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NO. 51557-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of Joel Reimer:

STATE OF WASHINGTON,

Respondent,

v.

JOEL REIMER,

Appellant.

RESPONSE TO APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

A jury recommitted Joel Reimer as a sexually violent predator after an unconditional release trial. Reimer testified at trial, but otherwise waived his right to be present and assist in his defense during trial. Approximately one year after trial, Reimer filed a CR 59 motion for a new trial alleging ineffective assistance of counsel based on allegations that were not part of the trial record. The trial court properly exercised its discretion in ruling that this motion was both untimely and not properly before the court.

Reimer subsequently moved the trial court to reconsider its denial of this motion “and/or to vacate” the recommitment order under CR 60(b)(1) and CR 60(b)(11). The trial court properly exercised its discretion in denying this motion. Reimer not only failed to file the CR 60(b) motion within a reasonable time, but also failed to provide any legal analysis in support of his motion. This Court should affirm the trial court’s denial of Reimer’s CR 59 and CR 60(b) motions.

Reimer did not raise an ineffective assistance of counsel claim in the direct appeal of his recommitment order. Instead, he improperly treats CR 60(b) as a substitute for direct appeal. Then, rather than properly focusing on the trial court’s denial of his CR 59 and CR 60(b) motions, he argues the merits of his ineffective assistance of counsel claim in this appeal. This Court should deny Reimer’s ineffective assistance of counsel

claims because they were not part of the trial record, were not considered by the trial court, and are not properly before this Court on direct appeal. Even if this Court were to address his ineffective assistance of counsel claims, Reimer has not met his burden of showing that his counsel's representation was deficient and prejudiced his case such that he is entitled to a new trial.

II. RESTATEMENT OF THE ISSUES

- A. Did the trial court abuse its discretion in denying Reimer's CR 59 motion for a new trial as untimely where he filed the motion nearly one year after the recommitment order?
- B. Did the trial court abuse its discretion in denying Reimer's CR 59 motion for a new trial where he failed to identify specific reasons or provide any legal analysis in support of his motion?
- C. Did the trial court abuse its discretion in denying Reimer's CR 60(b) motion where he failed to file the motion within a reasonable time and failed to adequately brief the issue?
- D. Are Reimer's ineffective assistance of counsel claims properly before this Court on direct appeal where the trial court did not consider the merits of the claims because they were not part of the trial record?
- E. Should this Court decline to address the merits of Reimer's ineffective assistance of counsel claims because the issue on the appeal is the trial court's denial of his CR 59 and CR 60(b) motions?
- F. Is Reimer precluded from arguing on direct appeal that he was denied legal materials to assist in his defense where his claims are not part of the trial record, where he did not raise the issue to the trial court, and where he explicitly waived his right to assist in his defense at trial?

III. STATEMENT OF THE CASE

A. Reimer Was Recommitted as a Sexually Violent Predator in an Unconditional Release Trial Before a Jury

Joel Reimer has a history of sexually assaulting young boys and girls. 10/13/16 RP at 486-89, 500-01, 507-26; 10/18/16 RP at 840-59.¹ In 1992, Reimer was initially committed as a sexually violent predator (SVP). 10/13/16 RP at 509. In 2016, Cowlitz County Superior Court held an unconditional release trial. *See* 10/11/16 RP. Prior to trial, Reimer reserved his right to testify, but otherwise explicitly waived his right to be present during all aspects of trial, including waiving his right to assist and consult with his attorneys during all phases of trial. CP at 330-34; *see also* CP at 329 (additional written waiver from Reimer requesting transport to and from court only on the day he testifies). The trial court engaged in a detailed colloquy with Reimer about his written waiver. *See* 10/11/16 RP at 74-78. On October 18, 2016, Reimer testified at trial for nearly an entire day. *See* 10/18/16 RP at 772-919. On October 24, 2016, a unanimous jury found beyond a reasonable doubt that Reimer continues to meet criteria as an SVP. CP at 210. On October 27, 2016, the court entered an order recommitting Reimer to

¹ All Verbatim Report of Proceedings (RPs) are referred to by the date of the proceedings. With the exception of 11/30/16 RP, 10/11/17 RP, and 10/25/17 RP, all other RPs are contained in the record of Reimer's direct appeal from the recommitment trial, which is pending before this Court under Cause No. 49881-2-II.

the custody of the Department of Social and Health Services at the Special Commitment Center (SCC). CP at 1.

B. Reimer's Motion for Reconsideration and Motion for New Trial

On November 4, 2016, Reimer's trial counsel filed a "CR 59 Motion for Reconsideration of Respondent's Motion for a Mistrial; Motion for a New Trial for Violation of Right to be Present at Trial." CP at 5-11.

First, based on CR 59, Reimer asked the trial court to reconsider its denial of his motion for a mistrial made during the State's cross-examination of his expert. CP at 5-11. Without elaborating, Reimer based his argument on CR 59(a)(1), (8), and (9). CP at 7-9.

Second, Reimer argued that the trial court should grant a new trial "because he was not permitted by the jail to come to court on Wednesday October 19th." CP at 6.² However, Reimer had filed a written waiver at the beginning of trial waiving his right to be present during all aspects of the trial, including "during all phases of The Defense Case." CP at 330-34. He also waived his right to assist and consult with his attorneys at trial. CP at 330.

In his motion for a new trial, Reimer's counsel stated that "for reasons that are unclear, Mr. Reimer was not permitted to attend his trial on

² Reimer based this motion on *In re Det. of Black*, 189 Wn. App. 641, 357 P.3d 91 (2015) (*Black I*). *Black I* has since been reversed by *In re Det. of Black*, 187 Wn.2d 148, 385 P.3d 765 (2016) (*Black II*).

October 19th in spite of his request to jail personnel that he be brought to court.” CP at 10; *see also* CP at 6. The motion did not include any facts in the “facts” section to support his motion. *See* CP at 6-7, 10. Instead, it stated that “Reimer will supplement this motion with a declaration attesting to these facts.” CP at 6. Neither Reimer nor his counsel submitted such a declaration prior to the trial court’s ruling. The State opposed the motion. CP at 12-22. Based on a local court rule, the trial court considered Reimer’s motion without oral argument. *See* Cowlitz County Local Civil Rule 59(e)(3)(A). On November 17, 2016, the trial court entered an order denying Reimer’s motion. CP at 23.

C. Trial Counsel’s Motion to Withdraw Representation and the Appointment of New Counsel

On November 22, 2016, Reimer’s trial counsel moved to withdraw because of a complete breakdown in communication with their client. CP at 211-20. At the December 5, 2016 hearing on this issue, Reimer agreed with the motion and expressed dissatisfaction with counsel’s representation for the first time in the record. *See* 12/5/16 RP at 1404-06. The trial court permitted counsel to withdraw and appointed new counsel at Reimer’s request. CP at 221-22; 12/5/16 RP at 1406, 1414.

