Supreme Court No. 100186-0
(COA No. 50400-6-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FORREST AMOS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Forrest Amos asks this Court to accept review of the Court of Appeals decision terminating review, dated June 8, 2021, for which reconsideration was denied on August 5, 2021, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). Copies of the decisions are attached as Appendix A and B.

B. ISSUES PRESENTED FOR REVIEW

1. This Court previously granted Mr. Amos' petition for review and directed the Court of Appeals to reconsider its decision in light of *Jackson*,[1] because the Court of Appeals applied the wrong test to determine whether Mr. Amos was entitled to relief after the trial court improperly required him to wear physical restraints during a jury trial where he represented himself.[2] On remand, the Court of Appeals adhered to the same faulty reasoning of its first decision, despite evidence showing

[1] *State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020).

[2] The original Court of Appeals decision is attached as Appendix C.

jurors would have noticed Mr. Amos' restraints and it would have impacted how they assessed his defense. Should this Court grant review where the Court of Appeals misapplied the controlling decision in *Jackson* despite this Court's remand order and its opinion signals the court's disregard for the constitutional rule that shackling is presumptively prejudicial?

2. The court forced Mr. Amos to wear physical restraints while representing himself based solely on a general jail policy. A court may not impair an accused person's right to self-representation by interfering with the accused's ability to fairly present the case to the jury. Does shackling a *pro se* defendant without cause undermine the constitutional right to self-representation, trigger an even stronger presumption of prejudice than used for person who is represented by counsel, and merit review where this Court's precedent does not address the right to relief for a *pro se* defendant who is unconstitutionally restrained throughout trial?

C. STATEMENT OF THE CASE

Days before Mr. Amos' trial started, he asked to represent himself after expressing frustration with his attorney's failure to communicate with him. 6/1/17RP 40, 43. The court accepted his waiver of counsel without telling Mr. Amos that jail policy would require him to be shackled at trial. *Id*. at 40-46. The court told Mr. Amos he would be treated like any attorney. *Id*. at 45.

During motions in limine at the start of trial, Mr. Amos asked the judge to remove the leg brace he was forced to wear. 6/7/17Supp.RP 51. Mr. Amos explained the brace was "awkward" and he would have to "get up and like talk to a jury and stuff" during trial. 6/7/17Supp.RP 51.

The court said, "No. That's got to stay on. That's jail policy" and told him, "you've got to work with it." *Id*.

Mr. Amos said the jury box was "[r]ight here" and "looking directly at this side of me. I understand I've got to work with it but I still think it's prejudicial." *Id*. He explained

he had no history of trying to run away and was "concerned about the prejudicial effect of this." *Id*.

The judge said he had not noticed the restraint until Mr. Amos mentioned it and described it as "minimally intrusive." *Id*. The judge told Mr. Amos that during the trial, the only noticeable thing would be that "you are going to reach down and hit the release [button] when you sit down." *Id*.

The court ruled, "that has to stay on" despite agreeing there was no reason to think Mr. Amos was would trying "to bolt," and said, "it's a security -- it's a safety thing, and it's just something we need to deal with it." *Id*. at 52.

The prosecutor said did not offer any reason to shackle Mr. Amos but said he did not see any "discernible protruding item" through Mr. Amos' clothes "at least not from this view." *Id*. at 52. Mr. Amos said the prosecutor was "looking at the wrong leg." *Id*.

When cross-examining multiple witnesses at trial, Mr. Amos approached them to show them exhibits to review. RP

152, 161, 172, 193, 201, 227, 273.[3] He got documents from his table that he handed to witnesses. RP 193, 221, 273-74.

Mr. Amos also testified. In front of the jury, the court told him to "Come on up" to the witness stand, then to "Go ahead and have a seat." RP 296. Mr. Amos asked to "possibly stand up at all" while reciting his testimony, which the court allowed him to do. RP 296. Once Mr. Amos ended his direct examination, the court said to him, "All right. Have a seat," and told the prosecutor to cross-examine him. RP 307.

After Mr. Amos finished testifying, the court told him to "step down" from the witness stand. RP 321. With the jury in the courtroom, the court told everyone to "Go ahead and be seated," showing Mr. Amos again standing and sitting in front of the jury. RP 333.

In its first decision in 2020, the Court of Appeals ruled, and the State conceded, the trial court improperly ordered Mr.

[3] The trial transcripts are contained in consecutively paginated volumes. Other transcripts are referred to by date.

Amos to wear restraints when it had no reason other than a generic jail policy. App. C, Slip op. at 17. But it refused to grant relief, finding Mr. Amos did not prove "the restraints had a substantial or injurious effect or influence on the jury's verdict." *Id*. (quoting *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)). It noted Mr. Amos' movements "were possibly irregular because of the leg restraint" but because the record did not show "the jury noticed Amos's leg restraint," it was harmless error. *Id*. at 18.

Mr. Amos filed a *pro se* petition for review and asked for counsel, because his original appointed attorney told him he no longer represented him. S. Ct. No. 98763-7 (motion for appointment of counsel). This Court granted the petition, directed the Court of Appeals to reconsider its decision in light of *Jackson*, and also appointed new counsel. *State v. Amos*, 197 Wn.2d 1007, 484 P.3d 1262 (2021).

Without asking for any supplemental briefing, the Court of Appeals issued an opinion finding no prejudicial error. App.

A, Slip. Op. at 6. It noted the judge and prosecutor said they could not see the brace under Mr. Amos' leg, without mentioning they had different vantage points than the jurors. *Id*.; *see* 6/7/17Supp.RP 51. It noted Mr. Amos moved around the courtroom frequently, as well as standing and sitting in front of the jury, without addressing the likelihood the jury noticed Mr. Amos was restrained when he moved. *Id*. It concluded, "[n]othing in the record on appeal shows that the jury noticed Amos's leg restraint," so the error was harmless beyond a reasonable doubt. *Id*.

Mr. Amos filed a motion for reconsideration, detailing *Jackson*'s application to his case. The Court of Appeals denied the motion without asking the prosecution to respond. App. B.

D. ARGUMENT

1. The Court of Appeals decision conflicts with *Jackson* and demonstrates its continued misunderstanding of how to enforce the State's burden to prove the improper shackling of a pro se defendant is harmless beyond a reasonable doubt.

a. It is presumptively prejudicial constitutional error for a court to require an accused person to wear physical restraints without just cause.

In *Jackson*, this Court held that when a trial court orders an accused person to wear physical restraints when appearing in court without an individual justification meriting these shackles, it engages in a constitutional error that is presumptively prejudicial. 195 Wn.2d at 854. On appeal, the prosecution bears the burden of proving this error was harmless beyond a reasonable doubt. *Id*.

Jackson "disavow[ed]" prior decisions that required the defendant to "show the shackling had a substantial or injurious effect or influence on the jury's verdict." *Id*. at 855-56. It noted the Court of Appeals was been using this incorrect standard to

treat shackling errors as harmless in numerous recent cases, creating "a culture in which incarcerated defendants are virtually guaranteed to have constitutional rights violated" with no remedy. *Id*. at 856-57. The Court of Appeals committed this same error in its original decision, which the prosecution conceded in its answer to Mr. Amos' petition for review. As a result, this Court granted review and remanded for reconsideration based on *Jackson*. 197 Wn.2d at 1007.

A person accused of a crime is entitled to appear in all court proceedings, including trial, free from restraints except in extraordinary circumstances. *Jackson*, 195 Wn.2d at 852. Restraints are inherently prejudicial, they detract from the presumption of innocence, and they undermine the dignity of judicial proceedings. *Id*.

The fact that an accused person is forced to wear a physical restraint "almost inevitably affects adversely the jury's perception of the character of the defendant." *Deck v. Missouri*, 544 U.S. 622, 633, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2007);

U.S. Const. amends. VI, XIV. It inevitably creates an adverse perception about the accused person's dangerousness as well as his character. *Id*. It erodes the dignity and decorum of the criminal proceedings. *Id*. It impairs the defendant's psychological state, stilts his movements, and affects the ability to freely communicate with counsel or testify in court. *State v. Finch*, 137 Wn.2d 792, 844, 863-644, 975 P.2d 967 (1999). A person accused of a crime is entitled to "the physical indicia of innocence" and to appear in court with the "dignity and self-respect of a free and innocent man." *Id*. at 844.

b. Jackson holds a court must credit available inferences that the jury was affected by seeing a testifying defendant shackled at trial.

