IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ALLEN HERSH, Appellant.	No. 40646-2-II UNPUBLISHED OPINION

Penoyar, J. — Michael Allen Hersh challenges his first degree premeditated murder and first degree felony murder convictions for killing Norma Simerly in 1978, arguing that: (1) the court's concurrent sentence on both counts violated his double jeopardy rights, (2) insufficient evidence supports the convictions, (3) evidence should have been suppressed for an insufficient chain of custody, (4) evidence of Hersh's assault of a woman two months after the murder should have been suppressed, (5) testimony regarding the autopsy report authored by a now-deceased coroner violated his confrontation rights, (6) deoxyribonucleic acid (DNA) evidence should have been suppressed because it failed the *Frye*[1] test, and (7) his right to a public trial was violated when the court excused witnesses and potential jurors during voir dire. The State concedes that the sentence constitutes double jeopardy and that the felony murder conviction should be vacated. It argues that we should otherwise affirm. We hold that the State's concession is well-taken, and we reverse and remand with instructions to vacate the felony murder conviction. We otherwise affirm, holding that there was sufficient evidence to support the remaining conviction, that arguments to chain of custody went to weight rather than admissibility, that the trial court

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

properly admitted the other assault evidence, that the autopsy testimony was harmless, that the DNA evidence satisfied the *Frye* test, and that Hersh's right to a public trial was not violated.

FACTS

I. The Murder

On April 29, 1978, Simerly's nude body was found in her master bedroom in her Vancouver home. Her body was between the side of her bed and a wall, propped up against some clothing. Her hands were bound with a woman's blouse. She had multiple stab wounds to the chest. The right side of her face was severely beaten, with bleeding and bruising, which surrounded her eye and extended down to her neck, including a broken jaw and several loose teeth. An empty vodka bottle was on top of her, and a loaf of bread was under her.

A bloody washcloth, woman's clothing, and blood covered the bedding. Pieces of wood bark were on the floor. A pair of pants and a necklace protruded out into the hallway. Blood splatter was on the door frame leading into the master bedroom.

In the adjacent master bathroom, there was clothing and blood on the floor as well as a knife. More blood and a knife handle without the blade were in the bathroom sink.

Across the hallway in the guest bedroom, a large amount of blood was on a picture frame on the bed. Two bloodstained paper bags and a liquor bottle screw cap were also on the bed. On the floor, there was a girdle with one nylon stocking still attached, but the other clip that would have attached the other stocking was torn off.

Blood smeared the walls in the hallway leading to the guest bedroom, which appeared to be bloody handprints. One of Simerly's shoes was on the hallway floor.

In the kitchen, blood splattered a cabinet door and the countertops. The bread box was

open and there was an empty bread bag. On the floor were Simerly's other shoe, the toaster oven with bloodstains on it, and a piece of wood with missing pieces of bark. The wood was similar to the wood in a pile outside the kitchen door. There was also bark on the floor. Blood splattered the door that divided the kitchen and the dining room.

II. The Investigation

Police photographed the scene and collected the evidence. Police found multiple hairs on the bloody washcloth on the bed in the master bedroom. Detective Curtis Reinbold collected the hairs, placed them between two glass slides with a semi-permanent medium, and put the slides in cardboard containers in a bag. He also placed the wood bark in bags. Reinbold placed the evidence in his evidence locker, and he eventually took it to the Vancouver Police Department's evidence locker.

Simerly's murder investigation stalled for twenty years. Police eventually sent the evidence to laboratories for DNA testing in 2008. Washington State Patrol (WSP) lab technicians found traces of DNA on the wood bark and piece of wood, the hair from the bloody washcloth, and the knives. WSP had to combine the pieces of wood from different parts of the house to obtain a meaningful sample. Since WSP's DNA technology was not sensitive enough to generate a DNA profile of the hair and wood bark, WSP sent the wood bark and knives to Orchid Cellmark, a private DNA lab in Texas, and the hair to the Arizona Department of Public Safety Crime Lab for further testing.

Orchid Cellmark conducted Y-STR DNA[2] testing on the knives and wood bark. After obtaining a partial DNA profile on the knife handle, Hersh was excluded as a possible donor. Two partial profiles were found on the wood bark pieces. Simerly's husband, Wally, was excluded as a possible donor, but Hersh could not be excluded as a contributor. Orchid Cellmark concluded that the profile occurred three times out of 1,267 Caucasians.

The Arizona Department of Public Safety Crime Lab tested the washcloth hair for mitochondrial DNA and compared the profile to Hersh's. The DNA sequencing from the hair matched Hersh's. The crime lab's DNA analyst concluded that this DNA sequence would occur in .98 percent of the Caucasian population.

III. The Trial

In December 2008, the State charged Hersh with two counts of first degree murder. The first count alleged that Hersh murdered Simerly with premeditation. The second count alleged a felony murder theory that Hersh murdered Simerly while committing or attempting to commit first or second degree robbery or first or second degree rape.

