

86043-2
NO. 60015-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TINH TRINH LAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Legitimate trial strategy and tactics cannot serve as the basis for a claim of ineffective assistance of counsel. The defendant had the assistance of two trial attorneys and two forensic experts to help those attorneys prepare for trial. On appeal, the defendant claims that his attorneys' cross-examination and closing argument were inadequate. Should this Court reject the defendant's ineffective assistance of counsel claim because it amounts only to a critique of the trial strategy used by his defense team?

2. The party seeking review bears the burden to provide an adequate record for review. The defendant challenges the trial court's in-chambers questioning of a seated juror, but he has failed to provide this Court with a copy of the sealed transcript from that hearing. Without the transcript, it is impossible to determine the nature of the closure, or what procedure the trial court used to determine that the closure was necessary. Should this Court decline to review the defendant's "public trial" challenge?

3. A trial court may not inform the jurors that the case does not involve the death penalty. Such error, however, can be harmless where there is abundant evidence of the defendant's guilt,

where the defendant's attorneys may have encouraged the court's comments, or where there is no evidence that the jurors were inattentive or failed to take their duty seriously. The defense attorneys acquiesced in the trial court's proposal to inform the jury (if asked) that the case was non-capital, the death penalty was never referenced again in any way, and the State presented overwhelming evidence of the defendant's guilt. Has the defendant failed to establish prejudice arising from the trial court's error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Tinh Trinh Lam, was charged in King County Superior Court with Murder in the First Degree for bludgeoning and strangling Nguyet Minh Nguyen, his girlfriend and business partner, to death on April 22, 2005. CP 1-4.

Prior to trial, Richard Warner was appointed to represent Lam in this case. Supp. CP ____ (sub no. 3, Notice of Appearance). A second attorney, Timothy Johnson, assisted Warner, and

appeared throughout the case on pleadings and at trial. See, e.g., CP 11-22; 1RP 1.¹

Prior to trial, Lam's attorneys sought public defense funding to obtain the counsel and expertise of two different experts. In October, 2006, Lam's attorneys sought public funds to employ Ms. Jeanne Ward, a private latent fingerprint examiner and crime scene analyst, for the purpose of conducting "a forensic latent print analysis and trial preparation consultation work with" defense counsel. Supp. CP ____ (sub no. 39, Motion for Appointment of Defense Expert). That motion was granted in an order filed the same day. Supp. CP ____ (sub no. 40, Order Authorizing Expert Services).

¹ The Verbatim Report of Proceedings for this case contains eleven volumes of transcripts. Nine of these volumes were referenced in the Brief of Appellant. To avoid confusion, the State will adopt the same numbering system as in the appellant's brief, and will simply add the remaining two volumes as volumes 10RP and 11RP. Thus, the transcripts will be referenced as follows:

- 1RP = March 12, 2007
- 2RP = March 13, 2007
- 3RP = March 14, 2007
- 4RP = March 15, 2007
- 5RP = March 19, 2007
- 6RP = March 20, 2007
- 7RP = March 21, 2007
- 8RP = March 22, 2007
- 9RP = March 27, 2007
- 10RP = December 15, 2006 (pretrial)
- 11RP = April 27, 2007 (sentencing)

Approximately one month later, Lam's attorneys sought public funds to hire a private forensic DNA scientist, for the purpose of "assist[ing] defense counsel in evaluating the State's DNA evidence in preparation [for] the jury trial." Supp. CP ____ (sub no. 42, Motion for Appointment of Defense Expert). That motion was also granted. Supp. CP ____ (sub no. 43, Order Authorizing Expert Services). At least one continuance of the trial date was sought and obtained for the purpose of providing complete discovery to the defense DNA expert prior to trial. Supp. CP ____ (sub no. 47, Order Continuing Trial).

The case was assigned to Judge Ramsdell for trial on March 12, 2007. 1RP 2. Prior to jury selection, the trial judge addressed the issue of how to deal with death penalty questions from potential jurors if they inquired about that issue. 3RP 2. After reviewing a recent Court of Appeals decision addressing the issue, defense counsel took the position that if asked, "the Court should say simply that it is not an issue in this case and the jury should not concern itself with potential punishment." 3RP 3. The parties discussed the potential instruction further, tinkering with the language to be used. 3RP 3-9.

