Supreme Court No. 98711-4

Court of Appeals No. 79519-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

V.

SIRRONE NEWBERN,

Petitioner.

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

The Honorable Linda Krese, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Sirrone Newbern asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Sirrone Newbern, COA No. 79519-8-I, filed June 1, 2020. A copy of the decision is attached to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court's exclusion of relevant exculpatory evidence violated petitioner's right to present a defense?

2. Whether petitioner received ineffective assistance of counsel?

3. Whether this Court should grant review of these significant questions of law under the state and federal constitutions? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Petitioner was convicted of robbery. CP 40. His defense at trial was mistaken identity. See e.g. 444-468. The witnesses described the robber as approximately 6'0". RP 153, 168, 170, 337-38. Yet, petitioner is 5'4". RP 312. The defense sought to have petitioner stand up in front of the jury to demonstrate his

height; he is also missing a pinky, which none of the witnesses described. RP 347, 407. The trial court excluded this evidence on grounds the state would not be allowed to present such evidence. RP 348-49.

Despite the court's ruling, the court indicated it would be willing to look at any authority provided by defense counsel to support the admission of the proffered height evidence. RP 349, 407. Defense counsel failed to present any authority to the court. RP 418-17.

On appeal, Newbern argued the court abused its discretion and violated his right to present a defense by prohibiting him from standing before the jury. Brief of Appellant (BOA) at 11-19. Because there was case law supporting admission of such evidence, Newbern also argued he received ineffective assistance of counsel because his attorney failed to present such case law to the court. BOA at 20-22.

The court of appeals disagreed with Newbern on both counts and affirmed his conviction. Appendix at 5-13. It agreed his case should be remanded, however, to strike the imposition of supervision fees from his judgment and sentence. Appendix at 13.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS CASE INVOLVES SIGNIFICANT QUESTIONS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS THAT SHOULD BE RESOLVED BY THIS COURT.

The Sixth[1] and Fourteenth[2] Amendments, as well as article 1, § 2[3] of the Washington Constitution, guarantee the right to trial by jury and to defend against the state's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Absent a compelling justification, excluding exculpatory evidence deprives a defendant of the fundamental right to put the

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[1] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[2] The Fourteenth Amendment provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

prosecutor's case to the crucible of meaningful adversarial testing. Crane v. Kentucky, 476 U.S. 683, 689- 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

In Washington, State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), define the scope of a criminal defendant's right to present evidence in his defense. A defendant must be permitted to present even minimally relevant evidence unless the state can demonstrate a compelling interest for its exclusion. No state interest is sufficiently compelling to preclude evidence of high probative value. Darden, 145 Wn. 2d at 621-22; Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 714- 15, 6 P.3d 43 (2000).

Relevant evidence is evidence that tends to "make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." State v. Stenson, 132 Wash.2d 668, 701-02, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998); ER 401. Under this definition, evidence is relevant if (1) it has a tendency to prove or disprove a fact

[3] Article 1, § 21 provides, "The right of trial by jury shall remain inviolate."

(probative value), and (2) that fact is of consequence in the context of the other facts and the applicable substantive law (materiality). 5 Karl B. Tegland, Washington Practice, Evidence sec. 82, at 227 (1989); State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987); Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 573, 719 P.2d 569 (1986).

To have probative value, evidence need only have minimal logical relevance. Tegland, sec. 83, at 229; Davidson, 43 Wn. App. at 573, 719 P.2d 569. To be material, the evidence must tend to prove or disprove a fact "of consequence to the determination of the action." Tegland, sec. 83, at 231; Davidson, 43 Wash.App. at 573, 719 P.2d 569 (emphasis omitted) (quoting ER 401). The relevancy of evidence in a given case will depend on the circumstances of that case and the relationship of the facts to the ultimate issue. Rice, 48 Wn. App. at 12; Davidson, 43 Wn. App. at 573. Relevant evidence tends to establish a party's theory of the case. Rice, 48 Wn. App. at 12.

The key issue in this case was identity. RP 444-470 (closing arguments). Although the witnesses identified Newbern as the man holding the gun during the robbery, the defense also presented numerous reasons to doubt their identifications, through the

testimony of Dr. Stephen Ross. See BOA at 14 (cross-racial identification, multiple perpetrators, use of weapon, disguises, show-ups, clothing bias, talking to other witnesses). These are just some of the circumstances that can affect memory that Dr. Ross saw present in this case.