As *Jackson* explains, the correct harmless error test following an erroneous shackling order places a heavy burden on the State to prove the constitutional violation was harmless beyond a reasonable doubt. 195 Wn.2d at 856. When there is conflicting evidence about the jurors' ability to notice the

physical restraints, this conflict is resolved in favor of the defendant, not the prosecution. *Id*. at 858.

In *Jackson*, the prosecution claimed there was no affirmative evidence the jurors saw the leg brace Mr. Jackson wore under his clothes. *Id*. at 857. But this Court explained it must also credit Mr. Jackson's statements. *Id*. Mr. Jackson told the court he believed the jury could see the restraints when he was seated in the jury box during his testimony. *Id*. He also had trouble moving from a seated to standing position due to the leg restraint and he did not stand to take his oath before testifying because of it, giving jurors further opportunity to notice he wore a physical device impairing his movements. *Id*. at 857-58.

Based on this information, this Court ruled there were "obvious limitations placed on his movement" and the jury would draw negative inferences from those limitations, such as thinking Mr. Jackson was not showing respect when he did not stand before the jury to take his oath. *Id*. at 858. His credibility

was central to his defense and these restraints could undercut his credibility and make him appear to be the type of person who would commit the charged crime. *Id*.

This Court explained that where there is "conflicting speculation and conflicting evidence" about the extent to which the jury saw and drew negative inferences from the shackles, the prosecution has not proven beyond a reasonable doubt that the improper shackling was harmless. *Id*.

> *c. It is far more likely the jury drew negative inferences from Mr. Amos' shackling than in Jackson, yet the Court of Appeals issued a decision that conflicts with Jackson.*

Rejecting, or misunderstanding, the analysis mandated by *Jackson*, the Court of Appeals ruled there was no evidence the jury noticed Mr. Amos's leg brace. App. A, Slip op. at 6. Yet the record provides ample evidence the jury would have noticed, even more than in *Jackson*.

Similarly to *Jackson*, Mr. Amos told the court jurors would see the restraint from the jury box. 6/1/17SuppRP 51.

His statement supplies affirmative evidence that jurors saw he was being physically restrained. *Jackson*, 195 Wn.2d at 857.

Although the prosecutor initially claimed he could not see the brace from where he was standing, Mr. Amos undercut this claim by telling the prosecutor he was looking at the wrong leg. 6/7/17SuppRP 51. In addition, the prosecutor's viewpoint has no bearing on what jurors saw. As Mr. Amos explained, the jury box was "right here" and "looking directly" at the side of him that was restrained. 6/7/17SuppRP 51.

The court acknowledged the brace would be noticeable each time Mr. Amos sat down, because he would need to push a button on the brace that allowed him to bend his knee. 6/7/17SuppRP 51-52. Mr. Amos stood, sat, and moved around the courtroom on numerous occasions, as the Court of Appeals recognized. App. A, Slip op. at 6.

While the judge said he did not notice the brace until Mr. Amos pointed it out, the judge was not sitting in the jury box. Mr. Amos told the judge that the jurors were sitting "right

here" and would look directly at the brace. 6/7/17Supp.RP 51. The Court of Appeals refused to credit Mr. Amos' expressed concern about its visibility to the jury, even though *Jackson* requires the court to credit Mr. Amos' statements about the restraint's visibility. 195 Wn.2d at 857.

The Court of Appeals claimed Mr. Amos was able to "freely move" about the courtroom because he walked to the witness stand and handed documents to witnesses. App. A, Slip op. at 6. Yet this shows the Court of Appeals misunderstands the nature of the leg restraint Mr. Amos wore -- it did not prevent him from moving at all, but would hobble his leg so he could not move around the courtroom without the brace being noticed. *See Jackson*, 195 Wn.2d at 847, 848 n.2 (explaining similar restraint made walking or standing difficult). Just like in *Jackson*, the jury would notice it as he stood and sat. *Id*. at 848 n.2. The trial court told him he would have to hit a release button each time he sat down. 6/7/17Supp.RP 51. And unlike *Jackson*, Mr. Amos was required to move around the

courtroom frequently, giving the jury many opportunities to notice his leg restraint.

Further, the Court of Appeals completely ignored the mental effect of forcing Mr. Amos to wear a leg brace at a trial where he not only testified but he represented himself. The case required the jury to assess Mr. Amos' credibility based on his testimony contesting the charges. App. C, Slip op. at 12 (noting Mr. Amos testified his conduct was innocent). And it was even more important that Mr. Amos appear with his mental faculties unfettered, because he was also arguing to the jury as his own lawyer about why the prosecution had not proved its case.

Under *Jackson*, the prosecution cannot prove the error was harmless beyond a reasonable doubt. The Court of Appeals did not apply the presumption of prejudice. It did not credit Mr. Amos' explanation that the jurors could see the leg brace from the jury box and it prejudiced him, and disregarded the judge's acknowledgement that Mr. Amos would have to adjust the leg brace each time he sat down. It ignored the importance of Mr.

Amos' ability to control his defense and be perceived as a capable attorney, which the leg restraints undermined.

This Court should grant review because the Court of Appeals issued a decision that conflicts with *Jackson*. The Court of Appeals decision also shows the risk that appellate courts will revert to its prior approach of refusing to remedy routine trial court orders shackling a criminal defendant that this Court disavowed in *Jackson*, 195 Wn.2d at 855-56.

2. Unjustified shackling of a person who is acting as his own lawyer causes more constitutional harm and inherent prejudice and cannot be dismissed as harmless.

a. Forcing a pro se defendant to wear shackles without cause undermines the right to self-representation.

The state and federal constitutions guarantee the right to self-representation. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); U.S. Const. amend. VI; Const. art. I, § 22.

When a person waives counsel, the trial court must ensure the jury believes the *pro se* defendant is conducting his own defense in a manner that "affirm[s] the accused's individual dignity and autonomy." *McKaskle v Wiggins*, 465 U.S. 168, 178, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). While the "core" of the right to self-representation is control over one's defense, it is equally important that the jury perceives the accused as having control over the case. *Id*. at 178-79. The court may not "erode the dignitary values that the right to self-representation is intended to promote" or "undercut the defendant's presentation to the jury of his own most effective defense." *Id*. at 181-82.

Article I, section 22 is more protective of the right to self-representation than the Sixth Amendment. *State v. Silva*, 107 Wn. App. 605, 622, 27 P.3d 663 (2001). It guarantees the right to meaningfully present a defense with the tools necessary to properly present the case to the jury. *Id.*

It is inconceivable that shackling a *pro se* defendant, without cause, does not impact the accused person's ability to represent himself. The right to self-representation is rooted in individual "dignity and autonomy." *In re Rhome*, 172 Wn.2d 654, 660, 260 P.3d 874 (2011). But physical restraints necessarily detract from the accused person's dignity and autonomy, as well as the dignity of the judicial proceedings. *Deck*, 544 U.S. at 631.

For practical purposes, wearing restraints impedes the physical actions required when presenting a case, such as handing documents to people on the witness stand or moving in the courtroom while presenting argument. Because it impairs a person's ability to move, it affects body language. Jurors generally pay attention to body language and other physical cues, from a lawyer or defendant, which is why visible restraints are presumptively prejudicial.