Later that morning, after the parties and the court questioned the jurors regarding claims of hardship, the following exchange took place:

JUROR NO. 57: I'm assuming you would have told us if this was a capital punishment case. I'm really eager to know if that's the case.

THE COURT: I'm sorry, ma'am. Could you speak up?

JUROR NO. 57: I'm assuming you would have told us if this was a capital punishment case, but I'm just concerned and wanting to know whether it is or not.

THE COURT: Okay. Well, that question comes up oftentimes in charges like this. All I can tell you at this juncture is: You should not concern yourselves with what penalty may be administered in the event the jury reaches a finding of guilty except the fact that a penalty may follow conviction should make you careful obviously.

This is not a capital case, and, therefore, the jury will not be involved in any way in determining any sentence which may be imposed in the event of a conviction. Does that answer your question?

JUROR NO. 57: It does. And I really appreciate knowing that. Thank you.

3RP 48-49.

Jury selection continued for parts of the next two days.

During this period, the trial court questioned some jurors

individually (i.e., outside presence of the other jurors), but apparently in open court. See, e.g., 4RP 2-5. After jury selection was completed, the clerk's minutes indicate:

Jury absent
Juror #10 is questioned outside the presence of the jury. Court holds in chamber conference with court reporter, Juror #10 and respective counsel.

CP 103. That conference took place on March 15, 2007. On March 19, 2007, the trial court signed an order "Sealing Transcript of In Chambers Conference of 3/15/07." CP 114. Lam has not moved this Court or the trial court for an order unsealing the transcript, and consequently the transcript is not part of the record on appeal.

After approximately two weeks of trial, a jury convicted Lam of Murder in the First Degree, as charged. CP 72. The trial court imposed a standard range sentence. CP 74-81. This appeal followed. CP 87.

2. SUBSTANTIVE FACTS

The defendant, Tinh Trihn Lam, and the victim of this murder, fifty-three-year-old Nguyet Nguyen, were involved in a dating relationship and were business partners in a local restaurant.

6RP 86; 7RP 11-12. Nguyen had lived in the United States for approximately eight years, and lived alone in the Downtowner Apartments in Seattle. 7RP 9, 79-81. Every Saturday, Nguyen joined her sisters at her mother's home to cook together and visit. 7RP 9.

On Saturday, April 23, 2005, however, Nguyen did not answer her door when her younger sister, Mary,² arrived to drive her to their mother's home. 7RP12-13. Mary waited a short time, then assumed Nguyen had left earlier and left. 7RP 13-14. When Mary arrived at her mother's home, she discovered Nguyen was not there. 7RP After some time, she began to try to locate Nguyen. 7RP 14.

Mary called the restaurant where Nguyen worked. Lam answered the phone and told Mary that he had not seen Nguyen in several days. 7RP 15-16. He was nervous and told Mary that he had just given Nguyen a large sum of money to deposit, and that Nguyen had not come back to work since. 7RP 16. During the call, Lam seemed to be crying. 7RP 16-17.

² Because Mary (Hoang) Nguyen and the victim share the same last name, the State will reference Mary by her first name only. No disrespect is intended.

Mary returned to Nguyen's building and asked a worker to check on her. The worker discovered Nguyen's dead body on the floor of her apartment, lying in a pool of blood. 5RP 87; 7RP 17. Police and fire personnel responded and confirmed her death. 8RP 7. A medical examiner estimated that Nguyen had died sometime the preceding day, on April 22, 2005. 7RP 68-69.

Nguyen had been severely beaten and strangled, and had died from blunt force injuries to her head, neck and trunk. Multiple straight and curved lacerations, scrapes, and contusions on her head and neck area, suggested that she had been beaten with more than one object and with many, many different blows. 7RP 50-56. Linear injuries were present on her chest and she suffered internal injuries caused by blunt force to her trunk. 7RP 59-60. She suffered petechial hemorrhaging in her eyes, her neck was bruised, and the cartilage in her larynx was fractured, indicating strangulation. 7RP 57-59, 61-62. Several of her ribs were fractured, consistent with a crushing-type injury or from being stomped. 7RP 66. The medical examiner also found several "defensive" injuries on the backs of Nguyen's hands and arms, likely sustained as she tried to fend off her attacker. 7RP 64.

