, which, as noted, was entirely absent from the Court of Appeals decision here. Jennings underscores the importance of conducting the full constitutional analysis based on the facts of each case. The Court of Appeals perverted Jennings by using it as a shortcut through the correct framework. RAP 13.4(b)(1) and (3) review is appropriate for this reason as well.

And Jennings presented a vastly different set of facts. It involved the exclusion of evidence of a toxicology report showing methamphetamine offered in support of a self-defense claim. 199 Wn.2d at 66. Although the decedent tested positive for meth, the test could not indicate how meth affected him, and Mr. Jennings was still able to testify he was fearful due his

perception of the decedent's drug-induced behavior. Id. at 62, 66. Thus, the toxicology report would have added only "speculat[ion] as to the effect the drugs might have had . . . when determining whether Jennings' fear was reasonable." Id. at 66.

Given the speculative nature of the toxicology report, the state successfully made a showing under the second step of the constitutional analysis that admitting the report did risk prejudicing the factfinding process. Id. at 66-67. Balancing the relevancy of the evidence with the state's showing under the third step of the constitutional analysis, the Jennings court concluded, "Given the State's interest in avoiding the prejudicial and speculative effect that the toxicology report might have on the fact-finding process, we conclude that excluding the report did not deprive Jennings of his constitutional right to present a defense." Id. at 67.

The excluded evidence in Mr. Perron's case was not speculative as it was in Jennings. It involved the state's principal law enforcement witness providing inconsistent accounts of law

enforcement actions in the case, undermining the witness's own credibility and the quality of the state's entire investigation. The Court of Appeals grudgingly acknowledged that this evidence had some relevance. Yet it never required the state to make any showing that this evidence would disrupt a fair factfinding process, and the state never provided a legal basis for excluding the evidence at all. RP 106.

Sgt. King did give inconsistent statements about who did the following. Admitting such evidence would serve to enhance a fair process in which all relevant evidence bearing on law enforcement credibility is considered. Without such a showing by the state, it does not matter to the analysis that Mr. Perron presented other evidence that also undermined police actions. Rather, the analysis ends, and the reviewing court finds a constitutional violation. Orn, 197 Wn.2d at 356.

By failing to conduct the correct constitutional framework, the Court of Appeals decision conflicts with Jennings, Orn,

Jones, Darden, and Hudlow. This calls for RAP 13.4(b)(1) and (3) review.

E. CONCLUSION

Because Mr. Perron satisfies the review criteria in RAP 13.4(b)(1) and RAP 13.4(b)(3), he asks that this petition for review be granted.

**I certify this document contains 3,476 words. RAP 18.17.**

DATED this 24th day of March, 2023.

Respectfully submitted,

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# APPENDIX

Filed
Washington State
Court of Appeals
Division Two

February 22, 2023

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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|---|---|
| STATE OF WASHINGTON<br><br>Respondent,<br><br>v.<br><br>MATTHEW J. PERRON,<br><br>Appellant. | No. 56590-1-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

GLASGOW, C.J.—In 2021, Zachary Fulleton operated as a confidential informant for the Grays Harbor Drug Task Force. During this time, he participated in three controlled buys of heroin from Matthew Perron. Following a bench trial, the trial court convicted Perron of three counts of delivering heroin and found that each offense occurred within 1000 feet of a school bus route stop.

Perron appeals his convictions. He argues that the trial court denied his right to present a defense by restricting his cross-examination of Fulleton's handler, that the trial court violated his Sixth Amendment right to counsel by improperly curtailing his closing argument, that the trial court violated the appearance of fairness, and that cumulative error deprived him of his right to a fair trial. We disagree with all of his arguments and affirm.

## FACTS

During January and February 2021, Zachary Fulleton operated as a confidential informant for the Grays Harbor Drug Task Force. Sergeant Darrin King was Fulleton's handler. Under the direction of the task force, Fulleton purchased heroin from Matthew Perron on three separate occasions.