But perhaps most significantly, the witnesses all described the man with the gun as approximately 6'0"; whereas Newbern is only 5'4" tall. Allowing jurors to see Newbern's height for themselves would necessarily support the defense theory that he was mistakenly identified. The evidence therefore was obviously relevant and material. "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person that committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The court excluded the proffered evidence on grounds a defendant cannot make an "exhibit" of himself. This was incorrect as an evidentiary ruling and denied Newbern his right to present a defense.

The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. State v. Franklin, 180 Wash.2d 371, 377 n. 2, 325 P.3d 159 (2014); State v. Strizheus, 163

Wash.App. 820, 829, 262 P.3d 100 (2011), review denied, 173 Wash.2d 1030, 274 P.3d 374 (2012). "An erroneous evidentiary ruling that violates the defendant's constitutional rights, however, is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." Franklin, 180 Wash.2d at 377 n. 2, 325 P.3d 159.

As Newbern argued on appeal, the lower court abused its discretion in denying the defense motion to have Newbern physically stand up for the jury. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wash. 2d 39, 940 P.2d 1362 (1997). In excluding the evidence here, the court reasoned the state – had it sought to have the defendant stand – would not be allowed to do so.

Presumably, the court was relying on case law holding the defendant cannot be compelled to give evidence against himself. This right protects a defendant from being compelled to provide evidence of a "testimonial or communicative nature," or from testifying against himself. See e.g. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966); City of

Seattle v. Stalsbroten, 138 Wash. 2d 227, 232, 978 P.2d 1059, 1062 (1999).

But here, Newbern sought to present the evidence himself. It's as if the trial court was bestowing some sort of right upon the state by negative implication. But the government does not have constitutional rights. And regardless, the constitutional right to present a complete defense limits the "'broad latitude'" the government has to establish rules excluding evidence from criminal trials. State v. Cayetano-Jaimes, 190 Wash. App. 286, 297, 359 P.3d 919, 925 (2015) (citing Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998))).

And as Newbern pointed out on appeal, case law is directly to the contrary of the lower court's reasoning – the defendant's height is considered non-testimonial demeanor evidence and the prosecution can in fact compel a defendant to stand. See e.g. State v. Clark, 156 Wash. 543, 287 P. 18 (1930).

In Clark, counsel for appellant argued that in ordering the appellant to stand up and walk over in front of the chair upon which the prosecuting witness was sitting, to enable her to identify the

appellant, the court compelled the appellant to be a witness against himself. The court disagreed, reasoning:

> The contention is without merit. The state has a right to have the defendant present. The defendant in a criminal case is necessarily present in court-he is there because under arrest; because of the charge against him he is compelled by law to be present. It is the defendant's right to be present; he cannot be prosecuted otherwise. When he comes into court, he brings with him the features with which nature endowed him. The jury could see those features. The mere standing up was not the giving of evidence-the evidence was there anyway, whether the defendant was reclining or standing. The defendant does not testify-the physical facts speak for themselves. The defendant is required to be present in such a position that the jury can see him at all times during the trial.
>
> The rule, supported by the authorities, is that a defendant may be compelled to stand for identification, and that he is not thereby compelled to give evidence against himself.

Clark, 156 Wash. at 547–48; see also State v. Pitmon, 61 Wn.2d 675, 379 P.2d 922 (1963) (same).

The court of appeals dismissed these authorities as distinct from Newbern's circumstances because they involved "identifications:"

> Newbern contends that this demonstrates that the State may compel a defendant to present his physical traits as nontestimonial demeanor evidence, and so it follows that the court should allow a defendant to choose to present such evidence. Newbern is wrong. The court's purpose in forcing

> Clark to stand was to allow the witness to identify him in testimony on the record. Clark, 156 Wash. At 547-48. The evidence for the jury to consider was not Clark's appearance itself but, rather the witness's testimony. Clark, 156 Wash. At 547-48.

Appendix at 8. In a footnote, the court dismissed the Pitmon decision for the same reason. Id.