Police recovered a folding chair, hammer (with its head broken off), and bloody gloves from Nguyen's apartment. 5RP 89-94, 112. Police also discovered a bloody fingerprint on the windowsill of Nguyen's apartment. 5RP 100. Near this area were also contact stains consistent with a person touching the window while wearing bloody gloves. 5RP 36. A small amount of blood was found on the faucet handles in the kitchen sink and on the bathroom door, possibly indicating that the attacker had cleaned himself after the attack. 5RP 38, 52, 67.

Later that evening, police contacted Lam at his restaurant, and questioned him with the assistance of a Vietnamese interpreter via telephone. 8RP 9-10. Lam told police that he had not seen Nguyen for several days. 6RP 84, 87. He admitted having been to the Downtowner Apartments building within the last month, but claimed he had not visited with Nguyen inside her apartment for approximately a month. 6RP 86-88.

The interviewing detective noticed a cut on Lam's cheek and another on Lam's finger. When asked about those injuries, Lam said he had been cut on a piece of equipment while working in the restaurant. 6RP 88-89. When the detective asked Lam why he had cried when speaking to Nguyen's sister, Lam mentioned the

large amount of cash he had recently given to Nguyen. 6RP 89. After the interview, the detective left but gave Lam the impression that Nguyen was alive and was hospitalized and being treated for her injuries. 8RP 15.

Police quickly discovered, through security footage at the apartment building and interviews with front desk employees, that Lam had lied about being in Nguyen's apartment on the day of her murder. 8RP 16-17. Police tried to re-contact Lam two days later, but discovered that Lam had attempted suicide after the police had first contacted him about the murder. 8RP 18. Lam had jumped from a tenth floor window in his own apartment building, but landed on a second floor awning and survived despite serious injuries. 7RP 26-28. A baseball cap belonging to Lam was found near the place where Lam jumped. 7RP 28-29.

Surveillance video from the day of the murder was also examined by a forensic examiner. This video showed Lam entering the Downtowner Apartments at 8:22 a.m., carrying a bag and wearing a baseball cap with a piece of material pulled low over his face. 6RP 27, 41. Lam pretended to sign the visitor log, but did not sign it. 6RP 28, 40; 7RP 112.

The video shows Lam leaving almost an hour later. 6RP 31. Lam again pretended to sign the visitor log, and took an item of identification back from the clerk. 6RP 31. Lam also wore different shoes. 6RP 45. The bag he carried when exiting appears to be heavier and the piece of cloth under the baseball cap was missing. 6RP 45-46. The hat worn by Lam in the video was consistent in every measurable way with the cap found near where Lam attempted suicide. 6RP 42, 48.

The man working the front desk on the day of the murder recalled that Lam visited Nguyen that day, and identified Lam in the security video. 7RP 83-85. He noted that on that day, Lam was unusually distant, appeared to have a strange look on his face, and did not greet the workers in their usual manner. 7RP 83-84. Another worker noted that when Lam left, he appeared to be in a hurry. 7RP 122.

The physical evidence from the crime scene was examined by a number of forensic scientists. Large amounts of Nguyen's blood were found in a number of places on the folding chair. 9RP 45. Additionally, some of the blood on the chair legs contained a mixed DNA sample, with both Nguyen and Lam confirmed as contributors with a high probability. 9RP 46.

The bloody gloves were also tested. A mixed sample of DNA was found on the interior cuff area of the gloves (such as might be contributed by a person wearing the gloves) that was consistent with Nguyen and Lam both being contributors. 9RP 47-51. Nguyen's blood was also present in large amounts on the gloves. 9RP 54.

