IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROY WAYNE RUSSELL, JR., Appellant.	No. 34424-6-II PUBLISHED IN PART OPINION

Bridgewater, J. — Roy Wayne Russell, Jr. appeals his conviction for second degree murder of 14-year-old C.M.H. We hold that the trial court did not violate Russell's constitutional right to public trial when it prohibited the media from photographing juvenile witnesses without consent because there was no closure of the courtroom in any sense under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Russell's other claims are meritless under prior case law from our Supreme Court: he did not have the right to have a jury decide the fact that he had prior convictions, nor did he have the right to have that issue decided beyond a reasonable doubt; and the Persistent Offender Accountability Act (POAA) does not violate the single subject requirement of the Washington State Constitution. Russell's claims in his Statement of Additional

Grounds (SAG)[1] are meritless as well. We affirm.

Facts

On December 9, 2005, the State charged Roy Russell with one count of second degree felony murder under RCW 9A.32.050(1)(b); RCW 9A.36.021.[2] The information alleged that Russell caused the death of C.M.H., who was found in the basement of his Clark County home.

Before trial, the State raised its concerns about media coverage of the case. The trial court decided that the broadcast media could operate a pool camera in the courtroom but that it would not allow photographs of the jury, under the bench-bar rules. In addition, the trial court decided that the print media could not photograph juvenile witnesses. The court specified that the media could report on and even record the voices of juvenile witness testimony, but that it could not photograph such witnesses and put their images in the press. The trial court also prohibited the pooled television camera from being pointed at the juvenile witnesses during their testimony.

Following its preliminary ruling, the trial court invited arguments from the print media and the parties. At a hearing held on January 4, 2006, the editor of a local newspaper argued that if the trial court denied the press the opportunity to photograph juvenile witnesses, it would deny the public its right to an open courtroom. Following an extended discussion with the editor and counsel about the competing interests at stake, the trial court affirmed its previous decision that it would not allow the press to photograph juvenile witnesses. But the trial court also stated that it was "not closing the door to the subject." 2 RP at 148.

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[1] RAP 10.10.

[2] In the alternative, the State charged Russell with one count of second degree murder under RCW 9A.32.050(1)(a) or one count of first degree manslaughter under RCW 9A.32.060(1)(a).

On January 6, 2006, the trial court revisited the issue of photographing juvenile witnesses and it "slightly adjust[ed]" its original decision. 3 RP at 154. Ultimately it decided that it would permit the press to photograph juvenile witnesses only if the witness and his or her parents agreed to the press taking photographs. Thereafter, the trial court and the press coordinated their efforts to identify which witnesses agreed to being photographed and which did not.

On January 24, 2006, a jury convicted Russell as charged. At sentencing, the trial court found by a preponderance of the evidence that Russell had two prior convictions "of the most serious offense[]" thereby qualifying him as a persistent offender under the Persistent Offender Accountability Act enumerated in RCW 9.94A.570. CP at 431. Following the POAA, the trial court sentenced Russell to life in prison without the possibility of parole. Russell timely appeals.

ANALYSIS

Public Trial

Russell first contends that the trial court violated his right to a public trial when it prohibited the press from photographing the juvenile witnesses without their consent at trial. The State maintains that the trial court did not even entertain the concept of closing the courtroom or denying the defendant his constitutional right to a public trial. The State is correct.

Whether a trial court has violated a criminal accused's right to public trial is an issue of law, subject to de novo review. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (citing *Bone-Club*, 128 Wn.2d at 256). The presumptive remedy for such violation is reversal and remand for new trial. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution each guarantee a criminal accused the right to a public trial. *Cohen v. Everett City Council*, 85 Wn.2d 385, 387, 535 P.2d 801 (1975). In addition, article I, section 10 of the Washington Constitution states that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision provides the public and press a right to open and accessible court proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). "The public trial right serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and discourage perjury." *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citations omitted).

Although the right to public trial is not absolute, protection of this basic constitutional right clearly requires a trial court "to resist a closure motion except under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. To protect the constitutional right to a public trial, the trial court may not close a courtroom without first considering the five requirements enumerated in *Bone-Club* and second, entering specific findings to justify the closure order. *Bone-Club*, 128 Wn.2d at 258-59 (citations omitted).

