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Division II  
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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JOHN ALLEN BOOTH, JR.,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Consolidated Brief**

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## I. ISSUES

- A. Did the trial court abuse its' discretion when it denied Booth's CrR 7.8(b) motion?
- B. Did the trial court err when it limited Booth's testimony regarding his confidence in his trial attorney?
- C. Did the trial court err when it denied Booth's motions to compel discovery?
- D. Did the trial court abuse its discretion when it denied Booth's motion to reopen the record after Booth had rested and the trial court had issued its oral ruling?
- E. Did Booth receive effective assistance from his counsel throughout the CrR 7.8(b) hearing?
- F. Did the trial court improperly impose legal financial obligations upon Booth in violation of the Eighth Amendment of the United States Constitution and Article I, Section 14 of the Washington State Constitution?

## II. STATEMENT OF THE CASE

### A. SUBSTANTIVE FACTS OF THE UNDERLYING CASE.

In the summer of 2010, Booth was the muscle behind an illicit drug business involving an associate, Robert (Robbie) Russell. *State v. Booth*, 2014 Wash. App. LEXIS 1966, 2; 2014 WL 3970707. Mr. Russell dealt methamphetamine, and Booth collected debts arising from Mr. Russell's business. *Id.*

On August 8, 2010, Mr. Russell, Booth, and Ryan McCarthy went to David West's home to discuss a drug debt with Mr. West. *Id.*

Mr. Russell spoke with Mr. West privately. *Id.* While this occurred, Booth spoke with Mr. West's family, including inquiring about Mr. West's grandchildren in a manner that made Mr. West's daughter and son-in-law uncomfortable. *Id.* After Mr. Russell, Booth, and Mr. McCarthy left, Mr. West looked scared and ordered his daughter to leave. *Id.*

Approximately a week later, Booth and Mr. McCarthy made a return visit to the West residence. *Id.* This time, Booth spoke privately with Mr. West. *Id.* Booth collected drugs and money from Mr. West and left the residence. *Id.*

Booth and Mr. McCarthy paid the West residence a visit for a third time on August 20<sup>th</sup>, just after midnight. *Id.* at 3. Mr. West, his teenage son, Mr. West's longtime girlfriend Denise Salts, and two acquaintances, Tony Williams and John Lindberg, were also at the residence. *Id.* at 3-4; Supp. CP Aff PC.<sup>1</sup> Booth and Mr. West discussed Mr. West's outstanding debt privately outside. *State v. Booth* at 3. When Mr. West returned inside, he looked stressed and

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<sup>1</sup> The State realized when reading this Court's unpublished opinion from Booth's direct appeal that it incorrectly identified Denise Salts as John Lindberg's girlfriend. The undersigned Deputy Prosecuting Attorney wrote the brief in the direct appeal, reading the 1800-page transcript, and has handled Booth's two personal restraint petitions, COA No. 45708-3-II, and Supreme Court No. 92833-9. Denise Salts was David West Sr.'s longtime girlfriend and resided at the residence where the murders occurred. The State is designating the Affidavit of Probable Cause to provide a factual basis to correct this mistake.

asked Mr. Lindberg if he had any money. *Id.* Mr. Lindberg informed Mr. West he had \$100. *Id.* Mr. West retreated to the master bedroom and Mr. Lindberg followed to let Mr. West know he had more money but did not want Booth to know. *Id.*

Mr. West grabbed a shotgun, walked back to the kitchen, pointed the gun at the table, cocked it, and ordered Booth and Mr. McCarthy out of his house. *Id.* at 4; Supp. CP Aff PC. The confrontation ended with Booth fatally shooting Mr. West, Mr. Williams, and Mr. West's teenage son. *State v. Booth*, at 4. Booth also shot Ms. Salts in the head, but she survived. *Id.* Mr. Lindberg survived by hiding in the bathroom. *Id.* Mr. Lindberg and Ms. Salts identified Booth as the shooter. *Id.*

Booth fled the area to Spokane. *Id.* Police tracked Booth to the residence of a friend, Eric Zacher. *Id.* at 4-5. Booth was arrested at Mr. Zacher's neighbor's house. *Id.* at 5.

The police found out Booth had attempted to circumvent the phone monitoring system at the Lewis County Jail. *Id.* Police listened to a phone call where Booth made references leading police to believe he was discussing a firearm that was still located in the residence where he was arrested in Spokane. *Id.* The police returned

to Mr. Zacher's neighbor's residence and located the firearm in the attic. *Id.* The gun was later identified as the murder weapon. *Id.*

Ultimately, Booth was convicted of one count of Murder in the Second Degree, two counts of Murder in the First Degree, one Count of Attempted Murder in the First Degree, one count of Attempted Extortion in the First Degree, and one count of Unlawful Possession of a Firearm in the First Degree. *Id.* at 1; CP 154-62. Booth was sentenced to life without the possibility of parole as a persistent offender. CP 154-62. This Court affirmed Booth's convictions. *State v. Booth.*

#### **B. FACTS FROM THE CrR 7.8(b) MOTION AND HEARINGS.**

On December 3, 2012, Booth filed a CrR 7.8(b) motion to vacate his judgment and sentence. CP 163-200.<sup>2</sup> Booth argued a number of different points in his written motion. *Id.* Booth's main contention was the State, both the prosecutors and the police, were illegally monitoring his communications with his legal team. *Id.* Booth also alleged Sheriff's officers searched his cell and took his legal papers. CP 165. Booth alleged his legal mail was read before the Lewis County Jail would send it out. *Id.*

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<sup>2</sup> The Clerk's Papers include a subsequent CrR 7.8 (b) motion filed on March 29, 2013, CP 201-20. This motion was transferred to the Court of Appeals and became the subject of Booth's first personal restraint petition, COA No. 45708-3-II.

On June 27, 2013, Booth, through his court appointed counsel, filed a motion to compel discovery. CP 370-76. A second motion to compel was filed pro se by Booth on January 22, 2016. CP 239-44. On April 2016, the trial court heard arguments on the second motion to compel. RP 6-17.<sup>3</sup> Booth's attorney presented Booth's argument. RP 8, 11, 14-6. The trial court denied the motion, but told Booth's attorney he could raise any additional request in respect to discovery in a timely fashion. RP 17.

On May 2, 2016, the trial court began hearing testimony procured by Booth in an attempt to substantiate the claims Booth made in his CrR 7.8(b) hearing. RP 22-239. The hearing lasted for three days, Booth called 27 witnesses, and testified on his own behalf. See RP.

Don Blair, a local defense attorney and former Lewis County Deputy Prosecutor, explained there were issues regarding the lack of soundproofing and the attorney-client visiting booths at the Lewis County Jail (Jail). RP 45-46, 48-49. According to Mr. Blair, signage really was not necessary to inform people using the booths they were not soundproof because once you were using them, "[y]ou can

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<sup>3</sup> The State will cite to the 603 page continuously paginated three Volume verbatim report of proceedings as RP. Any other verbatim report of proceedings will be cited with notation as to the date of the hearing.

immediately tell they are not soundproof.” RP 49, 52, 74. Once, Mr. Blair saw one of Booth’s attorney’s meeting with Booth and knocked on the door of the booth and let him know that Mr. Blair could hear what the attorney was discussing with Booth. RP 50. Mr. Blair also was aware, for security purposes, corrections officers would be stationed outside the booths. RP 59.

Mr. Blair also explained he has not had a problem talking to his clients in the jail, and has been in private practice since around 2005 to 2006. RP 73. Mr. Blair has never known or been aware of any prosecutor or detectives listening outside the attorney-client booths at the Jail. RP 78. Mr. Blair has never had a case, as a defense attorney or as deputy prosecutor where the corrections staff has shared information with investigators or prosecutors they have overheard between an attorney and defendant. RP 80.

Detective Sergeant<sup>4</sup> Dustin Breen of the Lewis County Sheriff’s Office (LCSO) supervised the detectives who investigated Booth’s case. RP 402-03. The detectives at the time were Detectives

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<sup>4</sup> The State will refer to the LCSO investigative staff by their rank at the time of Booth’s initial investigation in an attempt to eliminate confusion. Captain Breen is called Captain Breen and Detective Sergeant Breen during the hearing. Daniel Riordan is noted to be a sergeant now but called Detective Riordan throughout the hearing because he was a detective at the time of Booth’s initial investigation and trial. Similarly, Bruce Kimsey’s rank has also changed, and others have, such as Tom Callas and Ross Kenepa are no longer with LCSO.

Kenapa, Riordan, Kimsey, McGinty, and Callas. RP 404. Detective Sergeant Breen tasked the different detectives with assignments and gave himself the assignment of monitoring Booth's phone calls from the Jail. RP 371-72, 404-05.

Detective Sergeant Breen was able to listen to all of Booth's conversations that were not to an attorney related number. RP 406. Detective Sergeant Breen never inadvertently listened to any phone calls between Booth and his attorney. RP 407. No one on the law enforcement side of the LCSO listened to phone calls between Booth and his attorney. RP 407. Detective Sergeant Breen did not recall any phone calls Booth made to a private investigator. *Id.* No one listened to phone calls between Booth and his private investigator. RP 408.

Detective Sergeant Breen had several detectives in the courtroom during various hearing throughout Booth's case. RP 414. Detective Sergeant Breen tasked Detective Riordan to sit directly behind Booth. *Id.* Detective Riordan was assigned there as extra security, due to Booth having a tendency to act out, but more so to control the courtroom and people who came into the courtroom. RP 373, 379, 414. Detective Riordan sat between three-and-half and

four-and-half feet behind Booth, in the first pew in the general seating area behind the bar in the courtroom. RP 373-74.

While Detective Riordan sat behind Booth, he did not hear any conversations between Booth and his attorneys. RP 376. Detective Riordan did not attempt to listen to Booth and his attorneys. *Id.* Detective Riordan never looked at any notes written by Booth or his attorney. RP 380. Detective Riordan's focus was on Booth and the courtroom as rear security. RP 381. Detective Riordan was not aware that Booth was concerned Detective Riordan may be listening in on Booth's conversations with his attorney until October 28<sup>th</sup> when Booth told Detective Riordan not to sit behind Booth or Booth would spit on Detective Riordan. RP 376, 378. Booth made good on his threat and spit on Detective Riordan. RP 387. Judge Brosey addressed the issue, and Detective Riordan was not kept in the courtroom for security purposes going forward pursuant to the trial court's directive. RP 379, 415

It was acknowledged throughout the testimony of the administration of the LCSO that attorneys had complained about the noise in the attorney-client visiting booths. RP 143, 149, 151, 166-67, 283-84. Former Sheriff Mansfield, who came into office in 2005, explained a couple years after taking office he became aware of the

issue and over the years, improvements were made to combat the issue. RP 147-51. In order to figure out how much sound could be heard, LCSO brought facilities over and had them do an analysis. RP 309. LCSO put up carpet, sound boarding, handsets, and eventually had locks installed on the inmate side of the doors, which allowed corrections officers to not have to stand outside the visiting booth. RP 153-54, 308-09. All of the aforementioned actions were done with the intention to make people feel more comfortable about their conversations with their attorneys. RP 153-54. There were also notifications posted which informed people the booths were not completely soundproof. RP 309; Ex. 3.