The State presented testimony by Derek Hefely, who was in the neighborhood between three thirty and four o'clock in the afternoon on April 28, 1978. On that date, Hefely encountered a Caucasian man about seventeen years old who was between 5 feet 6 inches and 5 feet 8 inches tall and weighed between 140 and 150 pounds. The State argued that this description "basically matches" Hersh. 8 Report of Proceedings (RP) at 1253. Robert Hood also

[2] Y-STR DNA profiling is a process of obtaining a typing profile of DNA from the male Y-chromosome using a polymerase chain reaction (PCR) technique. The process attempts to characterize 16 different locations or (loci) on the male Y chromosome. It is a much more sensitive analysis than autosomal STRs because less DNA is required to get a DNA typing profile.

testified that he and Hersh were friends in 1978 and that he and Hersh would often walk near the Simerly home.

Over Hersh's objection, the trial court allowed the State to present evidence that Hersh assaulted Joy Towers two months after the Simerly murder under similar circumstances. Towers lived in the house behind Hersh's, which was 3.7 miles from Simerly's house. On July 12, 1978, Towers was at home with her nine-year-old son. Her son was outside, and she was preparing to go play tennis.

Hersh knocked on Tower's door and told her that her son threw eggs at his house. She believed Hersh and invited him in to discuss the matter. She went to look outside, and then she felt like she had a seizure and fell to the floor. When she looked up, Hersh was holding a knife, threatening to kill her. Hersh told her he wanted her keys and purse, and Towers told him to take them and go. Hersh then pulled something out of his pocket to tie her up, but became distracted by a noise from the backyard. Towers fled down the hall to her son's bedroom to try to scream out the window, but she was too terrified to scream. Hersh found her and tied her wrists.

Hersh became distracted again, and Towers ran into her bedroom and locked the door. Hersh crashed through the door, yelling "[W]hy did you do that? Why did you do that? You have to do as I say or I'll kill you. I've done this before, I will kill you." 6 RP at 945. Hersh again tied her hands. Throughout the ordeal, Towers and Hersh struggled over the ligature on her wrists. Towers would loosen or untie her hands, and he would re-tie them. At some point Hersh used women's stockings to tie her hands.

Hersh threw Towers on the bed and strangled her to unconsciousness. When she regained consciousness, she was on the bathroom floor, and she heard people calling her name. Three neighbors were in the room and, when one commented about all the blood, Towers realized that she had blood coming from her head and that she was naked from the waist down. The neighbors found Hersh hiding in the closet. Towers suffered facial fractures, cuts on her face, a shattered wrist requiring a pin, and a loose tooth. She remains blind in one eye.

After hearing the evidence, the jury convicted Hersh of both murder counts. On the felony murder count, the jury was not unanimous that Hersh committed or attempted to commit first or second degree robbery. The jury found that Hersh committed or attempted to commit first and second degree rape. The trial court sentenced Hersh to a minimum of 400 months and a maximum term of life in prison on each count, to be served concurrently, but consecutive to any other sentence. Hersh now appeals.

ANALYSIS

I. Double Jeopardy Violations for Imposing Sentences on Both Counts

Hersh argues that his sentence on both counts violates the double jeopardy provisions in both the Washington and Federal constitutions. The State concedes that the convictions should merge and that the felony murder conviction should be vacated. We accept the State's concession and we reverse and remand with instructions to vacate the felony murder conviction.

When a trial court imposes concurrent sentences for convictions for the same offense, the sentence violates the state and federal constitutional prohibitions against double jeopardy and we must reverse and remand with instructions to vacate the lesser punished crime. *State v. Turner*, 169 Wn.2d 448, 455, 238 P.3d 461 (2010); *see State v. Womac*, 160 Wn.2d 643, 656-60, 160

P.3d 40 (2007). Here, the trial court imposed concurrent sentences on both counts that arose from the same offense, when it should have vacated one of the convictions. This was error. *See Turner*, 169 Wn.2d at 454-55. The parties state that count two—the felony murder conviction—should be vacated, and we agree.

II. Sufficiency of Evidence

Hersh argues that the evidence was insufficient to convict him of both counts of first degree murder because (1) there was insufficient evidence of a rape, (2) there was insufficient evidence of premeditation, and (3) there was insufficient evidence that Hersh murdered Simerly. Viewing the evidence and the reasonable inferences therefrom in the light most favorable to the State, we affirm.

A. Standard of Review

On appeal, evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

B. Sufficiency of Evidence That Hersh Murdered Simerly

Hersh argues that there was insufficient evidence connecting him to the murder. Viewing

the evidence and the reasonable inferences therefrom in the light most favorable to the State, there was sufficient evidence connecting Hersh to the murder. *See Salinas*, 119 Wn.2d at 201.

The evidence shows that Simerly died, that she was severely beaten, and that she was stabbed multiple times in the chest. DNA found on the wood bark throughout the house matches Hersh's DNA profile. A hair on a bloody washcloth found close to Simerly's body had a DNA profile that matched Hersh's. Simerly's husband testified that he did not know Hersh and that Hersh would have no reason to be in the house. A jury could reasonably infer from the proximity of the hair to Simerly's body and its location amidst the bloody washcloth and bedding that it came from a violent act or struggle with Hersh.