Russell equates the trial court's prohibition on photographing the juvenile witnesses without consent to a complete closure of the courtroom. He then implies that the trial court failed to consider the *Bone-Club* factors and enter specific findings to justify the closure. *See Bone-Club*, 128 Wn.2d at 258-59.

In *Bone-Club*, the trial court cleared and closed the courtroom during a pretrial suppression hearing at the State's unexplained request. *Bone-Club*, 128 Wn.2d at 256-57. The

Washington Supreme Court held that the trial court erred when it failed to consider five factors and made a record before ordering the *complete closure*. *Bone-Club*, 128 Wn.2d at 258-59, 261 (emphasis added); *see also Orange*, 152 Wn.2d at 808 (emphasizing that the trial court erred because it failed to engage the *Bone-Club* analysis before permitting a *full* closure of the proceedings) (emphasis added).

But here, the trial court never completely closed the courtroom. It never prevented any person from entering the courtroom or removed any person from the courtroom. It merely ordered that the press not photograph juvenile witnesses without consent from the juvenile witness and/or the witness's parents. The trial court's prohibition on photographing minor witnesses without consent cannot even be considered akin to a partial closure.

In *State v. Gregory*, the Supreme Court distinguished between full closures and temporary, partial closures of the courtroom. *State v. Gregory*, 158 Wn.2d 759, 815-16, 147 P.3d 1201 (2006). There, Gregory argued that the trial court violated his right to public trial when it required his aunt to leave the courtroom during his grandmother's testimony. *Gregory*, 158 Wn.2d at 815. The Supreme Court distinguished *Brightman*, *Orange*, and *Bone-Club*, emphasizing that those cases involved full closures of the courtroom; whereas *Gregory* involved the exclusion of one person from the courtroom for a limited time. *Gregory*, 158 Wn.2d at 816. Finally, the *Gregory* court concluded that the trial court did not abuse its broad discretion to regulate the conduct of the trial because it explained its reason for excluding the defendant's aunt, offered the defendant the opportunity to object, and limited the exclusion to a particular witness's testimony. *Gregory*, 158 Wn.2d at 816.

Similarly, Russell's claim fails because the trial court never fully closed the courtroom; rather, it merely ordered that the press not photograph the juvenile witnesses without their permission. The trial court explicitly explained its reasons for prohibiting the press from photographing juvenile witnesses, stating that the cameras "could dampen [the juvenile witnesses'] ability to report on the facts. It could dampen their ability to speak." 2 RP at 129. The trial court later stated that allowing the press to photograph the juvenile witnesses "had the potential to have an adverse impact on the children's ability to testify. And I always want my jurors to have a complete picture." 3 RP at 152. Moreover, it is of particular importance to note that the trial court did not prohibit the media from recording the juvenile witnesses' testimony so long as they did not point the camera at the juvenile witnesses. Therefore, the trial court did not violate Russell's right to a fair and open trial. Because there was no closure in any sense, and certainly not a full closure at any time, we decline to discuss whether the trial court complied with the *Bone-Club* standards. We do however discuss the standards set forth in General Rule 16.

Russell contends that the trial court "failed to comply with GR 16 in any manner." Br. of Appellant at 12. Specifically, he contends that "[t]he court failed to presume open access of the courtroom." Br. of Appellant at 12. Russell's argument is patently wrong.

Under GR 16, broadcasting, televising, recording, and taking photographs in the courtroom are permissible, subject to the trial court's permission and conditions, and provided the media personnel do not distract the participants or impair the dignity of the proceedings. GR 16; 13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure with Forms § 4307, at 234 (3d ed. 2004). Under GR 16(c), a trial court may limit courtroom photography if it

makes particularized findings to support its decision. In making these findings, the trial court must presume open access, it shall hear from any party before imposing limitations, and shall explain its reasons supporting limitations on photography and how they relate to the specific circumstances of the case. GR 16(c)(1)-(3).

