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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH WHEATON,

Petitioner-Appellant,

v.

PATRICK GLEBE,

Respondent-Appellee.

No. 16-35554

D.C. No. 2:15-cv-00518-JCC

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Submitted December 6, 2017**
Seattle, Washington

Before: HAWKINS, McKEOWN, and CHRISTEN, Circuit Judges.

Kenneth Wheaton appeals the denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction for two counts of second-degree rape and one

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

count of felony harassment. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

1. It was not objectively unreasonable or contrary to clearly established law for the state court to conclude that Wheaton's right to a public trial was not violated given the absence of any evidence that (1) the trial judge ordered the courtroom closed or (2) the public was wholly excluded due to space limitations. *United States v. Withers*, 638 F.3d 1055, 1063 (9th Cir. 2011).

2. Wheaton's ineffective assistance of counsel claim is procedurally defaulted because he did not fairly present it to the Washington Supreme Court. *Cooper v. Neven*, 641 F.3d 322, 326 (9th Cir. 2011). Wheaton also failed to raise the claim in his federal habeas petition until his reply brief. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994).

AFFIRMED.