At the conclusion of the hearing, Reimer’s trial counsel stated that he was “not clear on the court’s ruling with regard to the CR 59 issue because we kind of included the *In re Black* issue, his jail/court appearance

issue.” 12/5/16 RP at 1414-15. Counsel stated, “I just want to make sure in Mr. Reimer’s interests that that issue is either resolved or that the court will further entertain his motion. It’s my belief that other counsel may issue [sic] to do further investigation on his behalf for his issue.” *Id.* at 1415. The trial court stated, “At this point I’m denying that motion without prejudice to Mr. Reimer or other counsel for Mr. Reimer renewing it. I understand that given your position in the case it’s not one you can really pursue.” *Id.*³ The trial court stated it would contact the Office of Public Defense “today” to have new counsel appointed. 12/5/16 RP at 1414-17. On January 9, 2017, Reimer’s new counsel filed a notice of appearance. CP at 299.⁴

D. Reimer’s Direct Appeal of the Recommitment Order

On August 30, 2017, Reimer’s appellate counsel filed the opening brief on the direct appeal of the recommitment order. Reimer raised three issues on appeal: (1) that he was denied the right to testify at trial; (2) that the State violated the rules of evidence and committed prosecutorial misconduct by cross-examining his expert in violation of a pretrial ruling;

³ Reimer’s counsel informed the court that Reimer wanted to file some “pro se” documents that “contain some pretty striking accusations” about his counsel that they “certainly aren’t endorsing or agreeing with.” 12/5/16 RP at 1411. The trial court allowed the documents to be filed “for posterity sake[.]” *Id.* at 1411-14. These documents were filed with the court on December 21, 2016. *See* CP at 231-98.

⁴ The Notice of Appearance is dated January 3, 2017, and indicates that Robert Thompson, Peter Connick, and Kevin Holt are assigned as Reimer’s new attorneys. CP at 299. Reimer’s assertion that the trial court “failed to ensure the appointment of new counsel for almost a year” is factually incorrect. *See* App. Br. at 3.

and (3) that the SVP statute is unconstitutional because it allows for commitment based on a preponderance of the evidence. App. Opening Br., Cause No. 49881-2-II. Reimer did not raise an ineffective assistance of counsel claim in the direct appeal. That appeal is currently pending before this Court.

E. Reimer's Post Appeal Motions for a New Trial

In September 2017, approximately eight months after new counsel filed a Notice of Appearance, the trial court received correspondence directly from Reimer claiming that he was “unaware of any attorney officially appointed to represent” him and that he wanted permission to proceed pro se. *See* CP at 24-26, 299. The trial court scheduled a hearing on the matter for October 11, 2017. CP at 24. At the hearing, Reimer was represented by counsel, Peter Connick, who had been assigned to the case since January 2017. *See* 10/11/17 RP 1-7; CP at 299.⁵

The trial court engaged in a colloquy with Reimer about whether he wanted to proceed pro se or maintain his appointed counsel. 10/11/17 RP at 2-5. Reimer stated that he had a good rapport with the assigned attorneys, but that he wanted his “pro se motions” heard by the court. *Id.* at 2-3. Reimer’s attorney stated that Reimer wanted to represent

⁵ At the hearing, Mr. Connick inexplicably claimed that he was “assigned standby counsel.” *See* 10/11/17 RP at 2. This is factually incorrect, as the trial court never ruled that Reimer may proceed pro se. Further, the Notice of Appearance indicates that Mr. Connick is one of three attorneys assigned to represent Reimer. CP at 299.

himself on his “pro se motions,” but be represented by counsel on all other issues. *Id.* at 4. The trial court rejected this hybrid representation, noting that it had previously rejected such representation, and directed Reimer to make a decision about whether to represent himself or have counsel represent him. *Id.* Reimer ultimately decided to be represented by assigned counsel. *Id.* at 3-5. The trial court rescheduled the hearing for October 25, 2017, to allow Reimer’s attorney time to prepare and file any motions he wanted heard. *See id.* at 4-7. The court set October 13, 2017, as the motions deadline. *See id.* at 6-7.

The State moved to strike the hearing after Reimer’s counsel did not file any motions by the deadline. CP at 300-23. However, two days before the hearing, Reimer’s counsel filed a “Restated Motion for New Trial.” CP at 28-187. The State filed a response the following day. CP at 188-90. Reimer’s “Restated Motion” moved for a new trial under CR 59 and, for the first time, alleged ineffective assistance of counsel. *See* CP at 28-39. The motion rested primarily on allegations that were not in the trial record, which Reimer asserted after he did not prevail at trial. *See* CP at 28-187.

The trial court denied Reimer’s CR 59 motion because it was “well outside” the time limits in the rule. 10/25/17 RP at 11. The court ruled that Reimer’s ineffective assistance of counsel claims were not properly before the court and should be raised either in the direct appeal or a personal

restraint petition. *Id.* The trial court entered an order denying Reimer's CR 59 motion. CP at 192.

On October 27, 2017, Reimer moved to reconsider the order denying his CR 59 motion for a new trial. CP at 193-94. Without providing any legal analysis, Reimer also moved to vacate the recommitment order under CR 60(b)(1) and CR 60(b)(11). *See id.* On November 29, 2017, the trial court entered an order denying the motion. CP at 199. Reimer appealed the orders "entered on Oct. 31, 2017 and Nov. 29, 2017." CP at 195, 200.⁶

IV. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion in Denying Reimer's CR 59 "Restated Motion for New Trial"**

1. **The Standard of Review Is Abuse of Discretion**

The issue on appeal is the trial court's denial of Reimer's CR 59 motion for a new trial. It is well established that the denial of a CR 59 motion is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000); *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 142, 990 P.2d 429 (1999).⁷ Motions for reconsideration under CR 59 also are

⁶ The trial court did not enter an order on October 31, 2017. It appears that Reimer is referring to the order entered on October 25, 2017.

⁷ Reimer incorrectly asserts that review of CR 59 and CR 60 motions is *de novo*. *See App. Br.* at 6-7.

reviewed under an abuse of discretion standard. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Aluminum Co. of America*, 140 Wn.2d at 537. Appellate courts can affirm the trial court on any basis in the record, even if the trial court did not consider that basis. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

2. The Trial Court Correctly Concluded That Reimer's CR 59 Motion Was Untimely

The trial court did not abuse its discretion in ruling that Reimer's CR 59 motion was untimely. A motion for a new trial under CR 59 "shall be filed not later than 10 days after the entry of the judgment, order, or other decision" and shall be noted to be heard "within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise." CR 59(b). The trial court entered the recommitment order on October 27, 2016. CP at 1. Reimer filed his CR 59 motion for a new trial on October 23, 2017, nearly one year after the order. *See* CP at 28-39. The trial court correctly ruled that this was "well outside" the time limit provided in the rule. *See* 10/25/17 RP at 11.

First, the fact that Reimer had previously filed a timely CR 59 motion on a different, unrelated issue does not make his "Restated Motion" under CR 59 timely. His first CR 59 motion raised two issues:

(1) a motion to reconsider his previous motion for a mistrial; and (2) a motion for a new trial for violating his right to be present at trial. CP at 5- 11. His “Restated Motion” raised an ineffective assistance of counsel claim. CP at 28-39.