Two months after the Simerly murder, Hersh was caught in the act of assaulting Towers under similar circumstances. In both instances, Hersh used a knife, he bound the victims' hands with women's clothing, he assaulted the victims in several rooms, he severely beat the victims' faces, and he stripped the victims until they were at least partially nude. The assaults occurred within 3.7 miles and two months of one another. While assaulting Towers, Hersh told her that "I've done this before, I will kill you." 6 RP at 945.

A jury could reasonably infer that Hersh was in Simerly's house; that he was involved in a violent act or struggle; and that he severely beat Simerly, stabbing her to death. Sufficient evidence supports the jury's conclusion that Hersh murdered Simerly.

C. Sufficiency of Evidence of Premeditation to Support First Degree Murder Conviction

Hersh argues that there was insufficient evidence showing that he acted with premeditation in murdering Simerly. Viewing the evidence and reasonable inferences therefrom in

the light most favorable to the State, sufficient evidence supports the finding of premeditation.

Premeditation is the "deliberate formation of and reflection upon the intent to take a human life and involves thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Allen*, 159 Wn.2d 1, 7-8, 147 P.3d 581 (2006) (internal citations and quotations omitted). It can be shown by either direct or circumstantial evidence, though the circumstantial evidence must be substantial. *State v. Bingham*, 105 Wn.2d 820, 824, 719 P.2d 109 (1986). Examples of circumstances supporting a finding of premeditation include "motive, prior threats, multiple wounds inflicted or multiple shots, striking the victim from behind, assault with multiple means or a weapon not readily available, and the planned presence of a weapon at the scene." *State v. Ra*, 144 Wn. App. 688, 703, 175 P.3d 609 (2008).

Here, viewing the evidence in the light most favorable to the State, Simerly's murder took place in multiple rooms throughout the house, involved multiple wounds to her head, neck, and chest, and was carried out with multiple weapons. A piece of wood resembling wood from the woodpile outside was found in the kitchen. Blood was splattered on the kitchen cabinets and counter. A jury could infer that Hersh grabbed the piece of wood outside and took it inside intending to use it to bludgeon Simerly.

Blood was found in the hallway leading to the guest bedroom, and blood was found on the picture frame on the bed in the guest bedroom. A liquor bottle cap was found on the guest bed. Simerly's clothes were strewn about the master bedroom, and her girdle with the clip torn off was found in the guest bedroom. More wood bark was on the floor of the master bedroom, and blood covered the bed. A jury could reasonably infer from these facts that the assault occurred throughout multiple rooms, meaning that time passed as Hersh and Simerly moved throughout the house.

Finally, Simerly's body was nude. Her hands were bound with a woman's blouse. In addition to the significant wounds to her face, jaw, and neck, Simerly was stabbed four times in the chest. An empty vodka bottle was on top of her. From these facts, the jury could reasonably infer that Hersh stripped Simerly, bound her hands, and then stabbed her with a knife after bludgeoning her with a piece of wood. He did this while drinking a bottle of vodka. He thus demonstrated a sexual motive, inflicted multiple wounds with multiple weapons, and took his time to finish a bottle of vodka. There was overwhelming evidence for the jury to find premeditation.[3]

III. Trial Court's Failure to Suppress Evidence and Test Results Because the Chain of Custody Had Large Gaps

Hersh argues that the trial court should have suppressed evidence relating to the pieces of bark, a piece of wood, and a hair because there were large gaps in the chain of custody and the State was unable to show the evidence was uncontaminated. We reject Hersh's argument and hold that any questions regarding the chain of custody go to weight rather than admissibility.

Before a physical object connected to a crime may be admitted to evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Factors to consider "'include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.'" *Campbell*, 103 Wn.2d at 21 (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960). Proponents need not identify the

[3] Hersh also argues that there was insufficient evidence for the jury to find that Hersh caused Simerly's death "in the course of or in furtherance of . . . or in immediate flight" from first degree rape. Br. of Appellant at 26 (quoting RCW 9A.32.030). Because we reverse and remand with instructions to vacate count two, the felony murder conviction, we need not address this argument.

evidence with absolute certainty or eliminate every possibility of alteration or substitution. *Campbell*, 103 Wn.2d at 21 (citing 5 K. Tegland, Wash. Prac. § 90 (2d ed. 1982)). "'A failure to present evidence of an unbroken chain of custody does not render an exhibit inadmissible if it is properly identified as being the same object and in the same condition as it was when it was initially acquired by the party.'" *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998) (quoting *State v. DeCuir*, 19 Wn. App. 130, 135, 574 P.2d 397 (1978)). The jury is free to disregard evidence if it finds that it was not properly identified or there was a change in its character. *Campbell*, 103 Wn.2d at 21. Minor discrepancies or uncertainties will affect only the weight of the evidence, not its admissibility. *Campbell*, 103 Wn.2d at 21. The trial court has wide latitude in determining admissibility, which we will disturb only if the decision was clearly untenable. *Campbell*, 103 Wn.2d at 21.

