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COURT OF APPEALS

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NO. 34697-4-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

PAUL NUNN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas P. Larkin, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Erroneous admission of unfairly prejudicial evidence denied appellant a fair trial.

2. The court improperly imposed the firearm enhancement applicable to a class A felony on appellant's conviction of a class B felony.

3. Appellant's state and federal constitutional rights to due process and to a jury trial were violated when appellant's prior juvenile adjudications of guilt were included in calculating his offender score without being proved to a jury beyond a reasonable doubt.

4. The court erroneously imposed an amount of restitution not established by a preponderance of the evidence.

Issues pertaining to assignments of error

1. Appellant was charged with first degree assault and attempted first degree robbery. In his statement to police, he said he had heard about the charge and felt he was being falsely accused because he had a reputation as an aggressive drug dealer with a history of violence. Where the comments about appellant's reputation were not relevant to any element of the charged offenses, did the court improperly admit this highly prejudicial evidence?

2. Appellant was convicted of attempted first degree robbery, a class B felony. Where the firearm enhancement applicable to a class B felony is three years, did the court err in imposing a 60-month enhancement?

3. Under Apprendi v. United States, 530 U.S. 466, 120 S. Ct. 2349, 147 L. Ed. 2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), were appellant's constitutional rights to a jury trial and to due process violated when the sentencing court counted juvenile offenses in appellant's offender score without those juvenile charges being proved to a jury beyond a reasonable doubt?

4. Where the court found that the evidence presented by the state was insufficient to establish that the proposed restitution amount was based on damages causally related to appellant's crimes, did the court err in ordering the proposed restitution?

B. STATEMENT OF THE CASE

1. Procedural History

On September 4, 2004, the Pierce County Prosecuting Attorney charged appellant Paul Nunn with first degree assault and attempted first degree robbery, alleging that Nunn or an accomplice was armed with a firearm for both offenses. CP 1-4; RCW 9A.36.011(1)(a); RCW 9A.56.200(1)(a)(i); RCW 9A.28.020; RCW 9.94A.530. The case

proceeded to jury trial before the Honorable Thomas P. Larkin, and the jury returned guilty verdicts and special verdicts indicating Nunn was armed with a firearm. CP 84-87. The court imposed standard range sentences based on an offender score of 9. CP 91, 93-94. It also imposed 60-month firearm enhancements on both offenses. CP 94. Nunn filed this timely appeal. CP 106.

2. Substantive Facts

On September 3, 2004, Shaun Parker was shot in the alley behind Browne's Star Grill in Tacoma. 4RP<sup>1</sup> 84. He spent the next two weeks in the hospital. 4RP 88.

Police detained a suspect at the scene, based on a description given by Tyrone Ferguson, the owner of Browne's. 4RP 68. The man was released, however, when Ferguson explained that his clothing was not exactly what he had seen on the surveillance video from that evening. 4RP 69; 5RP 47-48. Although the video did not show the shooting, there was footage of the man Ferguson believed was the shooter in the bar and alley. 5RP 30, 36-37. Ferguson provided a copy of some of the video footage to the police. 5RP 46. In the days after the shooting, police received information that the shooter was someone known by the

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<sup>1</sup> The Verbatim Report of Proceedings is contained in 14 volumes, designated as follows: 1RP—1/31/06; 2RP—2/2/06; 3RP—2/6/06; 4RP—2/7/07; 5RP—2/8/06; 6RP—2/9/06; 7RP—2/13/06; 8RP—2/14/06; 9RP—2/15/06; 10RP—2/16/06; 11RP—2/17/06; 12RP—3/10/06; 13RP—5/12/06; 14RP—6/9/06.

nickname Pezo. 6RP 141. Police identified Pezo as Paul Nunn, and a warrant was issued for Nunn's arrest. 8RP 17.

Nunn was arrested on May 26, 2005, and Detectives Dan Davis and David Devault interviewed him. 8RP 18. At the start of the interview, Davis told Nunn he was a suspect in the shooting at Browne's. 8RP 19. Nunn responded that he knew about the shooting. He was aware there was a warrant for his arrest, and he had been laying low. 8RP 20. Nunn explained that he had been falsely accused of the shooting because of his reputation on the Hilltop. He had been dealing drugs and had been aggressive about it, not respecting the hierarchy on the street. He had also beaten someone up. 8RP 22-24, 38.

At first, Nunn denied that he was at Browne's on the night of the shooting. 8RP 24. He said he was with a friend buying marijuana when his friend received a phone call about the shooting. 8RP 24. When Davis told Nunn that there was videotape showing him at Browne's that night, Nunn admitted he had been there but said he left before the shooting. 8RP 29. Davis told Nunn that, based on the videotape, he could not have left before the shooting. 8RP 40. Nunn then said he made contact with Parker for a drug transaction.

Nunn explained that Parker flagged him down in front of Browne's, and Nunn told him to drive around back. Nunn then met him in

the alley and exchanged an eightball for money. 8RP 43-44. Nunn told the detectives he was acting as a middleman, selling for another person who was near the back of Browne's. 8RP 45. When he realized Parker had not paid the right amount, he confronted Parker. Parker responded that that was what he paid for an eightball where he came from and started to walk away. 8RP 46. Nunn then called out to the seller, who came over and shot Parker. 8RP 47. Nunn ran from the alley and heard more shots as he was running. When he got to the street, a friend was driving by. He stopped and gave Nunn a ride. 8RP 48.