The State charged Perron with three counts of violating the Uniform Controlled Substances Act, chapter 69.50 RCW—delivery of heroin. CP 9-10. Perron waived his right to a jury trial.

At a bench trial, Sergeant King testified about his work on the drug task force handling Fulleton during the three controlled heroin buys. Before contracting Fulleton as a confidential informant, Sergeant King tested Fulleton's knowledge of drugs and dealers in the area. Fulleton approached Sergeant King about arranging a controlled drug buy from Perron in January 2021. On January 20, Sergeant King and Detective Tully did a "pre-meet" briefing with Fulleton before Fulleton attempted the controlled buy from Perron. Verbatim Rep. of Proc.(VRP) at 35. Detective Tully checked Fulleton's vehicle and Sergeant King searched Fulleton's person to make sure he did not have any drug paraphernalia or controlled substances. Detective Tully, Sergeant King, and Fulleton reviewed the safety plan for the controlled buy. Sergeant King provided Fulleton $300 of prerecorded buy money.

Fulleton picked up Perron and his girlfriend at a nearby apartment and drove them to Perron's house. Detective Tully and Sergeant King followed in unmarked vehicles surveilling Fulleton during the drive. Sergeant King witnessed Fulleton and Perron arrive at Perron's home and go inside for 15 to 20 minutes. After leaving the home, Fulleton drove to the designated meeting spot. Sergeant King conducted another search of Fulleton's vehicle and person. Fulleton gave Sergeant King heroin he purchased from Perron.

Fulleton conducted a second controlled buy on February 4, 2021. As in the first controlled buy, Sergeant King searched Fulleton's person and vehicle beforehand. Fulleton drove to Perron's home, picked up Perron and his girlfriend, and drove them to a nearby motel. Perron and his girlfriend went inside the motel for 5 to 10 minutes before returning to the vehicle. Fulleton drove

them to a nearby apartment complex before proceeding back to Perron's home. Fulleton went inside Perron's home for 15 to 20 minutes, returned to his vehicle, and proceeded to meet Sergeant King at the designated meeting spot. Fulleton gave Sergeant King two ounces of heroin he had purchased and remarked that "the town's hella dry." VRP at 64. Fulleton returned the remainder of the buy money to Sergeant King, and Sergeant King searched Fulleton's person, finding nothing.

Fulleton conducted a third controlled buy on February 17, 2021. When they met that night, Sergeant King conducted a search of Fulleton's vehicle and person. Fulleton picked up Perron at Perron's house, and they drove to a minimart where Perron's girlfriend got in the car. They returned to Perron's house where Fulleton purchased heroin. Fulleton provided the heroin to Sergeant King, and Sergeant King searched Fulleton's person and vehicle.

Sergeant King obtained a search warrant for Perron's home after the third controlled buy. When they executed the search warrant, Perron was not at the home but his teenage daughter and his girlfriend were. Sergeant King found drug paraphernalia including glass pipes, needles, baggies, residue, and spoons in every room. They also found digital scales and sharps containers.

Perron conducted extensive cross-examination of King, covering multiple topics including details of King's confidential informant agreement with Fulleton, King's expectations of Fulleton, Fulleton's criminal history, the searches King and his collegues conducted of Fulleton's person and car before and after the controlled buys, details about how the controlled buys were arranged, how much the purchased heroin cost, what King saw during the controlled buys, and items found when law enforcement searched Perron's home. Because Perron believed the confidential

informant contract set a minimum number of controlled buys per month, Perron questioned Sergeant King at length about how he counts weeks in a month.

Perron also asked Sergeant King about differences in his search warrant application and his written record of the controlled buys. Particularly, Sergeant King explained that he attempted to keep details somewhat vague in the search warrant to protect Fulleton's identity as a confidential informant. Additionally, in the search warrant application, Sergeant King did not specify which member of his team (Detective Tully or Detective Figg) specifically performed which task, instead referring to events more generally as performed by himself, the supervisor.

