

No. 49764-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHAD E. CHRISTENSEN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

**Respondent's Brief/Response to Appellate
Counsel's Motion to Withdraw**

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I. ISSUE

- A. Did appellate counsel correctly determine there are no non-frivolous issues on appeal and therefore should be permitted to withdraw as court appointed counsel by this Court?

II. STATEMENT OF THE CASE

PROCEDURAL FACTS

Christensen was convicted of one count of Child Molestation in the First Degree after a jury trial on June 18, 2012. CP 10. Christensen was sentenced to a minimum term of 132 months in prison. CP 13-14. Christensen timely appealed his conviction. CP 22-50. The Court of Appeals affirmed Christensen's conviction in an unpublished opinion on May 6, 2014 and a Mandate was issued on September 8, 2014. CP 35, 37-50.

On July 16, 2015 Christensen filed a pro se Motion for Relief from Judgment and Sentence pursuant to CrR 7.8(b)(5). CP 51-86. Christensen alleged an open courts violation due to his father being excluded from the voir dire portion of his jury trial. *Id.* Christensen also alleged his trial counsel was ineffective for failing to object to the closure. CP 57-58. Christensen was eventually appointed counsel for his CrR 7.8 hearing in December 2015. CP 198.

After further delays, evidence, and briefing the CrR 7.8 hearing was held on November 8, 2016. RP 1. Christensen provided

testimony to support his motion. RP 5-20. Courtroom Clerk Kimberly Alexander also testified. RP 22-30. The trial court ruled Christensen had not met his burden and denied the CrR 7.8 action, entering Findings of Fact and Conclusion of Law. CP 343-46.

SUBSTANTIVE FACTS

Christensen's jury trial commenced on June 14, 2012. CP 210. Present in the courtroom were Judge Brosey, Christensen, Ken Johnson (Christensen's attorney), Colin Hayes (the deputy prosecutor), Detective Rick Silva, Jane Westlund (court reporter), and Sherry Tyler (courtroom clerk). CP 78, 343. Later the two bailiffs, Thomas O'Connell and Mary Erickson, along with the jurors were also in the courtroom. CP 343. There were 51 prospective jurors who reported for jury duty for Christensen's trial. RP 305-08, 344.

Christensen was out of custody and arrived at court the morning of trial with his father, Chip Christensen. RP 6-7. Chip¹ sat in the first pew, directly behind where Christensen was seated in the courtroom. RP 7. According to Christensen his father was asked by someone to leave the courtroom to make room for the large jury

¹ The State will refer to Chip Christensen by his first name to avoid confusion, no disrespect intended.

panel. RP 7-9. Chip also asserted he was asked to leave to make room for the jury panel. CP 104.

Mr. O'Connell had explicit instructions from Judge Brosey to not exclude the public from voir dire. CP 327, 344. The public may be asked, in cases where there is a large jury panel, to stand while the venire is seated. CP 327. If there is not enough available seating in the pews after the prospective jurors are seated Mr. O'Connell, or any of Judge Brosey's bailiffs, will bring in chairs for spectators so they may view the jury selection process. CP 327, 344. Mr. O'Connell did not exclude Chip Christensen from the courtroom. CP 328.

Chip alleged he could not return into the courtroom because it was locked, even though the jury selection process was proceeding. CP 104-05. Courtroom clerk Kimberly Alexander explained how the courtroom doors, and their locking mechanisms, worked. RP 23-30. Ms. Alexander explained that it is physically impossible to enter the courtroom from the public hallway if the courtroom doors are locked. RP 25. It would have been impossible for a jury panel to enter Judge Brosey's courtroom if the courtroom doors were locked. RP 24. The doors can only be unlocked with a key, from the outside of the door. RP 26. The bailiffs do not have keys to the courtroom. RP 26-27.

Christensen walked through the courtroom doors when he arrived with his father. RP 16. Christensen also saw Mr. O'Connell open the courtroom door from outside the courtroom and walk in. RP 17. The jury entered through the public courtroom doors. RP 17.

The trial court found that Chip had not been excluded from the courtroom. CP 345. The trial court found there was no courtroom closure. CP 345. The trial court also found Christensen's attorney's performance was not deficient. *Id.* Therefore, according the trial court, Christensen had not met his burden, and the court dismissed the CrR 7.8 motion. *Id.* Christensen timely appeals the trial court's denial of his motion. CP 347-51.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. APPELLATE COUNSEL HAS CORRECTLY DETERMINED THERE ARE NO NON-FRIVIOUS ISSUES ON APPEAL.

Counsel has identified as potential appellate issues (1) the trial court violated Christensen's public trial right by excluding his father without considering the *Bone-Club*² factors, (2) trial counsel

² *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 629 (1995).

was ineffective in failing to object when Christensen's father was asked to give up his seat, and (3) appellate counsel in failing to raise this issue on direct appeal. Counsel correctly notes each of these issues lack merit. Counsel also has requested permission from the Court to withdraw as Christensen's court appointed counsel.