Physical restraints affect the defendant's actual control over his movements and the appearance of control. Restraints

"almost inevitably affects adversely the jury's perception of the character of the defendant." *Deck*, 544 U.S. at 633

Restraints also affect a person's mental faculties and may cause pain. *Spain v. Rushen*, 883 F.2d 712, 721 (9th Cir. 1989). They "ten[d] to confuse and embarrass defendants' mental faculties" which "prejudicially affect[s] his constitutional rights." *Deck*, 544 U.S. at 631 (citing with approval *People v. Harrington*, 42 Cal. 165, 168 (1871)); *see State v. Damon*, 144 Wash.2d 686, 691, 25 P.3d 418 (2001) ("keeping the defendant in restraints during trial may deprive him of the full use of all his faculties"). The Ninth Circuit recently recognized the prejudicial effect shackling has on inmates proceeding *pro se* in civil cases and imposed the obligation to make an individualized determination there as well. *Claiborne v. Blauser*, 934 F.3d 885, 901 (9th Cir. 2019).

b. The unjustified use of physical restraints on a pro se defendant automatically prejudices the defendant.

The detrimental effects of unjustified restraints recognized in *Jackson* are compounded when the accused person has waived the right to counsel. When a court violates a person's right to self-representation, the error is structural and not subject to harmless error analysis. *McKaskle*, 465 U.S. at 177 n.8. Mr. Amos was not warned he would be physically restrained at trial at the time he waived his right to counsel and was instead told he would be treated like any lawyer. 6/1/17RP 45. Forcing Mr. Amos to represent himself while wearing restraints undermines the knowing, intelligent and voluntary nature of his waiver of counsel and fundamentally alters his ability to represent himself with dignity and autonomy.

When a court improperly requires a *pro se* defendant to be shackled at trial, the error should be treated as *per se* prejudicial because it vitiates the core of the right to self-representation. *See United States v. Gonzalez-Lopez*, 548 U.S.

140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (holding violation of right to counsel of choice is structural error).

Alternatively, if the error is presumed prejudicial, the scale must tip even more favorably to the defendant and against the prosecution. While acting as his own lawyer, Mr. Amos was required to move around the courtroom, argue to the jury, and testify in his own defense wearing a device that impaired his ability to move. He knew the jury was likely to see the restraint and told the court it would prejudice his ability to represent himself. 6/7/17SuppRP 51. Having to wear restraints, without cause, while trying to persuade the jury he did not commit the offenses charged created an insurmountable obstacle that cannot be proven harmless beyond a reasonable doubt.

This Court should grant review to ensure trial courts do not impose restraints on a person who is *pro se* without the mandatory individual justification for shackling a defendant and to explain the heightened presumption of prejudice, or *per*

se reversal, that will follow from an unjustified shackling order. Review of this constitutional issue is warranted as a matter of substantial public interest.

E. CONCLUSION

Based on the foregoing, Petitioner Forrest Amos respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 3566 words and complies with RAP 18.17(b).

DATED this 7th day of September 2021.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 8, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FORREST EUGENE AMOS, Appellant.	No. 50400-6-II UNPUBLISHED OPINION ON REMAND FROM THE SUPREME COURT

WORSWICK, J. — On April 28, 2020, we filed an unpublished opinion affirming Forrest Amos's convictions and sentence for four counts of forgery and four counts of first degree criminal impersonation. *State v. Amos*, 13 Wn. App. 2d 1040 (2021). Our Supreme Court granted Amos's petition for review in part and remanded to us for reconsideration only on the issue of whether Amos was unconstitutionally shackled during trial in light of *State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020).[1] *State v. Amos*, 197 Wn.2d 1007, 484 P.3d 1262 (2021).

We set out the majority of the facts in our original opinion and need not repeat them here. The only issue before us is the proper remedy on remand as to Amos's restraints during trial. Amos argues that he was unconstitutionally physically restrained during the trial. We hold that Amos's physical restraint was harmless, and thus, we affirm Amos's convictions.

[1] In *Jackson*, our Supreme Court held that the State bears the burden to prove that unconstitutional shackling was harmless beyond a reasonable doubt, abrogating *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998).

RELEVANT FACTS

This case arises out of Amos's attempt to file documents with the Lewis County Superior Court regarding the Lewis County prosecutor, a Lewis County deputy prosecutor, and two City of Centralia police detectives. As a result of Amos filing these documents, the State charged Amos with four counts of forgery and four counts of first degree criminal impersonation.

On June 7, 2017, before Amos's trial started, the trial court and parties addressed a number of issues, including Amos's leg restraint. Verbatim Transcript of Proceedings (VTP) (June 7, 2017) at 51. The following exchange occurred:

> MR. AMOS: One quick question, your Honor, before we take a recess. Is there a possibility that I can object to this leg brace being on my leg since I've got to get up and like talk to a jury and stuff? It's kind of awkward.
>
> THE COURT: No. That's got to stay on. That's jail policy. I'm not going to direct that, because you just need to—you've got to work with it.
>
> MR. AMOS: Right here in our jury box it's like looking directly at this side of me. I understand I've got to work with it, but I think it's still prejudicial. I've never had any kind of eludes or any kind of attempts to do anything. We have an officer right here. I mean, that's not—I'm just kind of—
>
> THE COURT: I understand that but—
>
> MR. AMOS: I'm just concerned about the prejudicial effect of this.
>
> THE COURT: Well, I will tell you I didn't notice that you had anything on until you said that. And I—that is minimally intrusive. You know, it's not something they can see. The only thing that is going to happen is you are going to reach down to your knee and hit the release when you sit down, and that's the only thing that's going to happen. So that has to stay on.
>
> MR. AMOS: All right.
>
> THE COURT: All right. I don't think that it's going to be an issue for here, but there is—we have had other people who have tried to bolt, and it's just—it's a security—it's a safety thing, and it's just something that we need to deal with it.

> MR. AMOS: All right.
>
> [THE STATE]: If I could just make a record, your Honor, it appears that there is no exterior discernible protruding item that at all shows through the clothing of the defendant, at least not from this view, and I don't see anything either. So for the record—
>
> MR. AMOS: You [sic] looking at the wrong leg just for the record.
>
> THE COURT: Well, but there's nothing—it's all contained. It's underneath your pant leg, correct?
>
> MR. AMOS: Yes.
>
> THE COURT: Okay. All right. We will take a recess.

VTP (June 7, 2017) at 51-52.

During the trial, Amos moved around the courtroom in front of the jury. Amos handed documents to witnesses and approached the bench. When Amos presented his defense, the trial court directed Amos to "come on up" to testify in the presence of the jury. 3 Verbatim Report of Proceedings (VRP) at 296. Other than Amos's objection, there is no further mention of the leg restraint. And nothing in the record on appeal shows or suggests that the jury noticed Amos's leg restraint.

The jury found Amos guilty of four counts of forgery and four counts of first degree criminal impersonation.

ANALYSIS

Amos argues that the trial court abused its discretion by requiring Amos to wear a leg restraint. The State concedes that the trial court abused its discretion, but argues that the error was harmless beyond a reasonable doubt. We agree with the State.

The presumption of innocence is a fundamental component of a fair trial. *State v. Jaime*, 168 Wn.2d 857, 861, 233 P.3d 554 (2010). To preserve the presumption of innocence, a defendant is "'entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent [person].'" *Jaime*, 168 Wn.2d at 861-62 (quoting *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)).

A trial court also has a duty to provide for courtroom security, and may exercise its discretion to implement measures needed to protect the safety of court officers, parties, and the public. *State v. Hartzog*, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). In exercising discretion, the trial court must bear in mind a defendant's right "to be brought into the presence of the court free from restraints." *State v. Damon*, 144 Wn.2d 686, 690, 25 P.3d 418 (2001). "[R]egardless of the nature of the court proceeding or whether a jury is present, it is particularly within the province of the trial court to determine whether and in what manner, shackles or other restraints should be used." *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 227 (2015).

Courts recognize that physical restraints are inherently prejudicial to the defendant. *Finch*, 137 Wn.2d at 845-46. Restraints should be allowed "only after conducting a hearing and entering findings into the record that are sufficient to justify their use on a particular defendant." *Walker*, 185 Wn. App. at 800. The trial court must engage in this individual inquiry prior to every court appearance. *Jackson*, 195 Wn.2d at 854. The trial court's determination must be based on specific facts in the record that relate to the particular defendant. *Jaime*, 168 Wn.2d at 866.