When Perron asked Sergeant King if he could have written the details in his reports differently, Sergeant King acknowledged he could have. Perron then asked, "Would that have been better than writing two different names in two different reports?" VRP at 106. The State objected. The trial court remarked:

> [DEFENSE COUNSEL], really? What is it we're accomplishing right now? That February 4th is in the first week of February and February 17th is the third week of February? I don't understand. And now we're asking whether he could have written his report in a different way.
>
> Do you have something more relevant that you can ask him about, please.

VRP at 106.

Perron asked Sergeant King about how he searched Fulleton before and after he went into Perron's house. Sergeant King testified that he required Fulleton to stand "prone" for the search of his person. VRP at 112. "I have them take everything out of their pockets and then I check inside. They don't have anything and—I don't get too private." VRP at 112.

In closing, Perron argued that Fulleton was motivated to fabricate the buys. He argued that no one knew what occurred inside of Perron's house; that Fulleton could have hidden drugs on his

person to begin with and flushed the buy money down the toilet. Perron argued, "The search that was conducted by Sergeant King was a pat down. There's plenty of places that addicts can hide drugs that would not be found with a pat down." The trial court interjected asking, "When did Sergeant King say it was a pat down? He said he searched him." VRP at 262. Perron responded, "He said it was just upon arrest, that it was just a pat down, nothing too intimate." VRP at 262. The trial court moved on, "Well . . . Okay." VRP at 262.

Perron concluded his closing argument by suggesting Perron did not sell Fulleton drugs, but rather they were two addicts using drugs together:

> The reality is that we have addicts using together. And even though that makes it a very sad reality, it is what—what we have. And Mr. Perron may have used with Mr. Fulleton three times or more, but he did not even have drugs to sell Mr. Fulleton. So with that we ask the Court to acquit him of three counts of delivery.

VRP at 263.

The trial court then engaged Perron in a colloquy with hypothetical questions such as, "[I]s it not a crime for someone to deliver heroin to another person, regardless of whether they had it—the person making the delivery had it in their home at the time that the confidential informant showed up, as opposed to having to go somewhere else to get it from a third person?" VRP at 263. The back-and-forth continued, with Perron arguing that Fulleton could have obtained the drugs from someone else. Perron pointed out that Perron's girlfriend and teenage daughter were at his home for the second and third controlled buys. The trial court responded:

> [COURT]: But is there any evidence that there was anybody else in that house on any of these three occasions?
>
> [PERRON: The two females, yes. . . .
>
> [COURT]: You mean his 15-year-old daughter? Is that one of the females you're referring to?

> [PERRON]: Yes.
>
> [COURT]: So you want me to find that Mr. Perron's daughter is delivering controlled substances?
>
> [PERRON]: Your Honor, if you—a lot of the things that were found in this case were found in her bedroom.
>
> [COURT]: Well, I understand you have to play the hand you're dealt. But, [], these arguments are not persuasive. You may be seated.

VRP at 265-66. The trial court did not ask the State if it had any rebuttal, and the court proceeded to issue its oral ruling.

The trial court convicted Perron of all three counts of delivering heroin and found that each offense occurred within 1000 feet of a school bus route stop.

Perron appeals his convictions.

## ANALYSIS

### I. RIGHT TO PRESENT A DEFENSE

Perron argues that the trial court violated his right to present a defense by limiting his cross-examination of Sergeant King. We disagree.

The right to present a defense is constitutionally guaranteed to all criminal defendants. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017). When reviewing a trial court's discretionary evidentiary ruling that potentially implicates the Sixth Amendment right to present a defense, we use a "two-step review process." *State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019). First, we review the evidentiary ruling for an abuse of discretion, then we consider de novo the constitutional question of whether the

ruling deprived the defendant of their right to present a defense. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022); *Arndt*, 194 Wn.2d at 797.