Second, the trial court did not, as Reimer implies, allow him to raise any CR 59 issue at any time. Rather, the trial court merely indicated that Reimer’s new counsel was not precluded from raising the issue involving Reimer’s right to be present at trial. *See* 12/5/16 RP at 1415. On December 5, 2016, the trial court held a hearing to address counsel’s motion to withdraw representation. *See* 12/5/16 RP at 1403-18. Reimer incorrectly asserts that this hearing involved his motion for a new trial; however, the trial court had already denied that motion. *See* App. Br. at 4; CP at 23. At the conclusion of this hearing, Reimer’s counsel inquired about the trial court’s ruling on the CR 59 motion, asking whether the “*In re Black* issue, his jail/court appearance issue” was resolved or could be raised by new counsel after further investigation. 12/5/16 RP at 1414-15. The trial court denied the motion without prejudice to Reimer or other counsel to renew. *Id.* at 1415.

The trial court’s ruling was not an authorization for counsel to circumvent the time limits in CR 59(b) or any other rule. The court did not make any ruling regarding the timing of filing any motions. *See* 12/5/16 RP

at 1414-18. Furthermore, the court's ruling was limited to the *Black* issue involving the right to be present during trial. However, ten days after Reimer's hearing, the Supreme Court reversed the decision in *Black* and held that Black had waived his right to be present. *See Black II*, 187 Wn.2d 148. In light of this decision, Reimer never pursued the *Black* issue. Instead, approximately one year after Reimer's recommitment, he raised a completely new issue involving ineffective assistance of counsel and framed it as a "Restated Motion" under CR 59. *See CP* at 28-39. Reimer failed to file the CR 59 motion within ten days of the recommitment order as required by court rule. *See CR 59(b)*.

Finally, the fact that the trial court appointed new counsel for Reimer does not justify the filing of such an untimely motion. Reimer incorrectly asserts that the trial court "failed to ensure the appointment of new counsel for almost a year." *See App. Br.* at 3. Reimer was assigned new counsel within one month of the December 2016 hearing. *See CP* at 299. The Notice of Appearance filed by new counsel is dated January 3, 2017. *CP* at 299. Counsel did not file the "Restated Motion" under CR 59 until October 23, 2017, which was nearly ten months after he was assigned. *See CP* at 28-39. The trial court did not abuse its discretion in denying the motion because it was untimely.

3. Reimer Failed to Comply with the Court Rules Requiring Him to Identify a Basis for the Motion

The trial court did not abuse its discretion in denying Reimer's CR 59 motion for a new trial because Reimer failed to comply with the court rules requiring him to identify specific reasons in support of his motion. A motion for a new trial under CR 59 "shall identify the specific reasons in fact and law as to each ground on which the motion is based." CR 59(b). Arguments not presented to the trial court will not be considered on appeal. *In re Marriage of Tang*, 57 Wn. App. 648, 655, 789 P.2d 118 (1990).

Other than stating his motion "is based on CR 59," Reimer's trial court briefing failed to identify the legal basis for his motion under the nine provisions articulated in the rule or to provide any legal analysis under any of the provisions. *See* CP at 28-39. The trial court was not required to construct an argument on Reimer's behalf. *See State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371 (2002); *see also U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Reimer fails to show that CR 59 is applicable to his ineffective assistance of counsel claims. He cites no authority to suggest that he may raise an ineffective assistance of counsel claim under CR 59. Notably, he has not argued to the trial court or to this Court that an ineffective assistance of counsel claim fits under any of the criteria outlined in CR 59(a).

See CP at 28-39. CR 59 does not provide for the type of relief Reimer is seeking. The trial court did not abuse its discretion in denying Reimer's CR 59 motion for a new trial. The trial court properly found that Reimer's ineffective assistance of counsel claim was not properly before the court and should be raised in either a direct appeal or a personal restraint petition. *See* 10/25/17 RP at 11.

B. The Trial Court Did Not Abuse Its Discretion by Denying Reimer's Untimely CR 60(b) Motion to Vacate the Recommitment Order

1. The Standard of Review Is Abuse of Discretion

A trial court's decision to vacate a judgment or order under CR 60(b) is within the trial court's discretion and will not be overturned absent an abuse of discretion. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985); *In re Det. of Mitchell*, 160 Wn. App. 669, 675, 249 P.3d 662 (2011). A court abuses its discretion only if there is a clear showing that the exercise of discretion was manifestly unreasonable or based on untenable grounds. *Mitchell*, 160 Wn. App. at 675.

A CR 60(b) motion to vacate is not a substitute for an appeal. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 452, 618 P.2d 533 (1980). An appeal from the denial of a CR 60(b) motion is limited to the propriety of the denial and not the impropriety of the underlying judgment. *Bjurstrom*, 27 Wn. App. at 450-51; *Mitchell*, 160 Wn. App. at 675. Thus, appellate

courts will review only the trial court's decision to deny the motion to vacate and not the underlying order that the party seeks to vacate.

Appellate courts can affirm a lower court's decision on any basis supported by the record and the law, even if the trial court did not consider that basis. *LaMon*, 112 Wn.2d at 200-01; *State v. Boisselle*, 3 Wn. App.2d 266, 279, 415 P.3d 621 (2018).

2. Reimer Failed to Adequately Brief the CR 60(b) Motion Before the Trial Court

The trial court did not abuse its discretion by denying Reimer's CR 60(b) motion, which lacked any relevant facts or legal analysis. Arguments or theories not presented to the trial court will not be considered on appeal. *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978); *Tang*, 57 Wn. App. at 655. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). CR 60(e)(1) requires that a motion for relief be "supported by the affidavit of the applicant or applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based[.]" CR 60(e)(1); *Friebe v. Supancheck*, 98 Wn. App. 260, 266, 992 P.2d 1014 (1999). Reimer failed to provide an affidavit providing a "concise statement of the facts or errors" in support of his motion. Reimer's only argument was that the trial court should vacate the recommitment order based on CR 60(b)(1)

and CR 60(b)(11). CP at 194. Reimer failed to provide *any* argument regarding the basis for his CR 60(b) motion or how this rule applied to the facts of his case. *See* CP at 194. On this basis alone, the trial court did not abuse its discretion in denying Reimer's CR 60(b) motion.

Reimer moved to vacate the recommitment order under CR 60(b)(1), which allows the trial court to relieve a party from a final order for mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining the order. *See* CR 60(b)(1). Reimer provided no legal argument as to which of these reasons, if any, should serve as a basis for a new trial. *See* CP at 194. In fact, he failed to provide any legal analysis at all in support of this motion.