But Newbern's case boiled down to identity. If the state may compel a defendant to stand up to a allow a witness to make an identification, why then, would not the same logic apply to allow Newberg stand up before the jury to give nontestimonial demeanor evidence that would assist the jury in evaluating the credibility of the state witnesses' identification of him? As the Clark court noted, he brought that evidence in with him to court, whether reclining or standing. The facts speak for themselves. The defendant is not testifying. The appellate court sliced the onion too thinly based on a meaningless distinction and thereby abused its discretion and violated Newbern's right to present a defense on the singular most important issue in the case. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

For similar reasons as just discussed, the court rejected Newbern's ineffective assistance claim. The appellate court held

that since Clark and Pitmon did not support Newbern's contention that the court should have allowed him to stand for the jury, he could not demonstrate prejudice. Appendix at 12. Because the appellate court sliced the onion too thinly in interpreting Clark and Pitmon, this Court should accept review of whether counsel's failure to cite them to the trial court amounted to ineffective assistance of counsel.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A

reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Deficient performance is that which falls below an objective standard of reasonableness. Id. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); Kyllo, 166 Wn.2d at 869.

Counsel has a duty to research the relevant law. Kyllo, 166 Wn.2d at 862. Based on older cases such as Clark and Pitmon, supra, counsel should have known that there was relevant authority to convince the court of its misinterpretation of the rule regarding demeanor evidence. The court indicated it was willing to consider any authority to support defense counsel's proposition that such demeanor evidence was admissible. Had the court been presented with the relevant authorities, it is likely the court would have allowed Newbern to stand up before the jury.

There is a reasonable probability the outcome might have been different but for counsel's failure to present the relevant authorities to the court. As indicated above, identity was a key issue in the case. Although there was verbal evidence of Newbern's

height, there was no physical evidence. As defense counsel properly recognized by seeking admission of the defendant's physicality, having the defendant stand before the jury to see for itself was the best evidence available. Without this, jurors likely did not perceive just how short 5'4" appears. Had they been presented such evidence, it is likely they would have had a reasonable doubt about the witnesses' identification of Newbern as the robber.

F. CONCLUSION

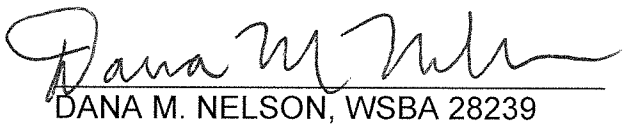
Trial counsel was correct that having Newbern stand so that the jury could see his height – a feature with which nature endowed him – was nontestimonial and did not break any evidentiary rules. If the state is allowed to compel such evidence, the defendant surely is entitled to offer it. As such, the court's evidentiary error was not only manifestly unreasonable, but it also violated Newbern's right to present a defense. It was strongly compelling and there was no state interest for not allowing it.

Newbern's constitutional right to present a defense and to effective representation were violated. This Court should accept review because Newbern's case involves significant questions of law under the state and federal constitutions. RAP 13.4(b)(3).

Dated this 30th day of June, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SIRRONE TERRELL NEWBERN, Appellant.	DIVISION ONE No. 79519-8-I UNPUBLISHED OPINION

DWYER, J. — Sirrone Newbern was convicted of robbery in the first degree. On appeal, he contends that (1) the trial court violated his constitutional "right to present a defense" by ruling that he could not stand to show the jury his height without being called as a witness, (2) his trial counsel failed to provide him with constitutionally sufficient representation, and (3) the court erred by ordering Newbern to pay supervision fees as a condition of his community custody. Finding no merit to his constitutional and evidentiary contentions, we affirm his conviction. However, we remand to the superior court with instructions to strike the discretionary supervision fee.

I

On December 14, 2017, J.K.[1] sat behind the front counter in the office of his father's towing company. The company, R&R Star Towing, had just wrapped up its monthly, cash-only car auction. J.K. was playing with his phone and

[1] J.K. is a juvenile. Hence, we refer to him by his initials.

discussing baseball with the tow dispatcher, Brian Solak. The office was well lit with natural light as it was a clear day and the windows were unshaded.

Around noon, two men walked into the office and asked about buying a car. Solak told them that they had missed the auction that day, but that there would be another auction in January.

One of the men then drew what appeared to be a gun and pointed it at J.K. "[G]ive me the fucking cashbox," the gunman said before turning the gun on Solak. The other man then approached Solak and also demanded the cashbox, which Solak relinquished to the robber. The men then retreated back through the office's front door and "took off."

Meanwhile, one of R&R Star's tow truck drivers, Levi Harless, was working in the adjacent tow yard preparing to transfer the auctioned cars to their new owners. Harless heard the office door rattle and saw two men exit the office and run past him. One was concealing something as he ran, and Harless guessed that it was the auction's cashbox.

Harless gave chase. He watched the fleeing men get into an "[o]lder white—Oldsmobile car" that "[h]ad distinctive rust marks on it." Harless continued his pursuit but gave up when he realized that he would not be able to catch them. He met responding police officers and gave them a description of the vehicle and the men. The three witnesses, all Caucasian men, had observed that both the robbers were African-American men.