A. Evidentiary Ruling

We review a trial court's determination of whether evidence is relevant and admissible for abuse of discretion. *Jennings*, 199 Wn.2d at 59. A trial court abuses its discretion when its decision is based on untenable grounds or reasons, such as a misunderstanding of the law. *State v. Enriquez-Martinez*, 198 Wn.2d 98, 101, 492 P.3d 162 (2021). Relevant evidence is "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. In addition, ER 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here, the evidence Perron sought to elicit from Sergeant King was at most minimally relevant. Perron elicited an admission from King that both he and another detective followed Fulleton and Perron during one of the controlled buys, but King's report did not list the second detective. *See* Clerk's Papers at 106. The cross-examination question to which the State objected was whether Sergeant King could have written his reports better by specifically naming the detectives when describing the details of the drug task force's surveillance operation. Perron argues that this evidence was relevant to show Sergeant King's credibility. But Sergeant King's answer had only minimal relevance given that King admitted his report did not specifically list the detectives surveilling during one of the buys. Moreover, all of the detectives involved in the operation testified at trial about their surveillance and what they saw. *See, e.g.*, VRP at 207, 230.

So any lack of specificity in the reports was cured by trial testimony from the detectives who were subject to cross-examination. The trial court's decision to sustain the objection was reasonable and was not an abuse of discretion.

Additionally, any error in excluding King's answer was harmless. The nonconstitutional harmless error test requires the defendant to show that "'within reasonable probabilities . . . the outcome of the trial would have been materially affected' had the error not occurred." *State v. Barry*, 183 Wn.2d 297, 317-18, 352 P.3d 161 (2015) (alteration in original) (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Perron fails to show that evidence that Sergeant King could have written his warrant affidavit or reports differently or "better" could have had a reasonable probability of materially affecting the outcome of the trial. To the extent Perron sought to highlight discrepancies in the warrant affidavit and written reports, the trial court permitted him to do so. The trial court was ultimately unpersuaded by Perron's argument that Sergeant King was not credible, and it would be unreasonable to conclude that the excluded cross-examination would have changed that determination.

B. Constitutional Question

Although the trial court's evidentiary ruling was not erroneous, we consider de novo whether the exclusion of evidence violated Perron's right to present a defense. *Jennings*, 199 Wn.2d at 58. The Washington Supreme Court recently clarified, "If the evidence is relevant, the reviewing court must weigh the defendant's right to produce relevant evidence against the State's interest in limiting the prejudicial effects of that evidence to determine if excluding the evidence violates the defendant's constitutional rights." *Id.* at 63.

"The constitutional right to present a defense ensures the defendant has an opportunity to defend against the State's accusations." *Id*. at 66. "'The Constitution permits judges to 'exclude evidence that is repetitive . . . , only marginally relevant[,] or poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (alterations in original) (internal quotation marks omitted) (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). Where the defendant's evidence is minimally relevant, but he had the opportunity to present his version of the incident, even if some evidence was excluded, a defendant's right to present a defense is not violated. *Jennings*, 199 Wn.2d at 66-67; *see also State v. Hudlow*, 99 Wn.2d 1, 18, 659 P.2d 514 (1983).

As previously discussed, the evidence excluded by the trial court was at most only minimally relevant. Moreover, the trial court's ruling did not restrict Perron's ability to present his theory of the case—that surveillance and handling of the controlled buys was imperfect to the point that the State could not prove where Fulleton got the heroin. Perron questioned Sergeant King at length about the minor discrepancies in his warrant affidavit and written reports before the trial court upheld the State's objection to Perron's question about whether Sergeant King could have written his reports in a different way. And Perron was able to elicit sufficient testimony about other people who were present during the buys that he could argue in closing that someone else could have sold Fulleton the heroin. We hold that Perron's right to present a defense was not violated by the trial court's evidentiary ruling.

## II. RIGHT TO CLOSING ARGUMENT

Perron argues that the trial court denied his right to counsel by improperly curtailing his closing argument. We disagree.