Here, the record clearly shows that the trial court complied with the GR 16 requirements. First, it made particularized findings to support its decision to limit photographing juvenile witnesses, repeatedly stating that it was concerned with cameras hindering the juvenile witnesses' ability to testify. Furthermore, there is no doubt that the trial court based its decision on the presumption of an open courtroom because it repeatedly indicated that his ruling would not infringe on the ability of the public to be aware of the courtroom proceedings. In addition, it held a special hearing to allow members of the media to voice concerns about the ruling. Finally, the trial court supported the limitation on photographing the juvenile witnesses on the specific circumstances of the case. Namely, the record shows that the trial court was cognizant of the sensitive and possibly embarrassing subject matter to which the juvenile witnesses would testify. Its primary concern was that the juvenile witnesses would be able to provide accurate testimony of the facts and circumstances of the case.

The trial court also considered the ethical standards of the press in regard to publishing images of the juvenile witnesses; ethical and legal standards to protect juveniles in order to minimize harm; and the First Amendment and rights of the press. And, the trial court ensured that the restriction was no broader in its application or duration than necessary. The trial court never closed the courtroom to the public; the pool camera was always recording the proceedings; and

all media had free access to the courtroom for all purposes including recording all of the testimony. The only restriction the trial court placed on the media was that the press could not photograph the juvenile witnesses without prior permission from the witnesses and their parents. The court went out of its way to establish a procedure by which it would alert the press to the juvenile witnesses that granted such permission.

Therefore, based on the record, we hold that the trial court balanced the interests of the defendant's right to a public trial together with its abilities to control the courtroom photography under GR 16. Further, the trial court is to be commended for its thorough and careful balancing of all interests. Thus, the trial court acted within its discretion in limiting photography of juvenile witnesses under GR 16.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Jury Determinations of Prior Convictions

Russell next argues that he was entitled to have a jury decide whether he had two prior "most serious" offenses under the POAA, citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). He reasons that it was not just the fact of prior convictions that led to his life sentence, but the finding that the prior convictions were "most serious offenses." Br. of Appellant at 19.

Russell concedes that *Apprendi* and *Blakely* excluded a defendant's criminal history from

those sentence-increasing facts that a jury must find beyond a reasonable doubt. On this point, *Apprendi* and *Blakely* relied on *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), in which the United States Supreme Court concluded that the indictment did not have to set out the defendant's earlier convictions, even though the fact of the earlier convictions increased his penalty. *Almendarez-Torres*, 523 U.S. at 226. The *Almendarez-Torres* Court reasoned that the earlier felony convictions were not elements of the crime charged; rather, they were penalty provisions that simply authorized a court to increase the sentence for a recidivist. *Almendarez-Torres*, 523 U.S. at 226.

But Russell claims the "prior conviction" exception is in doubt, citing Justice Thomas's concurring opinion in *Apprendi*, expressing his opinion that *Almendarez-Torres* was incorrect in excluding criminal history from the rule that sentence-increasing facts must be found by a jury. Br. of Appellant at 17-18. To support this proposition, Russell also relies on *Ring v. Arizona*, where the Supreme Court held that when aggravating factors are used to determine whether a defendant will receive the death penalty, those factors must be found by a jury. *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Although the *Ring* court did not specifically address the issue of prior convictions, it did not exclude them from matters that must be decided by a jury, stating: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602. Therefore, Russell contends that *Ring* expanded the *Apprendi* rule and in doing so, overruled *Almendarez-Torres sub silentio*.

Nevertheless, the Supreme Court has not overruled *Almendarez-Torres* and we are bound

to follow it. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004); *see also State v. Rudolph*, ___ Wn. App. ___, 168 P.3d 430 (2007) (affirming that under *Almendarez-Torres*, the constitution requires neither a jury finding nor proof beyond a reasonable doubt of the fact of prior conviction, including the identity of the prior defendant, and stating that the prior conviction exception applies to Washington's POAA), *accord State v. Ball*, 127 Wn. App. 956, 113 P.3d 520 (2005), *review denied*, 156 Wn.2d 1018 (2006). In fact, our Supreme Court has "repeatedly rejected similar arguments and held that *Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt." *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (citing *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996 (2002); *State v. Ortega*, 120 Wn. App. 165, 84 P.3d 935 (2004), *accord Almendarez-Torres*, 523 U.S. 224, 247).