Reimer also moved to vacate the recommitment order under CR 60(b)(11), which allows the court to relieve a party from a final order for “[a]ny other reason justifying relief” from the judgment. *See* CR 60(b)(11). The “any other reason” language of CR 60(b)(11) is not a blanket provision authorizing reconsideration for all conceivable reasons. *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982). Rather, relief under this provision “should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.” *Id.*; *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). “Such circumstances must relate to irregularities extraneous to the

action of the court or questions concerning the regularity of the court's proceedings." *Yearout*, 41 Wn. App. at 902. Courts have stressed the need for the presence of "unusual circumstances" before CR 60(b)(11) will be applied. *Id.*; *State v. Ward*, 125 Wn. App. 374, 379, 104 P.3d 751 (2005) ("CR 60(b)(11) is a catch-all provision, intended to serve the ends of justice in extreme, unexpected situations."). Reimer failed to provide *any* reasons, let alone "extraordinary" or "extreme" reasons, justifying relief under CR 60(b)(11). *See* CP at 194.

The trial court was not required to construct an argument on Reimer's behalf. *See Cox*, 109 Wn. App. at 943. The trial court did not abuse its discretion by denying Reimer's CR 60(b) motion, which lacked any factual or legal analysis.

3. Reimer Failed to File the CR 60(b) Motion Within a Reasonable Time

Reimer's CR 60(b) motion was untimely, and the trial court did not abuse its discretion in denying the motion. Although the trial court did not explicitly rule on the timeliness of the motion, this Court can affirm on any basis in the record, even if the trial court did not rely on that basis.

See LaMon, 112 Wn.2d at 200-01.⁸

⁸ Reimer incorrectly asserts that the trial court ruled that his CR 60(b) motion was untimely. *See* App. Br. at 6. The trial court's ruling on timeliness pertained only to Reimer's CR 59 motion. *See* 10/25/17 RP at 11. Reimer had not raised a CR 60(b) motion at the time of this ruling and did not raise the CR 60(b) motion until after the trial court denied his CR 59 motion as untimely. *See* CP at 192-94.

A CR 60(b)(1) motion must be made “within a reasonable time” and not more than one year after the order. CR 60(b); *Luckett v. Boeing Co.*, 98 Wn. App. 307, 310-11, 989 P.2d 1144 (1999).⁹ What constitutes “a reasonable time” depends on the facts and circumstances of the case. *Luckett*, 98 Wn. App. at 312. In determining whether the motion is brought within a reasonable time, the critical period is the time between when the moving party knew of the order and when he filed the motion. *Id.* The court considers the prejudice to the nonmoving party due to the delay and whether the moving party has good reasons for failing to take appropriate action sooner. *Id.* The moving party must show good reasons explaining the delay even if there was no prejudice to the nonmoving party. *See id.* at 313.

Reimer reads *Luckett* incorrectly. *See App. Br.* at 6. In *Luckett*, the Court held that the trial court did not abuse its discretion in denying the CR 60(b)(1) motion to vacate the dismissal order as untimely where the attorney waited four months to move to vacate the order and offered no good reason for this lack of diligence. *Luckett*, 98 Wn. App. at 313-15. Here, Reimer’s attorney waited nearly ten months to move to vacate the recommitment order. *See CP* at 193-94, 299. His Notice of Appearance is dated January 3, 2017, and he did not file the motion to vacate until October 27, 2017. *Id.* Reimer provides no justification for this lengthy delay. Under

⁹ A CR 60(b)(11) motion must be filed “within a reasonable time.” CR 60(b).

Luckett, Reimer failed to file his CR 60(b) motion within a reasonable time. See *Luckett*, 98 Wn. App. at 313-15. The trial court did not abuse its discretion in denying Reimer's CR 60(b) motion.

4. Reimer Has Abandoned All Other Issues Regarding His CR 60(b) Motion

Other than raising a timeliness issue, Reimer does not otherwise challenge the trial court's denial of his CR 60(b) motion. Accordingly, any other issues are considered abandoned on appeal. RAP 10.3(a)(6) requires an appellant to include "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Appellate courts will not consider issues that are not supported by argument or citations to authority. *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974); *Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 712-13, 395 P.3d 1059 (2017). A party abandons an issue on appeal by failing to brief the issue. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006); see RAP 12.1(a) (appellate courts generally decide a case only on the basis of issues set forth by the parties in their briefs).

5. Reimer Is Improperly Using CR 60(b) as a Substitute for Direct Appeal

An appeal from the denial of a CR 60(b) motion is not a substitute for appeal and is limited to the propriety of the denial, not the impropriety

of the underlying order. *Bjurstrom*, 27 Wn. App. at 450-52. “[A]n unappealed final judgment cannot be restored to an appellate track by means of moving to vacate and appealing the denial of the motion.” *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). Although Reimer timely appealed his recommitment order, he did not raise ineffective assistance of counsel as an issue in the direct appeal. Reimer’s opening brief was already filed in this Court when, two months later, Reimer filed the CR 59 and CR 60(b) motions in the trial court alleging ineffective assistance of counsel. *See* CP at 28-39, 193-94.¹⁰

Any ineffective assistance of counsel claim based on the trial record should have been raised in Reimer’s direct appeal. His CR 60(b) motion is an improper attempt to restore this issue to the appellate track by moving to vacate the recommitment order under CR 60(b) and then appealing the trial court’s denial of that motion. *See Gaut*, 111 Wn. App. at 881.

In *Gaut*, Gaut pled guilty, was sentenced by the court, and did not appeal the judgment or sentence. *Gaut*, 111 Wn. App. at 876-78. After the appeal period expired, Gaut moved to withdraw his guilty plea. *Id.* at 878. Gaut appealed the trial court’s denial of this motion. *Id.* at 879. The Court of Appeals noted that Gaut’s appeal focused on errors in the judgment and

¹⁰ Reimer filed his opening brief in the direct appeal on August 30, 2017. App. Opening Br., Cause No. 49881-2-II. He filed the CR 59 and CR 60(b) motions in the trial court on October 23, 2017, and October 27, 2017, respectively. CP at 28-39, 193-94.

sentence and made no attempt to show how the trial court abused its discretion in denying the motion. *Id.* at 880-81. The Court of Appeals rejected this type of collateral attack, explaining “Mr. Gaut ignores the motion proceedings and attacks the underlying judgment to try to leverage a limited right of review for abuse of discretion into a second chance for a full, direct appeal of the underlying judgment.” *Id.* at 880-82. The Court held that the issue was not reviewable on appeal from an order denying a motion to vacate. *Id.* at 882.

Similar to *Gaut*, Reimer improperly attempts to leverage a limited right of review for abuse of discretion regarding the CR 60(b) motion to vacate the recommitment order into a second chance for a full, direct appeal of the underlying order. This Court should not allow Reimer to make an end run around the time restrictions for the direct appeal.

Furthermore, Reimer cites no authority to suggest that it is proper to move to vacate a recommitment order under CR 60(b)(1) or CR 60(b)(11) based on ineffective assistance of counsel. Reimer’s motion is not authorized by the civil rules. “A motion to vacate a judgment is inherently a collateral action.” *Gaut*, 111 Wn. App. at 881. Such motions are confined to cases where the issue alleged is something extraneous to the action of the court or affects the regularity of the proceedings.

Burlingame v. Consolidated Mines and Smelting Co., Ltd., 106 Wn.2d 328, 336, 722 P.2d 67 (1986); *Gaut*, 111 Wn. App. at 881.

