

78611-9

No. 23023-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ARO TE'JHON WILLIAMS-WALKER

Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
HONORABLE JEROME J. LEVEQUE

APPELLANT'S OPENING BRIEF

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....2
B. STATEMENT OF THE CASE.....3
C. ARGUMENT.....13
D. CONCLUSION.....46

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|--|--|
| <u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... | 14, 16, 44, 45, 46 |
| <u>Blakely v. Washington</u> , 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)..... | 14, 15, 16, 17, 18, 44, 45, 46 |
| <u>Dawson v. Delaware</u> , 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992)..... | 42 |
| <u>Frye v. United States</u> , 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923)..... | 32 |
| <u>Kent v. United States</u> , 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966)..... | 16, 17, 18, 19, 20, 21, 22, 24, 25, 27, 28, 29, 30 |
| <u>Ring v. Arizona</u> , 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)..... | 15, 16 |
| <u>United States v. Lancellotti</u> , 761 F.2d 1363, 1366 (9th Cir. 1985)..... | 16 |
| <u>In re Harbert</u> , 85 Wn.2d 719, 538 P.2d 1212 (1975)..... | 19, 20 |
| <u>In re Hernandez' Welfare</u> , 15 Wn.App. 205, 548 P.2d 340 (1976)..... | 23 |

| | |
|--|----------------|
| <u>State v. Acosta</u> , 123 Wn.App. 424, 433, 98 P.3d 503 (2004)..... | 37 |
| <u>State v. Allery</u> , 101 Wn.2d 591, 596, 682 P.2d 312 (1984)..... | 31, 34 |
| <u>State v. Black</u> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987)..... | 31, 34, 35 |
| <u>State v. Boot</u> , 89 Wn.App. 780, 950 P.2d 964, <i>rev. denied</i> , 135 Wn.2d 1015, 960 P.2d 939 (1998)..... | 36, 37, 38 |
| <u>State v. Bowen</u> , 48 Wn.App. 187, 196, 738 P.2d 316 (1987)..... | 43 |
| <u>State v. Campbell</u> , 78 Wn.App. 813, 901 P.2d 1050, <i>rev. denied</i> , 128 Wn.2d 1004, 907 P.2d 296 (1995)..... | 36, 37, 38 |
| <u>State v. Cauthron</u> , 120 Wn. 879, 885, 846 P.2d 502 (1993)..... | 32 |
| <u>State v. Dennison</u> , 115 Wn.2d 609, 627, 801 P.2d 193 (1990)..... | 36, 39 |
| <u>State v. Foltz</u> , 27 Wn.App. 554, 619 P.2d 702 (1980)..... | 29, 30 |
| <u>State v. Furman</u> , 122 Wn.2d 440, 858 P.2d 1092 (1993)..... | 19 |
| <u>State v. H.O.</u> , 119 Wn.App. 549, 81 P.3d 883 (2003), <i>rev. denied</i> , 152 Wn.2d 1019, 101 P.3d 108 (2004)..... | 16, 17 |
| <u>State v. Holland</u> , 98 Wn.2d 507, 656 P.2d 1056 (1983)..... | 19, 21, 25 |
| <u>State v. Hughes</u> , __ Wn.2d __, 110 P.3d 192 (2005)..... | 18 |
| <u>State v. Lough</u> , 125 Wn.2d 847, 853, 889 P.2d 487 (1995)..... | 36 |
| <u>State v. M.A.</u> , 106 Wn.App. 493, 23 P.3d 508 (2001)..... | 22, 25, 28, 29 |
| <u>State v. Powell</u> , 126 Wn.2d 244, 258, 893 P.2d 615 (1995)..... | 39 |
| <u>State Recuenco</u> (2005 WL 8551155, Supr.Ct. No. 74964-7, filed 4/14/2005)..... | 44, 45, 46 |

| | |
|---|------------|
| <u>State v. Rice</u> , 48 Wn.App. 7, 13, 737 P.2d 726 (1987)..... | 44 |
| <u>State v. Toomey</u> , 38 Wn.App. 831, 690 P.2d 1175 (1984), <i>rev. denied</i> , 103 Wn.2d 1012, <i>cert. denied</i> , 471 U.S. 1067, 105 S.Ct. 2145, 85 L.Ed.2d 501 (1985)..... | 19, 20, 24 |
| <u>State v. Trickler</u> , 106 Wn.App. 727, 734, 25 P.3d 445 (2001)..... | 43, 44 |
| <u>People v. Ayala</u> , 567 N.E.2d 450 (1990)..... | 43 |