We review a trial court's decision to keep a defendant restrained for abuse of discretion. *State v. Turner*, 143 Wn.2d 715, 724, 23 P.3d 499 (2001). A trial court's failure to exercise its discretion when considering a courtroom security measure constitutes constitutional error. *State v. Lundstrom*, 6 Wn. App. 2d 388, 394, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019). Deferring to general jail policy without an individual inquiry is an abuse of discretion and constitutional error. *Lundstrom*, 6 Wn. App. 2d at 395.

A claim for unconstitutional physical restraint is subject to a harmless error analysis. *Jackson*, 195 Wn.2d at 855-56. If an error violates a defendant's constitutional right, it is presumed to be prejudicial. *Finch*, 137 Wn.2d at 859. But the State may overcome this presumption by showing that the error was harmless beyond a reasonable doubt. *Jackson*, 195 Wn.2d at 856.

In *Jackson*, the trial court failed to conduct an individualized inquiry into whether the defendant needed to be restrained. 195 Wn.2d at 844, 857. Jackson was shackled during trial and the record there showed that Jackson therefore remained seated for his oath and on the witness stand. *Jackson*, 195 Wn.2d at 848, 857. The only mention in the record there as to whether the restraint was visible was Jackson's statement to the trial court that the jury could see his restraint when he was in the witness box. *Jackson*, 195 Wn.2d at 857. Our Supreme Court reversed Jackson's conviction, holding that the State had failed to prove that the error was harmless beyond a reasonable doubt. *Jackson*, 195 Wn.2d at 858.

Here, the trial court abused its discretion because it failed to conduct an adequate hearing or enter findings sufficient to justify Amos's leg restraint. Amos objected to the leg restraint, but the trial court ruled that Amos would remain restrained during trial. The trial court failed to

conduct an individual inquiry and failed to enter any findings about the leg restraint. The court merely deferred to jail policy as the justification for the restraint. We hold that the trial court abused its discretion and that Amos's restraint was a constitutional error.

As stated above, unconstitutional shackling is subject to a harmless error analysis. *Jackson*, 195 Wn.2d at 855. The State is required to show that this error was harmless beyond a reasonable doubt. *Jackson*, 195 Wn.2d at 856. It does so here.

This case differs from *Jackson*. The record here shows that neither the trial court judge nor the prosecutor saw anything protruding under Amos's pant leg. The record also shows that throughout the trial, Amos moved around the courtroom in front of the jury. Amos handed documents to witnesses and approached the bench. When Amos was presenting his defense, the trial court directed Amos to "come on up" to testify in the presence of the jury. 3 VRP at 296.

On appeal, Amos states that the leg restraint interfered with his ability to move around while presenting his defense. He argues that the leg restraint encumbered his movements but the record on appeal shows otherwise. Amos even acknowledges that "[i]t is not clear from the record" whether his movements were impeded. Brief of Appellant at 15. Amos, acting as his own counsel, moved throughout the courtroom in the presence of the jury. Nothing in the record on appeal shows that the jury noticed Amos's leg restraint. Indeed, the trial court judge did not notice the restraint until Amos called it to his attention. Because the record shows that the leg restraint was not visible and that Amos was able to freely move around the courtroom and step into the witness box, we hold that the State has shown that the error was harmless beyond a reasonable doubt.

Accordingly, we hold that Amos's physical restraint was harmless. We affirm Amos's convictions.

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.

Worswick, J.

Lee, C.J.

Sutton, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

August 5, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FORREST EUGENE AMOS, Appellant.	No. 50400-6-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the Court's June 8, 2021 unpublished opinion. After consideration, the Court denies appellant's motion for reconsideration without prejudice and notes that appellant's motion is more properly considered as a personal restraint petition (PRP). As such, appellant is free to refile this motion as a PRP pursuant to RCW 10.73.090.

Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Lee, Sutton

FOR THE COURT:

Worswick J

Worswick, J.

APPENDIX C

Filed
Washington State
Court of Appeals
Division Two

April 28, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FORREST EUGENE AMOS, Appellant.	No. 50400-6-II UNPUBLISHED OPINION

WORSWICK, J. — Forrest Amos appeals his convictions and sentence for four counts of forgery and four counts of first degree criminal impersonation. Amos argues (1) insufficient evidence supports his forgery convictions,[1] (2) he was unconstitutionally physically restrained during the trial, (3) he received ineffective assistance from his counsel regarding pretrial matters, (4) the trial court erred by allowing him to waive counsel and denying his motion to continue the trial, and (5) the trial court improperly imposed an exceptional sentence. Amos also raises a number of issues in a Statement of Additional Grounds (SAG) for Review.

We hold that (1) sufficient evidence supports Amos's forgery convictions, (2) Amos's physical restraint was harmless, (3) Amos did not receive ineffective assistance of counsel, (4) the trial court did not err by allowing Amos to waive counsel or by denying his motion to

[1] Amos's brief also states that insufficient evidence supports his criminal impersonation convictions. But other than quoting the statute for criminal impersonation, Amos makes no argument regarding these convictions. We do not consider an issue that has not been briefed. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); RAP 10.3(a).

continue trial, and (5) Amos's sentence was properly imposed. Additionally, we hold that Amos does not raise reversible issues in his SAG. Accordingly, we affirm.

FACTS

This case arises out of Amos's attempt to file documents with the Lewis County Superior Court regarding the Lewis County prosecutor, a Lewis County deputy prosecutor, and two City of Centralia police detectives. As a result of Amos filing these documents, the State charged Amos with four counts of forgery and four counts of first degree criminal impersonation.

Amos was involved in a 2013 criminal case, a civil case, and this current criminal case. Events from the first two cases led to the charges in this case.

A. *Amos's 2013 Criminal Case*

In 2013, Amos was arrested and charged with multiple crimes. William Halstead was the deputy prosecutor assigned to this case, and Jonathan Meyer was the elected Lewis County prosecutor at the time. The trial court set Amos's bail at $1 million. Amos could not post bail, so he remained in Lewis County jail pending the proceeding. While Amos was awaiting trial, Centralia Police detectives executed a search warrant on Amos's jail cell. Detective Adam Haggerty and Detective Chad Withrow executed this warrant. According to Amos, the detectives took documents related to his defense that he was keeping in his cell. Amos entered a guilty plea, later claiming that he had no other options without his legal documents.[2]

[2] Amos pleaded guilty to tampering with a witness, first degree computer trespass, possession of marijuana with intent to manufacture or deliver, attempted forgery, three counts of possession of a controlled substance with intent to manufacture or deliver, four counts of delivery of a controlled substance, third degree introducing contraband, and second degree attempted theft.

B. *Amos's Civil Case Filings That Led to this Criminal Case*

Amos filed a civil lawsuit against Halstead, Meyer, Detective Haggerty, and Detective Withrow claiming that his civil rights had been violated and that he was entitled to damages. Amos then filed several handwritten documents with the Lewis County Superior Court under the 2013 criminal case number. He filed four sets of documents relating to four different individuals: Halstead, Meyer, Detective Haggerty, and Detective Withrow. Each set is identical, except for the identity and profession of the individual.

For example, the set of documents relating to Halstead contained three pages. The first page is titled "Forced Commercial Contract" and "Notice of Subrogation Bond in the Nature of RCW 7.44.040;[3] 42.08.020; 42.08.080;[4] 42.20.100.[5]" Ex. 2. The body of the page states:

> William Halstead, public servant, prosecuting attorney, law merchant *do hereby enter myself security for costs in the cause, and acknowledge myself bound to pay or cause to be paid all costs which may accure* [sic] *in this action*, either to the opposite party, or to any of the officers of this Court, pursuant to the laws of this State, and/or the District of Columbia, 28 USC Sec. 3002(15)(c). See State v. Sefrit, 82 Wash. 520, 144 P. 725 (1914); State v. Yelle, 4 Wn.2d 327, 103 P.2d 372 (1940); Nelson v. Bartell, 4 Wn.2d 174, 103 P.2d 30 (1940).
>
> Dated this 11th day of March, 2016. William Halstead
> public servant, prosecuting attorney.