Irregularities that can be considered under CR 60(b)(1) are those “relating to want of adherence to some prescribed rule or mode of proceeding” and typically involve procedural defects unrelated to the merits. *Tang*, 57 Wn. App. at 654; *see also State v. Price*, 59 Wn.2d 788, 791, 370 P.2d 979 (1962) (such irregularities consist of either omitting a procedural matter that is necessary for the orderly conduct of the trial or doing it at an unreasonable time or in an improper manner). Reimer’s ineffective assistance of counsel claims do not fit under any of the criteria listed in CR 60(b)(1). They are not “[m]istakes, inadvertence, surprise, excusable neglect or irregularity *in obtaining a judgment or order.*” *See* CR 60(b)(1) (emphasis added). They also are not extraordinary or unusual circumstances such that CR 60(b)(11) should apply. Notably, Reimer fails to even allege that his ineffective assistance of counsel claims meet any of the criteria in CR 60(b). The trial court did not abuse its discretion in denying Reimer’s CR 60(b) motion to vacate the recommitment order based on ineffective assistance of counsel.

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C. This Court Cannot Consider Ineffective Assistance of Counsel Claims Based on Matters Outside the Record in a Direct Appeal

Reimer improperly asks this Court to grant him a new trial based on ineffective assistance of counsel claims that are not part of the trial record and were not considered by the trial court. Reimer's self-serving statements about his counsel's representation, which he made after he did not prevail, were not before the trial court. The trial court properly declined to address his claims. This Court should decline to address Reimer's direct appeal of claims that were not properly raised in the trial court, that were not considered by the trial court, and that are not properly before this Court.

1. Reimer's Ineffective Assistance of Counsel Claims Are Not Properly Before This Court

It is well established that evidence not in the record will not be considered on appeal. *State v. Linville*, No. 94813-5, slip op. at 13-14 (Wash. Aug. 16, 2018), <http://www.courts.wa.gov/opinions/pdf/948135.pdf>; *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10 (1991). Appellate courts "will not consider matters outside the trial record" on direct appeal of an ineffective assistance of counsel claim. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also State v. King*, 24 Wn. App. 495, 500, 504-05, 601 P.2d 982 (1979) (holding that the ineffective assistance of counsel claims were not reviewable on direct appeal because they were

based only on the defendant's unsworn allegations and could not be resolved by resorting to the record).

Reimer did not raise an ineffective assistance of counsel issue in his direct appeal. His trial court attorney informed the trial court that appellate counsel will not raise this issue "because there's no record." 10/25/17 RP at 4. Reimer's trial court attorney improperly attempted to create a record by filing self-serving statements from Reimer that were not part of the trial record. *See* CP at 28-187. Reimer then filed a direct appeal of the trial court's denial of his CR 59 motion for a new trial based on alleged ineffective assistance of counsel. *See* CP at 200.

The trial court did not consider the merits of the CR 59 motion because it was untimely and not properly before the trial court. *See* 10/25/17 RP at 11. Similarly, this issue is not properly before this Court on appeal. This Court cannot make a proper determination of Reimer's ineffective assistance of counsel claims because the basis of his claims are not part of the trial record and were not considered by the trial court.

2. Matters Not in the Trial Record Must be Raised in a Personal Restraint Petition

A personal restraint petition (PRP) is the appropriate procedure to raise a claim of ineffective assistance of counsel based on alleged facts outside of the trial record. *McFarland*, 127 Wn.2d at 335; *State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917 (1981). In a direct appeal, "[t]he

burden is on a defendant alleging ineffective assistance of counsel to show deficient representation *based on the record established in the proceedings below.*” *McFarland*, 127 Wn.2d at 335 (emphasis added). If a defendant wants to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a PRP. *Id.* at 335, 338; *Linville*, No. 94813-5, slip op. at 13-14.

Appellate courts have explained the rationale for limiting appeals to matters occurring in court:

The contentions now made would require us to make a determination of the truth of defendant’s ex parte post trial claims *concerning matters occurring out of court.* For all we know, an evidentiary hearing would disclose that the defendant’s present statements are controverted and that the decisions made concerning trial management were tactical decisions of trial counsel in discharge of his duty to best represent the defendant. If there be a basis for the claims now made in an effort to show that, after considering the entire record, the accused was denied a fair and impartial trial, that basis must be established in a separate proceeding, the merits of which we do not prejudge.

State v. Norman, 61 Wn. App. 16, 27, 808 P.2d 1159 (1991) (emphasis added); *State v. Humburgs*, 3 Wn. App. 31, 36-37, 472 P.2d 416 (1970). “Therefore, with respect to matters outside the record..., the *only* remedy is to bring an independent proceeding by way of personal restraint petition under RAP 16.3.” *Norman*, 61 Wn. App. at 27-28 (emphasis added); *King*, 24 Wn. App. at 504-05. “Then, if an evidentiary hearing is held, trial counsel can dispute the allegations, explain his tactics and

otherwise defend the charges leveled against him.” *King*, 24 Wn. App. at 505. In *Humburgs*, the defendant claimed that his trial attorney was ineffective for various reasons that were not in the trial record. *Humburgs*, 3 Wn. App. at 36. The Court of Appeals refused to consider the issue because there was no basis for the claim in the trial record and “no complaint concerning the quality of the legal representation in the actual trial itself.” *Id.* at 36-37; *see also Linville*, No. 94813-5, slip op. at 13-14 (appellate court cannot determine ineffective assistance of counsel claim where no evidence on counsel’s strategic or tactical decisions was presented to the trial court).

Because Reimer’s ineffective assistance of counsel claims are based on self-serving statements he made after he did not prevail at trial – statements which are not part of the trial record, have not been tested for their truth, and were not considered by the trial court – his claims cannot be raised in a direct appeal.

D. Reimer’s Ineffective Assistance of Counsel Claims Lack Merit

As demonstrated above, Reimer’s ineffective assistance of counsel claims are not properly raised in this appeal of the trial court’s denial of his CR 59 and CR 60(b) motions. His self-serving factual representations have not been tested for their truth and cannot be tested now, on appeal.

But even if his factual allegations were accepted as true, he has not demonstrated ineffective assistance of counsel.

1. Reimer Bears the Burden of Proving Ineffective Assistance of Counsel

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that counsel's representation was deficient and fell below an objective standard of reasonableness based on all the circumstances; and (2) that this deficient representation prejudiced the defendant such that there is a reasonable probability that, but for the errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-35 (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *McFarland*, 127 Wn.2d at 335. There is a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance," *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (citing *Strickland*, 466 U.S. at 689), and that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994); *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993). Courts will not find ineffective assistance of counsel if counsel's actions go to the

theory of the case or to trial tactics. *Garrett*, 124 Wn.2d at 520; *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The burden is on the defendant to show “from the record” a sufficient basis to rebut the “strong presumption” that counsel’s representation was effective. *McFarland*, 127 Wn.2d at 337.