Booth was classified as a maximum security prisoner. RP 284. The classification is based upon Booth's criminal history and incarceration history. *Id.* Booth "wears a red and white uniform, which predicates a mandatory two-man escort any time he is out of his unit. His door does not get opened to his room without two officers there or he is restrained." *Id.* The reasoning behind these precautionary measures is because the Jail classifies Booth as "a threat to the safety and security of the facility." *Id.* Due to Booth's security classification, two officers were required to stand outside his attorney-client booth. RP 285. Kevin Hansen, Chief of the Lewis

County Jail, explained the two officer stand-by had been the policy of the jail since the mid 2000's. RP 282, 286. Chief Hanson explained once the door locks were installed, two corrections officers did not have to stand outside the attorney-client booths. RP 289.

Out of the 13 LCSO corrections officers called, four regularly transported Booth: Officer Harper, Officer West, Officer Sullivan, and Officer Lamping. 98-99, 102, 178-9, 181, 388, 429-30. Officer West explained when the officers initially began transporting Booth down to his attorney-client booth they stood outside the door, they realized they could hear the conversation inside the booth, and moved right away. RP 100-01. According to Officer West he did overhear one conversation between Booth and his attorney:

A. I don't remember exactly how it was said, but Mr. Booth stated that he did kill the kid and the kid had a gun.

Q. Did you confer that information or relay that information to anybody?

A. Nope.

Q. In your capacity, are you required to report anything that you hear like that that could be used against a person?

A. Nope.

Q. Having heard that information, did you report it to anybody?

A. No.

Q. Did you prepare a written report to that effect.

A. No.

Q. Did you discuss it with your colleague that was standing outside the door with you?

A. That I don't recall. I tried to recall. I tried to think about whether I did or not. I don't recall. I know we immediately moved away.

Q. Where did you move to?

A. Down the hall where we couldn't hear any content.

Q. Did you -- do you remember who your colleague was?

A. I do.

Q. And who was that?

A. Curtis Lamping.

RP 101-02. Officer West explained this was the first time he had ever told anyone what Booth had said. RP 104-05.

Officer Lamping similarly explained he heard Booth state "something along the lines of, 'The guy had the gun, so I had to shoot him.'" RP 181. Officer Lamping stated he disclosed this information to none except to ask other transport officers, Harper, Sullivan, and West, if they had heard anything along those lines. RP 181. Officers Harper and Sullivan testified they did not listen to Booth's

conversations between Booth and his attorney. RP 389, 432. Officer Harper did not recall any transport officer talking about hearing Booth talk to his attorney. RP 390. Officer Sullivan did not learn any information from his colleagues, although Officer Lamping told Officer Sullivan he had heard something. RP 435-36.

Corrections Officers Barrett, Engel, Allen, Heppe, and Rodkey worked in the jail while Booth was incarcerated there. RP 196-97, 224, 230, 318, 422. None of the officers overheard any conversations between Booth and his attorney, or Booth and his private investigator. RP 198-99, 226, 232, 326, 425-27.

Corrections Officer Haskins was the classification and compliance officer for the Lewis County Jail. RP 348. Officer Haskins was tasked with listening to all of inmate phone calls, which was over 220 inmates. RP 348. Officer Haskins was specifically tasked by Lieutenant Pea to listen to all of Booth's phone calls for the "safety and security of the facility and for Mr. Booth, [and] the public." RP 350. While monitoring Booth's phone calls, Officer Haskins heard one he realized, while listening to the conversation, was heading towards a legal question. RP 352. Officer Haskins immediately stopped listening to the call, looked up the phone number that was called, it came back to an attorney, informed Lieutenant Pea who told

Officer Haskins to go and let Booth know what had occurred. *Id.* Officer Haskins was also instructed to ask Booth if there were any further phone calls and numbers that needed to be blocked so the situation did not occur again. *Id.*

There was also an issue with the phone system and Booth contacting his private investigator, John Wickert. RP 355, 357, 363-64. John Wickert also owned a bail bonding company in town and inmates at the Jail had to be able to communicate with that number and the jail would not block the number of the bonding company. RP 357, 363. Officer Haskins did put in to have the private investigator number, the number for that business, blocked once Booth did give Officer Haskins the separate number. RP 359-60, 363-64. Officer Haskins did not recall hearing any conversations between Booth and his private investigator. RP 358.

None of the detectives working on Booth's case received any information regarding Booth's conversations with his attorney from staff members of the corrections bureau of the LCSO. RP 89-91, 116, 337, 339, 346, 342, 370-71, 409-11, 419. The detectives did not instruct anyone to listen to Booth's conversations with his attorney or private investigator. RP 91, 100, 343, 369-70, 372. The detectives were not present in the jail when Booth was meeting with his attorney

or private investigator. RP 91, 312-13, 329, 420, 443-44. The detectives did not purposely or inadvertently listen to phone conversations between Booth and his attorney or private investigator. RP 333-35, 372, 407, 420. Further, the prosecutors who worked on Booth's case were not passed any information in regards to conversations between Booth and his attorney or Booth and his private investigator. RP 113, 116, 182-83, 353, 452-53.

Three former inmates of the Lewis County Jail testified. RP 24, 210, 244. Terry Dunnivan stated he could talk with Booth through the walls of the attorney-client booths. RP 244-45, 249-50. Mr. Russell, who the State believed Booth was attempting to collect money for the night of the murders, testified on Booth's behalf. RP 210; *State v. Booth*. Mr. Russell explained he was considered a high-risk offender due to his criminal history which was comprised of drug, assault, and gun offenses. RP 212. Mr. Russell also had prior felony convictions for burglary and theft. RP 222. Mr. Russell testified that when he spoke to his attorney, Mr. Blair, there were two officers outside his booth, and he was concerned they were listening. RP 211-14. According to Mr. Russell he gave his attorney information against Booth, regarding a female, there were two officers outside the booth at the time. RP 220-21.

Robert Maddeus was never actually housed at the Jail, but transported to the Jail from the Thurston County Jail. RP 25-26. Mr. Maddeus was currently residing at Clallam Bay Corrections Center for several felony convictions including Murder in the First Degree. RP 25. According to Mr. Maddeus there were always two corrections officers outside his attorney-client booth. RP 33. Mr. Maddeus could hear what was going on outside the booth and what was occurring in the booths next to him. RP 34-35. Mr. Maddeus stated one of the times he was speaking with his attorney about Robert Russell. RP 32. After Mr. Maddeus finished speaking with his attorney, he was walked back by the corrections officers. RP 32. According to Mr. Maddeus, one of the corrections officers told him Mr. Russell was in one of the other booths, and they had heard Mr. Maddues discussing Mr. Russell. RP 32.

Booth testified on his own behalf. RP 461-513. Booth was housed at the Jail from August 2010 until around December 2011. RP 461; CP 154-62. Booth met with his attorneys more than 50 times during that period. RP 461. Booth stated he was always completely shackled, escorted by two officers, once in the room chained to the stool after removing one of the leg shackles, and the doors to the attorney-client meeting rooms locked. RP 461-63. Booth said he had

two officers posted outside his attorney client meeting room. RP 464. Booth stated he could hear everything that was going on in the other booths, but he then contradicted his statement by stating he was never given any indication that the attorney-client booths were not soundproof. RP 466-67.

Booth explained he realized the officers were outside listening to everything he told his attorneys, so he complained to his attorneys about the officers standing outside the room. RP 467-68. Booth also said he saw the detectives outside the attorney-client booth, naming Detective Riordan specifically. RP 469. Booth alleged the State gained information from listening in to these conversations. RP 471-73.

Booth explained Officer Haskins told him he had listened to his attorney phone call. RP 474-75. Booth said he only found out about Haskins listening after asking Officer Haskins if he had ever listened to any of his attorney conversations because Booth was in the process of grieving over the jail listening to his private investigator conversations. RP 475-77. According to Booth, Officer Haskins refused to stop recording and listening to Booth's conversations with his private investigator. *Id.*

Booth said Detective Riordan was sitting behind him in the courtroom to listen in on Booth's conversations with his attorney. RP 490. The surveillance of his attorney conversations was why Booth told Detective Riordan if Detective Riordan continued to sit behind Booth in court Booth would spit in his face. RP 490-92.

Booth explained when he was conferring with his attorney and private investigator about the jury questionnaires Officer West, was inside the meeting room on the fourth floor of the courthouse. RP 498. This made Booth feel as if he could not have a private consultation with his attorney. RP 499. Booth also stated the corrections officers who transported him commented all the time to Booth about the substance of the conversations between Booth and his attorney. RP 499-500. Booth does acknowledge that no one sat behind him during jury selection and throughout the trial. RP 504.

The trial court denied Booth's motion. RP 560; CP 357. The trial court found the evidence did not support the allegation that the corrections staff had a pattern of eavesdropping. RP 546-49. The trial court found there was no evidence that if anything was overheard that it was passed on or used in Booth's prosecution. RP 550. The trial court was not persuaded that Booth had lost confidence in his attorney. RP 550.

The trial court found that Officer Haskins, upon realizing it was an attorney phone call, immediately terminated the call, informed his supervisor, and made sure the number was blocked in the system to prevent future recordings. RP 551-52. The trial court also found there was no evidence anything was overheard between Booth and his private investigator, nor if it was, did that information get produced and used at trial. RP 558-59. The trial court held Booth was not denied due process by anything done by the corrections department. RP 558, 560. Booth timely appeals. RP 69.

### **C. FACTS FROM THE LEGAL FINANCIAL OBLIGATION MOTIONS AND HEARINGS.**

Booth had a number of prior cases he owed legal financial obligations on in Lewis County, Case numbers 96-8-00501-1, 98-1-00162-8, 99-1-00565-6, 03-1-00714-4, 04-1-00325-8, and 10-1-00845-2. CP 1-8, 23-30, 78-86, 89-96, 154-62; 2CP 11<sup>5</sup>. Booth filed a motion to terminate legal financial obligations on these cases on January 26, 2016. CP 247-53. Booth argued the trial court must vacate all of his legal financial obligations because they were

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<sup>5</sup> Although this is a consolidated appeal, the State has two sets of Clerk's papers starting at '1'. The second set was sent on or about 12/17/17 for a designation on Lewis County Case No. 96-8-00501-1. The State will cite to this set of Clerk's papers as 2CP, as it plans to do supplemental Clerk's papers which it will have to cite to in briefing below.

imposed in violation of the Eighth Amendment's clause prohibiting excessive fines. RP 570-72, 574; CP 247-53.