Soon thereafter, police officer Paul Bryan pulled over a car that matched the description given by Harless, inside of which sat three African-American

men.[2] One of the men, Newbern, fled on foot. After a brief chase, the officer apprehended him.

Police then drove J.K. to where Officer Bryan had detained Newbern. They pulled Newbern from the police car so that J.K. could see him and asked J.K. if Newbern was one of the robbers. J.K. identified Newbern as the gunman. Harless had followed J.K. in his tow truck, and he identified Newbern as the man who had not been carrying the cashbox.

The State charged Newbern with robbery in the first degree. At trial, J.K. and Solak identified Newbern as the gunman, while Harless identified him as the robber who had not been carrying the cashbox.

Newbern argued that the witnesses had mistakenly identified him as one of the robbers. Newbern supported his theory by noting discrepancies between the witnesses' descriptions of the gunman and Newbern's actual appearance. For example, J.K., Solak, and Harless all testified that both robbers were about six feet tall with the gunman slightly shorter than the other robber. However, Newbern is only five feet four inches tall.

Newbern chose not to testify. However, his attorney requested that Newbern be allowed to "just stand up, physically, because there's so much about the defendant's appearance that is at stake here. The jury can see for themselves whether he's a tall person or a short person . . . . It's non-testimonial. It's similar to O.J. trying on the glove, in my opinion." The court responded that

[2] The vehicle was a Buick, not an Oldsmobile as Harless had described, but it had the same distinctive marks. Officer Bryan, a former member of an auto theft task force, testified at trial that the two cars are "similar style type vehicles."

"[t]he case law talks about the state not being able to do exactly this sort of thing. That's not evidence."

Later, after Newbern's last planned witness testified, the court reiterated that "you can't argue something about the defendant's demeanor or characteristics that may have been seen by the jury but weren't ever actually introduced into evidence. So I just want to make sure you are comfortable you have the evidence you think you need." Newbern's attorneys had considered the possibility of calling another witness to testify about Newbern's height. However, because Brian Jorgensen, a police detective called by the State, had testified to Newbern's true height on cross-examination, the attorneys decided that they had established a sufficient evidentiary record to advance Newbern's argument. Nevertheless, in a colloquy with the court, one of Newbern's attorneys asserted that he still wished to delay resting Newbern's case until the next morning so that he could look for case precedent to support his belief that Newbern could stand to show the jury his height. The judge agreed and excused the jury for the day.

The next day, Newbern's attorney reported that he "did not find any case law that says that I can do that physical demonstration with my client." He also noted that the court had already ruled "based on case law that [the court] know[s] does exist that says that you can't do certain things, or certain things cannot be argued." The attorney and the court then confirmed that the record reflected the detective's testimony that Newbern was five feet four inches tall and then continued on to other business.

At the trial's conclusion, the jury found Newbern guilty of robbery in the first degree. The court subsequently imposed a standard range sentence of 50 months of confinement. The court also imposed 18 months of community custody following confinement. It further imposed the mandatory $500 victim penalty assessment. The court found that Newbern was indigent and stated that it would "waive all other nonmandatory fees and costs." Nevertheless, the court's written order made payment of "supervision fees as determined by [Department of Corrections]" a condition of Newbern's community custody.

II

Newbern first contends that his constitutional "right to present a defense" was denied when the court prevented him from standing before the jury to demonstrate his height. This evidentiary ruling was error, he avers, because standing to show his height would have been nontestimonial demeanor evidence, something he believes case authority permits him to present. The State retorts that the court properly exercised its discretion and that Newbern's "right to present a defense" was not violated because Newbern's height was admitted into evidence through a witness' testimony, and Newbern was able to argue his misidentification theory to the jury. The State has the better argument.

The Sixth Amendment to the United States Constitution and article 1, section 22 of Washington's constitution guarantee a defendant's rights to compulsory process and to confront the witnesses against him. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. "Courts and litigants often refer to these rights, collectively, as the 'right to present a defense,' although this phrase does

not appear in our state or federal constitutions." State v. Bedada, No. 79036-6-I, slip op. at 6 n.2 (Wash. Ct. App. May 11, 2020), https://www.courts.wa.gov/opinions/pdf/790366.pdf (citing State v. Arndt, 194 Wn.2d 784, 789, 453 P.3d 696 (2019)).