Thus, here we find that the sentencing court correctly determined by a preponderance of the evidence that Russell had two prior most serious offenses.[3] *See Lavery*, 154 Wn.2d at 252; *Ball*, 127 Wn. App. at 960. It follows that the sentencing court did not err in finding that Russell qualified as a persistent offender under the POAA's three strikes law, nor did it err in sentencing him accordingly. *See Lavery*, 154 Wn.2d 249.[4]

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[3] Because Russell does not contest the sentencing court's analysis of his out-of-state conviction with a comparable Washington offense, we do not address the trial court's application of the two-part comparability test. *See* RAP 10.3(a)(6) (appellate brief should contain argument supporting issues presented for review and citations to legal authority.); *see also Lavery*, 154 Wn.2d at 255 (addressing the two-part comparability test).

[4] At oral argument, Russell candidly admitted that the Washington Supreme Court previously decided his issues with respect to a jury trial and the constitutionality of the POAA statutes, but

Constitutionality of the POAA

Russell also contends that the POAA, enacted as part of Initiative 593, violates the single subject requirement of the Washington State Constitution and must therefore be invalidated in its entirety. But Russell's argument lacks merit.

Our Supreme Court rejected an identical argument in *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996), where it held that even though the POAA encompassed both persistent offenders and early release provisions, "[t]he ballot title to Initiative 593 contains only one subject, persistent offenders; hence, any provisions in the law which relate to that subject are valid under Article II, Section 19." *Thorne*, 129 Wn.2d at 758; *see also State v. Cloud*, 95 Wn. App. 606, 618, 976 P.2d 649 (1999) (finding the provisions *not relating to persistent offenders* are invalid and thus holding the early release provision was unconstitutional) (emphasis added). In this case, as in *Thorne*, Russell directs his challenge solely to the portion of I-593 that falls within the scope of the title.

Russell relies on *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762, 27 P.3d 608 (2000), and *City of Burien v. Kiga*, 144 Wn.2d 819, 31 P.3d 659 (2001), to support his argument that the POAA is unconstitutional. But both these cases are distinguishable. Unlike *Thorne*, which analyzed a restricted title with a single subject, both *Amalgamated Transit* and *Kiga* involved initiatives with general titles that encompassed multiple subjects. *See Amalgamated Transit*, 142 Wn.2d at 217; *Kiga*, 144 Wn.2d at 826-27. Therefore, *Thorne* is controlling in this case. Under *Thorne*, I-593 does not violate article II, section 19 of the

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he was preserving them for federal review.

Washington State Constitution.

Statement Of Additional Grounds (SAG) For Appeal

Hearsay Testimony

In his SAG, Russell argues that the trial court erred when it admitted Christine Bisson's testimony. Bisson stated that her dog barks every time she sees Russell. Russell asserts that the trial court violated his constitutional right to confrontation because the "dog was the suposed [sic] witness and not [Bisson]." SAG at 4. Russell is incorrect for several reasons.

First, defense counsel did not object when Bisson testified that her dog barks every time it sees Russell. Because Russell failed to object to testimony at trial, he may not challenge it on appeal. *See State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). And although Russell argues the testimony was an evidentiary error affecting his constitutional right to confrontation, his argument is misguided.[5]

Hearsay is a statement made by someone other than the witness offered into evidence to prove the truth of the matter asserted. ER 801(c). But the reference to a person in ER 801 rules out the possibility that the hearsay rule might apply to sounds that animals make. A witness may testify that a dog was barking without violating the hearsay rule. *See* 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice § 801.6, at 331 (5th ed. 2007). Here, Bisson was the declarant and not her dog, as Russell argues. Thus, the trial court did not deprive Russell of his constitutional right of confrontation when it allowed Bisson's testimony.

Frye Hearing

[5] When an evidentiary effort affects a constitutional right, the issue may be raised for the first time on appeal. RAP 2.5(a)(3).