Here, police collected the evidence in 1978, placing the items in the police evidence room. Wet items were placed in an open bag to dry and avoid rot or destruction. Some pieces of wood bark were stored in a bag containing other items, including an earring and shampoo bottle. The evidence was stored until 2002 in an identified cardboard barrel in the Vancouver police storage facility, and later moved to another facility. The evidence from the Towers case was kept in the same barrel, separated by a layer of paper and the bags containing the items. Protocol allowed that a bag could be cut open, and then resealed and initialed by the officer. The bags containing the various pieces of evidence showed that they had been opened, resealed, and initialed. With regard to the hair sample, Arizona Department of Public Safety Crime Lab cleaned the sample to remove any possible contaminants before testing it.

On these facts, we hold that the trial court did not abuse its discretion when it admitted the

physical evidence and test results. Any break in chain of custody or potential access by intermeddlers was properly left for the jury's consideration of the weight of the evidence.[4] *Campbell*, 103 Wn.2d at 21.

IV. Admission of the Facts Surrounding Hersh's Assault and Burglary of Joy Towers

Hersh argues that the trial court abused its discretion when it admitted Joy Towers's testimony describing Hersh's assault on her several months after the murder that resulted in Hersh's assault and burglary convictions. He argues that the trial court misapplied ER 404(b) and RCW 10.58.090, and that the testimony did not show motive or intent. Because the trial court properly applied ER 404(b), we reject Hersh's argument.

Hersh moved to prevent the State from introducing evidence relating to his assault of Towers. The State argued that the evidence was admissible under ER 404(b), contending that the evidence showed identity, motive, and intent, and that it was admissible under RCW 10.58.090. During the pretrial hearing, the State offered Towers's testimony that two months after Simerly's murder, Hersh talked his way into Towers's home. He then threatened her with a knife, bound her hands with woman's clothing, and told her he would kill her, adding "I've done this before." 1 RP at 82. Hersh then strangled Towers until she passed out and bludgeoned her face. When Towers came to, she was naked from the waist down. Hersh ultimately pleaded guilty to assault, burglary, and attempted robbery.

The trial court ruled that Towers's testimony was admissible under ER 404(b) because it

[4] Hersh relies on *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001), which is inapposite. The *Neal* court held that the trial court erroneously admitted a toxicology report lacking the name of the person from whom the evidence was received for testing, holding that the report was inadmissible hearsay and lacked foundation under CrR 6.13(b). 144 Wn.2d at 604, 608-09, 611. Here, by contrast, Hersh does not argue that there was a hearsay or CrR 6.13(b) problem.

went to establishing identity and intent, ruling that the probative value outweighed the prejudicial effect. The court noted the similarities between the two assaults and explained that the "time, the distance and the admissions of similar conduct is a significant tie back to this particular case and creates a sufficient, unique modus operandi for purposes of identifying the perpetrator."[5] 1 Clerk's Papers (CP) at 309.

The court also found that the evidence should not be excluded pursuant to ER 403 for the following reasons:

> (a) The defendant's attack on Joy Towers was very similar to the facts of the current case. The Court has previously weighed the similarity in the ER 404(b) hearing and found great similarity between the two incidents.
> (b) The incidents occurred close in time.
> (c) There is one prior act, where the defendant bound Joy Towers with woman's clothing as was done to Norma Simerly. However, while attempting to bind Joy Towers with woman's clothing, the defendant stated he had done the same thing to two other women.
> (d) There appear to be no intervening circumstances.
> (e) Evidence of the defendant's attack on Joy Towers is necessary to the State's case. The only other evidence the State has to rely on is Mitochondrial DNA and Y-STR DNA. Neither of these types of DNA provides a positive "match" to the defendant's DNA.
> (f) The defendant's attack on Joy Towers resulted in a conviction. The defendant was caught in the act.
> (g) The probative value of evidence of the defendant's attack on Joy Towers outweighs any prejudice to the defendant. Evidence of the Joy Towers case will not be misleading, will not confuse the issues, will not cause undue delay, will not waste time, and will not include needless presentation of cumulative evidence.

2 CP at 610-11.[6]

[5] The trial court also found that the evidence was admissible under RCW 10.58.090. The court found that Hersh's conduct during the Towers's assault supports a finding that the incident was a sex offense as RCW 10.58.090(4) requires.

[6] For reasons not apparent in the record, the State abandoned the argument that the evidence showed intent and motive.

Over Hersh's objection, Towers testified about her assault. A police officer testified that no other murder similar to Simerly's occurred in Vancouver during the same time period.

The trial court instructed the jury that this evidence could be used for the limited purpose of proving identity and for no other purpose. During the State's closing and rebuttal, it argued that the similarities between the Towers assault and the Simerly murder proved Hersh's involvement in the murder, pointing out that the jury could only use the Towers assault to show identity.