The case against Nunn proceeded to trial on charges of first degree assault and attempted first degree robbery. Following a CrR 3.5 hearing, the trial court ruled that Nunn had knowingly, intelligently, and voluntarily waived his rights, and his statement to the detectives was therefore admissible. 1RP 67. Defense counsel moved to exclude portions of the statement, however, under ER 403. 1RP 84. Counsel argued that Nunn's statement that he had a reputation on the Hilltop would lead to speculation about gang affiliation. Since the statement was not necessary to the state's case, its potential for unfair prejudice outweighed its probative value. 1RP 84.

The court responded that Nunn's statement supported his claim that people jumped to conclusions based on his reputation and was

actually good for the defense. 1RP 84. The court found there was some probative value to the statement and allowed it into evidence because “it balances things out and explains what’s going on.” 1RP 86.

Defense counsel then moved to exclude Nunn’s statement that he had been dealing drugs to make a living, and the court initially granted the motion. 1RP 87-88. Counsel also moved to exclude Nunn’s statement that he had been very aggressive in his drug dealings and had not respected the territories of other dealers. 1RP 91. The state argued, however, that the full context of the interview was necessary, since Nunn talked about his drug dealing to explain why he was a suspect. 1RP 92. The court noted that the jury would hear that Nunn told the detectives he had sold Parker an eightball, so it was not a secret that he was dealing drugs. 1RP 93. Counsel argued, however, that there was a difference between hearing about a single drug transaction associated with the charged offense and hearing that the defendant had been making his living selling drugs. The latter statement should be excluded as more prejudicial than probative. 1RP 93. The court then ruled that all the information regarding Nunn’s drug dealing needed to come in so that the jury would understand what was going on. It did not believe the statements were unfairly prejudicial. 1RP 93-94.

Defense counsel clarified that he was not objecting to any statements regarding what happened on the night of the shooting. The more general statements about Nunn's reputation, however, had nothing to do with the charged offenses and should not be admitted. 1RP 95. At that point, the court agreed to review the entire statement and address the issue again at a later time. 1RP 96-97. When the court returned to the subject, it ruled that the jury needed to hear everything except the fact that Nunn had recently been released from prison, so that the jury could get a feel for what was going on in the interview and what Nunn's position was, "otherwise, his statement and arguments and as to why he was doing that don't make any sense." 3RP 6-7.

Counsel again made a record of the statements he was moving to exclude. He argued that references to Nunn's reputation, his drug dealing, the fact that he had beaten up a man behind Browne's, and the fact that he had made enemies should all be excluded under ER 403. 8RP 71-2. The court reaffirmed its earlier ruling. 8RP 14.

Davis testified at trial about Nunn's statement. 8RP 19-50. Defense counsel was granted a standing objection. 8RP 20.

In addition to testimony about Nunn's interview with the detectives, the state presented testimony from Shaun Parker. Parker testified that he was driving around that Friday night when he noticed that

Browne's was pretty crowded. He had never been there before, so he stopped and asked Nunn, who was standing out front, what the club was like. Nunn said it was cool, so Parker drove around to the alley in back and parked. 4RP 75. Once he had parked, Parker walked to the back of his truck, where he urinated against a wall. He then started walking toward the club. 4RP 80.

According to Parker, the man he identified as Nunn then approached him and drew a pistol. The man told him to strip and said this was a robbery. Parker tried to talk him out of it, saying he did not have anything. When the man again told him to strip, Parker ran. 4RP 81. As he was running, he was shot in the back. He was shot again in the hip and was knocked to the ground. 4RP 84. Parker got back to his feet and began tussling with his assailant. 4RP 85. The next thing he remembered was being on his back on the ground with people telling him an ambulance was on the way. 4RP 87. He regained consciousness in the hospital. 4RP 88.

Although police had put together a montage containing Nunn's photograph in the days following the shooting, they never showed it to Parker to see if he could identify Nunn as the shooter. 6RP 129. The week before trial, at the court's order, the state conducted an in-person lineup. 1RP 104; 4RP 96. Detective Davis told Parker to pick the guy he

thought did the crime, and Parker understood that the man the police considered the suspect was in the lineup. 4RP 101-02. Parker picked Nunn. 4RP 98.

Parker testified he never bought drugs from Nunn and had no conversation about drugs with him. 4RP 79-80. He also testified that he had not been drinking that night, although he could not remember exactly what he had been doing or where he had been before he arrived at Browne's. 4RP 109-115, 118. Moreover, he had told a physician's assistant who evaluated him in the hospital that he drinks a case to a case and a half of beer every weekend, and Parker testified he could not wait until he got inside the club to use the restroom but instead chose to urinate in the alley. 4RP 118; 9RP 12-13.

Ferguson was another key witness for the state. He testified that he was standing in the back hallway inside the club when he heard a shot. 5RP 13. As he was walking down the hall toward the back door, he heard a second shot. 5RP 15. He stepped out the back door and scanned the area from right to left. Ferguson then saw Parker on the ground with a man Ferguson testified was Nunn pointing a gun at him. According to Ferguson, when Nunn realized he was there, Nunn ran from the area. 5RP 15-16, 61. Ferguson was standing 75 to 100 feet from the struggle, and he

was outside a maximum of 15 seconds before the assailant ran off. 5RP 16, 61.

Ferguson identified Nunn as the shooter in large part based on his clothing, which he described as a dark blue or black sweatshirt and pants and a wool knit cap with a short visor. 5RP 19, 48, 59. He admitted, however, that generally everyone in the club wears predominantly dark clothing, and many people wear hats. 5RP 52.