Statutes

| | |
|-----------------------------|------------------------|
| U.S. Const. amend. VI..... | 14, 15, 16, 17, 44, 45 |
| U.S. Const. amend. XIV..... | 14, 44 |
| RCW 9.94A.525(9)..... | 15 |
| RCW 9.94A.540..... | 15 |
| RCW 9A.32.030..... | 15 |
| RCW 9A.32.030(2)..... | 46 |
| RCW 9A.56.200(2)..... | 46 |
| RCW 9A.94.533(3)(a)..... | 45 |
| RCW 9A.94.533(4)(a)..... | 45 |
| RCW 13.34.0357..... | 15 |
| RCW 13.40.010(2)..... | 29 |
| RCW 13.40.110(2)..... | 19 |
| RCW 13.40.110(3)..... | 20 |

Court Rules

ER 404(b).....30, 36, 37, 38, 43, 44

ER 70230, 32

ER 703.....30

Other Resources

Burrell, Gang Evidence: Issues for Criminal Defense,
30 Santa Clara L.Rev. 770 (1990).....31

I. Spergel, Youth Gangs: Problems and Response: A Review of the
Literature (Assessment Part I), (National Youth Gang Suppression and
Intervention Project, A Cooperative Project with the Office of Juvenile
Justice and Delinquency Planning, U.S. Department of Justice, and the
School of Social Service Administration, University of Chicago, note 2, at
10-14 (1990).....33

A. ASSIGNMENTS OF ERROR

1. The juvenile court erred in making the factual determinations to support declination based on a preponderance of the evidence.
2. The juvenile court erred in entering Findings of Fact 2, 3, 4, 5, 8 and 9. (CP 40-47)
3. The juvenile court erred in finding and concluding that juvenile court jurisdiction should be declined. (Conclusion of Law; CP 47-48)
4. The trial court erred in allowing testimony regarding gang affiliation and gang-related activity.
5. The trial court erred in overruling defendant's objection to admission of Brandon Silva's testimony identifying defendant as one of the people who "beat" Silva into the 'A street' gang.
6. The trial court erred in imposing firearm enhancements.

Issues Pertaining to Assignments of Error

No. 1. Do the judicial findings of declination factors by only a preponderance of the evidence, which elevate the maximum punishment for the charged crime, violate due process?

No. 2. Did the juvenile court abuse its discretion in finding that evidence weighed in favor of declination of juvenile court jurisdiction, where there was no evidence it actually considered the purposes and intent of the Juvenile Justice Act and it did not sufficiently consider the Kent factors?

No. 3. Did the trial court abuse its discretion in allowing Officer McIntyre to testify as an expert regarding gang affiliation and gang-related activity?

No. 4. Was there a sufficient nexus between the alleged crimes and allegations of gang affiliation/activities to be admissible under ER 404(b)?

No. 5. In accordance with Blakely v. Washington, was it unconstitutional for the trial court to impose firearm enhancements where the jury found only deadly weapon enhancements?

B. STATEMENT OF THE CASE

Defendant, Aro Te`Jhon Williams-Walker, was charged in juvenile court with first-degree murder while “committing and attempting to commit first or second degree robbery.” (Decline CP 6)¹ This charge arose out of an incident that occurred on August 26, 2002. (Decline CP 6) By separate information, Aro W. was charged with first-degree robbery, arising out of an unrelated incident that occurred on June 19, 2002. (Exhibit S-2, p. 1) At the time these offenses occurred, the defendant was 14 years old. (Decline CP 40)

A declination hearing was held May 28, 29 and 30, 2004, as to these two Class A felonies. (Decline RP 1-656)² As its first witness, the State called Officer Sandy McIntyre, who was qualified without objection as an

¹ There are two sets of clerk’s papers in this matter. The clerk’s papers for the declination hearing will be referred to as “Decline CP ____.” The clerk’s papers for the trial will simply be referred to as “CP ____.”