The State conceded jurisdiction had expired on the 96-8-00501-1, 98-1-00162-8, and 99-1-00565-6 cases and proposed orders indicating the legal financial obligations were expired and could not be enforced, which the trial court signed. RP 566-67, 576; CP 13, 68; 2CP 13. For the remaining matters, the State asked the trial court to conduct an inquiring regarding Booth's present and future ability to pay, acknowledging it would necessarily be that Booth did not have either as he was doing a life without the possibility of parole sentence. RP 568-69. The State therefore requested the trial court impose only the mandatory legal financial obligations and restitution that had already been ordered in the 10-1-00485-2 case. *Id.* The trial court agreed and signed the State's proposed orders. RP 572-73, 575-77; CP 87-88, 97-98, 359-60. Booth timely appeals. CP 14.

The State will supplement the facts as necessary throughout its arguments below.

### III. ARGUMENT

#### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED BOOTH'S CrR 7.8(b) MOTION CLAIMING THE STATE HAD VIOLATED HIS CONSTITUTIONAL RIGHT TO COUNSEL BY INTRUDING UPON HIS PRIVILEGED COMMUNICATIONS WITH HIS DEFENSE TEAM.

Booth argues the trial court abused its discretion when it denied his CrR 7.8(b) motion. Booth alleged the State had violated his constitutional right to counsel, and his right to due process, by eavesdropping on privileged communications with his defense team. Booth argues this conduct was egregious, pervasive, intentional, and denied him the ability to have a confidential relationship with his attorney and private investigator. Booth's claims are baseless, the evidence does not support them, and the trial court's denial of his motion was not on untenable reasons. The Court should affirm.

##### 1. Standard Of Review.

A trial court's determination of a CrR 7.8(b) motion is reviewed for abuse of discretion, and the findings of fact that support this decision are reviewable for substantial evidence. *State v. Blanks*, 139 Wn. App. 543, 548, 161 P.3d 455, 457 (2007); *citing State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, *review denied*, 132 Wn.2d 1002 (1997), *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006); *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945

P.2d 228 (1997). A trial court abuses its discretion if “no reasonable judge would have ruled as the trial court did.” *State v. Arredondo*, 188 Wn.2d 244, 256, 394 P.3d 348 (2017) (internal citations and quotations omitted). If the decision is unreasonable, or based upon untenable grounds or reasons the reviewing court will reverse. *Arredondo*, 188 Wn.2d at 256.

Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992).

Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *Lohr*, 164 Wn. App. at 419. Findings not assigned error become verities on appeal. *Id.* at 418.

A trial court’s determination that a defendant received effective representation from his or her attorney is a mixed question

of fact and law and is reviewed de novo. *State. v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

## **2. The Trial Court's Findings Of Fact Are Supported By Substantial Evidence.**

Booth assigned error to 19 Findings of Fact, but only specifically mentions 13 within his brief (one, 1.29 was not assigned error). Booth casually states Findings of Fact 1.1, 1.5, 1.7, 1.8, 1.9, 1.10, 1.14, 1.16, 1.17, 1.19, and 1.22 are not supported by the record because the attorney-client booths are not soundproof. Brief of Appellant 42. The State will address 1.1, 1.8, and 1.14 throughout its briefing. The corrections officers and detectives all testified they did not eavesdrop nor were there instructions to eavesdrop on conversations between Booth and his attorney. RP 90-91, 100, 112, 160, 175, 194, 199, 226, 231-32, 262, 299-94, 312-13, 326, 329, 333-34, 343, 369-72, 380, 389-90, 407-08, 414, 419-20, 427, 432, 442-44. There was nothing intentionally done by the prosecutor, corrections, or detectives, to unlawfully compromise Booth's case. *Id.* Findings 1.1, 1.8, and 1.14 are all supported by substantial evidence.

Officer Sullivan testified he "was never right outside of his room. It was always at the other end of the hallway." RP 432. Officer Allen similarly explained they stayed in the hallway. RP 231. Officer

West explained they could hear conversations when they first began standing outside of the door, so they moved away right after that. RP 100-01. This testimony supports Finding of Fact 1.5.

Officer West and Officer Lamping discussed Booth's raised voice when he made the statement about the gun that the officers heard. RP 113, 115, 190-91. Officer West explained the corrections officers moved away and stood further down the hall after that so they would not hear any conversations between Booth and his attorney. RP 100-01. This supports Finding of Fact 1.7.<sup>6</sup>

The deputy prosecutors working on the case never received any information from the Lewis County Jail, or any other law enforcement, about any statements between Booth and his attorney overheard by corrections staff. RP 104-05, 187, 353, 455. This supports Finding of Fact 1.9.

Officer West, Officer Lamping, and Officer Harper testified they did not say anything about what occurred in the attorney-client booths outside of the other transport officers, including not speaking of it to family or friends. RP 101, 103, 181-83, 392. This is the

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<sup>6</sup> With the exception that the State believes there was only one occasion that was overheard by the officers, they just remembered what Booth said slightly different.

equivalent of a self-imposed gag order as the trial court termed it and supports Finding of Fact 1.10.

Mr. Hunko, Booth's attorney, testified he was able to communicate with Booth, was unaware of any eavesdropping issues, and could not state as to what effect it had on Booth, but Mr. Hunko was not aware of any effect. RP 134-36. Mr. Hunko's testimony supports Finding of Fact 1.16.

Findings of Fact 1.17 is a credibility determination from the trial court.

Lieutenant Pea testified the jail went out of its way to make sure they knew if a number an inmate was trying to reach belonged to an attorney so the number would be marked confidential. RP 268. An attorney who provided their number to the jail would have it blocked from being recorded. RP 268-69. This supports Finding of Fact 1.19.

When Mr. Haskins reported to his supervisor he had heard a snippet of Booth's attorney phone call, Officer Haskins reported it was an attorney phone call and the number needed to be blocked, he did not report the substance of the call. RP 364-65. This supports Finding of Fact 1.22.

There was only testimony from Officer West regarding hearing one statement Booth made in the jail. This would support Finding of Fact 1.26. Further, Finding of Fact 1.29 can be gleaned by Mr. Hunko's testimony that Mr. Hunko did not do anything different.

The remaining Findings of Fact Booth assigns error but does not cite to and argue should be considered verities on appeal. *Lohr*, 164 Wn. App. at 419. Therefore, Findings of Fact 1.21, 1.23, 1.24, 1.25, 1.31, 1.32, and 1.33 are now verities. The remaining unchallenged findings are also verities. *Id.* at 418

**3. Generally, A CrR 7.8(b) Motion Is A Collateral Attack And Defendant Must Establish Actual And Substantial Prejudice To Be Entitled To Relief From Their Judgment And Sentence.**

CrR 7.8 allows for relief from final judgment when a defendant provides sufficient proof of:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b). Motions brought under CrR 7.8(b) are also subject to RCW 10.73.090, RCW 10.73.100, RCW 10.73.130, and RCW 10.73.140, all which govern collateral attacks.

Reviews of alleged errors on collateral attacks are distinct from review on direct appeal. *In re Stockwell*, 179 Wn.2d 588, 597, 316 P.3d 1007 (2014). “[C]ollateral relief undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes costs society the right to punish admitted offenders.” *Id.* (internal quotations and citations omitted).

In *Stockwell*, the Court analogized the burden a petitioner must meet in a personal restraint petition showing prejudice resulting from misinformation regarding sentencing consequences with the burden required of a defendant in a CrR 7.8(b) motion. *Id.* at 601-02. *Stockwell* argued to the Court the prejudice standard found under CrR 4.2, the manifest error requirement, mirrored prejudice standard required in a personal restraint petition. *Id.* at 601. The Court rejected *Stockwell*'s argument, noting post-sentence motions to withdraw a guilty plea are not governed by CrR 4.2, but by CrR 7.8(b). *Id.* The Court stated:

CrR 7.8 represents a potentially higher standard than CrR 4.2(f) for withdrawing a plea. Just as a petitioner may need to meet a higher burden when withdrawing

a plea postjudgment versus prejudgment, so should a petitioner in the context of a PRP.

*Id.* at 602. The Court concluded a petitioner, who was seeking to withdraw his guilty plea after being misinformed about the statutory maximum sentence, was required to show the complained error caused actual and substantial prejudice. *Id.* at 602-03.

Therefore, generally, prejudice is not presumed in a collateral attack in the trial court pursuant to CrR 7.8(b). One exception to this rule is when there has been an allegation and a finding the State has intruded upon the attorney-client relationship. *In re Pers. Restraint of Amos*, 1 Wn. App. 2d 578, 599 406 P.3d 707 (2017). Courts employ a presumed prejudice standard for intrusions by the State on attorney-client confidential relationship, which the State may rebut by proof beyond a reasonable doubt no prejudice occurred. *In re Amos*, 1 Wn. App. 2d 599, *citing State v. Pena Fuentes*, 179 Wn.2d 808, 819-20, 318 P.3d 257 (2014).

#### **4. The Trial Court Did Not Error When It Found The State Did Not Intrude On Booth's Attorney-Client Relationship.**

The trial court, through its 34 Finding of Facts, found the State did not intrude upon Booth's attorney-client relationship. CP 352-57. The trial court held there was no pattern of eavesdropping, there was no evidence of intrusion upon Booth's phone conversations with his

private investigator, and nothing that was inadvertently heard by corrections staff was ever relayed to anyone beyond the four transport officers. *Id.* Contrary to Booth's repeated and inflammatory accusations regarding the State's egregious, pervasive, purposeful eavesdropping, the evidence Booth proffered from the corrections officers, command staff, detectives, and the deputy prosecutor all lead to one conclusion: there was no eavesdropping, no collusion between prosecutors and law enforcement, and no intrusion by the State on Booth's attorney-client relationship.

A criminal defendant's right to counsel in a criminal prosecution is a constitutionally protected right, and denial of that right is denial of due process. U.S. Const. amend V; U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 3; Const. art. I § 22; *State v. Cory*, 62 Wn.2d 371, 373, 382 P.2d 1019 (1963). A critical, and statutorily protected, portion of the right is that communication between a defendant and his attorney is privileged. RCW 5.60.060(2)(a). Therefore, no attorney may, "without consent of his client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." *Id.*

The necessity for a defendant to have confidence their communications with their attorney are confidential has been recognized by the Washington State Supreme Court since the 1960s.

It is also obvious that an attorney cannot make a full and complete investigation of both the facts and the law unless he has the full and complete confidence of his client, and such confidence cannot exist if the client cannot have the assurance that his disclosures to his counsel are strictly confidential.

*Cory*, 62 Wn.2d at 374 (internal quotations omitted). It has been recognized the appropriate remedy for when the prosecution gains privileged information, thereby interfering with the defendant's right to private consultation with their attorney, is a dismissal. *Id.* at 377-78. In *Cory*, the sheriff installed a microphone in the conference room where in custody defendants met with their attorneys. *Id.* at 372. The sheriff not only listened to the conversations but also recorded them. *Id.* The Supreme Court determined this conduct denied *Cory* of his right to counsel as protected by the constitution and RCW 5.60.060(2). *Id.* at 377. The Court stated:

It is our conclusion that the defendant is correct when he says that the shocking and unpardonable conduct of the sheriff's officers, in eavesdropping upon the private consultations between the defendant and his attorney, thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment

and sentence must be set aside and the charges dismissed.