As our Supreme Court has explained, appellate contentions that trial court evidentiary rulings violated a defendant's constitutional "right to present a defense" are reviewed under a two-step process. Arndt, 194 Wn.2d at 797-98. First, we review the challenged evidentiary rulings under an abuse of discretion standard. See Arndt 194 Wn.2d at 797-812. Then, if necessary, we review de novo whether such rulings violated the defendant's constitutional "right to present a defense." See Arndt 194 Wn.2d at 797-812.

A

Before considering Newbern's constitutional contention, we first address his argument that the trial court abused its discretion by not allowing him to stand for the jury to observe his height. Because the Supreme Court has advised against allowing a jury to consider evidence outside sworn testimony and admitted exhibits, we conclude that the court did not abuse its discretion.

"We review a trial court's decision to exclude evidence for abuse of discretion." State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). A trial court has only abused this discretion if its decision is "'manifestly unreasonable or based on untenable grounds or untenable reasons.'" State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). A decision is manifestly

unreasonable if it is "'outside the range of acceptable choices, given the facts and the applicable legal standard.'" Dye, 178 Wn.2d at 548 (quoting Littlefield, 133 Wn.2d 39 at 47). Courts must "exercise reasonable control" over the presentation of evidence so as to make it "effective for the ascertainment of the truth" and to "avoid needless consumption of time." ER 611(a).

Our Supreme Court has expressed doubts about the appropriateness of a trial court allowing a jury to consider nontestimonial demeanor evidence. State v. Barry, 183 Wn.2d 297, 305 n.4, 352 P.3d 161 (2015). In Barry, the Supreme Court stated that "both parties and courts would be well advised to avoid drawing the jury's attention to subject matter outside the scope of admitted exhibits and the testimony of witnesses." 183 Wn.2d at 305 n.4. While this admonition falls short of a command to bar the admission of such evidence, it plainly demonstrates that barring evidence that is neither testimony nor an admitted exhibit is well within the range of acceptable choices for a Washington trial court.

Herein, the superior court properly exercised its discretion by not allowing Newbern to stand for the jury. Newbern sought to allow the jury to consider something beyond either the testimony of witnesses or the admitted exhibits. The court's decision to bar this was within its range of acceptable choices given existing case authority. Barry, 183 Wn.2d at 305. Furthermore, given that Newbern's height had already been testified to by Detective Jorgensen, we view the trial court's decision not to permit Newbern to stand before the jury as a proper exercise of reasonable control over the presentation of evidence so as to

make it "effective for the ascertainment of the truth" and to "avoid needless consumption of time." ER 611(a)

Nevertheless, Newbern avers that the trial court's decision was unreasonable, asserting that case authority supports his contention that the court should have allowed him to stand and present his height as nontestimonial demeanor evidence. He refers us to State v. Clark, 156 Wash. 543, 287 P. 18 (1930), to support this contention. Therein, the defendant argued on appeal that he had been forced to be a witness against himself when the trial court compelled him to stand and approach the testifying witness to be identified. Clark, 156 Wash. at 547. The Supreme Court disagreed and held that the privilege against self-incrimination does not extend to being made to stand for identification. Clark, 156 Wash. at 547-48.

Newbern contends that this demonstrates that the State may compel a defendant to present his physical traits as nontestimonial demeanor evidence, and so it follows that the court should allow a defendant to choose to present such evidence. Newbern is wrong. The court's purpose in forcing Clark to stand was to allow the witness to identify him in testimony on the record. Clark, 156 Wash. at 547-48. The evidence for the jury to consider was not Clark's appearance itself but, rather, the witness's testimony. Clark, 156 Wash. at 547-48. Thus, the opinion does not support Newbern's contention on appeal.[3]

[3] Newbern also references State v. Pitmon, 61 Wn.2d 675, 379 P.2d 922 (1963), to support his contention. In that case, as in Clark, the defendant was made to stand for the purpose of aiding in the witness's identification of him, which was memorialized in testimony on the record. Pitmon, 61 Wn.2d at 677. Pitmon no more supports Newbern's contention than does Clark.

The superior court reasonably exercised its discretion and committed no error.[4]

B

Having established that the trial court did not abuse its discretion, we now must determine whether the court's ruling violated Newbern's "right to present a defense." Because Newbern's height was properly admitted into evidence through witness testimony and because Newbern was permitted to rely on that evidence to argue to the jury that he had been misidentified as the gunman, his "right to present a defense" was not violated.