The hammer head contained Nguyen's blood, as well as the hammer handle. 9RP 54-56. On the handle, another mixed sample of blood appeared, with Lam confirmed as a possible contributor to the sample. 9RP 56. And the fingerprint found on the windowsill had been made in Nguyen's blood. 9RP 59. A fingerprint examiner found that the bloody print belonged to Lam. 6RP 113.

Finally, Lam's cap was analyzed for DNA evidence. A small blood stain was present on the front or logo part of the hat. 9RP 61-62. The blood contained Nguyen's DNA. 9RP 61-62.

C. ARGUMENT

1. LAM'S CRITIQUE OF HIS TRIAL TEAM'S PRESENTATION OF EVIDENCE CANNOT SUPPORT AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

On appeal, Lam cites to a number of claimed deficiencies in his defense. In short, he claims that his two defense attorneys inadequately cross-examined State witnesses, failed to highlight inconsistent testimony, and failed to present a plausible alternative theory for the victim's murder (other than Lam's guilt) in closing argument. This claim should be rejected. Matters of trial strategy and tactics cannot serve as the basis for an ineffective assistance of counsel claim. Moreover, Lam cannot demonstrate prejudice.

In order to demonstrate ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that but for counsel's errors, the outcome of the trial would have been different. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (citing Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The reviewing court

should begin with the “strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment.” State v. Glenn, 86 Wn. App. 40, 45, 935 P.2d 679 (1997). The competency of counsel is determined based upon the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 125 (1995).

If the defendant fails to carry his burden on either part of the test, the inquiry need not go further. Hendrickson, 129 Wn.2d at 78. Thus, if a defendant fails to show prejudice from the claimed error, the reviewing court need not consider whether counsel's performance was deficient. State v. Lord, 117 Wn.2d 829, 884, 822 P.2d 177 (1991).

Washington courts consistently hold that where a claimed error was part of a legitimate trial strategy or tactical decision, it does not constitute ineffective assistance of counsel. See, e.g., State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). In particular, the extent and manner of cross-examination is a matter of judgment and strategy. In re Personal Restraint of Davis, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). The attorney trying the case is generally in a far better position to assess the impact of a particular

witness's testimony. See State v. Robinson, 79 Wn. App. 386, 396, 902 P.2d 652 (1995). "In retrospect we might speculate as to whether another attorney could have more efficiently attacked the credibility of witnesses. The extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict. This is a matter of judgment and strategy." In re Davis, 152 Wn.2d at 720 (quoting State v. Stockman, 70 Wn.2d 941, 945, 425 P.2d 898 (1976)). "[E]ven a lame cross examination will seldom, if ever, amount to a Sixth Amendment violation." In re Personal Restraint of Pirtle, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

On appeal, Lam points to a litany of strategic decisions or perceived failures in cross-examination that he claims constituted deficient performance. He groups these claims into three categories: "DNA Evidence"; "Other Evidence"; and "Ineffective Closing Argument." Br. App. at 8-22. However, Lam's contentions amount to nothing more than a hindsight view of what would have been more effective trial strategy. Such critiques cannot be the basis for an ineffective assistance of counsel claim.

For example, Lam's primary DNA challenge rests on the fact his attorneys did not adequately question the State's expert (Jennifer Reid) about the nature of the database used to arrive at

the probability estimates she recited on direct examination. Br. App. at 8-11. But defense counsel elicited testimony from Reid during cross examination that questioned the validity of her statistical conclusions, pointing out the non-Asian nature of the database used to produce the statistics and suggesting that her probability statement could mean that at least 27 people in the city of Seattle alone would likely have DNA that could have contributed to the sample found on the gloves. 9RP 120-22.

Furthermore, Lam repeatedly frames his challenges in terms of the "missed . . . opportunit[ies]" by his attorneys, or the failure of his attorneys (a) "to impress upon the jury" certain points, (b) to contrast evidence or point out inconsistent testimony, or (c) to "invite the jury to consider" certain facts. Br. App. at 11, 12, 13. For example, he claims that his attorneys "did not press Reid to explain" why she was not more precise during direct testimony, and he questions the timing of asking her questions about the fact that she had received training in how to testify in court. Br. App. at 13. But Lam's attorneys touched on many of these issues and claimed failures during their examinations of Reid. See, e.g., 9RP 119 (discussion of cross-contamination); 9RP 123 (highlighting Reid's

training in how to testify). These "failures" are textbook examples of trial strategy that cannot be questioned on appeal.