A. ER 404(b)

Hersh argues that that the trial court incorrectly ruled that the evidence of Towers's assault was admissible under ER 404(b) to show identity. We disagree.

ER 404(b) prohibits the use of prior bad acts for purposes of showing bad character or propensity, but prior bad acts can be admitted to show identity:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We review a trial court's decision to admit evidence of other crimes for an abuse of discretion, and we will not reverse that decision unless it is based on untenable grounds or reasons. *State v. Norlin*, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Before admitting the evidence, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime

charged, and (4) weigh the probative value against the prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009). Hersh's focus here is on the third prong, claiming that because the crimes did not share unique characteristics, the prior crime had no relevance to the charged crime.

When evidence of other bad acts is introduced to show identity by establishing a unique modus operandi, the evidence is relevant "'only if the method employed in the commission of both crimes is "so unique" that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.'" *State v. Vy Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002) (quoting *State v. Russell*, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994). The device must be so unusual and distinctive that it is like a signature. *Vy Thang*, 145 Wn.2d at 643 (quoting *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)). The greater the distinctiveness, the higher probability that the defendant committed the crime, so the distinctive features must be shared between the crimes. *Vy Thang*, 145 Wn.2d at 643. Factors relevant to similarity include geographical proximity and commission of the crimes within a short time frame. *Vy Thang*, 145 Wn.2d at 643.

Here, the trial court did not act unreasonably when it ruled that the Towers assault was sufficiently similar to the Simerly murder to constitute a signature crime. Both victims lived close to Hersh and close to one another. The crimes occurred within two months of one another. Thus, there is both geographic and temporal proximity.

Next, both crimes share unique similarities. The victims were both middle-aged, Caucasian females, who were home alone when the assaults occurred. The assaults took place in several rooms in the house. Women's clothing was used to bind both the victims' hands. Both

women were stripped naked at least below the waist. The victims suffered similar injuries to the head, face, and neck. A knife was used in both assaults: Hersh threatened Towers repeatedly with a knife, and Simerly was stabbed four times in the chest. The trial court reasonably concluded that the "time, the distance and the admissions of similar conduct is a significant tie back to this particular case and creates a sufficient, unique modus operandi for purposes of identifying the perpetrator." 1 CP at 309.

Hersh argues that the crimes were not sufficiently similar, contending that there was nothing "specific or distinctive such as the type of knot" used to bind the victims. Br. of Appellant at 53. The crimes need not be identical, but merely similar enough to constitute a signature. *See Russell*, 125 Wn.2d at 30-36. Here, the crimes were close in time, location, and in how they occurred. We reject Hersh's argument.

Hersh also cites *Vy Thang*, which is inapposite. In *Vy Thang*, the court held that the following features were insufficient to allow the prior crime under ER 404(b):

> The shared features as represented to the court in this case are: (1) both cases involved theft of a purse and jewelry; (2) both victims were elderly; (3) in both cases, the perpetrator allegedly remarked that "the bitch is dead" and (4) both victims were kicked, Morgan three times and Klaus repeatedly. However, there are also several dissimilarities between the two crimes: (1) they occurred 18 months apart; (2) they took place in different parts of the state; (3) one victim was kicked three times and the other until she died; (4) [i]n one case, entry occurred through a door, and in the other, through a window; (5) in one case, the perpetrators fled in the victim's car, and in the other case, on foot.

145 Wn.2d at 645. But here, there are more similarities, including geographic and temporal proximity, as compared to *Vy Thang*. We hold that the Towers assault evidence was admissible under ER 404(b) because it helped establish Hersh's identity.[7]

[7] Hersh also argues that the trial court improperly admitted evidence to show motive and intent.

B. ER 403

Hersh argues that the trial court improperly admitted the evidence of the assault on Towers because its prejudicial effect outweighed its probative value. He argues that the evidence went to showing propensity and that the evidence materially affected the outcome of the case. We disagree.

ER 403 provides that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." We examine whether the trial court's decision to admit evidence was untenable. *Norlin*, 134 Wn.2d at 576.

The trial court found that the probative value of the evidence outweighed any prejudicial effect based on tenable grounds. The probative value of the evidence was to establish the identity of Simerly's killer, the most disputed issue during the trial. The State's evidence was largely circumstantial. While the State presented DNA evidence, none of that evidence definitively confirmed that Hersh was the killer, and Hersh argued that such DNA evidence might be contaminated. The evidence of Towers's assault went to establishing that Hersh was the person who murdered Simerly. The evidence had significant probative value.

The evidence also was not unfairly prejudicial. Contrary to Hersh's assertion that the trial court failed to weigh the impact of this evidence, the trial court found that the evidence would not be misleading, would not cause the jury to confuse the issues, would not cause undue delay, would not waste time, and would not include cumulative evidence. The court considered the testimony's import to the State's case. By the time the jury heard Towers's testimony, the jury

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The State correctly points out that it abandoned this argument at trial. We need not address this argument.

had already heard detailed testimony and viewed the pictures of the instant crime scene. As a result, Towers's testimony, which was less detailed, was not likely to be so gruesome as to appeal to the jury's emotions, and it was not mere propensity evidence.