To establish prejudice, the defendant must show that counsel’s errors were so serious as to deprive him of a fair trial. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (citing *Strickland*, 466 U.S. at 687). It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the trial; not every error that conceivably could have influenced the outcome undermines the reliability of the result of the trial. *Strickland*, 466 U.S. at 693. The defendant “bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” *McFarland*, 127 Wn.2d at 337. If either part of the *Strickland* test is not satisfied, the inquiry need go no further. *Hendrickson*, 129 Wn.2d at 78.

2. Reimer Waived His Right to Communicate with Counsel During Trial

Reimer’s argument that trial counsel acted unreasonably by failing to maintain “open communication” with him during trial lacks merit because Reimer explicitly waived his right to consult with his attorneys

during trial. *See* CP at 330-34. First, Reimer fails to present any legal authority that “open communication” is a requirement of effective representation. His reliance on two federal cases for this assertion is misplaced. *See* App. Br. at 9 (citing *U.S. v. Nguyen*, 262 F.3d 998, 1003-04 (9th Cir. 2001) and *Brown v. Craven*, 424 F.2d 1166, 1169-70 (9th Cir. 1970)). The defendants in those cases refused to communicate with their attorneys, and the Court held that the right to counsel is violated when a defendant is forced into trial with an attorney “with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate.” *See Nguyen*, 262 F.3d at 1003-04; *see also Brown*, 424 F.2d at 1169. Reimer does not claim facts resembling those in *Nguyen* or *Brown*.

More broadly, Reimer made it clear that he did not want to be present or participate at trial. CP at 329-34; *see* 10/11/16 RP at 74-78; *see also* 10/5/16 RP at 54-69. Other than reserving his right to testify, Reimer filed a written waiver explicitly waiving his right to participate in all aspects of the trial. CP at 330-34. This waiver included waiving any right “to assist and consult with” his attorneys during trial. CP at 330. His reserved right to testify was preserved: Reimer was brought to court and testified for nearly an entire day during the trial. *See* 10/18/16 RP at 772-919; *see also* CP at 208-09. Furthermore, Reimer testified

immediately prior to his expert, Dr. Richards, and was present at the beginning of Dr. Richard's testimony. *See* 10/18/16 RP at 919-49. But the record indicates that Reimer wanted to return to the Special Commitment Center as soon as he was done testifying. 10/18/16 RP at 771-72; 10/24/16 RP at 1396; *see* CP at 329-34. And Reimer rested his case on the same day that Dr. Richards concluded his testimony. *See* 10/20/16 RP at 1200, 1247. Thus, it is disingenuous for Reimer to now assert that there was an "unintended absence" during his case-in-chief. *See* App. Br. at 10. If Reimer had wanted to testify twice, he would have stayed in the courtroom instead of asking to be returned immediately to the Special Commitment Center.

Finally, nothing in the record supports Reimer's argument that trial counsel failed to communicate conditional release negotiations with him. He fails to even allege that such an offer ever existed. Rather, he merely asserts, with no further elaboration, that he is "very concerned" that his attorneys "purposely withheld" information "about any conditional release negotiations because they wanted a trial." *See* CP at 150.¹¹ The record does

¹¹ Reimer's appellate attorney relies on Reimer's "pro se" "writ of mandamus" for this factual representation as opposed to a declaration filed by Reimer. *See* App. Br. at 9 (citing CP 150). Reimer's "pro se" motions were not addressed by the trial court because the court did not allow hybrid representation. *See* 10/11/17 RP at 4.

not indicate that the State gave a conditional release offer or that the State was even willing to consider such a release.¹²

Even if there was some record support for his argument, Reimer is precluded from raising this issue on appeal because he did not raise it below. *See Tang*, 57 Wn. App. at 655 (arguments not presented to the trial court will not be considered on appeal).

3. Counsel Did Not Object to the “John Gotti” Testimony Because the Trial Court Ruled it Was Admissible

Reimer’s trial counsel acted reasonably by not objecting to the “John Gotti” reference because the trial court previously ruled the testimony was admissible. “The decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). “Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Id.* Where a claim of ineffective assistance of counsel is based on counsel’s failure to object, a defendant must show that the trial court would likely have sustained the objection. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010); *In re Det. of Strand*,

¹² Reimer refused to participate in sex offender treatment at the SCC. 10/13/16 RP at 530. A conditional release requires treatment participation. RCW 71.09.092; RCW 71.09.096(4). There is nothing in the record to suggest that the State offered a conditional release to Reimer, who consistently refused to participate in treatment.

139 Wn. App. 904, 912, 162 P.3d 1195 (2007). Here, Reimer cannot make this showing because the trial court ruled the testimony was admissible.

In pretrial motions, Reimer's trial attorney filed a motion to prohibit the State from referring to Reimer as "the John Gotti of the SCC." CP at 1016-17. Reimer incorrectly asserts that the trial court reserved ruling on this issue. *See* App. Br. at 11-12. On the contrary, the trial court denied Reimer's motion and ruled that the testimony was admissible:

I think that language is fair game. You know, if it needs any explanation, it can certainly happen in cross or redirect, but what its value is is going to be up to the trier of fact, but in general, I think the language is appropriate for discussion.

10/11/16 RP at 188. Based on this ruling, Reimer's attorney did not object when the State briefly questioned Reimer about his statement that others perceive him as the "John Gotti" of the SCC. *See* 10/18/16 RP at 798-801. This was a legitimate trial strategy in light of the trial court's prior ruling that the testimony was admissible.

4. Counsel's Decision to Have Reimer Explain His Behavior at the SCC Was a Legitimate Trial Strategy

Reimer's attorney questioned Reimer about his behavior at the SCC in order to highlight the positive changes Reimer made over the years. This was a legitimate trial strategy. *See Hendrickson*, 129 Wn.2d at 77-78 (deficient performance is not shown by matters that go to trial strategy or tactics). Reimer cites no legal authority for his argument that his counsel

acted unreasonably by questioning him about his recent poor behavior at the SCC. *See* App. Br. at 12-13. Appellate courts will not consider issues that are not supported by argument or citations to authority. *Talps*, 83 Wn.2d at 657; *Riley*, 198 Wn. App. at 712-13; *see* RAP 10.3(a)(6). “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Holland*, 90 Wn. App. at 538.

Moreover, by the time Reimer testified, the jury had already heard detailed testimony from the State’s expert about Reimer’s negative behavior at the SCC. *See* 10/13/16 RP at 537-53, 573-74; 10/14/16 RP at 600-09. Reimer had already testified during the State’s direct examination about his poor behavior at the SCC, including receiving “hundreds” of infractions. *See* 10/18/16 RP at 777-82.¹³ Reimer’s argument does not consider the context this earlier testimony provided for the questions posed by his attorney. Reimer’s attorney wanted Reimer to explain how his spiritual quest improved his behavior over the years:

So how has that spiritual ... investigation or quest or whatever you want to call it -- how has that helped you in some manifestly clear way? *And I’m going to add something because the jury knows very clearly, they’ve heard a lot about your behavior at the SCC*, and let me put it this way because I don’t want to make a speech. I’m not allowed to anyway. But how do you reconcile the fact that you were engaged in this spiritual quest and you were still for lack of a better word, you know, raising hell at the SCC?