Ferguson had seen Nunn in the bar that evening, and he identified Nunn in the lineup the week before trial. 5RP 39. When police showed him a photo montage containing Nunn's photograph just four days after the incident, however, Ferguson was unable to identify Nunn. 5RP 49.

Roger Harrison, who had been working door security at Browne's that night, testified that Pezo, who he recognized in court as Nunn, was at Browne's on the night of the shooting. 7RP 107. When Nunn left the bar, Harrison told him there would be a cover charge if he wanted to return. 7RP 108. About a half hour after that, Harrison heard gunshots. 7RP 111. Harrison asked Ferguson, who was standing in the hallway, to go outside and see what was happening. Contrary to Ferguson's testimony, Harrison testified that before Ferguson reached the back door, Parker came inside saying he had been shot. 7RP 111, 117. Harrison rendered emergency aid until the paramedics arrived. 7RP 112-13.

The state also presented testimony from two witnesses whose testimony it expected would differ from their previous statements, Solange Williams and Yvonne Heads. 2RP 6-8; 7RP 79-80.

Solange Williams testified that she was at Browne's on the night of the shooting. 5RP 96. She was taking photographs of some of the customers, and Nunn asked her to take his picture. 5RP 97, 101. She did not want to at first because she did not know him, but she reluctantly agreed. They went outside behind Browne's, and Williams took the photograph. 5RP 102. Nunn left as soon as she took the picture, and Williams did not see where he went. 5RP 108-09.

Williams said she stood outside with a group of friends for ten to 15 minutes. 5RP 107. She noticed Parker's truck drive into the alley, but she never saw Parker. 5RP 103, 109. She did not see Nunn approach the truck, and she did not know if he did so. 5RP 105. Williams heard gunshots and ran back inside the building, out the front door, and down the street. 5RP 111. She did not see the shots fired, although she saw a gun from the corner of her eye. 5RP 106, 134.

Williams testified that she gave the police a statement the next day. 5RP 113. By then, the whole town was talking about the shooting, and she had learned that Nunn's nickname was Pezo. She told the detectives that she had seen Pezo in the bar before the shooting and he had asked her

to take his picture. 5RP 123. Williams also told the detectives that she heard talking before the shooting, about 50 to 75 feet from where she was standing. She testified that she did not know whose voices she heard or what was being said, but it looked like a robbery based on the body language she saw. 5RP 131-32. Williams testified that when the detectives showed her a photographic lineup, she pointed to three possible suspects to identify the general description of the person she had seen. 5RP 144-45.

In her direct examination by the prosecutor, Williams denied telling the detectives that she saw Pezo shoot Parker. 5RP 133, 136. She denied telling the detectives that Nunn approached her at Browne's the next day and demanded the film from her camera. 5RP 139. And she denied identifying Nunn's photograph from the montage. 5RP 146.

The state then called Detective Davis to impeach Williams's testimony. 6RP 84. Davis testified that in her interview, Williams told them Nunn's nickname was Pezo and that she knew him by sight from previous contacts. 6RP 85-86. Williams also said she had seen Parker and Pezo engaged in a struggle and had seen Pezo shoot Parker. 6RP 87. She told the detectives that she could hear Pezo "talking shit." 6RP 104. And she said when she saw him at Browne's the next night, he had asked about the photograph she had taken of him. 6RP 104. When the

detectives showed her the photo lineup, she pointed directly to Nunn's photograph and identified him as the shooter. 6RP 106-07.

Defense counsel objected to the testimony regarding Williams's prior statements, and the court agreed that the statements were not being admitted for their truth. 6RP 94. At the conclusion of this testimony, by agreement of the parties, the court instructed the jury "Members of the jury, the court has allowed Ms. Williams' statements to Officer Davis on September 8<sup>th</sup> for impeachment purposes. You must not consider her statements for any other purposes." 6RP 100, 110. Detective Tom Davidson also testified about the statements Williams made in her interview, and the court again instructed the jury that the statements were admitted only for impeachment purposes. 7RP 75.

Like Williams, Yvonne Heads testified that she was at Browne's on the night of the shooting. 7RP 129. Heads testified that she had just walked in through the back door when she heard some gunshots. She went to the back door to see what was happening, noticed a commotion, and left. 7RP 130. Heads did not recall seeing Nunn in back of Browne's when she arrived. 7RP 133. She had noticed Parker's truck as he drove by in the alley, but she did not see anyone approach the truck. 7RP 141. She testified that she did not see who did the shooting and that everyone outside was wearing dark clothing. 7RP 144-45.

Heads was interviewed by two detectives on September 7, 2004. She denied telling them that she had been inside the bar with Pezo that night. 7RP 134. She denied telling the detectives that the shooter was wearing dark clothing and a knit cap with a brim. 7RP 145. She denied saying she had seen Pezo wrestling with Parker. 7RP 147. And she denied telling the detectives she had overheard Nunn bragging about the shooting. 7RP 149-50.

As with Williams, the state called Davis to impeach Heads with prior inconsistent statements, and the court instructed the jury that the testimony was to be considered only for impeachment purposes. 8RP 51. Davis testified that Heads had said she saw Pezo at Browne's on the night of the shooting, that he was wearing dark clothing and a hat with a brim, that she had gone outside just before the shooting and saw the altercation, and that Pezo had done the shooting. 8RP 52-53. Davis also testified that Heads had said she heard Pezo talking about the shooting the next night at Browne's, saying, "Did you hear what I did last night 'cause I jacked that shit." 8RP 56.