*Id.* at 378.

The conduct of the detective in *Fuentes* was similarly appalling and shocking, but Supreme Court was tasked with determining if the State's intrusion upon attorney-client conversations was per se prejudicial. *Fuentes*, 179 Wn.2d 808, 818-20. After trial had concluded, the detective in *Fuentes* listened to Pena Fuentes' phone calls from the jail to investigate possible witness tampering. *Id.* at 816. The detective informed the prosecutor that in the process of listening to all of Pena Fuentes' phone calls, the detective listened to six phone calls between Pena Fuentes and his attorney. *Id.* The prosecutor told the detective to not listen to any more calls, to not disclose the content of the phone calls to anyone, and requested the detective be immediately removed from the case. *Id.* at 817. The prosecutor submitted a declaration stating the detective did not disclose the content of the phone calls with the prosecutor. *Id.*

The Supreme Court noted that the "United States Supreme Court has expressly rejected a per se prejudice rule for eavesdropping." *Id.* at 819, citing *Weatherford v. Bursey*, 429 U.S. 545, 557-58, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). It was reasoned

that when the eavesdropper did not communicate the content of the conversation “and thereby create at least a realistic possibility of injury to the defendant or benefit to the State, there can be no Sixth Amendment violation.” *Id.* (internal quotations, brackets, and italics omitted). The Supreme Court, while condemning the egregious act of eavesdropping on attorney-client communications, held such violations are presumed prejudicial, but the presumption is rebuttable. *Fuentes*, 179 Wn.2d at 819. This allows for the State to prove the intrusion was harmless beyond a reasonable doubt. *Id.* at 820.

**a. Booth’s conversations with his attorney in the attorney-client visiting booths at the jail.**

Throughout Booth’s briefing he unequivocally states the State was eavesdropping on his attorney-client conversations. Brief of Appellant 34-48. The evidence presented, by Booth, at the hearing does not support such an accusation. Eavesdrop, “to listen secretly to what is said in private ..<he hid under the table and eavesdropped on his sister and her sweetheart>.” Webster’s Third International Dictionary, 717. Eavesdropping insinuates purposeful surreptitious listening to another person’s conversations without their permission. The only evidence of eavesdropping was speculation on Booth’s part, testimony from Robert Maddeus, a convicted murderer with

multiple other felony convictions, and testimony for Robert Russell, another convicted felon, and the person whom Booth is alleged to have been collecting a debt for when Booth committed the murders in this case. *State v. Booth*, at 2-4; RP 32, 214, 220-21, 466-510. Whereas the other 26 witnesses consistently testified there was never any order, instructions, or intentions to purposefully or inadvertently listen to Booth's conversations with his defense team. See RP.

Booth's case is not like *Cory*, *Fuentes*, *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000), or *State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1999). In *Garza*, jail staff read inmates legal paperwork, including private communications with their attorneys, albeit due to searching for an attempted jailbreak. *Garza*, 99 Wn. App. at 293-94. In *Granacki*, the detective stayed in the courtroom during a break in the trial, read the notepads on the defense table that included privileged communication between the defendant and his attorney, and then lied about his conduct to the trial court. *Granacki*, 90 Wn. App. 600-01. All of the cases cited by Booth have purposeful and intentional conduct on the part of a law enforcement entity to intrude upon relationship of the defendant and his attorney. That is simply not the case here.

Booth was confined to the Jail while awaiting trial for his triple homicide case from August 2010 until December 2011. RP 461. Booth was classified as a maximum security inmate. RP 284. This security level required two corrections officers to accompany Booth whenever he was outside of his jail unit. *Id.* Jail policy, since the mid-2000's required two officers to stand outside the attorney-client booths while maximum security inmates were using the booths. RP 286. This is because prior to 2011 the attorney-client booths did not lock. RP 288-89.

The corrections officers who transported Booth to his attorney-client meetings discussed that until the locks were installed on the booths, they waited in the hallway while Booth visited with his lawyer. RP 112, 186, 231, 324, 442. The exception to this is the initial time, when Booth spoke extra loud and Officer West and Officer Lamping inadvertently overheard Booth state he had shot/killed someone who had a gun. RP 101, 112, 181. Officer West stated he never discussed with anyone what he heard Booth say to his attorney. RP 101-3. While Officer Lamping believes he asked the other transport officers, Officer West, Officer Harper, and Officer Sullivan if they had heard anything along the same lines of what he had heard; Officer Lamping insisted he was aware of attorney-client

privilege, he did not write a report about what he accidentally overheard, he did not disclose it to the prosecutors, to any detectives, to his family, friends, to no one. RP 181-83. Lieutenant Tawes, Lieutenant Pea, Chief Hansen, Mr. Walton, Sheriff Mansfield, Detective Sergeant Breen, Detective Riordan, Detective Kimsey, Detective McGinty, and DPA Halstead all stated they never heard of or were made aware of any statement Booth made to his attorney that was overheard by corrections officers in the attorney-client booth area. RP 146, 160, 171-72, 261, 293, 337, 342, 370, 419, 452-53. The inadvertent overhearing of a statement that was not transmitted to anyone beyond the four transport officers is not an intrusion by the State into Booth's private communications with his attorney.

The corrections officers, command staff at the jail, the Sheriff, and the detectives were all clear there was no order to eavesdrop on Booth's conversations with his attorney. RP 91, 160, 175, 199, 343, 369-70. Lieutenant Tawes stated it was expressly against jail policy for officers to stand outside and listen in on the conversations between an inmate and their attorney. RP 175. Similarly, contrary to Booth's contention, the jail would not allow an investigating detective or officer access to the inmate side of the attorney-client booth to listen in on a conversation between an inmate and their attorney. RP

312-13. Detectives did not listen in on the attorney-client booth while Booth was speaking to his attorney. RP 262, 329, 380, 420, 443-44. There was no intentional eavesdropping upon Booth and his attorney in the attorney-client visitation booths.

While there were structural issues with the attorney-client booths and their soundproofing, the jail took steps to address those issues. RP 309-10. There was carpet already on some of the walls, an analysis was done to see what sound could be heard, sound boarding was installed, headsets were installed, and as an extra measure of precaution, signs were installed to warn people the booths were not entirely soundproof. *Id.* These structural issues do not constitute a governmental intrusion on Booth's private communications with his attorney.

There were no governmental intrusions upon Booth's private communications with his attorney in the attorney-client booths. The evidence, proffered by Booth, contradicted his assertion there was conspiracy and concerted effort to listen to his privileged communications with his attorney in the visiting booth.

**b. Booth's phone calls with his attorney and private investigator while in jail.**

Booth argues the jail recorded all of his phone calls, including his attorney and private investigator phone calls. Brief of Appellant

36-37, 45. This is a gross exaggeration of the evidence presented and misconstrues the testimony of the witnesses. The jail did not engage in a pattern of recording Booth's phone calls to his defense team.

The evidence presented to the trial court was that one attorney phone call was recorded and accessed by corrections Officer Haskins. RP 352.

Q. Okay. So in this particular case with Mr. Booth, did you have an opportunity where you stumbled on a phone conversation between Mr. Booth and his attorney?

A. Yes.

Q. Okay. And could you tell me about that?

A. As I was listening to several phone calls, one of them was -- while I was listening to the conversation, I found that it was going towards legal questions, legal manner. And at that point, I stopped the conversation. I looked up on the internet the phone number that was being addressed, and it came to an attorney. And that's when I addressed it with Lieutenant Pea as far as we were recording his phone calls.

Q. And did you tell Mr. Booth that you stumbled across that call too?

A. Lieutenant Pea asked me to go down to Mr. Booth and let him know, and also to ask him if there was any further phone calls, any further phone numbers for me to get blocked so that we would not run into that situation again.

RP 352. Officer Haskins did not reveal the substance of the phone call to Lieutenant Pea, only that it was an attorney number that needed to be blocked. RP 364-65. Contrary, to Mr. Booth's assertion that Lieutenant Pea denied receiving such a report from Officer Haskins, Lieutenant Pea's statement was a conditional denial. Brief of Appellant 44; RP 261. When asked if he received a report, Lieutenant Pea said, "I don't believe so." RP 261. Lieutenant Pea had no direct knowledge of any phone calls made by Booth between himself and his attorney or his private investigator. RP 269.

Officer Haskins explained the issue regarding the private investigator was Mr. Wickert also ran a bail bonds company in town and the jail would not block the bail bonding company's number from being recorded. RP 363. Booth states he was told by Officer Haskins that Officer Haskins would not stop recording Booth's phone calls to his private investigator. Brief of Appellant 45. This is simply untrue. Booth's own exhibit, his grievance contradicts this statement. Ex. 6. Booth stated in the grievance, "I NEED YOU TO ADD MY PRIVATE DETECTIVES PHONE NUMBERS TO MY ALLOWED LIST 360 748 6295 AND 253 238 6124." Ex. 6. Officer Haskins responded back he will do this. *Id.* Booth asked nine days later why he could not call his private investigator? *Id.* Officer Haskins responds, "The 2 phone

numbers you provided me were 360-748-6295 belonging to a bail bonding company and 253-238-6124 would not accept a phone call from a Law Enforcement entity. So I will have to be provided another number for your PI.” *Id.* There was another entry where Haskins again stated a bonding company cannot be placed on the legal call situation and the 253 number would not let him call until that number took off the requirements of caller identification. *Id.* Officer Haskins testified once he was provided a number for the private investigator separate from the bail bonding company, Officer Haskins had the number put into the system to be blocked. RP 363-64.

Booth boldly misstates the State never asserted it stopped the practice of recording Booth’s attorney phone calls or that the number was blocked. RP 45. The testimony contradicts Booths assertion.

Q. And that one call that you were talking about where you picked up that he may have been talking to his attorney, you actually informed Mr. Booth personally of that, correct?

A. Yes.

Q. And thereafter, you made sure that phone call was blocked?

A. That phone number I did not listen to, correct. And then I addressed it with Lieutenant Pea to block that number.

RP 362-63.

Booth had confidential telephone access to his attorney and private investigator. The Jail cannot supply such access without knowledge of the telephone numbers that must be categorized as a legal call. It was legitimate for the Jail to require a separate number for Booth's private investigator from a local bail bonding company which all inmates may want to call for business that is not of a legal, privileged nature. Further, if the number Booth supplied would not accept the call from a law enforcement entity, it is not the Jail's fault, it is a problem that must be fixed by the owner of the number not the Jail. Once the Jail had information regarding which numbers belonged to members of Booth's defense team, and a number for the private investigator that could be accessed by the Jail, those numbers were entered into the system and blocked from recording. With the exception of the beginning of the phone call Officer Haskins inadvertently listened to between Booth and his attorney, there is no evidence of any intrusion upon the relationship of Booth and his defense team by recording phone calls in the jail.