Russell next contends that the trial court erred when it relied on *State v. Gore*, 143 Wn.2d 288, 304-05, 21 P.3d 262 (2001), *overruled on other grounds by State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), to conclude that a *Frye* hearing was not required to determine whether deoxyribonucleic acid (DNA) evidence derived from short tandum repeat on the Y chromosome (Y-STR) testing was admissible at trial. Russell maintains that the relevant scientific community has not generally accepted Y-STR testing. Russell also asserts that the trial court "did not conduct a[n] ER 702 hearing." SAG at 11. Russell's assertions lack merit.

The trial court determined that a *Frye* hearing was not necessary. In Washington, evidence derived from novel scientific theory is only admissible if the theory has achieved general acceptance in the relevant scientific community. *See* ER 702; *State v. Copeland*, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996). On appeal, we review a trial court's decision to admit scientific evidence under the *Frye* standard de novo. *State v. Kunze*, 97 Wn. App. 832, 854, 988 P.2d 977 (1999), *review denied*, 140 Wn.2d 1022 (2000). But if the evidence does not involve a novel scientific theory, a *Frye* hearing is not required. *State v. Hayden*, 90 Wn. App. 100, 104, 950 P.2d 1024 (1998). In this case, the trial court properly concluded that Y-STR testing is not a novel scientific theory and thus did not require a *Frye* hearing.

At the hearing held on January 6, 2006, the trial court heard testimony from Washington State Patrol Crime Lab DNA Supervisor, Stephenie Winter Sermeno, and considered briefing and arguments from both parties. Ms. Sermeno testified that Y-STR test results are a particular type of short tandem repeats (STR) DNA testing that looks only at Y chromosomes. STR is a polymerase chain reaction (PCR) based system. Also, Sermeno testified that there is no dispute

within the scientific community regarding the reliability of Y-STR DNA testing.[6] The record also contains an e-mail from Russell's retained forensic scientist expert, Dr. Raymond Grimbso, which seems to confirm that there is no significant dispute within the scientific community regarding the reliability of Y-STR testing.

Contrary to Russell's contention, testimony from the expert witness established that Y-STR DNA testing is merely one specific type of STR DNA testing. Moreover, the Washington State Supreme Court held that a *Frye* hearing on the admissibility of DNA PCR typing systems is no longer necessary in Washington. *Gore*, 143 Wn.2d at 304-05; *see also Gregory*, 158 Wn.2d at 832; *State v. Leuluaialii*, 118 Wn. App. 780, 77 P.3d 1192 (2003), *review denied*, 154 Wn.2d 1013 (2005); *Shabazz v. State*, 265 Ga. App. 64, 65, 592 S.E.2d 876, 879 (2004) (holding that the trial court did not err when it ruled that a *Frye* hearing was unnecessary because Y-STR testing is merely one specific type of STR DNA testing and STR DNA testing is a PCR DNA system which is widely accepted). Therefore, because Y-STR is merely a type of STR DNA testing, a *Frye* hearing is not required for admission of such evidence at trial. The trial court did not err when it found a *Frye* hearing unnecessary in this case.

[6] In fact, Sermeno testified that the Washington State Patrol Crime Lab is in the process of implementing Y-STR testing in its laboratories statewide. The reason why it is not already being used in their labs is due to financial constraints and the time it takes to begin implementing a different type of testing.

Admission of Testimony Referencing the "The Counting Method"

In this case, Russell failed to object to testimony about "The Counting Method" at trial. 8A RP at 997, 1001. Failure to object to the admissibility of evidence at trial precludes appellate review of that issue unless the alleged error is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Such error is not created by the failure to lay an adequate foundation under *Frye*. *In re Detention of Taylor,* 132 Wn. App. 827, 836, 134 P.3d 254 (2006); *State v. Florczak*, 76 Wn. App. 55, 72, 882 P.2d 199 (1994), *review denied*, 126 Wn.2d 1010 (1995). We do not consider this argument.

Affirmed.

Bridgewater, J.

We concur:

Houghton, C.J.

Penoyar, J.