

NO. 49764-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CHAD CHRISTENSEN,

Appellant.

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

The Honorable Richard L. Brosey, Judge

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MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN  
THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

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I. IDENTITY OF MOVING PARTY

Nielsen, Broman and Koch, appointed counsel for appellant, respectfully requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant requests permission to withdraw pursuant to RAP 15.2(i).

III. FACTS RELEVANT TO MOTION

By letter dated January 20, 2017, Nielsen, Broman & Koch was appointed to represent appellant Chad Christensen on appeal from the “Findings of Fact, Conclusions of Law from CR 7.8 Hearing” entered on December 9, 2016 denying Christensen’s motion for relief from judgment.

In reviewing this case for issues to raise on appeal, Jennifer Sweigert, a staff attorney at Nielsen, Broman and Koch, has performed the following:

1. Read and reviewed the Verbatim Report of Proceedings from the CrR 7.8 motion hearing on November 8, 2016;
2. Read and reviewed the clerk’s papers;
3. Researched all pertinent legal issues and conferred with other attorneys concerning legal and factual bases for appellate review;

4. Written to Christensen explaining the Anders<sup>1</sup> procedure and his right to file a pro se supplemental brief and served him with a copy of this motion.

IV. GROUND FOR RELIEF

RAP 15.2(i) allows counsel to withdraw on appeal if counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 83 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), State v. Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997), State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), and State v. Pollard, 66 Wn. App. 779, 825 P.2d 336, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Christensen to proceed pro se.

Nielsen, Broman and Koch submits the following argument and brief to satisfy its obligations under Anders, Theobald, Pollard, and RAP 15.2(i).

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<sup>1</sup> Anders v. California, 386 U.S. 738, 83 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

V. BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

A. POTENTIAL ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a public trial because, during voir dire, appellant's father was asked to give up his seat in favor of potential jurors.

2. Appellant was denied his constitutional right to effective assistance of counsel because his attorney failed to object to a closure of the courtroom during voir dire.

3. Appellant was denied his constitutional right to effective assistance of appellate counsel because his attorney on appeal failed to assign error or argue a denial of appellant's public trial right.

Issues Pertaining to Potential Assignments of Error

1. Was appellant denied his constitutional right to a public trial when, during voir dire, someone asked his father to give up his seat to potential jurors and the court did not expressly consider the factors mandated by State v. Bone-Club<sup>2</sup>?

2. Was appellant denied his constitutional right to effective assistance of counsel for his defense when his attorney failed to object to

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<sup>2</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

appellant's father being asked to give up his seat without consideration on the record of the Bone-Club factors?

3. Was appellant's appellate attorney ineffective in failing to argue on direct appeal that appellant's public trial right had been violated?

#### B. STATEMENT OF THE CASE

In 2012, Christensen was convicted of first-degree child molestation. CP 10-21. His conviction was affirmed on direct appeal. CP 35-50. In 2015, Christensen filed a motion for relief from judgment under CrR 7.8, arguing that his constitutional right to a public trial had been violated. CP 51-88. He included sworn statements from his father, his attorney, and himself regarding the proceedings during voir dire at his 2012 trial.

Christensen declared that his father, the only spectator, was asked to leave the courtroom due to a larger than usual group of potential jurors that filled the gallery. CP 69. He declared that three chairs were brought in to accommodate the bailiff and three of the potential jurors, and the chairs in the jury box itself remained empty, yet no attempt was made to accommodate his father's presence. CP 69-70. He declared his father was his main support and he (Christensen) would have objected if he had been informed of his public trial rights. CP 70.

Christensen's father declared that he was asked to leave because there was not enough room in the courtroom. CP 66. He waited just outside

the courtroom because he wanted to assist in jury selection. CP 66. However, when he attempted to enter the courtroom after some of the potential jurors had been excused, he found the door locked. CP 66-67. He was never informed of his right to be present or given the opportunity to object. CP 67. He declared he would have objected to being excluded from voir dire. CP 67.

Christensen's trial counsel stated in a letter that the potential jurors filled all or nearly all of the available seating. CP 73. Either counsel or the bailiff, he could not recall which, asked Christensen's father to give up his seat to a potential juror. CP 73. However, counsel claimed Christensen's father was not excluded from the courtroom. CP 73.

In its response to Christensen's motion, the State attached declarations from one of the bailiffs at the trial. CP 326-28. The bailiff declared he had been given explicit instructions by the judge not to exclude the public from voir dire. CP 327. He may ask members of the public to move to accommodate potential jurors but then brings chairs for the public to sit in the aisles to watch voir dire. CP 327. He had no independent memory of Christensen's trial. CP 328. However, he declared he had never, in the previous ten years, told anyone they could not be in the courtroom during voir dire, forced anyone to leave, or failed to provide a seat for a member of the public who wished to remain. CP 328.

Additional evidence was presented via live testimony at the hearing on Christensen's CrR 7.8 motion for relief from judgment. Christensen testified his father was initially seated directly behind him, but when he looked again, his father was gone. RP 7-8. He heard the prosecutor say something about an unusually large jury pool. RP 7. He testified he did not recall any discussion about closing the courtroom or about his father's absence during voir dire. RP 12-13. He testified he entered the courtroom through the main doors from the hallway, as did the bailiffs and the potential jurors after him. RP 16-18. After lunch, when his father returned, he did not mention his attempt to re-enter the courtroom or the doors being locked. RP 19.

The judge's clerk testified she unlocks the public door from the courtroom to the hall every morning, and that, if she did not do so, the jury would not be able to enter. RP 23-24. She could not say whether she checked to ensure that the door remained unlocked. RP 25. She testified the only way to lock the courtroom doors is from the hallway side, with a key. RP 26. She explained that the clerk, the judge, and the court administrator have keys, but the bailiffs do not. RP 27. She testified the courtroom was usually locked during the lunch recess. RP 29.