Despite the fact that Williams's and Heads's prior inconsistent statements had been admitted solely to impeach their credibility as witnesses, the state urged the jury in closing and rebuttal arguments to accept the prior statements as true. First, as part of his PowerPoint

presentation, the prosecutor showed the jury a slide which read, “As the sole judge of credibility, you’re entitled to reject the courtroom version in favor of the interview version if you find the interview version truthful.” See 10 RP 75. Defense counsel objected that the slide was a mischaracterization of the law. 10RP 63. Instead of correcting the misstatement, the court merely reminded the jury that if the attorneys’ arguments differed from the court’s instructions, the jury must follow the court’s instructions. 10RP 63.

The jury was excused for lunch following the prosecutor’s argument, and defense counsel made a further record of his objection to the state’s PowerPoint slide. He argued that the jury was not permitted to find Williams’s and Heads’s interview statements truthful, because they had been instructed they could consider that evidence only for impeachment. 10RP 75. The court responded that defense counsel would be able to argue what the instruction means. 10RP 76.

In closing argument, defense counsel argued that the court’s impeachment instructions meant that the jury could find, based on the prior inconsistent statements, that the witnesses were not credible. It could not, however, rely on the prior statements as proof of what really happened. Thus, the statements by Williams and Heads that Davis

described could not be accepted as the truth. They could only be used to determine the witnesses' credibility. 10RP 103-04.

The prosecutor returned to the issue in rebuttal. He argued that the jury was entitled to decide what to believe from each witness and it was the jury's job to determine which version of Williams's and Heads's statements was true:

If you find that what is credible about what they said is, in fact, what they said before, you reject what they said on the stand.... That's what impeachment is all about. It's a directive to you from the judge's instructions that you get to decide whether you believe the story in court where they're scared of being snitches and don't want to say that the defendant did it or what they said before.

10RP 115-16.

After the jury started deliberations, it sent a question to the court, asking, "Need better explanation of impeachment? How do we consider their testimony[?]" CP 45. Both the prosecutor and defense counsel proposed supplemental instructions in response to this question and, after discussing the issue with the parties, the court instructed the jury as follows:

The sole purpose of impeachment evidence is to enlighten the jury with respect to a witness' credibility. To impeach means to challenge the credibility, value or weight to be given the testimony in court of Solange Williams and Yvonne Heads. You must not consider this evidence for any other purpose.

CP 52; 11RP 22.

The jury entered guilty verdicts as well as special verdicts finding Nunn was armed with a firearm during the commission of the crimes. CP 84-87. At sentencing, defense counsel argued that Nunn's prior juvenile offenses should not count in his offender score because he was not convicted by a jury for those offenses. 12RP 13. The court rejected the argument based on its understanding of current law. 12RP 18. It imposed standard range sentences based on an offender score of 9. 12RP 24. The court also imposed 60-month firearm enhancements on both the assault and attempted robbery convictions, not addressing defense counsel's argument that because attempted robbery is a class B felony, a lesser enhancement applied. 12RP 26-28.

The state also submitted a restitution request at sentencing, but defense counsel objected that the request was not supported by sufficient documentation, and the court scheduled a restitution hearing. 12RP 26-27. At the restitution hearing on May 12, 2006, the state presented a proposed restitution order of \$29,793.92. 13RP 4. In support of this order, the state presented a statement from Parker indicating the value of the clothes damaged as a result of the crime. 13RP 6. The court accepted this statement and set the amount of property damages at \$200. 13RP 8.

The state also presented a computer-generated printout from crime victim's compensation, indicating the amounts paid to Parker for medical

bills and lost wages. 13RP 9-10. Defense counsel objected that this printout was insufficient to establish that the amounts paid were for damages causally related to the crime. 13RP 5, 8-9. The court agreed that the information provided by the state was insufficient, noting there was no documentation as to the basis for the amounts paid. 13RP 10. Over defense counsel's objection, the court granted the state's motion to continue and set a further restitution hearing for June 9, 2006. 13RP 11.

Defense counsel was not present at the next hearing. 14RP 4. The state again presented its proposed restitution order and, although the state had not provided any further documentation to support the proposed amount, the court signed the order. 14RP 5.

C. ARGUMENT

1. NUNN'S STATEMENTS ABOUT HIS REPUTATION AS AN AGGRESSIVE DRUG DEALER SHOULD HAVE BEEN EXCLUDED AS IRRELEVANT AND UNFAIRLY PREJUDICIAL.

Evidence that is not relevant is not admissible in a criminal trial. ER 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if relevant, evidence may be excluded if "its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ....” ER 403.

A trial court’s ruling on admissibility of evidence is reviewed for an abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997).

In Perrett, the defendant was arrested for second degree assault with a deadly weapon after he pointed a shotgun at a tenant. 86 Wn. App. at 314. Police arrested the defendant and, after advising him of his Miranda rights, asked him to produce the shotgun he used. Perrett refused, saying the last time the sheriffs took his guns, he did not get them back. Id. at 315. Perrett moved to exclude this statement, but the trial court admitted it, explaining that the jury needed to understand the totality of the circumstances to judge Perrett’s demeanor on arrest. Id. at 319.

On appeal, this Court held that admission of the statement was an abuse of discretion. Perrett’s demeanor on arrest was not relevant to any element of the crime charged. Moreover, the statement was unfairly prejudicial, as it raised the inference that he had committed a prior crime with a gun and thus it was more likely he committed the charged offense. Id. at 319-20.