Lam summarizes his ineffective assistance claim with the surprising and meritless assertion that "[f]ew defense lawyers are" up to the task of cross-examining a DNA expert. Br. App. at 25. In support of this assertion, Lam cites a **1995** law review article which noted that (over 13 years ago), the availability of defense DNA experts was scarce. Richard A. Nakashima, DNA Evidence in Criminal Trials: A Defense Attorney's Primer, 74 Neb. L. Rev. 444, 445 (1995). The article aimed to "assist defense attorneys [who are] in the unenviable position of having to challenge DNA evidence in court without the advice of a scientific expert to assist in discovery, pre-trial motions, cross-examination, and trial strategy." Nakashima, 74 Neb. L. Rev. at 445.

But Lam's attorneys, in contrast, had the benefit of a DNA expert to assist them over four months prior to the start of trial. Supp. CP ____ (sub no. 43, Order Authorizing Expert Services). Lam's attorneys had conducted several interviews of State experts, including a pretrial interview of Reid. 1RP 127-28; CP 25. The attorneys were obviously armed with research and scientific materials relating to the DNA testimony prior to trial and these

interviews. CP 25 (referencing "learned treatise" to be used during cross-examination); 9RP 98-102.

Moreover, the strategic nature of Lam's attorneys' cross-examination is evident. The prosecutor's direct examination of Reid covered approximately 54 pages of transcripts. 9RP 10-64. Lam's first cross-examination covered approximately 65 pages. 9RP 64-129. Lam's attorneys needed to focus on areas that, in their professional judgment, would have the biggest impact on the jury during trial, and would allow them to make the most compelling arguments in closing. A longer cross-examination, making every available argument or highlighting every possible area of dispute, risked alienating the jury or decreasing the impact of the more salient points. Additionally, Lam's attorneys may have viewed the additional points as weak, or may not have wanted to invite explanations from the State on redirect. See State v. Israel, 113 Wn. App. 243, 54 P.3d 1218 (2002). The fact that another attorney may have made different choices on where to place emphasis cannot serve as a basis to support an ineffective assistance claim.

Likewise, Lam's challenges to the "Other Evidence" missed by his attorneys can be explained by clear strategy. For example, Lam cites to a number of failures by his attorneys to highlight the

fact that first responders may have contaminated the crime scene. Br. App. at 17 (criticizing the failure to "invite the jury to wonder" why a police detective found blood on a faucet, while the blood spatter expert did not; and criticizing lack of focus on the position of Nguyen's body and existence of unexplained bloody footprints). Lam's attorneys, however, *did* question some witnesses about these issues. See, e.g., 5RP 119-21 (suggesting building manager or fire personnel responsible for footprints and for moving body's position). The fact that in hindsight Lam views this questioning as inadequate is simply not enough to support a claim of ineffective assistance of counsel.

Similarly, Lam claims on appeal that the blood print exhibits were "mixed up and mislabeled," citing a detective's inconsistent testimony regarding exhibit number or location on north versus east windows. Br. App. at 19-20. Lam contends that the "impact of the print mix-up was huge," but he fails to recognize that the jurors had the benefit of a large number of photos and diagrams of the crime scene to help them evaluate the testimony of these witnesses.

See, e.g., Supp. CP ____ (sub no. 84A, Exhibit List).³ The State's witnesses frequently referenced these exhibits during their testimony, and thus the impact of any mistaken references to location was almost certainly insignificant to those present in the courtroom during trial. In any event, Lam's trial attorneys were in the best position to determine the relative significance of any inconsistent or contradictory testimony in the context of their trial strategy. See Robinson, 79 Wn. App. at 296.