² There are two sets of transcripts in this matter. The record for the declination hearing will be referred to as “Decline RP ____.” The record for the trial will simply be referred to as “RP ____.”

expert in gangs. (Decline RP 6-27) Ofc. McIntyre had been employed by the Spokane Police Department as a gang intelligence officer for 2-1/2 years. (Decline RP 6-6) Prior to joining the gang unit, Ofc. McIntyre had met Aro W. two times before his arrest on this case. (Decline RP 45, 60-62) She also saw his name one time in a report about a purported gang incident. (Decline RP 63-64) Ofc. McIntyre testified about Aro W.'s purported involvement in the Spokane gang culture, based on third-party information shared among the gang intelligence community. (Decline RP 27-75) In her opinion, Aro W. was mature for his age, more sophisticated than the average 14-year old and, when she talked with him during the present arrest, more like a young adult than a little kid. (Decline RP 45-46)

Dr. E. Clay Jorgensen, a clinical psychologist³ and an expert witness at decline hearings on 10-20 prior occasions,⁴ made assessments based on the Kent factors, through testimony and a written report entered into evidence. (Decline RP 305-376) Regarding Kent factor 6, sophistication and maturity, Dr. Jorgensen could not recommend declination. (Decline RP

³ The parties stipulated to Dr. Jorgensen's professional qualifications. (Decline RP 305-06, 324)

⁴ Dr. Jorgensen has previously been called as an expert witness on behalf of the state and on behalf of the defense, and has not always recommended retention of juvenile court jurisdiction. (Decline RP 306)

316) Dr. Jorgensen further stated that while fathering two children by different mothers was an aspect suggesting adult life style (Decline RP 318), having children at Aro W.'s age would not indicate maturity. (Decline RP 318) Aro W. has never been self-supporting, i.e. buying his own food, paying his rent, taking care of his basic needs. (Decline RP 319)

Ron Zumwalt is the Investigating Probation Officer with the Spokane County Juvenile Court. He has a B.A. in criminal justice, and has worked with the court since approximately 1989 in the capacities of security officer, corrections officer, and probation officer with minimal and high-risk supervision caseloads. For the past two years he has worked in the court investigation unit. (Decline RP 461-62) Aro W. had been assigned to Mr. Zumwalt during a prior detention, which was subsequently dismissed. (Decline RP 466)

Prior to this hearing, Mr. Zumwalt gathered and reviewed much information. He met with Aro W. a number of times, talked with Aro's mother at her house, reviewed school records, and consulted with school personnel from the middle schools attended by Aro. (Decline RP 466-67) His extensive report was admitted as State's Exhibit 2.

After taking considerable time to consider all eight of the Kent factors to reach a decision, Mr. Zumwalt recommended retention of juvenile court jurisdiction. (Decline RP 480-81) Regarding Kent factor 6, Mr. Zumwalt testified he would not necessarily find Aro W. to be mature. (Decline RP 486) Although he might appear sophisticated in some ways, Mr. Zumwalt believed Aro W. was simply modeling behavior he'd been exposed to all his life, including gang activity and inappropriate sexual activity. (Decline RP 486-87) Despite these influences, Aro W. had done well at school and in sports, and was earning honors in detention hall classes. Mr. Zumwalt testified Aro was an intelligent young man, with leadership potential. (Decline RP 488-90)

Regarding Kent factor 8, rehabilitation vs. adequate protection, Dr. Jorgensen recommended Aro W. be retained. (Decline RP 317) Dr. Jorgensen felt Aro W.'s youth made him more amenable to change, treatment, and management in the juvenile system. (Decline RP 317. 320) Although acknowledging some reservations stemming from prior life style, gang involvement and seriousness of the charged crime, Dr. Jorgensen testified that society would be adequately protected, because Aro W. could be rehabilitated in the six years or so until he turned age 21. (Decline RP 316-17, 319-20, 351)

Mr. Zumwalt testified that, based on his experiences and the patterns of behavior Aro W. has shown while in detention for this alleged offense, he “think[s] the community is safer by having [Aro W. stay and participate in] the [juvenile court] rehabilitative services” ... “that I know are available.” (Decline RP 481)