Here, as in Perrett, Nunn moved to exclude some of the statements he made in his interview with the detectives on the grounds that they were unfairly prejudicial. At the beginning of his interview, Nunn explained that he believed he had been falsely accused of the shooting because of his reputation. He said he had been dealing drugs for a living and was very aggressive about it, refusing to respect the hierarchy on the streets and beating people up.

Like the court in Perrett, the court below denied the motion to exclude these statements, finding they would help the jury understand the circumstances of the interview. Since Nunn told the detectives he felt he had been falsely accused of the crime, the court believed the jury needed to hear his explanation as to why that would happen, to place the statement into context. 1RP 84, 93-94; 3RP 6. But also like in Perrett, these circumstances were not relevant to any element of the charged offense. Nunn's explanation about his reputation for being an aggressive drug dealer known for his violence was not referring to any event connected to the charged offense. Nunn did not mention any specific time or sequence of events and therefore his statements could not shed light on the questions before the jury but only mislead the jury and confuse the issues. Moreover, even without the statements about his reputation and drug dealing, the jury would still learn that Nunn had heard the Crime Stopper's

report and word on the street and that he felt he was being falsely accused. The reputation evidence was neither relevant to the charged offenses nor necessary for context.

Furthermore, even if the evidence had some relevance, its prejudicial impact mandated its exclusion. As the Washington Supreme Court has recognized, “It cannot be doubted the public generally is influenced with the seriousness of the narcotics problem ... and has been taught to loathe those who have anything to do with illegal narcotics ....” State v. LeFever, 102 Wn.2d 777, 783-84, 690 P.2d 574 (1984) (citations omitted), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

The court reasoned, however, that the evidence was not unfairly prejudicial because the jury would hear that Nunn said he was conducting a drug transaction with Parker. 1RP 93. But as defense counsel pointed out, there is a huge difference between the jury learning about an isolated transaction integral to the events at issue and learning that Nunn had been dealing drugs to make a living, aggressively moving in on the territories of other dealers. There is no doubt that Nunn’s reputation as someone extensively involved in the drug trade created the unfair potential that the jury would convict him because they thought he was a loathsome

character, rather than because the state proved he committed the charged offenses.

The jury might well have concluded that Nunn was the type of person who would attempt to rob and shoot someone in an alley because he was selling drugs for a living, was considered aggressive, and was known to have a history of violence. This information was not, however, necessary to place either the crime or Nunn's other statements to the police into context. The court therefore abused its discretion in admitting the evidence.

Reversal is required if there is a reasonable probability that the erroneous admission of evidence materially affected the outcome of the case. State v. Pogue, 104 Wn. App. 981, 988, 17 P.3d 1272 (2001). There were several weaknesses in the state's case. Ferguson, the only person who testified he saw an altercation between Nunn and Parker, admitted on the stand that he was having difficulty with his memory of that evening. He originally testified that he had provided video footage to the police that night, but later retracted when confronted with evidence that he did not provide it until four days later. 5RP 25, 46-47. He first said he had given the police the nickname Pezo that night, then later said that Harrison had given the nickname in his presence. 5RP 23, 65, 69. Detective Davis testified, however, that neither Ferguson nor Harrison gave him the name

of the suspected shooter that night. 6RP 118. Ferguson told the detectives he saw the assailant for only a few seconds, although he testified it was 15 to 20 seconds, and he was unable to identify Nunn's photograph from a montage just days after the shooting. 5RP 21, 49, 58, 61.

Next, neither Solange Williams nor Yvonne Heads testified that they had seen Nunn shoot Parker. Although the state tried to convince the jury they could believe the witnesses' prior statements to the contrary, that evidence was not admitted for the truth of the statements. At most that evidence could cause the jury to question whether they were credible witnesses.

Finally, the adequacy of the police investigation was called into question by the evidence. The defense established that Davis had not questioned the owners of the vehicles that were parked at Browne's when the police arrived. 9RP 19-20. He never followed up on obtaining surveillance video from Browne's for the next night, when Williams and Heads said they spoke to Nunn. 9RP 32-33. He did not prepare a report of his search of Parker's truck. 9RP 33-35. And he did not even request a report of the fingerprint analysis from Parker's truck, once he learned that none of the ten prints of comparison value lifted from the exterior of the truck matched Nunn's prints. 5RP 87, 91.

Given these weaknesses in the state's case, it is reasonably likely that the jury convicted Nunn because of the improperly admitted statements about Nunn's reputation. Even if the jury believed Nunn's statement that he was conducting a drug transaction, they might have discounted his claim that someone else shot Parker, not because they were convinced by the state's evidence, but because they knew he was a hard-core drug dealer with a history of violence and thus the type of person who would commit the charged crimes. The court's error was not harmless, and reversal is required.

2. THE ATTEMPTED ROBBERY CONVICTION IS NOT SUBJECT TO A 60-MONTH FIREARM ENHANCEMENT.

At the sentencing hearing, the state presented a Judgment & Sentence mistakenly listing the offence in count II as robbery in the first degree, rather than attempted robbery in the first degree. 12RP 25; CP 90. The document also listed the standard range and firearm enhancement associated with the greater offense. 12RP 25; CP 91. Defense counsel caught the error, and the state recalculated the standard range and made corrections to the Judgment & Sentence. 12RP 25; CP 90-91. When counsel pointed out that attempted robbery is a class B felony, not a class A felony, and was therefore subject to a lower sentence enhancement, the prosecutor responded that he believed the statute calls for a 60 month

enhancement for both robbery and attempted robbery. 12RP 28. The court did not address counsel's question but imposed a 60 month firearm enhancement on the attempted robbery count. CP 94. This enhancement is not authorized by statute and must be corrected.