**c. Detective Riordan's presence in the courtroom and Officer West's presence in the conference room.**

Detective Riordan's placement as rear security in the courtroom by Detective Sergeant Breen did not effectively block

Booth's "last avenue of confidential communication with his attorney or investigators." See Brief of Appellant 41. Booth complains Detective Riordan was two feet directly behind counsel table during pretrial hearings, purposely placed to listen to confidential conversations. *Id.* The only person who testified it was Detective Riordan's purpose to eavesdrop was Booth, who also referred to Detective Riordan as "this shit detective." RP 489-90, 492, 510.

Detective Riordan was given his assignment to sit in the first pew in the public seating area in the courtroom behind Booth by Detective Sergeant Breen. RP 140, 379, 414. Detective Riordan was seated approximately four feet behind Booth. RP 373-74. Detective Kimsey explained the reasoning for Detective Riordan's presence in the first pew:

I remember a situation occurred that people were coming up and they were trying to sit closer. And I want to say I heard a conversation that these people were trying to get up in that very first row. And so he was keeping people from that row and it just so happened to be him.

RP 335. Detective Riordan's presence in the first pew was during pretrial hearings, until October 28, 2011. RP 378-79. It was at that time Booth made it known to Detective Riordan that Booth believed Detective Riordan was eavesdropping on his conversations with counsel. RP 376, 378. Due to Booth's displeasure with Detective

Riordan sitting behind him, which was demonstrated by Booth spitting on Detective Riordan, Detective Riordan was removed from the courtroom. RP 378-79.

The fact Detective Riordan's presence behind Booth as rear security was not replaced does not prove Detective Riordan's placement was solely for the purpose of eavesdropping. Brief of Appellant 41-42. Due to Booth's actions it is completely plausible it was felt that having another detective sit behind Booth was inadvisable. Also, since it was the trial court who instructed Detective Riordan to no longer sit in the courtroom, it could have been viewed as the court's order to not have anyone sit there. RP 414-15.

Officer West was apparently, according to Booth and equivocally by Mr. Hunko, in a meeting room when they went over jury questionnaires. RP 138-39, 498-99. Booth states Officer West was about seven feet away. RP 499. Mr. Hunko first stated Officer West was outside the door of the room, then changed his statement to say the officer was on the far side of the room. RP 138-39. Officer West was never asked about this incident, but Officer West's testimony indicated only one statement had been overheard between Booth and his attorney and that was down in the jail. See

RP 98-117. Also, Mr. Hunko never raised any issue regarding Officer West being present in the meeting room. RP 129-30.

Unlike the detective in *Granacki* who purposely looked through privileged communications on defense counsel table during trial and was caught by a Clerk, a neutral third party, and then lied about what occurred, Detective Riordan did nothing in Booth's case except sit in court as directed by his supervisor. See *Granacki*, 90 Wn. App. 598. Detective Riordan categorically denied eavesdropping on Booth or reading any notes written by Booth, Booth's attorney, or private investigator. RP 376, 380. Detective Riordan did not report to anyone the content of any conversations between Booth and his attorney or private investigator. RP 337, 414, 453. Again, as argued above, there was no intrusion into the attorney client relationship.

**5. The Trial Court Did Not Error When It Found The State Did Not Intrude On Booth's Attorney-Client Relationship.**

This is not a complete relitigation of the CrR 7.8(b) hearing. A defendant has a right to appeal the denial of their CrR 7.8(b) motion. *State v. Larranaga*, 126 Wn. App. 505, 508, 108 P.3d 833 (2005). Yet, on appeal, the only order before the appellate court is the denial of the CrR 7.8(b) motion. *Larranaga*, 126 Wn. App. at 509. "The

original sentence would not be under consideration.” *Id.* Appellate review is limited to whether the trial court abused its discretion when it denied the CrR 7.8(b) motion. *Id.*

Booth argues the court relied upon “self-serving testimony elicited from a plethora of Lewis County officers, investigators, detectives, and jail officers and deputy prosecutors...” Brief of Appellant 44. Booth quickly forgets it was he who called the plethora of Lewis County officers, the deputy prosecutor, and elicited the alleged self-serving testimony. See RP. Booth chose these witnesses, Booth chose the questions, Booth chose the evidence to present to the court. Booth is the one who paraded corrections officer after corrections officer up onto the stand and elicited the testimony he now rails against, crying foul. The inconsistency between Officer Lamping’s rendition and Officer West’s can best be categorized as two people remembering an event differently.

The trial court found the corrections officers, detectives, and deputy prosecutor credible. The findings of fact make this clear. CP 352-57. The Court defers to trial court’s credibility determinations because it “had the opportunity to evaluate the witnesses’ demeanor.” *State v. Tyler*, 166 Wn. App. 202, 216, 269 P.3d 379 (2012) (internal quotations and citations omitted). In this matter, the

trial court's Finding of Fact 1.17 gives a glimpse of its evaluation of Booth's character,

It is not beyond the scope of the court's imagination that Mr. Booth may have deliberately raised his voice when speaking with his lawyer, with the intention of raising the issue of the lack of soundproofing of the attorney visitation booths on appeal.

RP 355. The trial court in the CrR 7.8(b) matter was the same judge who heard the entirety of Booth's underlying case. See RP; *State v. Booth*. This is particularly important in two aspects, one assessing Booth's character, and secondly, his historical knowledge of Booth and his actions in this case. This Court defers to the finder of fact, in this case the trial court, regarding not only witness credibility but also the weight to be given reasonable but competing inferences. *County of Pierce*, 65 Wn. App. at 618.

The trial court did not abuse its discretion when it denied Booth's CrR 7.8(b) motion. The trial court had a clear understanding, through its historical knowledge of the case, and then hearing all of the evidence presented by Booth, the egregious, pervasive conduct Booth complains of is a fanciful myth, raised by a desperate man grasping at anything for the mere possibility to get out of prison.

Booth, is playing at revisionist history, and the trial court knew it. Booth, on the first day of trial attempted to have his attorney

removed. RP 127; Supp. CP PRP 3-4.<sup>7</sup> In his pro se motion before the trial court Booth argued he wanted a new attorney because Mr. Hunko had failed to interview State witnesses and because Mr. Hunko had failed to secure an expert witness regarding cell tower pinging. Supp. CP PRP 4. As noted in the dismissal order, Booth also told the trial court he had a “great relationship” with Mr. Hunko even though he was dissatisfied with certain aspects of Mr. Hunko’s performance. *Id.*

Booth has never had an issue speaking up when he felt it would benefit him. This is also evidenced in the CrR 7.8(b) hearing, when he spoke up, addressed the court directly about the waiver of attorney client privilege. RP 119. In another instance during the hearing Booth again interjected and demanded that the record reflect where detectives were currently sitting in the courtroom during Detective Riordan’s testimony. RP 382.

Booth filed pro se motions, such as his motion to compel, motion to expand the record, and motion for reconsideration. CP 239-44, 298-03. The trial court understood if Booth actually believed there had been an issue with his privileged communication during

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<sup>7</sup> The State in its Supplemental Designation of Clerk’s papers is designating the Certificate of Finality with attached Order of Dismissal of Booth’s PRP No. 92833-9. The page reference will be the page number of the dismissal order.

the pendency of his case, the issue would have been addressed then. The fact that it was not done makes Booth's claims less than credible.

Further, consistent testimony of witnesses, as argued above, proved there was no intrusion upon Booth's privileged communication. The only possible intrusion, was an inadvertent overhearing of a statement, which Booth had raised his voice for, by two corrections officers. That one statement, where Booth described shooting one of the victims, was never, until the day of the hearing, related to anyone outside the four corrections officers who regularly worked as a team to transport Booth. Out of those four officers, Officer West, Officer Lamping, Officer Sullivan, and Officer Harper, only Officer Lamping recalls possibly discussing the matter with the other three. The other officers do not recall such a thing ever occurring.

Booth argues the judge may have not applied the correct legal standard, and that it is not clear the trial court resolved critical factual questions regarding the scope of State's breach and its use of the confidential information. Brief of Appellant 47. The Findings of Fact resolve the critical facts and make it clear no breach occurred and no confidential information was used. CP 352-57. Apparently Booth

conveniently forgot every detective who testified never received any information from a jail officer and never heard any conversation between Booth and his attorney or his private investigator. Booth also ignores Deputy Prosecutor Halstead's testimony,

Q. When you were preparing the case for trial and preparing your questioning of witnesses and preparing your closing argument, did you take into consideration anything from the jail regarding a conversation that may have been overheard between Mr. Booth and his lawyer?

A. No, because there was nothing to take into consideration.

Q. Okay. And then I will ask the same question only regarding any statement that may have been made between Mr. Booth and his private investigator.

A. No. Again, there was no information to be taken into consideration.

RP 455-56.

There was no breach, no evidence of anything passed to anyone on the law enforcement side or the prosecutors. Further, if the Court finds the inadvertent overhearing of Booth's statement to his attorney and Officer Haskins accidental listening to a portion of one attorney phone call as an unlawful intrusion upon Booth's constitutionally protected right to counsel, the State has proven beyond a reasonable doubt it was harmless. The trial court's denial

of Booth's CrR 7.8(b) motion was not manifestly unreasonable or based on untenable grounds. This Court should affirm the trial court.

**B. THE TRIAL COURT'S LIMITATION OF BOOTH'S TESTIMONY WAS PERMISSIBLE, AND IF IN ERROR WAS HARMLESS.**

Booth argues the trial court erred by not allowing him to testify regarding his loss of confidence in his attorney due to the alleged systemic eavesdropping. Brief of Appellant 49-52. Booth does not address the standard of review or that such determinations are subject to a harmless error analysis. The trial court's ruling was not an abuse of discretion, or if the trial court erred, it was harmless.

**1. Standard of review**

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted).<sup>8</sup> The interpretation of an evidentiary rule is reviewed de novo. *State v. De Vincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v.*

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<sup>8</sup> Simply alleging a constitutional rights violation does not make an evidentiary ruling reviewed under a de novo standard instead of an abuse of discretion standard. See *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 168, 288 P.3d 1140 (2012); *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010).

*Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.* (citations omitted).

## **2. The Trial Court’s Limitation Of Booth’s Testimony Was Not An Abuse Of Its Discretion.**

Booth argues he was hobbled in his presentation of evidence because the trial court sustained an objection to the answer of his counsel’s question if Booth had faith or confidence in his trial attorney, Mr. Hunko. Brief of Appellant 49-52; RP 494. The trial court stated it was irrelevant. *Id.* The trial court has the discretion to limit testimony it finds irrelevant. The trial court’s ruling, in the total context of the CrR 7.8(b) hearing was not an abuse of discretion.

A defendant does not have an absolute right to present evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Without adherence to the rules of evidence and other procedural limitations the adversary process would not function effectively because it is imperative each party be given a fair opportunity, within the rules, “to assemble and submit evidence to contradict or explain the opponent’s case.” *Taylor v. Illinois*, 484 U.S. 400, 410-11, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

Evidence presented by a defendant must be, at the very least, minimally relevant, and there is no constitutional right for a defendant to present irrelevant evidence. *Jones*, 168 Wn.2d at 720. If a defendant can show the evidence is relevant, then the burden shifts to the State to show the trial court the evidence is so prejudicial it will “disrupt the fairness of the fact-finding process at trial.” *Id.* Invoking the right to compulsory process is not a free pass to present evidence that would be considered inadmissible under the Rules of Evidence. *Taylor v. Illinois*, 484 U.S. at 414.