Lam also criticizes his trial attorneys' cross-examination of the State's fingerprint expert, arguing that they failed to challenge the reliability of her testimony in a number of possible ways. Br. App. 17-19. But Lam's trial team included a private latent fingerprint examiner and crime scene analyst, who was retained over four months prior to trial. Supp. CP (sub no. 39, Motion for Appointment of Defense Expert); Supp. CP ____ (sub no. 40, Order Appointing Expert). After consulting with this expert, it is quite likely that Lam's attorneys chose to pursue some areas of examination

³ Over 70 photos or posterboards containing numerous photos were identified by witnesses at trial, including a posterboard containing "photos of bloody print." Supp. CP ____ (sub no. 84A, Exhibit List at Ex. 75). Additionally, the jury had the benefit of a "Diagram of [the] crime scene" to help evaluate the testimony about the location of pieces of evidence found in the apartment. Supp. CP ____ (sub no. 84A, Exhibit list at Ex. 38); 5RP 24-27.

over others. These decisions are purely strategic and tactical. As one court has aptly noted: "What one defense attorney may find strategically sound another may find lackluster." State v. Riofta, 134 Wn. App. 669, 695, 142 P.3d 193 (2006).

Finally, Lam challenges his attorneys' failure to provide a "plausible scenario to account for the forensic evidence." Br. App. at 20-21. Washington courts have repeatedly and consistently held that "the determination of which arguments to advance in closing is a tactical decision susceptible to a wide range of acceptable strategies." Israel, 113 Wn. App. at 271 (citing State v. Soonaloe, 99 Wn. App. 207, 216, 992 P.2d 541 (2000)); see also State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004) ("We will not find ineffective assistance of counsel if the actions [the defendant] complains about go to the theory of the case or trial tactics."). Certainly, the decision to propose a hypothetical "alternate" theory to a jury during closing argument lies at the heart of trial strategy and tactics.

Even if Lam's trial team could have been more effective at cross-examining the forensic witnesses, Lam cannot demonstrate prejudice. Overwhelming evidence of Lam's guilt was presented at trial.

Lam was identified on video entering and exiting the victim's building near the time of the murder. 6RP 27, 41; 7RP 83-85. His behavior during that visit was unusual, and he tried to conceal his presence by covering his face from the surveillance camera and failing to sign the log book. 6RP 45-46; 7RP 83-84. He lied to police about visiting the victim on the day of her murder. 6RP 86-87. The victim had defensive injuries, and police noticed cuts on Lam's face and hand shortly after the murder. 6RP 88-89; 7RP 64.

Furthermore, Lam's actions following the murder demonstrate his consciousness of guilt. He cried when speaking to the victim's sister, when she called to inquire whether he had seen the victim. 7RP 16-17. He lied to police about seeing the victim on the day of her murder. 6RP 84-88. Although police left Lam with the impression that the victim was still alive, Lam never contacted the victim's family or the police to inquire about her health. 7RP 17. Instead, Lam attempted suicide. 8RP 18.

This evidence, together with the extraordinarily compelling forensic DNA, blood spatter, and fingerprint evidence, constituted overwhelming evidence of Lam's guilt. Lam cannot demonstrate prejudice and his ineffective assistance of counsel claim should be rejected.

2. THIS COURT SHOULD DECLINE TO CONSIDER LAM'S PUBLIC TRIAL CHALLENGE BECAUSE HE HAS NOT PROVIDED AN ADEQUATE RECORD FOR REVIEW.

For the first time on appeal, Lam raises a "public trial" challenge to his conviction based upon the trial court's questioning of one juror in chambers near the beginning of trial. Br. App. at 22. This Court should decline to consider this claim, because Lam has not provided an adequate record for review.

RAP 9.2(b) requires the party seeking review to "arrange for transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." Matters that do not appear in the record will not be considered by appellate courts on a direct appeal. State v. Rienks, 46 Wn. App. 537, 545, 731 P.2d 1116 (1987). An appellant's failure to provide an adequate record for review precludes appellate review of that claim. State v. Thompson, ___ Wn. App. ___, 181 P.3d 858 (2008); Rienks, 46 Wn. App. at 545.

In this case, Lam acknowledges that a transcript of the in-chambers hearing exists. Br. App. at 24-25. But he has not made

any effort to obtain the transcript of the proceeding.⁴ This failure precludes appellate review.