Both the trial court and the State instructed the jury that the evidence of Towers's assault could only be used to establish identity and for no other purpose. We presume the jury was able to follow the court's instruction. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). We reject Hersh's argument.[8]

V. Dr. Wickham's Testimony Regarding the Autopsy Report

Hersh argues that the trial court should not have admitted an autopsy report and should have excluded Dr. Wickham's testimony because he relied on Dr. Hamilton, the deceased coroner. Hersh submits that Dr. Wickham's testimony violated his state and federal constitutional right to confront witnesses. The State responds that the autopsy report was never admitted into evidence or seen by the jury, that the autopsy was not used in lieu of live testimony, and that Dr. Wickham offered an expert opinion, which was subjected to cross-examination. The State adds that any error would be harmless. We conclude that any error would be harmless, so we need not decide whether Hersh was denied his right to confrontation.

In 1978, Dr. Hamilton performed an autopsy on Simerly. He took photographs and wrote a report opining that Simerly died from a homicide and that her cause of death was stab wounds to the chest. Dr. Hamilton is now deceased.

At trial, the State called Dr. Wickham, the Clark County Medical Examiner, to discuss

[8] Because the evidence is independently admissible under ER 404(b), we need not address RCW 10.58.090, which, in any case, is unconstitutional. *State v. Gresham*, 173 Wn.2d 405, 432, 269 P.3d 207 (2012).

Simerly's cause of death. Hersh objected, arguing that the testimony would violate his right to confrontation. The trial court ruled that Dr. Hamilton's autopsy report would not be admitted but that Dr. Wickham could refer to the report and photographs to form his own expert opinion.

Dr. Wickham testified that he reviewed Dr. Hamilton's report and photographs from his autopsy. Using the report and photographs, Dr. Wickham described Simerly's injuries. Dr. Wickham agreed with Dr. Hamilton's observations and findings, including the cause of death. He also explained that Dr. Hamilton concluded that the cause of death was multiple stab wounds to the chest.

On cross, Hersh elicited from Dr. Wickham that he could not determine the cause of death from the photographs. He also elicited that Dr. Hamilton did not describe any trauma to the genitals or find evidence of spermatozoa after multiple tests. On recross, Dr. Wickham agreed that there was no physical evidence of rape or sexual contact.

Hersh now argues that the autopsy report and Dr. Wickham's testimony violated his right to confront witnesses. Even if we agree, any error would be harmless. Confrontation error is "classic trial error" subject to a harmless error analysis. *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012); *State v. Watt*, 160 Wn.2d 626, 633-35, 160 P.3d 640 (2007). A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error or that the jury verdict is unattributable to the error. *Watt*, 160 Wn.2d at 635.

That test is met here because Hersh elsewhere concedes that "there is no question that Ms. Simerly was murdered" and that the sole issue was the identity of the person responsible. Br. of Appellant at 34. Dr. Wickham's testimony went only to explaining the injuries and the cause of

death—issues unrelated to identity. *Watt*, 160 Wn.2d at 640 (erroneously admitted evidence that has no bearing on disputed factual issues before the jury is harmless). Further, much of Dr. Wickham's testimony about the injuries was cumulative to admitted photographs and descriptions of Simerly's body by other witnesses. *See* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L. Rev. 277, 319 (1995/96) ("Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative"). The jury can easily infer from this evidence that Simerly suffered an extensive beating to the head, face, and neck, and that she was stabbed. Other pictures and physical evidence show that the assault occurred in several rooms throughout the house and that Hersh stripped and bound Simerly, showing premeditation.

If anything, Dr. Wickham's testimony was beneficial to Hersh. Hersh elicited that there was no physical evidence on Simerly's body of rape or sexual contact. This testimony would tend to negate the State's charge that Hersh raped or attempted to rape Simerly. And Hersh makes no attempt to argue that the confrontation error is not harmless. In short, Dr. Wickham's testimony was not relevant to the disputed issues, was cumulative, and in part benefited Hersh. We hold that any error would be harmless, so we need not address whether Hersh's right to confrontation was violated.

VI. Admission of the Y-STR DNA Test Results

Hersh next argues that the trial court erred by admitting expert testimony regarding Y-STR DNA results because the testimony relied on evidence found 30 years ago and was based on combining multiple pieces of bark found at the victim's house. He argues that such testimony fails the *Frye* test. We reject Hersh's arguments and hold that the testimony satisfied the *Frye*

test. Any question to the combining of the bark pieces goes to weight rather than admissibility.