We consider de novo the question of whether a trial court's otherwise valid evidentiary ruling deprived a defendant of the "right to present a defense." Arndt, 194 Wn.2d at 797. "'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). What has come to be called the "right to present a defense" is not absolute, and courts may still place reasonable restrictions on what they admit as evidence at trial. State v. Donald, 178 Wn. App. 250, 263-64, 316 P.3d 1081 (2013). In determining whether the right has been violated, "the State's interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted." Arndt, 194 Wn.2d at 812. If an

[4] For the same reasons, we also reject Newbern's contention that the court erred in not allowing Newbern to show the jury that he was missing a pinky finger. The court's decision to not direct the jury's attention to facts outside the testimony of witnesses or admitted exhibits was consistent with appellate case authority. Barry, 183 Wn.2d at 305.

evidentiary ruling prevents a defendant from presenting evidence that is the entirety of the defendant's case, then that evidence's probative value will outweigh nearly any state interest. Jones, 168 Wn.2d at 723-24. However, if a defendant is still able to offer relevant evidence to support his theory of the case, then his interest in the admission of particular information will be comparatively low. Arndt, 194 Wn.2d at 814.

Herein, while not permitted to present it in the form he preferred, Newbern was permitted to present all of the facts he sought to have admitted to support his theory that he was mistakenly identified.[5] This included his height, evidence of which was properly admitted in the form of sworn testimony on the record. The evidence on the record of his height was sufficient for Newbern's counsel to rely upon it in arguing to the jury that Newbern had been wrongly identified as the gunman. Thus, Newbern's "right to present a defense" was plainly not violated when the court denied him the opportunity to stand and show the jury his height.[6] Arndt, 194 Wn.2d at 814.

III

Newbern next argues that he was denied constitutionally effective counsel. This is so, he contends, "[t]o the extent defense counsel contributed to

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[5] We note that after it first ruled that Newbern could not stand before the jury, the court asked Newbern's attorneys if they were confident that they had established a sufficient evidentiary record and offered the defense the opportunity to call more witnesses. Newbern's attorneys confirmed that they believed that they had the record they needed and declined to present any additional evidence.

[6] For similar reasons, we reject Newbern's contention that his "right to present a defense" was violated when the court did not allow him to show the jury his hand. The court gave Newbern ample opportunity to call additional witnesses, who could have testified about Newbern's missing finger. It was Newbern's choice not to call any witnesses to testify about his physical characteristics, so it cannot be said that the trial court denied him the "right to present a defense" with evidence about his missing finger.

[the court's error in excluding demeanor evidence] by not citing the relevant authorities supporting admission." We reject this contention. Newbern cannot prove that he suffered prejudice from his counsel's alleged contribution to the trial court's ruling because the court committed no error.

Both the United States Constitution and the Washington State Constitution guarantee criminal defendants the assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art I, § 22. The United States Supreme Court has recognized that the guarantee of assistance of counsel is, in fact, a "'right to the effective assistance of counsel.'" Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

Contentions of constitutionally ineffective assistance of counsel present mixed questions of law and fact that we review de novo. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010). We base our determination on the record established in the trial court. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). "[T]he defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." State v. Estes, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017) (citing Strickland, 466 U.S. at 687).

While courts often determine whether a defense attorney's performance was deficient before addressing prejudice,

> there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in [that] order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether

> counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697.

To establish that any errors made by his counsel were prejudicial, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Instead, Newbern must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 694).

> "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226; [State v.]Garrett, 124 Wn.2d [504,]519[, 881 P.2d 185 (1994)]. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like." Strickland, 466 U.S. at 694-95.

State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Newbern cannot establish that he was prejudiced by his counsel's failure to present the trial court with the Clark and Pitmon decisions. As explained above, neither case supports Newbern's argument that the trial court should have allowed him to stand for the jury. Thus, his contention that he was deprived

of his right to constitutionally effective assistance of counsel fails. Estes, 188 Wn.2d at 457-58 (citing Strickland, 466 U.S. at 687).

IV

Finally, Newbern contends that the sentencing court improperly imposed "supervision fees" as a condition of community custody. We agree. This court has already considered a nearly identical situation in State v. Dillon, 12 Wn. App. 2d 133, 456 P.3d 1199 (2020). We therefore follow Dillon and remand to the superior court to strike Newbern's obligation to pay the supervision fees. 12 Wn. App. 2d at 152 (citing State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007 (2019)).

Affirmed in part and reversed in part.

WE CONCUR:

NIELSEN KOCH P.L.L.C.

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