Lam's challenge is premised on the unsupported assertion that the trial court failed to obtain a public trial waiver and failed to address the factors for closing a courtroom required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). But without a transcript of the in-chambers proceeding, Lam cannot demonstrate that the courtroom was even "closed," triggering the Bone-Club requirements in the first place. See, State v. Momah, 141 Wn. App. 705, 708-16, 171 P.3d 1064 (2007), review granted, 163 Wn.2d 1012, 180 P.3d 1291 (2008) (defendant did not meet burden to show a closure occurred; court declined to consider Bone-Club issue).⁵ Likewise, without a transcript, there is no evidence to suggest that the trial court failed to conduct the required balancing. To the contrary, it is entirely possible that the trial court addressed the Bone-Club factors on the record during the in-chambers

⁴ The fact that the transcript was ordered "sealed" is no barrier to obtaining the transcript for appellate review. Lam could have made a motion to unseal the transcript for purposes of appellate review, as the State did to obtain the records of the defense requests for authorization for expert funding. See, Supp. CP ____ (sub no. 106, Motion and Order to Unseal Documents).

⁵ The Supreme Court is scheduled to hear argument on the Momah case on June 10, 2008.

hearing. Thus, Lam's failure to provide the transcript precludes appellate review of this issue.

3. LAM CANNOT DEMONSTRATE THAT HE WAS PREJUDICED BY THE TRIAL COURT'S ANSWER TO A JUROR'S QUESTION THAT THE CASE DID NOT INVOLVE THE DEATH PENALTY.

In his supplemental brief, Lam claims he received ineffective assistance of counsel because his attorneys did not object to the trial court's decision to inform the jury -- in response to a question -- that the case did not involve the death penalty. This claim should be rejected. Lam cannot demonstrate prejudice.

The Washington Supreme Court has ruled that it is error for a trial court to inform a jury that the case does not involve the death penalty. State v. Hicks, ___ Wn.2d ___, 181 P.3d 831 (2008); State v. Mason, 160 Wn.2d 910, 162 P.3d 296 (2007); State v. Townsend, 142 Wn.2d 838, 15 P.3d 1455 (2001). Even when a juror specifically asks whether the death penalty is involved, the trial court may only tell the jurors that they are not to consider punishment. Mason, 160 Wn.2d at 930-31. Very recently, the Supreme Court held that in light of its previous rulings, failing to object when the trial court informs the jury that the case is

noncapital may constitute deficient performance. Hicks, 181 P.2d 836.

However, the Supreme Court has yet to rule that in any particular case, the error in informing a jury that a case is noncapital prejudiced the defendant. For example, in Townsend, the court pointed to the overwhelming evidence of premeditation and noted that the defendant had failed to show that he was prejudiced in any way. Townsend, 142 Wn.2d at 849. In Mason, rather than relying on the overwhelming evidence, the Court noted that the objection lodged by the defense attorney was "lukewarm" and that the attorneys may have even encouraged the response by the court. Mason, 160 Wn.2d at 930-31. Furthermore, Mason's attorneys made no objection to the selection of any juror or to the panel, and therefore the error was harmless. Mason, 160 Wn.2d at 931.

In Hicks, the Supreme Court found deficient performance but again found no prejudice. The court noted that "there is no showing that the defendants were deprived of a fair trial or that the trial outcome would have differed." Hicks, 181 P.3d at 837. Noting the "abundant evidence in the record to support the conviction," the Supreme Court found that "a guilty verdict was likely even if the jury

had not been informed that the case was noncapital." Hicks, 181 P.3d at 837.

Lam's trial took place prior to the Supreme Court's decision in Mason. Thus, the trial court looked to the Court of Appeals decision in that case, which had ruled that it was not error for the trial judge to inform the jury that the case was noncapital, if the matter were first raised by a juror during voir dire. 3RP 2-9; State v. Mason, 127 Wn. App. 554, 126 P.3d 34 (2005), reversed, 160 Wn.2d 910, 162 P.2d 396 (2007). Lam's attorneys did not object to the trial court's proposal, but suggested that the trial court inform the jury that "it is not an issue in this case and the jury should not concern itself with potential punishment." 3RP 3, 8. Thus, like Mason's attorneys, Lam's attorneys seemed to encourage the course of action taken by the trial court, something the Supreme Court has found weighs against a finding of prejudice. See Mason, 160 Wn.2d at 930-31.

