

11.11. Exhibition of a Person’s Appearance, Condition, or Capability¹

When a person’s appearance, condition, or capability is relevant to an issue in a proceeding, the appropriate aspect of the person’s appearance, condition, or capability may be exhibited to the trier of fact, provided the proffered exhibition is probative and the probative value in exhibiting the person’s appearance, condition, or capability is not outweighed by undue prejudice.

Note

This rule is derived from long-standing Court of Appeals precedent (*Harvey v Mazal Am. Partners*, 79 NY2d 218, 223-226 [1992] [exhibiting brain-damaged plaintiff, who was not sworn as witness, and asking him questions to show his condition]; *de Baillet-Latour v de Baillet-Latour*, 301 NY 428, 433-434 [1950] [in annulment action wife was allowed to exhibit conspicuous scars on her body, the existence of which her husband had denied]; *Clark v Brooklyn Hgts. R.R. Co.*, 177 NY 359 [1904] [no error present where trial court permitted the plaintiff, who had been injured in a collision, to leave the witness stand assisted and to exhibit himself to the jury in the act of writing his name and taking a drink of water as the display was designed to illustrate the plaintiff’s testimony that he was afflicted by a tremor and could use his hands only with difficulty]; *Mulhado v Brooklyn City R.R. Co.*, 30 NY 370, 372 [1864] [exhibition of injured arm “tended to make the description of the injury more intelligible”]).

In *Harvey*, the Court was concerned that an exhibition of a party’s injuries “when ill-designed or not properly relevant to the point at issue, instead of being helpful” could “mislead, confuse, divert or otherwise prejudice the purposes of the trial” (*Harvey* at 224). In that instance, the Court instructed that “the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice” (*id.*). The trial court in *Harvey* permitted the plaintiff, who was not sworn, to appear before the jury and answer a series of questions that demonstrated the plaintiff’s loss of cognitive abilities. In deciding to permit the questioning, the trial judge noted that she had balanced the value of showing the jury the plaintiff’s injuries against the potential for prejudice and emotional response. The Court of Appeals held that this balancing was without question an exercise of judicial discretion, and there was no basis to disturb that decision. “Although . . . the preferred practice would have been for the Trial Judge to examine the plaintiff in camera, outside the presence of the jury, before

permitting the questioning,” the failure to do so did not constitute an abuse of discretion in *Harvey* (*id.* at 224).

Critically, as stated in the rule, before a person’s appearance, condition, or capability may be exhibited, that appearance, condition, or capability must be shown to be “relevant” to an issue in the proceeding (*see* Guide to NY Evid rule 4.01) and probative of the issue (*People v Rodriguez*, 64 NY2d 738, 741 [1984]).

In *Rodriguez*, for example, the eyewitness apparently did not describe the perpetrator as having tattooed hands and the defendant requested to display his tattooed hands to the jury or to have his counsel testify to the appearance of his hands four days after the theft. The court properly denied the request “inasmuch as defendant offered no proof regarding the presence of the tattoos on the date in issue” (*id.* at 741). *Rodriguez* also held that the court properly refused “to allow defendant to testify on this point, which testimony clearly would implicate his credibility, without being subject to cross-examination concerning his past convictions” (*id.*; *see People v Robinson*, 100 AD3d 934, 935 [2d Dept 2012] [similarly holding that the defendant “failed to lay a proper foundation” to show scars on his torso and abdomen, “offering no proof that the scars on his torso and abdomen existed on the date of the alleged rape”; and that the court’s denial of his application to testify about his scars was also properly denied “where he conditioned his application upon the ability to testify without being subject to cross-examination”]).

A defendant, however, is not required to lay a foundation to exhibit his or her appearance or condition by personally testifying; the defendant may present a witness or exhibits that properly lay the foundation (*People v Shields*, 81 AD2d 870, 871 [2d Dept 1981] [where the rape victim did not mention a 14- to 16-inch scar on the defendant’s abdominal region, the court erred in not permitting the defendant’s sister to testify along with hospital records to prove that the defendant had been scarred prior to the date in question]). Once the proper foundation is laid, “it would be proper to permit the defendant to exhibit the [relevant condition, such as tattoos] to the jury without being subject to substantive cross-examination” (*People v Scarola*, 71 NY2d 769, 778 [1988]).

A defendant’s request to provide a jury with a voice exemplar may raise concerns of “trustworthiness” (*Scarola*, 71 NY2d at 777). In *Scarola*, each defendant sought “to refute the complainant’s identification by demonstrating to the jury that he had a speech impediment. . . . The relevance of the evidence they offered was not in what they would say, but in how they would say it” (*id.* at 776). The “trial courts did not abuse their discretion in denying defendants permission to give the proposed exemplars. . . . [T]he foundation for the admission of the evidence . . . did not rule out the possibility that defendants could feign the existence of a speech defect” (*id.* at 778).

Requiring a defendant to produce real evidence may raise a question about whether a defendant's Fifth Amendment privilege against compelled self-incrimination has been violated (*People v Havrish*, 8 NY3d 389, 391 [2007] [the Fifth Amendment privilege was violated by a court's order of protection that directed the defendant to surrender an unlicensed handgun]).

Normally, however, the Fifth Amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. Similarly, a defendant can be ordered to participate in a lineup or to provide a handwriting exemplar [or to submit to] field sobriety tests conducted during a traffic stop [or to] display his upper body tattoos" (*id.* at 393 [internal quotation marks and citations omitted]; *see People v Hill*, 82 AD3d 1715, 1716 [4th Dept 2011] ["The Fifth Amendment privilege against self-incrimination does not preclude a defendant from being required to reveal the physical characteristics of his or her body"]).

Even where the People introduced photographs of a defendant's upper body tattoos that contained words evincing hate as evidence of the defendant's motive for committing a hate crime, there was no violation of the Fifth Amendment privilege (*People v Slavin*, 1 NY3d 392 [2004]). "The tattoos were physical characteristics, not testimony forced from his mouth (*see Schmerber v California*, 384 US 757, 764-765 [1966]; *People v Berg*, 92 NY2d 701, 704 [1999]). However much the tattoos may have reflected defendant's inner thoughts, the People did not compel him to create them in the first place" (*id.* at 394-395).

¹ In May 2023, the rule was amended to add the proviso and to amplify the Note.