Under RCW 9A.28.020(3)(b), an attempt to commit a class A felony is a class B felony.<sup>2</sup> Since first degree robbery is a class A felony, attempted first degree robbery is a class B felony. RCW 9A.56.200(2); RCW 9A.28.020(3)(b). The firearm enhancement for a class B felony is three years. RCW 9.94A.533(3)(b). The 60-month enhancement imposed by the court is not authorized by statute and must be stricken.

3. NUNN'S SIXTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED AT SENTENCING.

- a. The Sixth Amendment and due process rights are implicated by use of juvenile convictions in calculating an offender score

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<sup>2</sup> Subsection (3) of the statute reads as follows:

An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

The Sixth Amendment right to jury trial applies not only to proceedings at which a defendant is found guilty of an offense, but also to sentencing. See Apprendi, 530 U.S. at 476-77. Where there is a fact that “increase[s] the prescribed range of penalties to which a criminal defendant is exposed,” that fact is an “element” of the prosecution’s case and, under the Sixth Amendment, must be found by a jury. 530 U.S. at 490; see Blakely, *supra*, 542 U.S. at 303-305.

In addition, due process demands that such elements are proved by the state beyond a reasonable doubt. Apprendi, 530 U.S. at 477; see also, In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (due process mandates such proof). The only exception for the requirements of proof beyond a reasonable doubt to a jury is for a “prior conviction,” an exception which the Supreme Court has mandated must be construed narrowly. Apprendi, 530 U.S. at 490; Blakely, 124 S. Ct. at 2536-37.

That exception does not apply where, as here the element the prosecution had to prove was the fact of a prior juvenile adjudication of guilt. Although under Washington law the term “conviction” includes the concept of an adjudication of guilt for a juvenile, the Sixth Amendment exception Apprendi and Blakely cite for a “prior conviction” is not so broad. See, e.g., RCW 9.94A.030(12). Instead, the exception for “prior convictions” was based upon the Court’s decision, in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), that the fact the defendant had previously been convicted of an aggravated felony need not be charged in an indictment. As the Court later noted in Jones v. United

States, 526 U.S. 227, 248-49, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), Almendarez-Torres dealt not with the issue of the “Sixth Amendment right to a jury trial” but only whether recidivism had to be in the indictment and whether the defendant was entitled to notice that the government was going to rely on recidivism in sentencing. The Jones Court explained the reasoning behind Almendarez-Torres treating prior convictions differently than other facts upon which a sentence could be increased:

[U]nlike virtually every other consideration used to enlarge the possible penalty for an offense. . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.

526 U.S. at 529.

Thus, the “prior convictions” to which Almendarez-Torres referred, and which Apprendi and Blakely stated did not have to be proven to a jury beyond a reasonable doubt, were only those prior convictions which were obtained using procedures consistent with the fundamental rights of notice, proof beyond a reasonable doubt, and trial by jury. Apprendi itself relied upon the “vast difference” between proof of prior convictions “entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt,” and proof of other “facts,” which had no such protections. 530 U.S. at 496. Similarly, in Blakely, the Court reiterated that it was not “too much to demand that” facts upon which a man could be deprived of “more years of his liberty” should be subjected to the rigors of “unanimous suffrage of twelve of his equals and neighbors.” 124 S. Ct. at 2543. Implicit in this holding is the

idea that any prior convictions will already have been submitted to a jury and established by the high reasonable doubt standard of proof, before they can be used to increase a sentencing range.

Indeed, the 9<sup>th</sup> Circuit has held that juvenile adjudications are not “prior convictions” under Apprendi unless they “afford the right to a jury and a beyond-a-reasonable-doubt burden of proof.” United States v. Tighe, 266 F.3d 1187, 1194 (9<sup>th</sup> Cir. 2001). The court noted that these “procedural safeguards,” coupled with the right to notice, were a fundamental underpinning of the reasoning for the “prior convictions” exception of Apprendi, because its holding of “prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions.” 266 F.3d at 1194. Because juvenile convictions are not subjected to all three parts of that “fundamental” testing, they are not “prior convictions” exempt from the requirements of proof beyond a reasonable doubt to a jury. Id.

In this state, juvenile adjudications of guilt are not “prior convictions” under Apprendi. While they are required to be based upon a finding of guilt beyond a reasonable doubt, that finding is not made by a jury, because neither the state nor federal constitutions provide juveniles the right to a jury trial. See McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); State v. Schaaf, 109 Wn.2d 1, 16, 743 P.2d 240 (1987). Thus, Washington juvenile adjudications of guilt are not “prior

convictions” as that term is contemplated under Apprendi and Blakely, and defendants have Sixth Amendment and due process rights to have those prior adjudications proved beyond a reasonable doubt to a jury, before those adjudications can be used to increase the range of punishment a defendant will face.

b. Caselaw to the contrary is flawed

In response, the prosecution is likely to rely on State v. Mounts, 130 Wn. App. 219, 122 P.3d 745 (2005), and State v. Weber, 127 Wn. App. 879, 112 P.3d 1287 (2005), review granted, 156 Wash.2d 1010, 132 P.3d 147 (2006), cases in which this Division and Division One held that defendants are not entitled to have juvenile adjudications of guilt proven beyond a reasonable doubt to a jury before those adjudications are counted in the offender score. The Washington Supreme Court heard argument in Weber, (Supreme Court No. 77395-5), on March 23, 2006, and a petition for review is pending in Mounts, (Supreme Court No. 78053-6). This Court should not follow the decision in either case because the decisions are flawed.