Booth argues he was building his case to show prejudice, by showing the intrusions had destroyed his confidence in his attorney pursuant to *Garza*, Brief of Appellant 51, *citing Garza*, 99 Wn. App. at 301. Booth also asserts the trial court was, in effect, assessing his credibility without hearing his testimony. Brief of Appellant 51. Booth further argues there was no evidence presented regarding an alleged bar complaint Booth had filed against Mr. Hunko. *Id.*

The trial court was in a unique position to make credibility determinations regarding Booth because it heard him testify at trial in this matter and heard him argue his pro se motion for new counsel in the underlying case, as well as his conduct throughout the hearing and his filings with the court. *See RP; State v. Booth; Supp. CP PRP.*

The trial court could take judicial notice of Booth's filed bar complaint against Mr. Hunko, as it was Booth's own counsel who alerted the trial court to this fact in a pretrial motion. ER 201(b)(2); RP 14.<sup>9</sup> It was also clear from Mr. Hunko's testimony there was at least some discord because Booth had tried to fire him the first day of trial (although for different reasons). RP 127. Booth was able to testify he felt he was never able to have any private consultations with his attorney. RP 499.

The key issue in Booth's CrR 7.8(b) hearing was whether the State purposefully intruded upon Booth's attorney client privileged communications. Under *Fuentes*, once the intentional intrusion is shown, prejudice is presumed and the State must show it is harmless beyond a reasonable doubt. *Fuentes*, 179 Wn.2d at 819-20. The trial court did not hobble its ability to determine credibility or the issue at hand, thereby abusing its discretion by disallowing Booth to testify about his confidence in his attorney. Nor did it error by finding Booth's conclusory statement irrelevant. RP 494-95. Booth had to establish the intrusion, and the other testimony laid the foundation for whether it would be considered harmless (i.e. the noted discord between Booth and his counsel, the State allegedly obtaining and using the

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<sup>9</sup> "He's not cooperating because Mr. Booth filed a bar complaint against Mr. Hunko."

information, his inability to confer privately with his defense team and more). There was no error by the trial court.

**3. Any Error In Failing To Allow Booth To Testify That He Had Lost Confidence In His Attorney Was Harmless.**

Unless an error resulted in prejudice to the defendant, this Court does not reverse due to an error by the trial court in admission of evidence. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). A reviewing court does not use the more stringent harmless error beyond a reasonable doubt standard when there is an error from violation of an evidentiary rule. *Thomas*, 150 Wn.2d at 871. The court applies “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.*, citing *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Therefore, “[t]he improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Id.*, citing *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

In this case, the failure of the trial court to allow Booth to answer the question of whether he had lost confidence in Mr. Hunko was harmless, as it would not, within reasonable probabilities,

changed the outcome of the CrR 7.8(b) proceedings. Whether Booth lost confidence in Mr. Hunko does not change whether there was an actual intrusion into the attorney-client privileged communications by the State. That is the initial inquiry, and Booth's proffered evidence failed to show by a preponderance of the evidence such an intrusion occurred. Arguendo, if an intrusion had been shown, the entirety of the evidence throughout the CrR 7.8(b) hearing, including Mr. Hunko's testimony, the statement regarding the bar complaint, and Booth's testimony make it clear he had lost confidence in his defense team. Any error in failing to admit the testimony was harmless.

**C. THE TRIAL COURT PROPERLY DENIED BOOTH'S MOTION TO COMPEL DISCOVERY.**

Booth claims the trial court improperly denied his motions to compel discovery. Supp. Appellant's Brief 6-12. Booth's claims are without merit. The trial court did not abuse its discretion in denying the motion to compel further discovery for Booth's CrR 7.8(b) motion pursuant to CrR 4.7(e)(1).

**1. Standard Of Review.**

"The scope of criminal discovery is within the trial court's discretion" and the reviewing court will not disturb such decisions "absent a manifest abuse of that discretion." *State v. Blackwell*, 120

Wn.2d 822, 826, 845 P.2d 1017 (1993), *citing State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).

**2. The Trial Court Did Not Abuse Its Discretion When It Denied Booth's Motion To Compel The State To Provide Discovery.**

Booth argues his counsel moved to compel discovery for a number of documents and other materials, made requests pursuant to the Public Records Act, and the trial court denied Booth's motion to compel on April 13, 2016. Supp. Brief of Appellant 6-7. Booth sets out the facts for his argument in his Statement of the Case, pages 2-5. *Id.* The facts as set forth in Booth's factual statement and argument are difficult to follow, not accurate, the citations to the record are incorrect, and some of the factual statements are missing citations to the record. *Id.* 2-7. Booth cites to letters written by his counsel and the prosecutor, but gives no citation in the record for them.<sup>10</sup> Booth then cites to Clerk's Papers 227-231 in the last paragraph on page 2, which is not the motion to compel discovery, but the motion for a continuance. Later, in the same paragraph Booth cites to Clerk's Papers 247-253 regarding public records request, but

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<sup>10</sup> This is because they are missing from the Clerk's Papers. After a diligent search of the 400 pages of Clerk's papers the State realized these documents were filed under a separate entry into Booth's trial file (docket number 372), the Declaration of Erik M. Kupka in Support of Defendant's Motion to Compel Discovery, filed 6/27/13. The State will be designating this document so the Court has the complete and accurate record.

this document is a motion to vacate legal financial obligations. These inaccuracies continue on page 3 of the Supplemental Brief. Booth's failure to accurately cite to the record "places an unacceptable burden on opposing counsel and on this court." *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990). This is particularly true when the Clerk's papers include approximately 400 pages and verbatim report of proceedings that is 600 pages in length.

The State, therefore, will attempt to respond to the essence of Booth's argument, noting that there were actually two separate motions to compel discovery. The first was filed by Booth's attorney on June 27, 2013, which also had an accompanying declaration and documents in support of the motion. CP 370-76; Supp. CP Dec Kupka. The State filed a written response to the motion. Supp. CP State 6/28/13 Response. The motion was heard on September 3, 2013. Supp. CP Mt Hearing 9/3/13. The trial court denied the motion. *Id.*

Booth filed a pro se motion to compel discovery on January 22, 2016. CP 239-44. The State responded to the motion on April 5, 2016, attaching a number of documents to its response. CP 255-74. On April 13, 2016, the trial court heard the motion to compel and denied Booth's motion. RP 3-17.

Booth asserts pursuant to CrR 4.7, in particular the State's discovery obligation under CrR 4.7(a), the State has the obligation and duty to disclose evidence that is material and favorable to the defendant. Supp. Brief of Appellant 7-8. Booth does acknowledge this requirement is limited by CrR 4.7(a)(4). Booth cites to CrR 4.7(d), (e)(1) to support his argument. Finally, Booth extensively argues pursuant to *Fuentes* the State was obligated to retain and obtain the records requested by Booth. *Id.*

In a post-conviction action, a defendant is not entitled to discovery in the manner he or she would be in pretrial matters. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 391, 972, 1250 (1999), citing *Bracy v. Gramely*, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97, 103 (1997). Defendants are "limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief." *Id.* A CrR 7.8(b) motion is a post-conviction motion. Therefore, Booth begins with the burden of having to show the trial court good cause that his numerous requested items would prove entitlement to relief. Booth's counsel's first request included a list of 10 enumerated items requested by Booth. Supp. CP Dec Kupka (Ex. A). It included:

1. A list of all jail staff, officers, and personnel who were employed during John Allen Booth, Jr.'s incarceration at the Lewis County Jail in this cause of action...
2. A list of all attorneys, investigators, and consultants who met with John Allen Booth, Jr. at the Lewis County Jail during his incarceration in this cause of action.
3. A list of any other attorneys, investigators, and consultants who did not represent John Allen Booth, Jr., but who have met with other individuals at the Lewis County Jail during the time of Mr. Booth's incarceration in this cause of action.
4. A copy of all policies and procedures implemented at the Lewis County Jail during the incarceration of John Allen Booth, Jr...
5. A list of all facility changes, improvements, structural changes, and alterations to the Lewis County Jail following the complaint by Mr. Booth for breach of attorney-client privilege and lack of confidentiality at the Lewis County Jail.
6. A list of all personnel and employees who made the physical changes, improvements, structural changes, or alterations made to the Lewis County Jail following the complaint for breach of attorney-client privilege...
7. Copies of any and all emails, letters, correspondence, and notes in possession of the state of Washington addressing concerns that are subject to the CrR 7.8 motion...
8. Copies of any and all jail records with John Allen Booth, Jr.'s name on them, including any "kites," "grievances," "emails." And any communications about Mr. Booth's phone use during the time of his incarceration in this cause of action.

9. An itemization, list, or log of any and all phone calls made from John Allen Booth, Jr., to his attorneys and investigators from the Lewis County Jail.

10. A copy of the legal note pad seized during a cell search by Detective Danny Riorden [sic] of the Lewis County Sheriff's Office.

*Id.* The State's position was there was no argument by Booth and therefore no showing, under *Gentry*, how these enumerated items would prove Booth was entitled to the relief he was seeking. Supp. CP State 6/28/13.

In *Gentry*, the Supreme Court held relief was only entitled when the petitioner could "demonstrate a substantial likelihood the discovery will lead to evidence that would compel relief..." *Gentry*, 137, Wn.2d at 392. This ruling was in part because there are no rules for discovery at the appellate court level. *Id.* at 391. This rule is similar to the requirements of CrR 4.7(e)(1). The rules states:

Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d).

CrR 4.7(e)(1).

"If a defendant requests the disclosure of information beyond that which the prosecutor is specifically obligated to disclose under the discovery rules, the defendant's request must meet the

requirements of CrR 4.7(e)(1).” *State v. Norby*, 122 Wn.2d 258, 266, 858 P.2d 210 (1993), *citing Blackwell*, 120 Wn.2d at 828. Pursuant to CrR 4.7(e)(1) a defendant must show the evidence sought is material and the request is reasonable. *Norby*, 122 Wn.2d at 266-68 *Blackwell*, 120 Wn.2d at 828-29. The first showing is whether the request is material, “the mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial . . . does not establish ‘materiality’ in the constitutionality sense.” *Blackwell*, 120 Wn.2d at 828, *citing State Kwan Fai Mak*, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986), *rejected on other grounds by State v. Hill*, 123 Wn.2d 641, 645-47, 870 P.2d 313 (1994).