Ex. 2. (Emphasis added.)

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[3] RCW 7.44.040 describes conditions under which a person may apply for a ne exeat writ. Ne exeat is an equitable writ ordering the person to whom it is addressed not to leave the jurisdiction of the court or the state. BLACK'S LAW DICTIONARY 1243 (11th ed. 2019).

[4] RCW 42.08.020 and RCW 42.08.080 describe who may maintain an action on a public officer's official bond.

[5] RCW 42.20.100 states that a public officer's willful neglect to perform their duty is a misdemeanor.

The second page is titled "Justification of Surety Subrogation." Ex. 2. It states that Halstead personally appeared

> before me, Forrest Eugene Amos, surety on the bond of William Halstead, public servant, prosecuting attorney, law merchant of the County of Lewis and Washington State who, being duly sworn, deposes and says that he is seized of his right mind, and that over and above all of his just debts and liabilities, in property not exempt by law from levy and sale under execution, of a clear unencumbered estate of the value in excess of one million $1,000,000 Dollars . . . .

Ex. 2. Amos signed the page. The page also bears a notary's seal regarding Amos's signature.

The third page is titled "Bond for Costs" and states "Subrogation Security for One Million Dollars, filed and approved the 11th day of March, 2016." Ex. 2. Amos signed this page and the page also bears a notary's seal.

The State charged Amos with four counts of forgery and four counts of first degree criminal impersonation.

C. *Pretrial Proceedings*

The trial court appointed counsel for Amos. In November 2016, Amos wrote the trial court a letter requesting new appointed counsel because his current counsel was not bringing the pretrial motions Amos thought were necessary. Amos also submitted a motion to proceed pro se. At a hearing on November 23, Amos argued that he either wanted different counsel or would represent himself based on a lack of communication with his current counsel. The trial court allowed a recess for counsel and Amos to communicate, and Amos decided to remain represented by his current counsel. Following this hearing, Amos's trial counsel filed a *Knapstad*[6] motion to dismiss.

[6] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

On November 29, the trial court denied Amos's *Knapstad* motion to dismiss. Amos personally then moved for a continuance because he and counsel had not adequately discussed witnesses and trial strategy. The State told the trial court that the witnesses had been interviewed by Amos's counsel. Counsel replied, "I have talked to all of them but one—actually, two. I haven't talked to the gentleman that certified the documents, but I don't believe that's an issue." Verbatim Report of Proceedings (VRP) (Nov. 29, 2016) at 43. The trial court granted the continuance and stated, "And I'm specifically ordering [trial counsel] to make however many trips between here and Clallam Bay Corrections Facility as is necessary to properly prepare the defense in this case." VRP (Nov. 29, 2016) at 54.

At a hearing on June 1, 2017, Amos again asked to represent himself because he and trial counsel were not communicating well, trial counsel had not visited him in person, and he and trial counsel did not agree on trial strategy. Counsel responded that he and Amos had an hour-long telephone meeting to discuss issues in the case. As a result of that meeting, trial counsel brought a second *Knapstad* motion regarding legal efficacy of the documents. Counsel acknowledged that Amos wanted counsel to make certain arguments, but counsel stated he could not properly present all of Amos's arguments.

Amos stated that he wanted to represent himself because he had his own arguments and strategies for trial that he did not think counsel would adequately present. The trial court asked Amos if he wanted his counsel to remain as standby counsel, but Amos said, "I don't feel comfortable with [trial counsel] being that guy if you're going to appoint standby counsel." VRP (June 1, 2017) at 46-47. The trial court informed Amos of the risks and hazards of self-

representation. The trial court then granted Amos's request to represent himself without standby counsel.

On June 7, 2017, the trial court and parties addressed a number of issues before trial started. These issues included Amos's motion for a continuance, Amos's request to interview witnesses, Amos's leg restraint, and the State's motions in limine.

Amos's motion for a continuance claimed that he needed additional time to interview witnesses and make pretrial motions. Amos's affidavit accompanying the motion further stated that he needed more time for discovery issues and to prepare his defense. The trial court stated that the only discovery in this case was a police report and the documents written by Amos. Amos stated that his trial counsel had not provided him any witness list or interviews. When the trial court asked which potential witnesses Amos wanted to interview, Amos stated the four complaining witnesses—Halstead, Meyer, Detective Haggerty, and Detective Withrow—and the bondholders or sureties. The State responded, "As far as the witnesses, my understanding is they have been interviewed. In talking with them they've had discussions with defense counsel I know." VRP (June 7, 2017) at 19. Nonetheless, the State suggested that, because the complaining witnesses were present for trial, Amos could take time before the trial began to interview them. The trial court gave Amos an opportunity to interview witnesses, and Amos interviewed these witnesses. The trial court denied Amos's motion for a continuance.

Amos also raised the issue of his leg restraint. The following exchange occurred:

> MR. AMOS: One quick question, your Honor, before we take a recess. Is there a possibility that I can object to this leg brace being on my leg since I've got to get up and like talk to a jury and stuff? It's kind of awkward.
>
> THE COURT: No. That's got to stay on. That's jail policy. I'm not going to direct that, because you just need to—you've got to work with it.

MR. AMOS: Right here in our jury box it's like looking directly at this side of me. I understand I've got to work with it, but I think it's still prejudicial. I've never had any kind of eludes or any kind of attempts to do anything. We have an officer right here. I mean, that's not—I'm just kind of—

THE COURT: I understand that but—

MR. AMOS: I'm just concerned about the prejudicial effect of this.

THE COURT: Well, I will tell you I didn't notice that you had anything on until you said that. And I—that is minimally intrusive. You know, it's not something they can see. The only thing that is going to happen is you are going to reach down to your knee and hit the release when you sit down, and that's the only thing that's going to happen. So that has to stay on.

MR. AMOS: All right.

THE COURT: All right. I don't think that it's going to be an issue for here, but there is—we have had other people who have tried to bolt, and it's just—it's a security—it's a safety thing, and it's just something that we need to deal with it [sic].

MR. AMOS: All right.

[THE STATE]: If I could just make a record, your Honor, it appears that there is no exterior discernible protruding item that at all shows through the clothing of the defendant, at least not from this view, and I don't see anything either. So for the record—

MR. AMOS: You [sic] looking at the wrong leg just for the record.

THE COURT: Well, but there's nothing—it's all contained. It's underneath your pant leg, correct?

MR. AMOS: Yes.

THE COURT: Okay. All right. We will take a recess.

VRP (June 7, 2017) at 51-52.

Additionally, the trial court granted the State's motion in limine to exclude evidence regarding the bond process. The State also moved to exclude evidence regarding legal efficacy

of the documents, arguing that legal efficacy was not an issue for the jury to decide. Rather, the State argued that legal efficacy was a matter of law already decided by the trial court with the *Knapstad* motions. The trial court granted this motion.

D. *Trial Proceedings*

At trial, the complaining witnesses all testified that they did not file the documents at issue, nor did they give Amos permission to file them. The documents were admitted as exhibits. Meyer testified that the documents were filed under the criminal case number, "well after the case was completed." 2 VRP at 143. He testified that based on the language of the documents, he would be liable for the costs that were imposed in Amos's 2013 criminal case. Meyer testified that the same would be true for the three other complaining witnesses' documents. Costs and fees in Amos's 2013 criminal case amounted to approximately $18,000.

When discussing the jury instructions, Amos argued that the definition of written instrument needed to include that the instrument, if genuine, had legal effect. The trial court and the State agreed, and the court instructed the jury on the definition of written instrument.[7] Based on the new instruction, the State recalled Meyer. Meyer testified that based on the language of the document, he would be liable for the costs that were actually imposed in the 2013 case. Meyer testified that the same would be true for the three other complaining witnesses' documents. Amos had the opportunity to cross examine Meyer. Meyer testified that, to his knowledge, a sheriff had not levied or executed on his bond.

[7] Jury instruction 10 stated, "'Written instrument' means any paper, document or other instrument containing written or printed matter which, if genuine, may have legal effect or be the foundation of legal liability." CP at 135.