¹³ Infractions at the SCC are referred to as “Behavioral Management Reports” or “BMRs.” 10/18/16 RP at 779.

10/18/16 RP at 887-88 (emphasis added). When Reimer's attorney suggested that Reimer made some inappropriate statements to staff "fairly recently," Reimer responded, "Not recently." 10/18/16 RP at 889. His attorney then clarified, "Well, when I say 'recently,' I mean we're talking about 25 years, so we're talking early 2000, 2005." *Id.*¹⁴ Reimer pointed out that this behavior was ten years ago, and his attorney responded, "Exactly." 10/18/16 RP at 889. Reimer then explained how his behavior had improved over the past ten years due to his spiritual journey. *See id.* at 889- 95. Reimer's attorney focused on these positive changes and the "dramatic reduction" in rule violations over recent years during closing argument. *See* 10/21/16 RP at 1345-58, 1380-81. Thus, when Reimer's counsel gave Reimer the opportunity to explain the positive changes he made over the years, it was in response to abundant evidence already presented about Reimer's negative behavior at the SCC. Asking Reimer to explain negative behavior that was already in evidence was a legitimate trial strategy.

Finally, the central issue in the case was not, as Reimer asserts, whether Reimer could follow rules at the SCC. *See* App. Br. at 12-13.

¹⁴ At the time of trial, Reimer had been committed for approximately 25 years. *See* 10/13/16 RP at 509.

Rather, the central issue at trial was whether Reimer continued to have a mental abnormality or personality disorder that makes him likely to commit predatory acts of sexual violence. *See* CP at 343.

5. The Decision to Call Witnesses Is a Legitimate Trial Strategy Within Counsel's Discretion

Reimer's trial counsel was not ineffective for making the strategic decision about what witnesses to call at trial. "For many reasons ... the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." *In re Det. of Hatfield*, 191 Wn. App. 378, 398, 362 P.3d 997 (2015) (quoting *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)). The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981); *Strand*, 139 Wn. App. at 913; *see also In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 735, 16 P.3d 1 (2001) ("the decision to call or not to call a witness is for counsel to make").

Reimer cites no authority to support his argument that he is entitled to decide what witnesses to call at trial when represented by counsel. *See* App. Br. at 14-15. Counsel has full authority to manage the conduct of the trial. *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). "The adversary process could not function effectively if every tactical decision required client approval." *Id.* The array

of trial tactics and strategy available to the attorney is considerable, including decisions on whom to call as a witness. *Hatfield*, 191 Wn. App. at 398. Counsel has wide latitude and flexibility in his choice of trial tactics:

If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off—indeed, in some instances, whether to interview some witnesses before trial or leave them alone—he will lose the very freedom of action so essential to a skillful representation of the accused.

Piche, 71 Wn.2d at 590.

The presumption of counsel's competence can be overcome by showing that counsel failed to conduct appropriate investigations. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987). However, counsel is not required to investigate matters that would be fruitless. *Strickland*, 466 U.S. at 691. “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. *Id.* Inquiry into counsel's conversations with the defendant may be necessary in order to properly assess counsel's investigation decisions. *Id.*

Here, other than Reimer's self-serving statements provided after trial, there are no facts properly before this Court that trial counsel refused to investigate or interview witnesses. There is no record of the identity of these alleged witnesses or what testimony they would have provided that was admissible, relevant, or favorable to Reimer's case. *See* App. Br. at 14-15 (citing CP 171, 173-74).¹⁵ There is no record as to what additional evidence might have been provided by these other alleged witnesses that was not already provided by the five witnesses Reimer's counsel did call, who testified at trial about Reimer's positive behavior at the SCC, his lack of dangerousness, and his release plans. *See* 10/18/16 RP at 773-946; 10/19/16 RP at 958-1153; 10/20/16 RP at 1167-1247. Reimer has not shown that this strategic decision by counsel was deficient.

6. Counsel Has the Authority to Decide Which Legal Motions to File

Reimer cites no authority for his argument that trial counsel is required to raise legal motions that he deems important. "Defense counsel, not the defendant, has authority to decide which theories and strategies to employ." *State v. Davis*, 3 Wn. App. 2d 763, 790, 418 P.3d 199 (2018). In *Davis*, the defendant argued on appeal that his trial counsel committed

¹⁵ Rather than citing the factual record, Reimer cites legal briefing submitted to the trial court for the majority of the facts in support of his motion. *See* App. Br. at 14 (citing CP 35). This is improper. *See Holland*, 90 Wn. App. at 538 ("trial court briefs cannot be incorporated into appellate briefs by reference").

misconduct for refusing to file motions at his request. *Id.* at 791. The Court of Appeals held that counsel's decision was not improper and that defense counsel, "not Davis, had the proper authority to determine trial strategy, including which motions to file." *Id.* Here, Reimer's trial counsel had the authority to decide which motions to file.

Furthermore, other than Reimer's self-serving statements made after trial, there is nothing in the record indicating that Reimer brought these issues to counsel's attention prior to trial. Even if he had, as a general rule, "the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction." *See Adams*, 91 Wn.2d at 91; *see also Piche*, 71 Wn.2d at 590 (counsel is not obliged to raise every conceivable point which in retrospect may seem important to the defendant).

Finally, there is no legal authority for Reimer's motion to exclude the age of a victim in an SVP trial. The State "is not prevented from proving facts to establish an individual committed a sexually violent offense[.]" *In re Boynton*, 152 Wn. App. 442, 456, 216 P.3d 1089 (2009); *see In re Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993) (superseded by statute on other grounds) (prior sexual history is highly probative in an SVP trial). The manner in which the sexual offenses were committed has some bearing on the motivations and mental states of the offender and is relevant to whether the person meets criteria as an SVP. *Young*, 122 Wn.2d at 53.

Victim L.L. testified at trial that she was twelve years old when Reimer sexually assaulted her. 10/18/16 RP at 764-71. Both Reimer and the State's expert also testified about the details of this incident. *See* 10/13/16 RP at 507-09, 518-23; 10/18/16 RP at 855-61. Reimer pled guilty to child molestation in the third degree for this incident, which is not a sexually violent offense. *See* RCW 71.09.020(17); 10/18/16 RP at 858; Exhibits 16, 17, and 18. However, given the age of the victim, Reimer's behavior met criteria for child molestation in the second degree, which is a sexually violent offense. *See* RCW 71.09.020(17); RCW 9A.44.086. Thus, the victim's age is relevant in assessing Reimer's dangerousness.

Reimer also claims that trial counsel was deficient for not raising an issue regarding brain development. Because Reimer did not raise this issue below, he is precluded from raising it on appeal. *See Tang*, 57 Wn. App. at 655 (arguments not presented to the trial court will not be considered on appeal).