Hersh moved to exclude testimony regarding the Y-STR DNA evidence derived from the wood bark pieces, arguing that combining the wood pieces violated the *Frye* standard. During a pretrial hearing, Stephanie Winter Sermeno, a forensic scientist with the Washington State Patrol Crime Laboratory who worked in the DNA section, testified that she swabbed the piece of wood and each piece of wood bark and tested it for DNA presence. She was unable to obtain a profile on any individual piece of bark or the piece of wood. Based on the information she had regarding the crime scene, she decided to combine the extracts from the bark and the piece of wood. She explained that the bark was found throughout the house and appeared to be the same type of bark. After combining the samples, she obtained enough DNA to generate a partial DNA typing profile. Winter Sermeno testified that combining swabs to get a DNA profile is not novel, citing two articles from the Journal of Forensic Sciences discussing combining swabs from multiple items to obtain a DNA profile. She testified that this process was something that she has done throughout her career and that other forensic scientists use this same sampling technique. Combining samples is generally accepted at DNA conferences where other DNA analysts talk about how to sample items. She added that she combines samples all the time.

On cross, Winter Sermeno testified that she did not test each piece of bark to determine if they came from the same piece of wood, but they visually appeared to be from the same piece of wood. She explained that although wood can inhibit sampling, she used an extraction technique that is known to counteract inhibition.

Hersh called Dr. Donald Riley, who testified that it may be impossible to tell if the mixture was on any one piece of bark or whether the DNA was on different pieces and combined. He stated that this was the first case where he saw pieces of wood combined to get a sample. On cross, Dr. Riley admitted that it was not novel to combine swabs, like from different parts of a gun, to find a DNA profile.

The trial court ruled that the evidence satisfied the *Frye* standard, finding that combining swabs to form a DNA sample was an accepted practice within the scientific community. The trial court noted that Dr. Riley agreed that this technique was used on other substances and that Winter Sermeno used a process to prevent inhibition.

At trial, Winter Sermeno testified to the above information. She explained that her understanding was that the bark had most likely come from the piece of wood, that the pieces of bark looked similar to each other, and that it appeared logical to combine the pieces to obtain enough DNA. She stated that she has combined swabs into one sample in other cases, and that she frequently uses this process "where there are low levels of DNA." 5 RP at 728. She added that this was a generally accepted technique.

Washington adheres to the *Frye* standard to determine whether novel scientific evidence is admissible. *State v. Gentry*, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995) (citing *State v. Cauthorn*, 120 Wn.2d 879, 886, 846 P.2d 502 (1993). The *Cauthorn* Court explained the *Frye* standard:

> [E]vidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.

Cauthorn, 120 Wn.2d at 886 (quoting *Frye*, 293 F. at 1014.

Washington has two prongs to the *Frye* test: (1) whether the scientific theory on which the evidence is based is generally accepted in the relevant scientific community, and (2) whether the technique used to implement that theory is also generally accepted by that scientific community. *Gentry*, 125 Wn.2d at 585. If there is a significant dispute between qualified experts as to the validity of the scientific evidence, it may not be admitted, though scientific opinion need not be unanimous. *State v. Gregory*, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006). A third prong that asks whether the generally accepted technique was performed correctly is included in some states, but Washington case law holds that prong three inquiries go to weight rather than admissibility. *Gentry*, 125 Wn.2d at 586. Stated differently, once a methodology is accepted within the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows experts to testify if scientific, technical, or other specialized knowledge will assist the trier of fact.[9] *Gregory*, 158 Wn.2d at 829-30; *State v. Copeland*, 130 Wn.2d 244, 263, 272, 922 P.2d 1304 (1996) (citing *Cauthorn*, 120 Wn.2d 879); *see* ER 702. Whether laboratory error has occurred goes to weight, not admissibility. *Gregory*, 158 Wn.2d at 830.

Our Supreme Court has already held that "the underlying scientific theory of DNA typing is accepted in the scientific community for identification purposes in the forensic setting." *Gentry*, 125 Wn.2d at 586. It has also held that the PCR technique of DNA analysis is accepted within the scientific community, thus satisfying *Frye*. *Gentry*, 125 Wn.2d at 587 (citing *Russell*, 125 Wn.2d at 54). Here, both the State's expert and Hersh's expert agreed that the scientific community accepts combining swabs to find a DNA profile. Thus, the underlying theories and

[9] Hersh does not argue that the evidence was inadmissible under ER 702.

techniques used to test the wood bark are generally accepted within the scientific community and satisfy the *Frye* standard. *Gentry*, 125 Wn.2d at 585.

Hersh argues that the issue is whether "it is generally accepted within the scientific community that the STR markers can provide a reliable DNA sample where samples from individual pieces of bark found scattered in the house are combined to obtain a single sample." Br. of Appellant at 62-63. He argues that the State merely assumed that the pieces came from the same source and that there was no evidence regarding the effect of age on the pieces of bark. These challenges go to forensic scientists' application of generally accepted theories and techniques, which are matters that go to the evidence's weight, rather than admissibility. *Gregory*, 158 Wn.2d at 829-30; *Copeland*, 130 Wn.2d at 263 (citing *Cauthorn*, 120 Wn.2d 879); *see* ER 702. The trial court did not err when it admitted the DNA evidence.