A criminal defendant's "right to counsel encompasses the delivery of closing argument." *State v. Frost*, 160 Wn.2d 765, 768, 161 P.3d 361 (2007). Trial courts have broad "discretion over the scope of closing argument." *Id*. Accordingly, we review these challenges for an abuse of discretion. *Id*. A trial court abuses its discretion "'only if no reasonable person would take the view adopted by the trial court.'" *Id*. at 771 (quoting *State v. Perez–Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000)). In all cases, the trial court should "'restrict the argument of counsel to the facts in evidence'" and should confine its arguments to the relevant law. *See id*. at 772 (quoting *Perez–Cervantes*, 141 Wn.2d at 475).

The record does not support Perron's argument that the trial court "curtail[ed], argu[ed] with, and ultimately terminat[ed] counsel's argument of the case in summation." Br. of Appellant at 22. The only time the trial court interjected into Perron's closing argument was to ask when Sergeant King testified that his search of Fulleton was simply a pat down. The court asked Perron to clarify the evidence in the record, heard Perron's response, and permitted Perron to continue his argument in summation. Under ER 611(a), the trial court should restrict counsel's argument to the facts in evidence and therefore it was not unreasonable for the court to clarify Sergeant King's actual testimony during closing argument in a bench trial. *Frost*, 160 Wn.2d at 772.

On appeal, Perron characterizes the trial court's subsequent inquiries as "constantly interrupting counsel to argue with her," but the record does not support this contention. After Perron concluded his closing argument by saying "with that we ask the Court to acquit [Perron] of

three counts of delivery," the trial court engaged Perron in a series of hypothetical questions. VRP at 263. The trial court ultimately was not persuaded by counsel's responses, but the court's colloquy did not amount to arguing with counsel. Based on the record, we hold that the trial court's inquiries during and after Perron's closing argument were not an abuse of discretion and did not unconstitutionally deprive Perron of his Sixth Amendment right of counsel to argue the case in closing.

## III. APPEARANCE OF FAIRNESS

Perron also argues that the trial court violated the appearance of fairness doctrine. We disagree.

The appearance of fairness doctrine demands the absence of actual or apparent bias on the part of the trial court. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). "Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." *Id*. Under this doctrine, a presiding judge must actually be impartial and also appear to be impartial. *Id*. The question is "whether the judge's impartiality might reasonably be questioned." *Id*.

To make this determination, we apply an objective test that assumes a reasonable person knows and understands all the relevant facts. *Id*. The party asserting a violation has the burden of showing evidence of a judge's actual or potential bias. *Id*. We presume "that a trial judge properly discharged [their] official duties without bias or prejudice." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

The trial court's admonition during Perron's cross-examination of Sergeant King did not rise to the level of bias or prejudice. The trial court has the authority to control the presentation of evidence. ER 611(a). Nor did the trial court's inquiries and comments following Perron's closing argument violate the appearance of fairness. Contrary to Perron's characterization on appeal, the trial court did not cut him off or prematurely end his closing argument. Perron finished his closing argument before the trial court engaged him in a colloquy inquiring further about his defense theory and arguments. That the trial court ultimately found Perron's arguments unpersuasive does not equate to a showing of actual or potential bias.

Given our presumption that a trial judge acts without bias or prejudice, we hold that Perron fails to show that a reasonable person would conclude he received an unfair trial.

## IV. CUMULATIVE ERROR

Finally, Perron argues that the cumulative errors in this case denied him of his right to a fair trial. We disagree.

Perron fails to identify any trial error and therefore fails to carry his burden to show that cumulative error denied him of his right to a fair trial.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Birk, J.[1]

Che, J.

[1] Sitting in Division II pursuant to RCW 2.06.040 by order of the Associate Chief Justice.

**NIELSEN, BROMAN & KOCH, PLLC**

**March 24, 2023 - 1:57 PM**

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| **Superior Court Case Number:** | 21-1-00080-0 |

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