Amos then testified. He testified that he was not trying to defraud the complaining witnesses. He testified that he wrote the documents and submitted them to be filed with the Lewis County Superior Court. Amos explained:

> . . . [T]hey appeared before me when they arrested me and said, Mr. Amos, you're going to be held in jail until you answer our criminal complaint and you're going to be held in jail on $1 million bail unless you can post that. So I gave up my freedom because I could not post that money and the freedom is the equity that I'm claiming damages against, my freedom of sitting in the jail to answer the complaint. And before the complaint could be answered everything was taken from me so I couldn't effectively answer that. I couldn't have effective assistance of counsel. I couldn't have nothing. That's why I sued them. That's why I've been fighting, to try to hold these guys accountable.
>
> . . . .
>
> . . . I think the law allowed me to do it. I think I read the law right. And I filed these papers after initiating a lawsuit against them to try to attach their bond that they put up on the $1 million they were holding me in jail for. That's what I understood this to be, to try and get damages if I was to succeed in my lawsuits against them for deprivation of my constitutional rights.

3 VRP at 302-03.

Amos agreed that he had assumed the identities of the four complaining witnesses and that he created the documents. But, Amos testified, "That contract allows me to, when I believe I'm damaged, to take subrogated rights as an injured party against their liabilities and actually move against their surety and their liability policy. And that's all I intended to do in that because I filed a claim." 3 VRP at 313. Amos testified that his intent was "subrogation, to act in the shoes of another person to assert my rights against their sureties and their bonds because I believed I was damaged." 3 VRP at 301.

Throughout the trial, Amos moved around the courtroom in front of the jury. Amos handed documents to witnesses and approached the bench. When Amos was presenting his

defense, the trial court directed Amos to "come on up" to testify in the presence of the jury. 3 VRP at 296. Other than Amos's motion, there is no further mention of the leg restraint. And nothing in the record on appeal shows or suggests that the jury noticed Amos's leg restraint.

The jury found Amos guilty of four counts of forgery and four counts of first degree criminal impersonation.

E. *Sentencing*

At sentencing, the trial court found that the forgery and criminal impersonation convictions were the same criminal conduct. Amos agreed his offender score was 21. Amos's standard range for each forgery count was 22 to 29 months. The State requested an exceptional sentence of 116 months, 29 months for each forgery conviction to run consecutively. Amos requested a sentence within the standard range. The trial court adopted the State's recommendation and imposed 29 months for each forgery conviction to run consecutively, totaling 116 months based on RCW 9.94A.535(2)(c). The trial court's finding regarding sentencing stated, "The exceptional sentence is justified by the following aggravating circumstances: (a) Multiple Current Offenses RCW 9.94A.535(2)(c)." CP at 165.

Amos appeals his convictions and sentence.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Amos argues that his convictions are not supported by sufficient evidence. Specifically, Amos argues that the State failed to prove his intent to injure or defraud and the legal efficacy of the documents. We disagree.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Such inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). We defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). Circumstantial evidence is not any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a jury verdict. *Kintz*, 169 Wn.2d at 551.

RCW 9A.60.020(1) provides:

> A person is guilty of forgery if, with intent to injure or defraud:
> (a) He or she falsely makes, completes, or alters a written instrument or;
> (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

A. *Sufficient Evidence Supports Amos's Intent To Injure or Defraud*

Amos argues that there was insufficient evidence of his intent to injure or defraud. We disagree.

When an intent to defraud is an element of an offense, "it shall be sufficient if an intent appears to defraud any person." RCW 10.58.040. Intent to commit a crime may be inferred if the defendant's conduct and surrounding circumstances plainly show such an intent as a matter of logical probability. *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). Regarding

forgery, a defendant must demonstrate an intent to pass off their forged documents as authentic. *Vasquez*, 178 Wn.2d at 12.

Amos testified that he handwrote the documents and submitted them to be filed with the Lewis County Superior Court. Amos agreed that he assumed the identities of the four complaining witnesses when he wrote the documents. But, Amos testified, "That contract allows me to, when I believe I'm damaged, to take subrogated rights as an injured party against their liabilities and actually move against their surety and their liability policy. And that's all I intended to do in that because I filed a claim." 3 VRP at 313. Amos testified that his intent was "subrogation, to act in the shoes of another person to assert my rights against their sureties and their bonds because I believed I was damaged." 3 VRP at 301.

On appeal, Amos relies only on his own testimony to explain his actions. But we defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Andy*, 182 Wn.2d 303. Taking the evidence in a light most favorable to the State, a reasonable jury could find that Amos had the intent to injure or defraud. Amos admitted to creating these documents and writing the names of the four complaining witnesses. The documents are written in the first person, using language like "hereby enter myself security for costs in the cause, and acknowledge myself bound to pay or cause to be paid all costs." Ex. 2. Each individual's name then appears at the bottom of the document, following a date. Moreover, Amos filed these documents with Lewis County Superior Court. As a matter of logical probability, an intent to defraud could be inferred. A reasonable jury could find that Amos possessed an intent to injure or defraud when he created and filed these documents, assumed the complaining witnesses' identities, and purported to make each individual liable for costs and fees

in his criminal case. We hold that the State presented sufficient evidence of Amos's intent to injure or defraud.

B. *Sufficient Evidence Supports the Legal Efficacy of the Documents*

Amos also argues that the State failed to provide sufficient evidence that the documents constituted written instruments with legal efficacy. We disagree.

To prove Amos committed forgery, the State bore the burden of proving that Amos possessed, uttered, offered, disposed of, or put off as true a written instrument. RCW 9A.60.020(b). In the crime of forgery, a "written instrument" is

> (a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or (b) any access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

RCW 9A.60.010(7). This statutory definition contains a common law requirement that the instrument have "legal efficacy," or "'is something which, if genuine, may have legal effect or be the foundation of legal liability.'" *State v. Scoby*, 117 Wn.2d 55, 57-58, 810 P.2d 1358 (quoting *State v. Scoby*, 57 Wn. App. 809, 811, 790 P.2d 226 (1990)), *amended on recons.*, 815 P.2d 1362 (1991). "[A] written instrument can support a charge of forgery when it is incomplete, but not when it is so incomplete that it would lack legal efficacy even if genuine." *State v. Smith*, 72 Wn. App. 237, 243, 864 P.2d 406 (1993).

Certain public officials, including prosecuting attorneys, must post an official bond while in office. RCW 36.16.050(6); *see also generally* chapter 42.08 RCW. The purpose of an official bond is "to provide indemnity against malfeasance, nonfeasance and misfeasance in public office." *Nelson*, 4 Wn.2d at 182 (quoting *Gray v. De Bretton*, 192 La. 628, 639, 188 So. 722 (1939)); RCW 42.08.010-.020. In dicta, our Supreme Court mentioned that an unlawful search

can create liability on the bond. *See Greenius v. Amer. Sur. Co.*, 92 Wn. 401, 407, 159 P. 384 (1916). When a public official is performing an official act, commits misconduct, and injures a person, certain classes of injured persons can "resort to the bond" to recover damages. RCW 42.08.020, .070-.080; *Nelson*, 4 Wn.2d at 178. When a public official is liable on their bond, the surety on the bond is liable as well. RCW 42.08.070. A plaintiff's recovery against the surety is limited to amount of the bond. RCW 42.08.050.

A written contract is not necessary to create a principal-surety relationship. *Fluke Capital & Mmgt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620-21, 724 P.2d 356 (1986). "A personal suretyship is a consensual and contractual relationship that requires mutual assent." *Fluke*, 106 Wn.2d at 621. "Where a person agrees to be answerable for the debt of another, a 'personal' suretyship is created." *Honey v. Davis*, 131 Wn.2d 212, 218 n.5, 930 P.2d 908 (1997).