First, in Mounts, the Court relied on its belief that, even without the right to a jury trial, juvenile court adjudications are “not significantly less reliable than the adult court system” and thus prior adjudications can be counted as “prior convictions” under Apprendi. 130 Wn. App. at 747. But the Apprendi Court did not hold that prior convictions need not be proven because they were so “reliable.” Instead, it relied on “the certainty” that the *full range* of procedural protections had applied to the prior conviction in

explaining the exception for such convictions. 530 U.S. at 488. And, notably, the Appendi Court specifically described the “prior conviction” exception as narrow. 530 U.S. at 490.

Second, both in Mounts and in Weber, the Courts failed to look beyond the surface contention: that due process is not violated by depriving juveniles of a right to a jury trial, so due process must not be violated by using the result of the nonjury proceeding against the juvenile later. And the cases upon which Weber relied make the same error. In United States v. Smalley, 294 F.3d 1030 (8<sup>th</sup> Cir. 2002), cert. denied, 537 U.S. 1114 (2003), the court simply listed the right juveniles have, then concluded that, if juvenile proceedings are reliable enough to be constitutional the results of those proceedings may be used in adult proceedings without further constitutional protections. 294 F.3d at 1032-34; see Weber, 127 Wn.2d at 891-92 (relying on Smalley). People v. Lee, 111 Cal. App. 4<sup>th</sup> 1310, 4 Cal. Rptr. 3d 642, 647 (2003), cert. denied sub nom Lee v. California, 542 U.S. 906 (2004), similarly cites the rights juveniles still have without examining the reasoning behind depriving juveniles of the right to a trial by jury and the important goals it serves. See Weber, 127 Wn.2d at 392 (citing Lee).

And in State v. Hitt, 273 Kan. 224, 42 P.3d 732 (2002), cert. denied sub nom Kansas v. Hitt, 537 U.S. 1104 (2003), the decision depended not upon the rights at issue but on crass pragmatism. After first noting the existence of the “two schools of thought” represented by Tighe's majority and dissent, the Hitt court then baldly declared its fear of the “practical impact” which would result from following the Tighe majority, and decided

to follow the dissent because the judges found it “difficult to justify” issuing a ruling which would have such a perceived impact. 273 Kan. at 234; see Weber, 127 Wn. App. at 892 (citing Hitt).

Thus, none of these cases examine the actual reasoning behind the justification for depriving a juvenile of the constitutional right to a trial by jury. But that reasoning and that justification are both absolutely crucial to understanding why it is constitutionally permissible to grant juveniles fewer procedural safeguards in juvenile proceedings. And that reasoning and justification is directly relevant to the issue of whether findings of guilt gained without such safeguards should be used to increase a sentence when an offender becomes an adult.

Thus, in State v. Brown, 879 So.2d 1276, 1285 (La. 2004), cert.denied sub nom Louisiana v. Brown, 543 U.S. 1177, 125 S. Ct. 1310, 161 L.Ed. 2d 161 (2005), the Louisiana court addressing this issue did not simply parrot the prior holdings of cases following the Tighe dissent. After discussing those cases and the Tighe majority, the court then examined that state’s “jurisprudence concerning the juvenile justice system and scholarly works addressing that issue.” 879 So.2d at 1285. The court traced the history of and rationale behind the juvenile justice system and its focus on therapeutic and rehabilitative goals as noted in In re Gault, 387 U.S. 1, 15, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). Brown, 879 So.2d at 1286. Those goals were an essential part of that state’s court holding that it was constitutionally permissible to deprive juveniles of a jury trial, because of the state’s role as *parens patriae*. 879 So.2d at 1286. And those rulings by the

courts had been based upon the U.S. Supreme Court's holding, in McKeiver, supra, that a juvenile proceeding is not a "criminal prosecution" within the meaning and reach of the Sixth Amendment." Brown, 879 So.2d at 1286. As the Brown court stated, the holding in McKeiver was based upon the U.S. Supreme Court's reluctance "to give up on the promise of the juvenile justice system concept and in the belief the system could still accomplish its rehabilitative goals." Brown, 879 So.2d at 1287.

The Brown court then noted that it had continued to follow McKeiver, despite changes in the juvenile justice system, because it had concluded that there was still a "great disparity in the severity of penalties" faced by a juvenile and those faced by an adult. The court stated that its holdings "that due process does not require juveniles to be afforded *all* the guarantees afforded adult criminals under the constitution have been premised upon the 'civil nature' of a juvenile adjudication, its focus on rehabilitation and the state's role as *parens patriae*." Brown, 879 So.2d at 1289 (emphasis in original).

Finally, the court rejected the surface reasoning of Smalley and its progeny, that "because the procedures of juvenile adjudications are sufficiently reliable for juvenile dispositions, they are therefore reliable to 'justify the much harsher consequences of their use as criminal sentence enhancements.'" Brown, 879 So.2d at 1290, quoting, Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1190 (2003). Indeed, the

Brown court found, it would render the “entire claim of *parens patriae*” a “hypocritical mockery” if juvenile adjudications were treated the same as adult convictions when they were not subject to the same protections.