Significantly, the juror who asked the question about the death penalty in Lam's case, who expressed relief when told that the case did not involve the death penalty, did not ultimately sit on the jury. 3RP 48-49, 65-66; CP 102. The prospect of the death penalty was not mentioned at any other time during trial by any

party or the court. And like the jurors in Hicks, there "is no indication that the jurors failed to take their duty seriously." Hicks, 181 P.3d at 837. Jurors were repeatedly instructed by the court, both orally and in writing, that they were not to consider punishment in the case, except to the extent that it would make them careful. 3RP 48-49; CP 58.

Notably, several jurors came to Lam's sentencing. 11RP 6-8. The foreperson addressed the trial court, noting how difficult their jury service was in this case because of the brutal facts presented during trial. 11RP 6-7. Her comments, and the fact that she and several other jurors took the time to attend the sentencing hearing at all, demonstrate that they took their role as jurors very seriously and were very attentive and diligent in their duties.

Moreover, the evidence of Lam's guilt was extraordinarily overwhelming. He was identified on video entering and exiting the victim's building during the time of the murder. 6RP 27, 41; 7RP 83-85. His behavior during that visit was unusual, and he tried to conceal his presence by covering his face from the surveillance camera and failing to sign the log book. 6RP 45-46; 7RP 83-84. He lied to police about visiting the victim on the day of her murder.

6RP 86-87. The victim's blood was found on the hat he wore during that visit. 6RP 42, 48; 9RP 61-62.

Lam was a contributor to DNA found on the hammer that was likely used in the murder, as well as on the bloody gloves worn by the murderer and on the chair used to bludgeon the victim. 9RP 46-56. And perhaps most damningly, Lam's fingerprint was found in the victim's blood at the murder scene. 6RP 113; 9RP 59. When interviewed by police, Lam had cuts on his face and hand. 6RP 88-89.

Furthermore, Lam's actions following the murder demonstrate his consciousness of guilt. He cried when speaking to the victim's sister, when she called to inquire whether he had seen the victim. 7RP 16-17. He lied to police about seeing the victim on the day of her murder. 6RP 84-88. Although police left Lam with the impression that the victim was still alive, Lam never contacted the victim's family or the police to inquire about her health. 7RP 17. Instead, Lam attempted suicide. 8RP 18.

In the face of this overwhelming evidence, and in the absence of any evidence whatsoever that the jury did not take its role seriously or was influenced by the trial court's brief advisement that the case was noncapital, Lam cannot demonstrate prejudice.

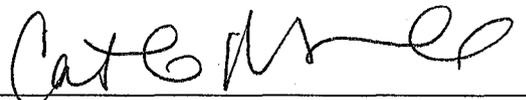
D. CONCLUSION

For the foregoing reasons, this Court should decline to consider Lam's "public trial" claim because he has failed to provide an adequate record.

Furthermore, this Court should rule that Lam's trial attorneys and their defense team of experts provided effective assistance of counsel during trial. Lam has not shown prejudice from the trial court's error in informing the jury that the case was noncapital. This Court should affirm Lam's conviction for first degree murder.

DATED this 9th day of June, 2008.

RESPECTFULLY submitted,

By: 

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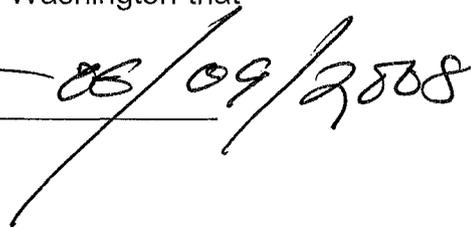
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jordan B. McCabe and Christopher H. Gibson, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. TINH TRINH LAM, Cause No. 60015-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date

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