Here, Amos filed a number of documents with the Lewis County Superior Court. For each complaining witness, the documents stated that the witness did "hereby enter myself security for costs in the cause, and acknowledge myself bound to pay or cause to be paid all costs." Ex. 2. Although Amos focuses on the fact that his testimony showed that he "did not know what he was doing," and that the documents as a whole could not have created legal liability in the manner Amos intended, Br. of Appellant at 11, we need look no further than the Notice of Subrogation Bond documents which clearly state that each complaining witness agrees to be answerable for the debt of another. Each document contains a complaining witness's name hand-printed on the signature line. These documents, if genuine, would have legal effect or be the foundation of legal liability.

Moreover, Meyer testified that based on the language of the document, he would be liable for the costs that were actually imposed in the 2013 case. Meyer testified that the same would be true for the three other complaining witnesses' documents. Amos argues that these documents were merely notices to the complaining witnesses. However, if genuine, these "notices" would legally bind the complaining witnesses. We hold that the State presented sufficient evidence of the legal efficacy to support Amos's convictions of forgery.[8]

II. LEG RESTRAINT

Amos argues that the trial court abused its discretion by requiring Amos to wear a leg restraint. The State concedes that the trial court abused its discretion, but argues that the error was harmless. We agree with the State.

The presumption of innocence is a fundamental component of a fair trial. *State v. Jaime*, 168 Wn.2d 857, 861, 233 P.3d 554 (2010). To preserve the presumption of innocence, a defendant is "'entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent [person.]'" *Jaime*, 168 Wn.2d at 861-62 (quoting *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)).

At the same time, a trial court has a duty to provide for courtroom security, and may exercise its discretion to implement measures needed to protect the safety of court officers,

[8] Amos also argues in passing that legal efficacy is a question that should have gone to the jury. But, this question did go to the jury. Jury instruction 10 states, "'Written instrument' means any paper, document or other instrument containing written or printed matter which, if genuine, may have legal effect or be the foundation of legal liability." CP at 135. This is the definition of legal efficacy. *Scoby*, 117 Wn.2d at 57-58. Amos's argument fails.

parties, and the public. *State v. Hartzog*, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). In exercising discretion, the trial court must bear in mind a defendant's right "to be brought into the presence of the court free from restraints." *State v. Damon*, 144 Wn.2d 686, 690, 25 P.3d 418 (2001). "[R]egardless of the nature of the court proceeding or whether a jury is present, it is particularly within the province of the trial court to determine whether, and in what manner, shackles or other restraints should be used." *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 227 (2015).

Courts recognize that physical restraints are inherently prejudicial to the defendant. *Finch*, 137 Wn.2d at 845-46. Restraints should be allowed "only after conducting a hearing and entering findings into the record that are sufficient to justify their use on a particular defendant." *Walker*, 185 Wn. App. at 800. The trial court's determination must be based on specific facts in the record that relate to the particular defendant. *Jaime*, 168 Wn.2d at 866.

We review a trial court's decision to keep a defendant restrained for abuse of discretion. *State v. Turner*, 143 Wn.2d 715, 724, 23 P.3d 499 (2001). A trial court's failure to exercise its discretion when considering a courtroom security measure constitutes constitutional error. *State v. Lundstrom*, 6 Wn. App. 2d 388, 394, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019). Deferring to general jail policy is an abuse of discretion and constitutional error. *Lundstrom*, 6 Wn. App. 2d at 395.

A claim for unconstitutional physical restraint is subject to a harmless error analysis. *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). If an error violates a defendant's constitutional right, it is presumed to be prejudicial. *Finch*, 137 Wn.2d at 859. But the State may overcome this presumption by showing that the error was harmless beyond a reasonable doubt. *Finch*, 137 Wn.2d at 859. For the unconstitutional restraints to be reversible,

rather than harmless error, the record on appeal must show that the restraints "had a substantial or injurious effect or influence on the jury's verdict." *Hutchinson*, 135 Wn.2d at 888.

Here, the trial court abused its discretion because it failed to conduct an adequate hearing or enter findings sufficient to justify Amos's leg restraint. Amos objected the leg restraint arguing that it was prejudicial and that he had never attempted to escape. The trial court cited jail policy as justification for the restraint. The trial court stated it had not noticed the leg restraint and that it was minimally intrusive because the leg restraint was contained underneath Amos's pant leg. The trial court failed to enter any findings about the leg restraint and merely deferred to jail policy as the justification for the restraint. We hold that the trial court abused its discretion.

Despite the trial court abusing its discretion, the record on appeal must show that the restraints "had a substantial or injurious effect or influence on the jury's verdict." *Hutchinson*, 135 Wn.2d at 888. During the initial colloquy about the leg restraint, Amos stated that he would be getting up to speak and the leg restraint was "kind of awkward." VRP (June 7, 2017) at 51. The State's counsel also stated that he did not see anything protruding under Amos's pant leg. Throughout the trial, Amos moved around the courtroom in front of the jury. Amos handed documents to witnesses and approached the bench. When Amos was presenting his defense, the trial court directed Amos to "come on up" to testify in the presence of the jury. 3 VRP at 296.

On appeal, Amos states that the leg restraint interfered with his ability to move around while presenting his defense. He argues that the leg restraint encumbered his movements but acknowledges that "[i]t is not clear from the record whether this was the case or not." Br. of Appellant at 15. But there must be evidence of an injurious effect or influence on the jury's

verdict in the record on appeal. The record shows that Amos, acting as his own counsel, moved throughout the courtroom in the presence of the jury. Amos's movements were possibly irregular because of the leg restraint. *See, e.g., State v. Jackson*, 10 Wn. App.2d 136, 150, 447 P.3d 633 (2019) (noting that the defendant struggled to walk with a leg restraint). However, nothing in the record on appeal shows that the jury noticed Amos's leg restraint. Because nothing in the record shows that the leg restraint influenced the jury's verdict, we hold that the error was harmless beyond a reasonable doubt.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Amos argues that he received ineffective assistance from his trial counsel because counsel failed to meet with Amos or interview witnesses. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To demonstrate that he received ineffective assistance of counsel, Amos must show both (1) that defense counsel's performance was deficient and (2) that the deficient performance resulted in prejudice. *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842 (2018). Defense counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Trial strategy and tactics cannot form the basis of a finding of deficient performance. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). Prejudice ensues if the result of the proceeding would have been different had defense counsel not performed deficiently. *Estes*, 188 Wn.2d at 458. Because both prongs of the ineffective assistance of counsel test must be met, the failure to demonstrate either prong will end our inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422

P.3d 489 (2018). We strongly presume that defense counsel's performance was not deficient. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

A. *Trial Counsel's Communications with Amos Were Not Deficient*

Amos argues, "The failure of defense counsel to meet with a client when specifically ordered by the court should be considered per se ineffective assistance of counsel." Br. of Appellant at 19.[9] We disagree.

An attorney must perform to professional standards, and failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Under the Rules of Professional Conduct, counsel has a duty of communication with the defendant. RPC 1.4. An attorney must "inform the client of any circumstance requiring the client's consent, reasonably consult with the client regarding the means by which the client's objectives will be accomplished, keep the client reasonably informed about the status of the matter, and promptly comply with any requests for information." *In re Disciplinary Proceedings Against Van Camp*, 171 Wn.2d 781, 803, 257 P.3d 599 (2011).

At the June 1 hearing, Amos requested to represent himself because he and trial counsel were not communicating well, trial counsel had not visited him in person, and Amos stated that he and trial counsel did not agree on trial strategy. Counsel responded that he and Amos had an hour-long telephone meeting to discuss issues in the case. As a result of that meeting, trial

[9] Amos also argues that counsel's deficient performance "improperly forced Appellant to become pro se against his wishes one week before trial." Br. of Appellant at 19. However, Amos offers no law or argument regarding this issue. We decline to review the issue because Amos's passing reference to the issue is insufficient to merit judicial review. RAP 10.3.

counsel brought a second *Knapstad* motion regarding legal efficacy. Counsel acknowledged that Amos had certain arguments he wanted counsel to make, but counsel stated that he could not properly present all of Amos's arguments.