A motion to withdraw as court appointed counsel on review on the ground there is no basis for a good faith argument must "be accompanied by a brief referring to anything in the record that might arguable support the appeal." *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970), *citing Anders v. California*, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967); *see also* RAP 15.2(i); RAP 18.3(a). The indigent defendant should be given a copy of this brief and allowed time to raise any issues of his or her choosing. *Id.* The court then decides whether the case is wholly frivolous after a full examination of the proceedings. *Id.*

Christensen's counsel has complied with this procedure. The State concurs with counsel's assessment that there are not any meritorious issues. The State, while understanding Christensen's counsel's addressment of the issues, would respectfully point out, if this were a full briefing, the State would be countering the issues as follows below. Even with the State's reassessment of how the issues

must be presented to this Court, there are still no meritorious issues to present. Christensen has not filed a *pro se* brief. Therefore, this Court should grant counsel's motion to withdraw and affirm the trial court's denial of Christensen's CrR 7.8 motion.

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).

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. 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 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, prejudice is not presumed in a collateral attack in the trial court pursuant to CrR 7.8. A defendant seeking to have his conviction set aside in a post-sentencing CrR 7.8(b) collateral attack motion, such as the one Christensen filed, must establish the error caused actual and substantial prejudice.

3. Review Is Limited To The Trial Court's Denial Of The CrR 7.8(b) Motion.

In identifying the three issues Christensen could potentially raise, his counsel fails to acknowledge this is an appeal of a CrR 7.8(b) motion. Brief/Motion of Appellant 7-12. Christensen does not get to relitigate each issue to this Court as if this were a direct appeal. Christensen's only course of action in this appeal is to argue the trial court abused its discretion when it reached its decision to deny his motion and to argue the trial court's ruling regarding his ineffective assistance of trial counsel claim was incorrect. Christensen did not

raise ineffectiveness of his appellate counsel below in his collateral attack, so it is unclear to the State how he raises the issue now.

A defendant has a right to appeal the denial of their CrR 7.8 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 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 motion. *Id.*

The trial court did not abuse its discretion when it denied Christensen’s CrR 7.8(b) motion. The trial court read all the briefing, considered the exhibits, and heard live testimony. The trial court made credibility determinations, applied the correct legal standard, and determined Christensen had not met his burden, as required as the person bringing the post-conviction collateral attack. CP 345. The trial court did not abuse its discretion when it determined Christensen did not meet his burden to show he suffered actual and substantial prejudice by his claimed errors. *Id.* The trial court’s denial of the motion was not manifestly unreasonable or untenable. Therefore, the trial court’s denial should be affirmed.

a. The trial court did not abuse its discretion when it determined there was no closure of the courtroom.

The United States Constitution and the Washington State Constitution guarantee a defendant in a criminal action the right to a public trial. U.S. Const. amend VI; Const. art. I, § 22. The Washington State Supreme Court has held the public trial right extends to jury selection. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 118, 340 P.3d 810 (2014). The public trial right is not an absolute right. *In re Coggin*, 182 Wn.2d at 118. Prior to closing a courtroom there must be consideration of the five criteria the Supreme Court set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a "serious imminent threat" to that right.
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.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d at 258-59. A criminal defendant's public trial rights are violated if there is a closed proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d 150 (2005).

The public trial requirement is primarily for the benefit of the accused. *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). "[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) (citations omitted). The right to a public trial is closely linked to the defendant's right to be present during critical phases of the trial. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

The trial court found Christensen's evidence that his father was asked to leave the courtroom not to be credible. RP 54-55. Chip's declaration stating he was asked to leave and could not reenter the courtroom because it was locked was not supported by the evidence. RP 6-7, 16-17, 24-25; CP 104-05, 327-28. Christensen

did present credible evidence that Chip was asked to give up his seat while the venire was seated. CP 111.

Relocating one's seat is not a courtroom closure, as Chip was not excluded from the courtroom. This does not invoke the principles behind open courts or require the trial judge to go through a *Bone Club* inquiry. The proceedings were not closed. Chip was still allowed to be present, he was simply required to take a different seat in the courtroom to accommodate the voir dire process of the venire. Christensen could not show the trial court abused its discretion in finding he had not met his burden to show a closure, let alone, actual and substantial prejudice from the alleged error. The trial court's dismissal of the CrR 7.8 motion should be affirmed.

b. The trial court did not abuse its discretion when it determined Mr. Johnson's performance was not deficient.