Hersh argues that there is less evidence of scientific acceptance than in *Russell*. His argument fails because the *Russell* Court examined whether the PCR technique had achieved general acceptance, not whether it had been applied properly to the specific facts of the case. *Russell*, 125 Wn.2d at 44, 49-50. But here, Hersh challenges the application of the PCR technique to the particular facts of his case, which *Russell* recognized is left for the province of the jury. *Russell*, 125 Wn.2d at 41.

VII. Right to Public Trial

In his supplemental brief, Hersh argues that the trial court violated his right to public trial when it excluded "witnesses" and conducted questioning of jurors outside the presence of other potential jurors, all without conducting a *Bone-Club* analysis.[10] Hersh's argument is unpersuasive; the trial court conducted a public trial.

We review an argument that the public trial right was violated de novo. *Bone-Club*, 128 Wn.2d at 256. Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a public trial. Article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly." The public trial right is not absolute, but it is strictly guarded to assure closed proceedings occur in the most unusual circumstances. *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009).

The *Bone-Club* factors considered before closure are:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

[10] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

State v. Castro, 159 Wn. App. 340, 342-43, 246 P.3d 228 (2011) (quoting *Bone-Club*, 128 Wn.2d at 258-59). Before a court addresses the *Bone-Club* factors, a closure must be contemplated or requested. *Castro*, 159 Wn. App. at 343. The failure to undertake a *Bone-Club* analysis on the record before closing the proceedings is a structural error warranting reversal. *Strode*, 167 Wn.2d at 223.

Here, Hersh waived any argument about excluding witnesses, and even if he had not waived this argument, he has failed to adequately brief the issue. First, Hersh waived any argument about excluding witnesses because he requested that the witnesses be excluded from jury selection. A defendant may knowingly waive his public trial right if he shows more than merely the failure to object. *See Momah*, 167 Wn.2d at 154-55; *Strode*, 167 Wn.2d at 234 (Fairhurst, J. concurring). After the court swore in the prospective jury, instructed them on their duties, and released them to the jury room to fill out the questionnaire, Hersh's defense counsel asked the court to exclude all witnesses: "I would say for jury selection, all witnesses should be excluded." RP (3/29/2010 excerpt) at 6. The State and court agreed. Even assuming that excluding witnesses implicated the right to public trial, Hersh waived his argument by affirmatively requesting that the witnesses be excluded.

Even if Hersh had not waived this argument, he has not adequately briefed the issue for appellate review. We will not address arguments not developed or supported in the brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Here, Hersh assigned error to the exclusion of witnesses as part of his supplemental assignment of error. He mentions that the court excluded witnesses, but he makes no argument that this violated his

right to public trial. Accordingly, we will not review this argument.

Even assuming that Hersh did not waive the argument and adequately presented it for review, we hold that no closure was requested or contemplated. Before a court addresses the *Bone-Club* factors, the court determines whether a closure was contemplated or requested. *Castro*, 159 Wn. App. at 343. Here, the courtroom never closed, and the public was free to enter and watch the proceedings. No closure was contemplated or requested.

Next, Hersh argues that his right to public trial was violated when the court excluded prospective jurors from the courtroom. During voir dire, the trial court excluded some prospective jurors from the courtroom during the questioning of several prospective jurors. The courtroom was otherwise open, and the trial court did not undertake a *Bone-Club* analysis.

We hold that *State v. Vega* controls. 144 Wn. App. 914, 184 P.3d 677 (2008). There, Division Three held that the trial court did not violate the right to public trial where it questioned individual jurors in open court but apart from the other jurors. *Vega*, 144 Wn. App. 916-17. The court reasoned that since prospective jurors take an oath and are officers of the court until discharged, they are not general members of the public. *Vega*, 144 Wn. App. at 917. The trial court may individually question a juror to fulfill its duty to determine if the a juror can try the case impartially and without prejudice to the substantial rights of either party. *Vega*, 144, Wn. App. at 917. No weighing of the *Bone-Club* factors was required. *Vega*, 144 Wn. App. at 917. In dictum, this court has approved of *Vega* and recommended that trial courts conduct jury selection using the method discussed in *Vega*. *State v. Erickson*, 146 Wn. App. 200, 205-06 n.2, 189 P.3d 245 (2008); *see State v. Wise*, 148 Wn. App. 425, 453, 200 P.3d 266 (Van Deren, J. dissenting), *review granted*, 170 Wn.2d 1009, 236 P.3d 207 (2010).

Vega is on all fours. Here, like in *Vega*, the trial court swore in the jury, and questioned individual jurors in open court but apart from the other jurors. Like in *Vega*, we hold that no weighing of the *Bone-Club* factors was required because the jurors were officers of the court and not members of the general public. *Vega*, 144 Wn. App. at 916-17. Like the defendant in *Vega*, Hersh's argument fails.

We reverse and remand with instructions to vacate count two's judgment, but not its verdict. We otherwise affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

I concur:

Van Deren, J.

I concur in the result only:

Quinn-Brintnall, J.