The juvenile court concluded that, after considering all of the evidence and Kent factors, it was in the best interests of the defendant and the public to have both of these matters heard in adult court. (Decline RP 669; Decline CP 47)

Prior to trial, defense counsel brought several motions *in limine*. Over objection of counsel, the trial court found Officer Sandra McIntyre was qualified as an expert to testify regarding gangs and gang-related activities in the Spokane-area community. (RP 92, 140-41) Ofc. McIntyre then testified extensively regarding gangs in general, and specifically about two close-knit gangs, of which Aro W., his brother, and some friends were members. (RP 93-131) With respect to an ER 404(b) motion to exclude reference to prior bad acts, the trial court ruled that testimony regarding gangs and gang-related evidence was admissible, but opinions sought to be elicited through any witness would still require a foundational basis. (RP 140-41)

During trial, Ofc. McIntyre defined a gang as, three or more people who identify themselves with a specific sign or symbol and who are continually involved in criminal activity. (RP 1098) Ofc. McIntyre testified 'A Street Crips' is a local gang, whose criminal activities typically include selling drugs, robberies, assaults, shoplifting and other thefts. (RP 1104-05) 'A Street' has been involved and continues to be involved in violent crimes. (RP 1106) 'Deuce Avenue Crips' is another local gang, with similar criminal activities. (RP 1106-07) A Street acts as a sort of "farm league" team for Deuce Avenue; both groups are very tight-knit. (RP 1107) McIntyre said that Aro W., his brother, Alan Penson-Way, Brandon Silva, Aaron Maxwell and Carlos Fuentes are members of the A Street/Deuce Avenue gangs, and are close associates of one another. (RP 1107-08, 1111-13)

Ofc. McIntyre said she participated in the investigation of this case. (RP 1114-22) The officer explained how this particular case was gang-related:

This case ... is gang-related because it involves gang members as well as gang associates. This is a crime, an ultimate crime involving robbery of a drug dealer and ultimately homicide.

This also is a case where I have experience in that we have victims and witnesses who will be intimidated. We also have gang associates who have been asked to take the hit for this crime and they've been made promises, and that is all the kind of stuff that

happens in the gang culture. When we talk about respect and earning respect, we talk about, you know, climbing up that ladder so that you get respect or juice as they call it out on the streets. That's what's occurred here and that's why it's made it a gang case.

[When one of their own is being accused of criminal activity], the expectation of being part of a gang is that you will assist the other gang members. You will assist the other gang associates in their crime. If that means that you've been asked to lie, then that's what you do. If you've made that commitment to this gang, that's what you'll do. If you've been asked to do something else, you're going to do what it takes to keep your respect and to be a part of this gang. It's a choice that you make.

(RP 1129-30)

[State]: Based on your understanding of this particular case, were the members acting in concert with each other?

[Ofc. McIntyre]: Yes.

(RP 1131)

During trial, Brandon Silva testified he was asked by Alan Penson-Way and Tyson Morgan to take the blame for the shooting. He agreed to do so to protect his "home boy" and because as a result he would become a top dog within the A Street gang. (RP 861-63, 880-81, 885-86) Silva signed a confession, which he later recanted. (RP 866-71, 876-77, 879)

When asked how he became a member of A Street, Silva testified he "got beat in," i.e. "you get beat up basically." (RP 849) When Silva

was asked who beat him in, defense counsel objected on an ER 404(b) basis, that the answer would assess an uncharged bad act against Aro W. (RP 849) The court overruled the objection, because “[The state] is going there to show [Fuentes’, Penson-Way’s and Aro W.’s] influence over this witness ... and how that relates or the nexus to the confession.” (RP 850-51) Silva then testified that Fuentes, Penson-Way and Aro W. “beat him in.” (RP 851)

Testimony regarding the actual incident revealed the following facts. On the evening before the early morning shooting, Ty Hardin was visiting his landlord, in her apartment. (RP 752, 754) Another tenant, Gene Chamberlin (the victim), came by to ask if they knew of anyone wanting to buy some “sherm.”⁵ Ty Hardin knew Aro W., having previously bought drugs from him several times, and agreed to call him. (RP 752-53, 756-57) Aro W. first said he didn’t know. But then he called Hardin back about 1:00-2:00 a.m. and spoke for 10-15 minutes with Chamberlin. (RP 757-59) Afterwards, Chamberlin asked Hardin to drive him and Jackie Karol to an address in North Spokane. (RP 759-63) Jackie