7. Counsel's Closing Argument Was Not Improper

Reimer incorrectly asserts that his attorney's closing argument played on jurors' fears and persuaded them to rule against him. That closing argument did not, as Reimer asserts, encourage jurors to commit him. On the contrary, counsel's closing argument stressed that although it may be difficult to release a sexually violent predator into the community and face

potential criticism from family and friends, the jurors heard the lack of evidence against Reimer and should follow their oath and reach a verdict in Reimer's favor. *See* 10/21/16 RP at 1340-42. Reimer's counsel explained that although a reporter would be writing a story about the case, jurors should not leave their courage or common sense at the door over concerns about what the community might think if they found the State did not prove its case. *Id.* Counsel reminded jurors to focus on the evidence presented at trial. *Id.*

Counsel's argument was consistent with the court's instructions to jurors that it was their duty to decide the facts based on the evidence and that they should not let emotions overcome their rational thought process. *See* CP at 336-38. Reimer has not shown that his attorney's argument was improper or unreasonable.

8. Even Had Reimer Demonstrated Any Deficient Representation by Counsel, He Has Not Demonstrated Prejudice

Reimer has not demonstrated that any conduct by his counsel was deficient, much less that it fell below an objective standard of reasonableness based on all the circumstances. He therefore has not met the first *Strickland* prong. If either part of the *Strickland* test is not satisfied, the inquiry need go no further. *Hendrickson*, 129 Wn.2d at 78.

Even had he identified some deficient conduct by his counsel, he has not met his burden to also demonstrate prejudice, the second part of the *Strickland* test. To prove prejudice, he must show, “based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” *McFarland*, 127 Wn.2d at 337. Speculation is not enough. *Strickland*, 466 U.S. at 693. Reimer must affirmatively prove prejudice and show more than a conceivable effect on the outcome to prevail. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Reimer’s opening brief asserts prejudice four times. App. Br. at 11-12 (John Gotti reference), 12-13 (Reimer’s conduct at the SCC), 13-14 (closing argument), 14-15 (decision not to call additional witnesses). Each assertion is nothing more than a conclusory sentence, without any accompanying showing based on the record before the trial court, that the result of the trial would have been different. Reimer bears the burden of demonstrating prejudice, but he points to nothing in the record that shows that any alleged error by his counsel was so serious as to deprive him of a fair trial, *Hendrickson*, 129 Wn.2d at 78, or even that “the result of the proceeding would have been different” in any way. *McFarland*, 127 Wn.2d at 337. Reimer has not satisfied either prong of the *Strickland* test.

E. Reimer's Assertion That He Was Denied Legal Materials and Deprived of the Ability to Assist in His Defense Lacks Merit

Reimer's argument that he was deprived of the ability to assist in his defense because the SCC withheld legal materials from him lacks merit for several reasons.

First, the facts Reimer relies on are not properly before this Court because they were not part of the trial record. He improperly relies on self-serving statements made for the first time after he did not prevail at trial.

Second, Reimer never raised this issue at trial and is precluded from raising it for the first time on appeal. The general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).¹⁶ Arguments not presented to the trial court will not be considered on appeal. *Herberg*, 89 Wn.2d at 925; *Tang*, 57 Wn. App. at 655. Raising the issue below gives the trial court an opportunity to prevent or cure any error. *Kirkman*, 159 Wn.2d at 935. "Neither counsel nor pro se defendant may remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Bebb*,

¹⁶ There is a narrow exception for a manifest error affecting a constitutional right, which requires a showing of "actual prejudice" that had "practical and identifiable consequences" at trial. *Kirkman*, 159 Wn.2d at 934-35. However, Reimer neither alleges a manifest constitutional error nor explains how he was prejudiced.

44 Wn. App. 803, 806, 723 P.2d 512 (1986); *see State v. Hoff*, 31 Wn. App. 809, 812, 644 P.2d 763 (1982). Reimer never informed the trial court that he did not have access to his legal materials. Reimer cannot remain completely silent on an alleged issue and raise it for the first time on appeal in an attempt to obtain a new trial.

Third, Reimer fails to show that he did not have access to his legal materials. His allegation that the SCC seized a hard drive of his legal files inaccurately presumes that this equates to a lack of access to legal materials. His trial counsel could have easily forwarded a copy of any necessary legal materials to Reimer. Moreover, Reimer fails to mention that the alleged seizure occurred back in 2010, which was *six years* prior to trial. *See App. Br.* at 18 (citing CP at 53-77). If access to this hard drive was so crucial to his defense, Reimer should have brought the issue to the trial court's attention at trial.

More importantly, in a written waiver, Reimer explicitly waived his right to assist in his defense at trial. CP at 330-34. The trial court granted Reimer's request not to attend the trial, other than while testifying. *See 10/11/16 RP* at 74-78; *see also CP* at 329-34. Thus, whether or not Reimer had access to this hard drive was irrelevant. He was not acting as his own counsel, and a defendant represented by counsel is not entitled to

the same scope of access to legal materials as a pro se defendant. *Davis*, 3 Wn. App. 2d at 785.

Finally, this Court should reject Reimer's attempt to cast this argument as a constitutional issue affecting his due process rights. Reimer's reliance on *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007), and *In re Det. of Halgren*, 156 Wn.2d 795, 807-08, 132 P.3d 714 (2006), is misplaced. *Stout* and *Halgren* merely stand for the general proposition that individuals facing SVP commitment are entitled to due process of law. *See Stout*, 159 Wn.2d at 369; *see Halgren*, 156 Wn.2d at 807-08. More specifically, *Stout* held that SVPs do not have a due process right to confront witnesses at trial or at depositions. *Stout*, 159 Wn.2d at 380-81. *Halgren* held that SVPs are entitled to due process protections that include a unanimous jury verdict. *Halgren*, 156 Wn.2d at 807-09. Reimer cites no relevant legal authority for his assertion that he has a due process right to a hard drive that was allegedly seized, for unknown reasons, six years prior to trial. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Furthermore, Reimer fails to brief this constitutional issue sufficiently to merit review. Parties raising constitutional issues must

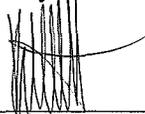
present considered arguments to the Court; “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *see also State v. Hoisington*, 123 Wn. App. 138, 145-47, 94 P.3d 318 (2004) (appellate courts “will not consider fleeting and unsupported assertions of constitutional claims.”).

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s denial of Reimer’s CR 59 and CR 60(b) motions and reject Reimer’s argument that he was deprived of the ability to assist in his defense.

RESPECTFULLY SUBMITTED this 12th day of September, 2018.

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NO. 51557-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

JOEL REIMER,

Appellant.

DECLARATION OF
SERVICE

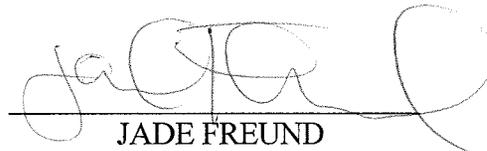
I, Jade Freund, declare as follows:

On September 12, 2018, I sent via electronic mail, per service agreement, a true and correct copy of Response to Appellant's Opening Brief and Declaration of Service, addressed as follows:

Gregory Link
Marla Zink
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12 day of September, 2018, at Seattle, Washington.


JADE FREUND

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

September 12, 2018 - 2:30 PM

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