The trial court, as reflected in the minutes from the hearing on September 3, 2013, did not find from the limited information provided by Booth that Booth had satisfied the requisite burden. Supp. CP Mt. Hearing 9/3/13. A little over two years later, Booth filed a second motion to compel discovery. CP 239-44. Again, Booth’s requests were broad, a transcript of every hearing in his case; every document related to his case;<sup>11</sup> any video of his movements in the facilities; and

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<sup>11</sup> Considered in the literal form, this would include all of his appellate files up until the motion to compel was filed, which included a 257-page response to a personal restraint

everything Booth's attorney had previously requested. CP 243-44. The State's position was Booth was asking for materials the State did not possess; materials that did not exist, were not material; and the State had supplied the discovery it was required to under the rule. CP 255-57; RP 7-16. The trial court asked for Booth to specifically identify items of discovery he had requested and not been provided with sufficient particularity such that the trial court could direct the jail or others to provide if the trial court found in Booth's favor. RP 11. The trial court's ruling makes it clear it did not find Booth's request material or reasonable. RP 11-17. The trial court did leave open the opportunity for further discovery requests raised in a timely fashion. RP 17.

The trial court's ruling was not an abuse of discretion. Booth had the burden of showing a substantial likelihood the discovery he requested would entitle him to the relief he was requesting in his CrR 7.8(b) motion. Booth made no such showing. Further, the requests were beyond broad, therefore, even if they had some aspect of materiality, were unreasonable. *Norby*, 122 Wn.2d at 268. Booth cannot use discovery requests as a fishing expedition, which was

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petition and lengthy briefing on his original appeal, along with a plethora of other documents which have nothing to do with his CrR 7.8(b) matter.

what he was attempting to do in this case. The trial court's denials of both motions were reasonable and this Court should affirm.

**D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED BOOTH'S MOTION TO REOPEN THE RECORD AFTER IT HAD ISSUED ITS ORAL RULING DENYING HIS CrR 7.8(b) MOTION.**

Booth claims the trial court erred when it denied his request to expand the record after Booth had rested his case. Supp. Appellant Brief 12-16. The trial court did not abuse its discretion when it denied Booth's request to reopen the proceedings and introduce further evidence. Booth's claim to the contrary has no merit.

**1. Standard Of Review.**

A trial court's denial of a motion to reopen a proceeding is reviewed under an abuse of discretion standard. *State v. Tyler*, 177 Wn.2d 690, 697, 302 P.3d 165 (2013), *citing State v. Luvene*, 127 Wn.2d 690, 711-12, 903 P.2d 960 (1995).

**2. The Trial Court Did Not Error When It Denied Booth's Motion To Reopen The Proceedings.**

Booth filed two motions to reopen the proceedings to allow for additional evidence after the trial court had rendered its oral decision denying his CrR 7.8(b) motion. RP 545-60; CP 298-301, 307-47. Booth's first motion, filed on August 8, 2016, requested permission

to reopen to introduce evidence regarding, 1) Global Tel\*Link's records regarding Booth's jail calls; 2) the plea deal for Ryan McCarthy; and 3) Detective Riordan being banned from the courtroom by Judge Brosey for interfering with Booth's attorney consultations. CP 1-3. Booth's second motion requested to supplement the record with Lewis County Jail's Inmate Handbook. CP 307-47. The purpose of this evidence was apparently to show inmates are informed their calls to attorneys are not recorded. *Id.*

The trial court heard Booth's pro se motions on September 29, 2016 at a hearing to handle a number of different matters, including an argument regarding legal financial obligations, Booth's motions to reopen, Booth's pro se motion for reconsideration, and entry of the Findings of Fact and Conclusions of Law from the CrR 7.8(b) hearing. RP 565; CP 302-03. The trial court informed Booth it had read his motions and allowed Booth ample opportunity to argue and explain to the trial court why it should reopen the hearing for additional evidence. RP 577-94. The argument was intertwined with Booth's argument for reconsideration. *Id.* The trial court disputed Booth's rendition of the testimony from the witnesses, the Judge's reasoning for requiring Detective Riordan to remove himself from the courtroom, there was never any argument by the State that inmates

were told attorney phone calls were confidential and not recorded, and finally the Global Tel\*Link records showed any relevant evidence. *Id.* The trial court denied Booth's motion. RP 594-96.

The trial court's ruling denying Booth's request to reopen the proceedings was not an unreasonable decision. The trial court did not base its decision on untenable grounds. The trial court accurately depicted the issue it and Booth had was a difference of perception regarding the proffered evidence and it had showed. See RP 587. Booth's desire to reopen and introduce further evidence is based upon faulty perceptions of the evidence. The trial court did not abuse its discretion when it denied Booth's motions.

**E. BOOTH RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE CrR 7.8(b) PROCEEDINGS.**

Booth's attorney provided competent and effective legal counsel throughout the course of his representation. Booth asserts his attorney was ineffective for failing to secure a witness to authenticate the Global Tel\*Link (GTL) records for admission. Brief of Appellant 52-55. Booth argues these records supported his arguments that his privileged phone calls to his defense team were being recorded. *Id.*

Booth's assertion his attorney was ineffective is false. If, this Court were to find Booth's attorney's performance was deficient, Booth has not shown he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

**1. Standard Of Review.**

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

**2. Booth's Attorney Was Not Ineffective During His Representation Of Booth During The CrR 7.8(b) Hearing.**

To prevail on an ineffective assistance of counsel claim Booth must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335.

Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. "Reviewing courts must be highly deferential to counsel's performance and should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Carson*, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015) (internal quotations and citations omitted). There is a sufficient basis to rebut the presumption an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy, the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case, the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. A "defendant can rebut the presumption of reasonableness by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." *Id.* (internal quotations and citations omitted). In this matter, Booth's attorney legitimately could have believed the trial court would have admitted the document without further documentation, as it was in response to Booth's subpoena duces tecum. ID 8. This erroneous belief does not render Booth's attorney ineffective, as his performance must be viewed as a whole and not this single incident.

The State maintains Booth's attorney's performance was not deficient. Arguendo, if this Court were to find Booth's attorney's performance deficient; Booth has not met his burden to show he was prejudiced. Booth must show, but for his attorney's error in failing to produce an authenticating witness for the GTL documents, the results of the proceedings would be different, or called into question. See *Horton*, 116 Wn. App. at 921-22. Booth's own statements about

the documents he received from GTL show they were of no value to the proceedings, except to perhaps the State. RP 479.

Q. Do you know if this conversation, this recorded conversation ever ended up with the prosecutor's office?

A. No.

Q. Do you know if it was ever saved or deleted?

A. It would have had to have been deleted.

MR. MEAGHER: Well, objection. Calls for a yes-or-no answer.

THE WITNESS: Yes, I know if it would have been saved or deleted. And yes, it was deleted.

Q. (Mr. Kupka continuing.) And how do you know that?

A. Because after our hearing on May 2nd and 3rd, we subpoenaed Global Tel Link's records. And when the records came back, mysteriously all the calls that were admitted to being recorded were not recorded.

Q. Now, you've requested through me a copy of all the records of outgoing phone calls made by you from the Lewis County Jail for the period of August 28, 2010, through December 15, 2011, correct?

A. Yes.

...

Q. So after May 2nd and May 3rd testimony we learned that Global Tel Link Corporation in Mobile, Alabama, was the company that the Lewis County Jail used?

A. Yes. I've been requesting it prior in public disclosures and through the discovery process, but I've been denied since I started this motion about four years ago. And we just finally were granted a subpoena

May 3rd or whenever it was. So that's when I was finally able to get a record of the calls.

RP 479-481.

Booth's own statements alleged some conspiracy that the documents have been altered so they no longer showed the phone calls that were recorded. Further, as argued above, the only privileged phone call recorded and accessed, that any corrections officer or law enforcement investigator was aware of, was the phone call Officer Haskins heard a portion of and informed Booth about. Therefore, Booth fails to meet his burden to show the requisite prejudice and his ineffective assistance of counsel claim fails.

**F. THE TRIAL COURT CORRECTLY HANDLED BOOTH'S LEGAL FINANCIAL OBLIGATIONS IN ALL OF HIS CASES.**

Booth argues the costs levied against him in six cause numbers from Lewis County was unconstitutional under the Eight Amendment of the United State Constitution's excessive fines provision because he was sentenced to life in prison. Booth additionally argues these costs are unconstitutional pursuant to Article I, Section 14 of the Washington State Constitution. Booth further argues his legal financial obligations are improperly imposed under RCW 10.01.160(3).

Booth's claims fail for multiple reasons. First, the three oldest cause numbers were outside financial jurisdiction, orders were entered to that effect, therefore any appeal is moot. Second, Booth cannot raise a State constitutional claim, as it is not preserved below. Booth's Eight Amendment and RCW 10.01.160(3) claim fail in regards to the remaining three cause numbers and this Court should affirm the trial court.

**1. Orders Were Entered Declaring The Expiration Of Financial Jurisdiction For Cause Numbers: 96-8-00501-1, 98-1-00162-8, and 99-1-00565-6, Therefore, Any Action Regarding These Cases Is Moot.**

The State is unclear from Booth's briefing if he is still arguing his fines and costs in regards to cause numbers 96-8-00501-1, 98-1-00162-8, and 99-1-00565-6 are unconstitutional and improper. See Brief of Appellant 55-67, 69. These three cases all had an order entered declaring the financial jurisdiction expired. CP 13, 68; 2CP 13.<sup>12</sup> The orders, which are all identical with the exception of the dates jurisdiction expired, all state "the legal financial obligations in the above referenced case number may no longer be enforced." *Id.*

An issue on appeal is moot if the reviewing court can no longer provide the party effective relief. *State v. Harris*, 148 Wn. App. 22,

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<sup>12</sup> This is the secondary CP for 96-8-00501-1 that started over the pagination.

26, 197 P.3d 1206 (2006), *citing State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). An issue that is moot will not be considered unless “it involves matters of continuing and substantial public interest.” *In re Eaton*, 110 Wn.2d 892, 895, 757 P.3d 961 (1988).

There is no effective relief this Court can provide Booth for 96-8-00501-1, 98-1-00162-8, and 99-1-00565-6 because the trial court already entered orders indicating the jurisdiction over the legal financial obligation had expired. Those obligations may never be collected upon and Booth is no longer required to make payment on the obligations. The issues raised for those three case numbers is moot.

**2. Booth Only Raised An Eighth Amendment Argument Regarding His Legal Financial Obligations; Booth Did Not Raise An Article I, Section 14 Challenge To His Legal Financial Obligations, Therefore, Booth Cannot Raise It For The First Time On Appeal, Absent A Demonstration That The Error Is A Manifest Constitutional Error.**

Booth did not challenge his legal financial obligations under Article I, Section 14 of the Washington State Constitution. See RP 570-75; CP 247-52. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O’Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The

origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two-part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (citations omitted).

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012). The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *O'Hara*, 167 Wn.2d at 98. The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (citations

*omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

The State is only addressing the remaining three case numbers, 03-1-00714-4, 04-1-00325-8, and 10-1-00485-2 not dealt with in its argument above. Booth's constitutional argument to the trial court rested solely on the Eighth Amendment, with no mention of Article I, Section 14 of the Washington State Constitution. RP 570-75; CP 247-52. Booth argued his legal financial obligations had to be vacated in whole because he was incarcerated to a term of life in prison and any fine, fee, costs, assessments, would run afoul of the Eighth Amendment prohibition against excessive fines, GR 34, and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *Id.* The trial court did an inquiry under *Blazina*, found Booth would be unable to pay any discretionary fines, fees, or costs, and vacated those obligations, leaving only the mandatory assessments. RP 568-69, 572-73, 577; CP 87-88, 97-98.