Evidence was also presented that the capacity of the courtroom was 90, and there were 51 potential jurors present that day. CP 76; RP 9-10.

Christensen argued that, given the number of persons in the courtroom, asking Christensen's father to give up his seat was akin to excluding him. RP 34, 38-39, 41, 50-51. He argued that, even if it were defense counsel who asked him to move, defense counsel was acting as an officer of the court. RP 47. The judge stated that, since the Bone-Club decision, he does not close the courtroom and, as far as he could determine, it was not closed in this case. RP 51-52. The court found Christensen's father was not asked to leave the courtroom, there was sufficient room, and bailiffs were willing to bring in additional chairs for spectators if necessary. CP 344. The court found the courtroom remained unlocked except during the lunch recess. CP 345. The court concluded there was no closure of the courtroom and no deficient performance by Christensen's attorney. CP 345.

### C. POTENTIAL ARGUMENT

1. THE COURT VIOLATED CHRISTENSEN'S PUBLIC TRIAL RIGHT BY EXCLUDING HIS FATHER WITHOUT CONSIDERING THE BONE-CLUB FACTORS.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 guarantees open court proceedings with respect to the public and press. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First

Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). The right operates as a check on the judicial system, providing accountability and transparency and assuring that what occurs in court will not be secret or unscrutinized. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012). The public trial requirement also is for the benefit of the accused: “that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

Therefore, court proceedings may not be closed to public view without consideration, on the record, of the factors discussed in Bone-Club. 128 Wn.2d at 258-59. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest justifying closure and, when closure is based on a right other than an accused’s right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least

restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Id. at 258-260; Wise, 176 Wn.2d at 12.

When the court fails to abide by this procedure, courtroom closure is structural error. Wise, 176 Wn.2d at 13-15. It is presumed prejudicial and not subject to harmless error analysis. Id.; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; State v. Brightman, 155 Wn.2d 506, 517-18, 122 P.3d 150 (2005).

Jury selection is a critical part of the trial that must be open to the public. Wise, 176 Wn.2d at 11 (citing Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010)). Before a trial judge can close any part of voir dire, it must analyze the five factors identified in Bone-Club. Orange, 152 Wn.2d at 806-07, 809; see also Brightman, 155 Wn.2d at 515-16 (public trial violated if court orders courtroom closed during jury selection but fails to engage in Bone-Club analysis). The need to accommodate a large potential jury pool is not a sufficiently compelling reason to partially close the courtroom by excluding the defendant's entire family from the courtroom during voir dire. Orange, 152 Wn.2d at 808-14.

Christensen could argue that, by asking his father (the only member of the public present) to give up his seat, the court effectively closed the courtroom during voir dire and violated Christensen's constitutional right to a public trial because it failed to first consider the Bone-Club factors on the record. A motion for relief from judgment should be granted under CrR 7.8(b) for mistake, newly discovered evidence, fraud, a void judgment, or when there is "any other reason justifying relief from the operation of the judgment." CrR 7.8. Christensen could argue the violation of his public trial right constitutes good reason for relief from judgment and the superior court erred in denying his motion.

2. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT WHEN CHRISTENSEN'S FATHER WAS ASKED TO GIVE UP HIS SEAT

Every person accused of a crime is entitled to effective assistance of legal counsel for his or her defense. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That constitutional right is violated when counsel's performance is unreasonably deficient and there is a reasonable probability that, without the errors, the outcome of the trial would have been different. State v. Ortiz, 196 Wn. App. 301, 306-07, 383 P.3d 586 (2016) (discussing Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Ineffective assistance of counsel is constitutional error that may be

raised for the first time on collateral review. In re Pers. Restraint of Khan, 184 Wn.2d 679, 689, 363 P.3d 577 (2015).

The public trial right cannot be waived without a knowing, voluntary, and intelligent waiver. State v. Frawley, 181 Wn.2d 452, 463, 334 P.3d 1022 (2014). The record shows no such waiver here. Christensen could argue his trial attorney was ineffective in failing to object to an improper closure of the courtroom in violation of his client's constitutional right to a public trial. Christensen could argue ineffective assistance of counsel constitutes good reason for relief from judgment and the court erred in denying his motion under CrR 7.8.

3. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

A person convicted of a crime has a constitutional right to effective assistance of appellate counsel for a first appeal as of right. In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 787, 100 P.3d 279 (2004) (citing Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)). Appellate counsel is ineffective when he or she fails to raise a meritorious issue and the defendant is thereby prejudiced. Id. (citing In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997)). The prejudice standard derives from the Strickland standard, discussed above, and requires showing a reasonable probability that, but for counsel's unprofessional

errors, the defendant would have prevailed on appeal. Id. (discussing Smith v. Robbins, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)).

Because of the presumption of prejudice, the failure of appellate counsel to raise a public trial issue constitutes ineffective assistance. Orange, 152 Wn.2d at 814. Christensen could argue his appellate attorney afforded constitutionally ineffective assistance in failing to raise this issue in his direct appeal. Christensen could argue ineffective assistance of appellate counsel is good reason for relief from judgment and the court erred in denying his motion under CrR 7.8.

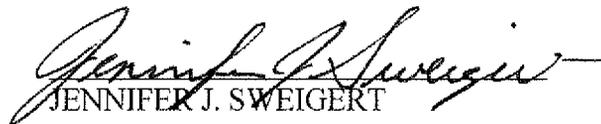
D. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record, and to permit Christensen to proceed pro se.

DATED this 5<sup>th</sup> day of May, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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**NIELSEN, BROMAN & KOCH, PLLC**  
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