Amos argues that his trial counsel failed to meet with him in person and did not accept phone calls. It is clear that Amos and his counsel disagreed about strategies and legal arguments regarding this case. This disagreement, however, is not equal to a failure to communicate. Amos relies on the trial court's statement, "And I'm specifically ordering [trial counsel] to make however many trips between here and Clallam Bay Corrections Facility as is necessary to properly prepare the defense in this case." VRP (Nov. 29, 2016) at 54. But, trial counsel was not ordered to go to the corrections facility. Rather, the trial court directed counsel to communicate with Amos as necessary to adequately prepare the defense. Although nothing in the record shows that trial counsel met with Amos in person at the correctional facility, trial counsel communicated with Amos over the telephone and brought a second *Knapstad* motion as a result. Amos and his counsel also corresponded by letter. We strongly presume that trial counsel's performance was not deficient, *Emery*, 174 Wn.2d at 755, and we hold that Amos fails to overcome this presumption regarding trial counsel's communications. Because Amos fails to demonstrate deficient performance, he cannot show ineffective assistance of counsel for failing to communicate. *Classen*, 4 Wn. App. 2d at 535.

B. *Trial Counsel Was Not Ineffective by Failing To Interview Witnesses*

Amos also argues that trial counsel's performance was deficient because counsel failed to conduct witness interviews. We disagree.

To provide effective assistance, defense counsel must investigate the case, including an investigation of witnesses. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Defense counsel's failure to investigate or interview witnesses, or inform the court of witness testimony can support a claim for ineffective assistance of counsel. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). However, courts may defer to trial counsel's decision against calling a witness if counsel investigated the case and made an informed and reasonable decision against conducting a particular interview or calling a particular witness. *Jones*, 183 Wn.2d at 340.

Here, trial counsel stated he conducted some witness interviews in November. After deciding to represent himself, Amos stated that trial counsel had not provided him any witness list or interviews. When the trial court asked which potential witnesses Amos wanted to interview, Amos stated the four complaining witnesses in this case and the bondholders or sureties. The State responded that it thought the complaining witnesses had been interviewed. Nonetheless, the State suggested that because the witnesses were present for trial, Amos could take time before the trial began to interview them. Amos confirmed before the trial began that he had an opportunity to interview witnesses.

Amos generally argues that his trial counsel failed to interview witnesses, but he does not allege any specific witnesses that counsel failed to interview. Trial counsel conducted some witness interviews. Even assuming without deciding that Amos's trial counsel deficiently performed, Amos fails to show prejudice. Amos was able to conduct witness interviews before trial. Amos cannot show that the outcome of the proceeding would have been different because the trial court allowed Amos time to interview the witnesses before the matter proceeded to trial.

IV. RIGHT OF SELF-REPRESENTATION

Amos argues that because his request for self-representation was untimely, the trial court abused its discretion by granting Amos's waiver of counsel. Within this argument, Amos also appears to argue that the trial court abused its discretion by denying Amos's motion for a continuance after allowing Amos to represent himself. We hold that the trial court did not abuse its discretion.

A. *Right of Self-Representation*

The Sixth Amendment and article I, section 22 of Washington Constitution guarantee criminal defendants the right of self-representation. *See State v. Curry*, 191 Wn.2d 475, 482, 423 P.3d 179 (2018). "This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). But the right to self-representation is not self-executing or absolute. *Madsen*, 168 Wn.2d at 504. To invoke the right of self-representation, a defendant must timely and unequivocally state a request to proceed without counsel. *State v. Coley*, 180 Wn.2d 543, 560, 326 P.3d 702 (2014). If the request for self-representation is unequivocal and timely, the trial court must then determine whether the request is voluntary, knowing, and intelligent. *Curry*, 191 Wn.2d at 486. The trial court must apply every reasonable presumption against a defendant's waiver of his right to counsel. *Curry*, 191 Wn.2d at 486.

Timeliness of a request for self-representation is determined on a continuum:

> If the demand for self-representation is made (1) well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self[-]representation exists as a matter of law; (2) *as the trial or hearing is about to commence, or shortly before, the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter*; and (3) during the

> trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

Madsen, 168 Wn.2d at 508 (quoting *State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994)) (emphasis added) (emphasis omitted). Timeliness focuses on the nature of the request itself rather than the motivation or purpose behind the request. *Curry*, 191 Wn.2d at 486-87. Specifically, "if, when, and how the defendant made a request for self-representation." *Curry*, 191 Wn.2d at 486-87.

We review a trial court's ruling on a defendant's request for self-representation for an abuse of discretion. *Curry*, 191 Wn.2d at 483. An abuse of discretion occurs when the ruling is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *Curry*, 191 Wn.2d at 483-84. We give great deference to the trial court, which has far more experience in considering requests for self-representation and has the benefit of observing the defendant and the circumstances and context of the request. *Curry*, 191 Wn.2d at 484-85.

Although Amos requested to represent himself more than once before trial, he refers only to his request from June 1, 2017 on appeal. He argues that, because he was proceeding as a self-represented litigant, the trial court's denial of his motion for a continuance was error. In his appellate brief, Amos quotes a large portion of the record discussing Amos's motion for a continuance on June 7. Amos's decision to represent himself occurred on June 1.

To the extent that Amos argues that his motion to represent himself was untimely, we hold that the trial court did not abuse its discretion. Here, Amos made his request on June 1, before his trial that was set for June 7. Because Amos's final motion to self-represent came shortly before trial, the right of self-representation depended on the facts of the case "with a measure of discretion . . . [to] the trial court." *Madsen*, 168 Wn.2d at 508.

Amos's case was not factually complicated. The fact that Amos created and filed the documents was never at issue. Amos's defense was that he did not mean to deceive anyone. This defense relied on his testimony, which Amos could have prepared in the time between becoming self-represented and the trial.

Moreover, the trial court and Amos engaged in a lengthy discussion with Amos and his trial counsel. Amos wanted to represent himself because he had his own arguments and strategies for trial that he did not think counsel would adequately present. The trial court informed Amos of the risks and hazards of self-representation. Amos had repeatedly requested to represent himself, suggested several motions his counsel did not feel he could present, had the opportunity to interview the witnesses, and possessed the discovery well before June 1. Accordingly, we hold that the trial court did not abuse its discretion when granting Amos's request to represent himself because it was timely.

B. *Motion for a Continuance*

Amos also appears to argue that the trial court abused its discretion by denying his motion for a continuance after the court allowed Amos to represent himself. We hold that the trial court did not abuse its discretion.

A trial court possesses the sound discretion to grant or deny a motion for a continuance. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). We will not disturb the trial court's decisions absent a clear showing that the trial court's ruling is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Flinn*, 154 Wn.2d at 199. There is no mechanical test when granting or denying a continuance, and the trial court may consider many

factors, "including surprise, diligence, redundancy, due process, materiality, and maintenance of ordinary procedure." *State v. Downing*, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004).

Amos moved for a continuance the morning of trial. His motion cited the need for time to interview witnesses and make pretrial motions. His affidavit accompanying the motion further stated Amos needed more time for discovery issues and to prepare his defense. The trial court stated that the discovery in this case was a police report and the documents written by Amos. The trial court gave Amos an opportunity to interview witnesses. The trial court then granted the State's motion in limine to exclude evidence regarding the bond process. As a result, the trial court denied Amos's motion for a continuance.

The trial court resolved the issues raised by Amos in his motion for a continuance. Discovery was manageable, the defense that Amos sought was excluded by the State's motion in limine, and the trial court allowed time for Amos to interview the witnesses before trial. We hold that the trial court did not abuse its discretion when denying Amos's motion for a continuance. The trial court did not abuse its discretion by allowing Amos to move forward without counsel or by denying Amos's motion for a continuance.

V. EXCEPTIONAL SENTENCE

Amos argues that the exceptional sentence was not supported by the record and that the length of his sentence was manifestly unreasonable. We disagree.

An exceptional sentence is a sentence that is either longer or shorter than the standard range sentence for the defendant's crime. RCW 9.94A.535. A sentence above the standard range may be imposed if an aggravating factor is present to justify its imposition. RCW 9.94A.535. The trial court has discretion to impose an exceptional sentence above the standard

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 50400-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Lewis County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: September 7, 2021
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