

JUL 10 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYREE DUANE HARRIS,

Petitioner - Appellee,

v.

JEFF PREMO, Superintendent, Oregon
State Penitentiary,

Respondent - Appellant.

No. 13-35579

D.C. No. 3:09-cv-01190-ST

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, PresidingSubmitted July 7, 2014**
Portland, Oregon

Before: PREGERSON, PAEZ, and WATFORD, Circuit Judges.

Tyree Harris' claim that his sentence violated the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is not procedurally defaulted. The Oregon Court of Appeals rejected Harris' claim without discussion or citation. "[T]hat absence of a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

citation coupled with the cursory statement denying the [appeal] satisfies the exhaustion requirement.” *Smith v. Oregon Bd. of Parole & Post-Prison Supervision, Superintendent*, 736 F.3d 857, 861 (9th Cir. 2013). Even if the state court could have relied upon *State v. Crain*, 33 P.3d 1050 (Or. Ct. App. 2001), *overruled on other grounds by State v. Caldwell*, 69 P.3d 830 (Or. Ct. App. 2003), to reject the claim, the court did not “clearly and expressly base[] its decision on state-law grounds.” *Nitschke v. Belleque*, 680 F.3d 1105, 1112 (9th Cir. 2012).

AFFIRMED.