Booth now argues in his appeal the denial of the motion and the imposition of mandatory costs was in violation of Article I, Section 14 of the Washington State Constitution after Booth conducts a *Gunwall* analysis. See *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808

(1986); Brief of Appellant 59-67. Booth fails to address in his briefing his failure to raise the State constitutional claim below or how it is a manifest constitutional error.

In *State v. Davis*, the Supreme Court declined to review an Article I, Section 14 claim that was not preserved below. *State v. Davis*, 175 Wn.2d 287, 343-45, 290 P.3d 43 (2012). The *Davis* court explained what it means for an error to be manifest, after placing itself in the shoes of the trial court the reviewing court must determine “if the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.” *Davis*, 175 Wn.2d at 344.

Booth gave the trial court no opportunity to evaluate a claim under Article I, Section 14 of the Washington State Constitution, which he now claims affords him greater protection than the Eighth Amendment. The trial court could not have foreseen this argument, or evaluated this position without at least reference to a Washington State Constitutional claim and an allegation it afforded Booth more protection than the United States Constitution. The error is not manifest, is not reviewable pursuant to RAP 2.5(a), and this Court should decline to review Booth’s Article I, Section 14 claim.

### **3. The Trial Court Correctly Imposed Mandatory Legal Financial Obligations Upon Booth.**

The trial court correctly imposed the mandatory legal financial obligations on Booth's three remaining case numbers, 03-1-00714-4, 04-1-00325-8, and 10-1-00485-2. The trial court did not abuse its discretion. Further, the imposition of the legal financial obligations does not violate the Eighth Amendment.

#### **a. Standard of review.**

The determination to impose legal financial obligations by a trial court is reviewed by this Court under an abuse of discretion standard. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015) (internal citation omitted). Alleged constitutional violations are reviewed de novo. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013).

#### **b. The trial court did not abuse its discretion when it reduced Booth's legal financial obligations and imposed only the mandatory legal financial obligations.**

The legal financial obligations imposed by the trial court in these three matters are only non-discretionary legal financial obligations. CP 87-88, 97-98, 359-60. In 03-1-00717-4 the trial court vacated \$400 attorney fees and \$1000 jail recoupment fee, imposing only \$110 filing fee, \$500 crime victim penalty assessment, and \$100

DNA fee. RP 577; CP 78-88, 80, 87-88. In the 04-1-00325-8 case, the trial court vacated \$1000 jail fee and \$448.50 attorney fee,<sup>13</sup> imposing only \$110 filing fee, \$500 crime victim penalty assessment, \$100 DNA fee, and \$509 in restitution. RP 577; CP 89-91, 97-98. In the 10-1-00485-2 case the trial court vacated \$1000 jail fee, imposing only \$200 filing fee, \$500 crime victim penalty assessment, \$100 DNA fee, and \$6,389.25 in restitution. RP 577; CP 154-62, 359-60.

Booth does not acknowledge the different classes of legal financial obligations present in his judgment and sentences. All contain a victim assessment, DNA fee, and filing fee, and two contain restitution, all which are non-discretionary, mandatory fees. CP 87-88, 97-98.

The statute in regards to the criminal filing fee is clear and unambiguous. RCW 36.18.020 states,

Clerks of superior courts shall collect the following fees for their official services:

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant shall be liable for a fee of two hundred dollars.

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<sup>13</sup> Supp. CP Order for Payment and Amending Judgment and Sentence 5/28/04.

The courts will not employ judicial interpretation if a statute is unambiguous. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). “A statute is ambiguous when the language is susceptible to more than one interpretation. *Steen*, 155 Wn. App. at 248. When the reviewing court is interpreting a statute its “goal is to ascertain and give effect to the intent and purpose of the legislature in creating the statute.” *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citation and internal quotations omitted). The court looks to the plain language in the statute, the context of the statute, and the entire statutory scheme to determine the legislative intent. *Steen*, 155 Wn. App. at 248; *Stratton*, 130 Wn. App. at 764 (citations omitted). If the statute fails to provide a definition for a term, then the courts look to the standard dictionary definition of the word. *Stratton*, 130 Wn. App. at 764. If the court finds that a statute is ambiguous, “the rule of lenity requires that we interpret it in favor of the defendant absent legislative intent to the contrary.” *Id.* at 765.

The plain language of the statute is clear, the Clerk **shall** collect upon a conviction or plea of guilty the criminal filing fee, which is set in the amount of 200 dollars, 110 when Booth was convicted of the older cases, as the defendant is liable for the fee. RCW 36.18.020(h). Shall is mandatory, not discretionary. This Court held

the criminal filing fee to be mandatory. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Since *Lundy*, Division Three has also stated the criminal filing fee is mandatory. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); *Clark*, 191 Wn. App. at 374. The criminal filing fee is mandatory and it was properly imposed, regardless of Booth's ability to pay.

Similarly, the DNA and victim penalty assessment are also mandatory fees, and the court does not need to consider a defendant's ability to pay when it imposes such a fee. *State v. Mathers*, 193 Wn. App. 913, 918-21, 376 P.3d 1163 (2016).

Finally, there was restitution ordered in 04-1-00325-8, in the amount of \$509, and 10-1-00485-2, in the amount of \$6,389.25. CP 97-98, 359-60. Similar to the filing fee, DNA fee, and victim penalty assessment, restitution is a mandatory legal financial obligation.

Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record.

RCW 9.94A.753(5). "The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753(4).

Booth fails to acknowledge the criminal filing fee, DNA fee, victim penalty assessment, and restitution are mandatory legal financial obligations. These obligations were properly imposed, regardless of Booth's ability to pay.

**c. The mandatory legal financial obligations are not in violation of the Eighth Amendment's prohibition of excessive fines.**

Washington State has imposed fines on criminal convictions dating back to territorial times. *Foster v. Territory of Washington*, 1 Wash. 411, 25 P. 459 (1890). Washington State's earliest penalty provisions allowed for quite large fines, a felony sentence could include a fine of not more than five thousand dollars. See Laws of 1909, ch. 249, § 13. Adjusted for inflation, a \$5000 fine in 1909 is worth approximately \$127,036.22 today. See CPI Inflation Calculator.<sup>14</sup>

The Eighth Amendment forbids excessive fines. The only case Booth cited to below at the trial court was *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314, (1998). Booth fails to acknowledge the test for an excessive fine under the Eighth Amendment is a proportionality test. *Bajakajian*, 524 U.S. at

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<sup>14</sup> [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited 3/20/18). This CPI inflation calculator reflects inflation dated back to 1913, the earliest calculator available with date from the Bureau of Labor Statistics the State could locate.

334-36. The Washington State Supreme Court has acknowledged the standard set in *Bajakajian*, “a fine is excessive if it is grossly disproportional to the gravity of the defendant’s offense.” *State v. WWJ Corp.*, 138 Wn.2d 595, 604, 980 P.2d 1257 (1999).

The Supreme Court upheld the \$500 fine imposed in 1890 for the felony crime of dealing faro on a premises.<sup>15</sup> *Foster*, 1 Wash. at 414. The Supreme Court similarly in 1918 upheld a fine of \$300 for petit larceny, finding the sentence was not excessive. *State v. Hatupin*, 99 Wash. 468, 469-71, 169 P. 966 (1918). The \$300 fine would be equivalent to \$5,335.52 today.<sup>16</sup>

Booth was convicted of Assault in the Third Degree and Tampering with a Witness, in case number 03-1-00717-4. CP 78-85. Assault in the Third Degree and Tampering with a Witness are both class C felony offenses punishable by not more than five years in prison and a \$5,000 fine for each offense. RCW 9A.20.020(1)(c); RCW 9A.36.031; RCW 9A.72.120. Booth was ordered to pay a total of \$710 in fees and assessments, this is not excessive. CP 87-88.

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<sup>15</sup> Faro is a gambling card game that was especially popular in the 1800’s in the United States. <https://lasvegassun.com/news/2012/nov/19/once-king-gambling-halls-faro-now-ghost/> (last visited 3/20/18).

<sup>16</sup> [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited 3/20/18).

Booth was convicted of two counts of Assault in the Second Degree, one with a deadly weapon, in case number 04-1-00325-8. CP 89-96. Assault in the Second Degree is a class B felony punishable by not more than ten years in prison and a \$20,000 fine for each offense. RCW 9A.20.020(1)(b); RCW 9A.36.021. Booth was ordered to pay a total of \$710 in fees and assessments and \$509 in restitution, this is not excessive.

Booth was convicted of one count of Murder in Second Degree, two counts of Murder in the First Degree, one count of Attempted Murder in the First Degree, one count of Attempted Extortion in the First Degree, and one count of Unlawful Possession of a Firearm in the First Degree; four class A felonies, one class C, and one class B felony. CP 154-62; RCW 9A.04.110; RCW 9A.32.030; RCW 9A.32.050; RCW 9A.41.040; RCW 9A.56.120. Therefore, the maximum punishment Booth could receive was life in prison and a fine of not more than \$50,000 for each class A felony offense. RCW 9A.20.020. Booth was ordered to pay a total of \$800 in fees and assessments and \$6,3893.25 in joint and several restitution, this is not excessive. Booth's constitutional right to be free from excessive fines was not violated by the trial court's ordered mandatory legal financial obligations in these three cases.

#### **IV. CONCLUSION**

This court should affirm the trial court's denial of Booth's CrR 7.8(b) motion. There was no intrusion upon Booth's privileged communications with his defense team by any member of the Lewis County Sheriff's Office. If, the Court finds the inadvertent overheard communications a violation, they are harmless beyond a reasonable doubt as investigating detectives and the prosecutors had no knowledge that they even occurred. The trial court did not abuse its discretion when it limited Booth's testimony, as the limitation was proper and if the trial court erred it was harmless. The trial court did not err when it denied Booth's motions to compel discovery because Booth did not meet the requisite burden to show the requested matters were material or the request was reasonable. The trial court did not abuse its discretion when it denied Booth's request to reopen the record after Booth had rested and the trial court had orally ruled on the CrR 7.8(b) motion. Booth received effective assistance from his attorney throughout the CrR 7.8(b) proceedings. Finally, the trial court handled the legal financial obligations in the six case numbers correctly, there is no constitutional violations, the remaining obligations are mandatory, and should be affirmed. This Court should affirm the trial court's rulings denying the CrR 7.8(b) hearing

and all peripheral matters that surround it, including the denial of motions to compel evidence, the limitations of Booth's testimony, and the denial to reopen the record.

RESPECTFULLY submitted this 23<sup>rd</sup> day of March, 2018.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: \_\_\_\_\_  
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Attorney for Plaintiff

**LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE**

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