⁵ A liquid drug, in which cigarettes are dipped and then smoked. Also known as “wet,” PCP embalming fluid, formaldehyde. (RP 681, 683, 755-56)

had earlier acquired the vial of sherm from her ex-boyfriend, and wanted to sell it. (RP 681-83, 693)

Hardin called Aro W. upon their arrival in the parking lot, and Aro W. and another male⁶ emerged through nearby bushes. (RP 771-73) Hardin waited in the car while the other three talked behind the car for several minutes. (RP 777-78) Chamberlin then got back in the car, and the other male asked to “smell the sherm, make sure its real.” (RP 778) As soon as the other male smelled it, he pointed a gun at Chamberlin, saying, “Give me the stuff.” (RP 779-80) He cocked the gun and shot it in the air, then reached in and shot Chamberlin. (RP 780-81)⁷ The two males then fled. (RP 781)

In closing, the State argued its theory of the case:

[I]n the early morning hours of August 26, 2002, the defendant and his accomplice formulated a plan to rob Gene Chamberlin of the drug sherm. This plan involved first trickery and threats, and, when that failed, lethal force. The lethal force that was used in this particular case was a .22 caliber gun pointed at Gene Chamberlin from a short distance away and then fired. (RP 1526-27) ...

You know that the reason why Gene Chamberlin died in this particular case is because there was a planned robbery. There was the intent by Carlos Fuentes, and the State argues by the defendant, to take by threats and then by force something of value, and you know that. (RP 1529) ...

⁶ Carlos Fuentes testified he was present at the time of the shooting. (RP 1239)

⁷ During trial, Hardin did not recall earlier telling Detective Gilmore that he was positive Aro W. was the shooter. (RP 790, 794) Karol testified she did not see either male smell the sherm, and only heard the two shots. (RP 709, 711, 713)

In this particular case you had two males, two men acting in concert. They acted in concert to rob and they acted in concert to kill, and that's exactly what they did. And that's exactly what happened. They were aiding each other. They were encouraging each other. And what do you expect them to do? They're in a gang. (RP 1540-41) ...

Gene Chamberlin, obviously his life was centered around drugs, and it eventually destroyed him. It killed him. Jackie [Karol], obviously she got tied up in drugs, and she's trying to better her life. Ty Hardin, again involved in drugs. And these are just people trying to do the best they can, and they found themselves in a situation that they didn't believe was going to happen to them.

They found themselves in a situation in which another lifestyle, a lifestyle full of violence, intimidation, weapons in the hands of young men who are willing to do whatever it took to promote themselves and their culture. And that's exactly what they were faced with. (RP 1561-62) ...

What did [Carlos Fuentes] tell you about Deuce Ave and A Street and its members? Violent. You heard from Sandi McIntyre, Officer McIntyre, and the culture of gangs. Violent. ...

(RP 1563)

The jury was instructed in pertinent part as to the deadly weapon enhancements:

INSTRUCTION NO. 34

For purposes of a Special Verdict, the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crimes in Count I, Count II, the alternative count or the lesser included counts.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there is a connection among the defendant or an accomplice, the crime, and the deadly weapon.

A pistol, revolver, or any other firearm is a deadly weapon, whether loaded or unloaded.

If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed even if only one deadly weapon is involved.

(RP 1525; CP 294)

The jury found Aro W. guilty of first-degree robbery and murder in the first degree. (RP 1617) The defendant was sentenced to concurrent low-end of the standard ranges on both counts, for a total of 261 months (21-3/4 years). (CP 672)

The jury found by special verdicts that Aro W. was armed with a deadly weapon at the time of the commission of the crimes in counts I and II. (CP 298, 300) The court imposed two consecutive firearm enhancements by adding 120 months (ten years) to the sentence. (RP 1702; CP 672)

C. ARGUMENT

Issue No. 1. Aro W. was entitled to a jury determination, based on proof beyond a reasonable doubt, of the facts used to support the decline decision.⁸

The juvenile court transferred this case for adult prosecution, increasing the statutory maximum penalty, based on findings of fact proven by only a preponderance of the evidence and not proven to a jury.