To prevail on an ineffective assistance of counsel claim Christensen had to show the trial court that (1) the Mr. Johnson'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 that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at

130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). 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. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

The trial court did not error when it determined Mr. Johnson's performance was not deficient and therefore not a basis to grant the CrR 7.8(b) motion. RP CP 345. There was no courtroom closure to object to, therefore, Mr. Johnson's failure to do so was not in error. Mr. Johnson requesting Chip move seats is not objectionable or deficient performance either, as Mr. Johnson would need to be able to select a jury and necessarily needed the venire seated in the pews. There is no showing of deficient performance. Christensen's claim of ineffective assistance of counsel properly failed and this Court should affirm the trial court's ruling.

c. Christensen never raised an ineffective assistance of appellate counsel claim in the trial court.

It has long been understood that an effective appellate lawyer should exercise discretion in bringing issues before the court.

The “process of ‘winnowing out weaker arguments ... and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L.Ed.2d 434 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)). Here, appointed counsel has thrown the chaff in with the wheat, ignoring their duty under RPC 3.1 to present only meritorious claims and contentions and leaving it for this court to cull the small number of colorable claims from the frivolous and repetitive. ... We hereby provide notice that such behavior will not be tolerated in the future.

Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 302-03, 868 P.2d 835, decision clarified sub nom. *In re Pers. Restraint Petition of Lord*, 123 Wn.2d 737, 870 P.2d 964 (1994). Thus, it follows that not all conceivable issues must be included in an appellate brief.

Effective assistance of counsel is guaranteed by both the federal and state constitutions. See. U.S. Const. amend. VI; Const. art. I, § 22. It is well-settled that to demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;

and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A failure to make either showing requires dismissal of the claim. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The same standard applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).

Review of counsel's performance starts with the strong presumption that counsel acted reasonably. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel has a duty to research relevant law. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland*, 466 U.S. at 690-91), and to investigate all reasonable lines of defense. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 744, 101 P.3d 1 (2004) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Importantly, "[i]n assessing performance, the court must make every effort to eliminate the distorting effects of hindsight." *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, *cert. denied*, 506 U.S.

958 (1992)). Ineffective assistance of counsel is a fact-based determination that is “generally not amenable to per se rules.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.

Strickland, 466 U.S. at 696.

Moreover, an attorney’s failure to raise novel legal theories or arguments is not ineffective assistance. See, e.g., *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir.) (“Counsel’s failure to raise [a] novel argument does not render his performance constitutionally ineffective”), *cert. denied*, 546 U.S. 882 (2005); *Haight v. Commonwealth*, 41 S.W.3d 436, 448 (Ky.) (“while the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will”), *cert. denied*, 534 U.S. 998 (2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky.2009). Similarly, counsel is effective even if she does not anticipate changes in the law. *State v. Grimes*, 165 Wn. App. 172, 192, 267 P.3d 454 (2011) (trial counsel’s failure to challenge widely-

accepted jury instruction later disapproved by the supreme court was not ineffective assistance of counsel); *State v. Brown*, 159 Wn. App. 366, 372, 245 P.3d 776 (2011) (collecting several cases). See also *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (trial counsel was not ineffective for failing to raise a voir dire challenge under *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), two days before *Batson* was decided, because reasonable conduct is viewed in accordance with the law at the time of conduct); *Knowles v. Mirzayance*, 556 U.S. 111, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (defense counsel's performance was not deficient when he counseled defendant to abandon NGI claim that stood almost no chance of success even though defendant asserted that he had "nothing to lose" by making the claim); *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant, if counsel, as a matter of professional judgment, decides not to present those issues). Counsel has no duty to pursue strategies that are not reasonably likely to succeed. *McFarland*, 127 Wn.2d at 334 n.2.

Christensen did not raise the argument that his appellate counsel was ineffective with the trial court as part of his CrR 7.8 motion and the trial court never made a ruling in regards to his appellate counsel. CP 51-88, 343-46. Even if Christensen could not meet the burden to show appellate counsel was ineffective for failing to raise an issue that was wholly outside the court record. There was nothing contained within the verbatim report of proceedings or the Clerk's minutes which would have indicated to appellate counsel that he or she could raise an open courts challenge in Christensen's case. This claim, as counsel notes in the *Anders* brief, has no merit.

IV. CONCLUSION

Appellate counsel has correctly determined there are no non-frivolous issues that could be raised on appeal in this case. The three potential areas counsel identifies have no merit. The trial court did not abuse its discretion when it determined Christensen did not meet his burden to show a courtroom closure through competent evidence and therefore did not show he sustained actual and substantial prejudice as a result of his alleged error. Further, Christensen has received effective representation from his attorneys, both at the trial court and the appellate court. This Court should grant appellate counsel's motion and dismiss this appeal.

RESPECTFULLY submitted this 29th day of June, 2017.

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by: _____
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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