Brown, 879 So.2d at 1289. The court concluded:

The determination that a jury trial was not constitutionally required in juvenile adjudications was predicated upon the non-criminal treatment of the adjudicated juvenile delinquent. . . It would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer. To equate this adjudication with a conviction. . . would subvert the civil trappings of the juvenile adjudication to an extent to make it fundamentally unfair and thus, violative of due process. In order to continue holding a trial by jury is not constitutionally required, we cannot allow these adjudications, with their civil trappings, to be treated . . . the same as felony convictions. *It seems contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults. It is inconsistent to consider juvenile adjudications civil for one purpose and therefore not constitutionally entitled to a jury trial, but then to consider them criminal for the purpose of classifying them as “prior convictions[.]”*

879 So.2d at 1289 (emphasis added). As a result, the Brown court held, it was a violation of the protections of due process to permit a juvenile adjudication to be a “prior conviction,” for the purposes of enhancing a sentence.<sup>3</sup> 879 So.2d at 1289.

In Washington, just as in Louisiana, the reason juveniles may be constitutionally deprived of the right to a jury trial is because of the nature of

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<sup>3</sup> In Brown, the use in question was for the Louisiana Habitual Offender Law. 879 So.2d at 1289.

the proceeding against them. In State v. Lawley, 91 Wn.2d 654, 591 P.2d 772 (1979), the Supreme Court rejected the argument that juveniles should have the same jury trial rights as those enjoyed by adults because the 1977 Juvenile Justice Act had changed the rehabilitative nature of the juvenile justice system to the extent that it was now like the adult criminal system. While agreeing that “the legislature has changed the philosophy and methodology” of the juvenile system to some extent, the Court concluded that the legislature had not “converted the procedure into a criminal offense atmosphere totally comparable” to the adult system, because it had retained its focus on the “interest, welfare and rehabilitation of the individual child.” 91 Wn.2d at 657-58.

Nearly ten years later, the Court again upheld the denial of a jury trial to juveniles based upon the rehabilitative goals of the system and the difference in penalties. See State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987). The Court rejected the claim that changes in the law and the juvenile justice system had so lost its rehabilitative focus that juveniles should have a right to jury trials. Instead, the Court noted that, unlike the adult system, the juvenile system still has a policy and purpose of “responding to the needs of offenders or rehabilitating them.” 109 Wn.2d at 9-10.

Thus, just as in Louisiana, in Washington, juveniles are deprived of the right to a jury trial based upon the theory that the proceedings against them have the predominant goal of focusing on the child’s needs and the possibility of rehabilitation, and because of the far lesser penalties involved. In a sense, it is as if the courts have been willing to risk the potential

unreliability of a nonjury trial based upon the theory that the result will somehow benefit the child, and will not cause the child too great a hardship. But the justification for depriving a child of a jury trial (i.e., to keep the proceedings less “formal” and more receptive to possible rehabilitative and treatment alternatives) is specific only to *those proceedings*. It is, as the Brown court held, contradictory and fundamentally unfair to provide juveniles with less procedural protection because of the nature of the proceeding, but then use the result gained in the absence of that protection as if it had been subject to the rigors of a jury trial.

Weber and Mounts failed to take into account the very important reasons for depriving children of the right to a jury trial, before then concluding that due process was not violated by relying on the results of such proceedings once the offender is an adult. Those cases are flawed and should not be followed by this Court.

#### 4. THE STATE FAILED TO PROVE THE AMOUNT OF RESTITUTION

Under RCW 9.94A.753(3):

[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury....

The trial court must base an order of restitution on easily ascertainable damages that are supported by sufficient evidence. State v. Tobin, 132 Wn. App. 161, 173-74, 130 P.3d 426 (2006).

In determining any sentence, including restitution, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). The state is obligated to prove the restitution amount by a preponderance of the evidence. State v. Dennis, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000). While restitution need not be proven with specific accuracy, evidence is sufficient only if it affords a reasonable basis for estimating loss based on a causal connection between the crime and the victim's damages. Dedonado, 99 Wn. App. at 256. "A causal connection is not established simply because a victim or insurer submits proof of expenditures[.]" Dedonado, 99 Wn. App. at 257.

Here, the only evidence the state presented in support of the restitution order for medical expenses and lost wages was a printout of the amounts paid to Parker from the victim's compensation fund. The court found this documentation insufficient to support the proposed restitution amount, because it did not indicate the basis for the amounts paid. 13RP 10. Thus, the state did not meet its burden of proving the restitution amounts by a preponderance of the evidence, because the documentation it provided did not prove a causal connection between Nunn's actions and the damages. See Dedonado, 99 Wn. App. at 257.

Even after the court granted the state's motion for a continuance so that it could provide further documentation, no additional evidence was presented to support the proposed restitution order. See 14 RP. The court appears to have entered the order without requiring the state to provide the necessary evidence simply because defense counsel was not present at the continued restitution hearing. 14RP 4-5. But the law in this area is clear. The state must prove by a preponderance of the evidence that the requested restitution is causally related to the defendant's crime. Dennis, 101 Wn. App. at 228; Dedonado, 99 Wn. App. at 257. Because it did not do so in this case, the court abused its discretion in entering the restitution order. See Dennis, 101 Wn. App. at 228 (court abused discretion in ordering restitution based solely on information that medical expenses were incurred, when state failed to prove expenses were causally related to defendant's crime).

D. CONCLUSION

The court's erroneous admission of unfairly prejudicial evidence denied Nunn a fair trial and requires reversal. Moreover, the court imposed an incorrect sentence enhancement, violated Nunn's right to due process in calculating his offender score, and improperly ordered restitution which the state failed to prove.

DATED this 14<sup>th</sup> day of December, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', with a long, sweeping flourish extending to the right.

CATHERINE E. GLINSKI

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