⁸ The undersigned acknowledges the assistance of David N. Gasch and Susan F. Wilk for work-product used in this section.

Under U.S. Supreme Court precedent, that decision violated due process because it did not require proof to a jury beyond a reasonable doubt of the facts necessary to increase punishment beyond the statutory maximum. U.S. Const. amend. VI, XIV; Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

In Blakely, the Supreme Court held that any fact necessary to increase punishment above any statutory maximum (excepting the mere fact of a prior conviction) must be proven to a jury beyond a reasonable doubt. The Blakely Court announced that the proper focus is on whether the factors are necessary to increase punishment beyond a legislative ceiling and not on the labels that are assigned to these factors:

Those who would reject Apprendi are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels as sentencing factors—no matter how much they increase punishment—may be found by a judge. This would mean, for example, that a judge could sentence a man for committing a murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even Apprendi's critics would advocate this result. The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at

some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime that the State actually seeks to punish. [Blakely, 124 S. Ct. at 2549 (internal citations omitted).]

Thus, under Blakely, it does not matter how the Legislature labels a fact; what matters is what impact the resolution of that fact has on the punishment that the defendant may receive. See Ring v. Arizona, 536 U.S. 584, 610, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (“[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane* -- must be found by the jury beyond a reasonable doubt.”).

Aro W.’s exposure to punishment was increased when he was transferred to the adult system. The standard range for first-degree murder in criminal court, based on an offender score of two, is 261-347 months incarceration, with a statutory minimum sentence of 240 months (20 years). RCW 9A.32.030; RCW 9.94A.525(9); RCW 9.94A.540. In juvenile court, jurisdiction terminates with an offender’s twenty-first birthday. RCW 13.34.0357. Aro W. was almost 16 years old when he was sentenced.

Blakely mandates that when the State seeks to increase punishment beyond the ceiling that the Legislature provided when crafting juvenile punishments, i.e. by transferring the juvenile into the adult system, the factors necessary to support that increase must comply with Sixth Amendment guaranties. Specifically, those factors must be proven to a jury and proven beyond a reasonable doubt.

In State v. H.O., 119 Wn.App. 549, 81 P.3d 883 (2003), *rev. denied*, 152 Wn.2d 1019, 101 P.3d 108 (2004), Division I attempted to distinguish Ring and Apprendi by claiming that that the Kent⁹ factors were mere jurisdictional factors. H.O., 119 Wn.App. at 554 (“Neither of these cases [Ring, Apprendi] requires that this jurisdictional determination ... must be supported by the “beyond a reasonable doubt standard.”). That case, however, has been undermined, if not abrogated, by Blakely, and this Court is not bound to follow opinions that are implicitly overruled by binding United State Supreme Court precedent. *Cf. United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985) (court of appeals opinion not binding when “an intervening Supreme Court decision undermines” the decision).

⁹ Kent v. United States, 383 U.S. 541, 566-67, 86 S.Ct. 1045, 1059-60, 16 L.Ed.2d 84 (1966).

Whatever value H.O.'s "jurisdictional distinction" may have had pre-Blakely it has no currency now. The Legislature or the courts may call something a sentencing factor, a jurisdictional factor, or Mary Jane, but after Blakely such labels are not meaningful. What *is* meaningful is the impact of the resolution of the labeled fact on the punishment that the defendant faces. See Blakely, 124 S. Ct. at 2549. In this case, the resolution of those facts undisputedly increased Aro W.'s punishment and exposure to punishment. Therefore, the 6th Amendment guarantee of a right to trial by jury controls.

The decline procedure that adversely affected Aro W. failed for the very reason identified in Blakely: "[a] jury could not function as circuitbreaker in the State's machinery of justice" because its role was "relegated to making a determination that the defendant at some point did something wrong" whereas the crime that the "State actually [sought] to punish" was predetermined by "judicial inquisition into the facts." Blakely, 124 S. Ct. at 2539 (emphasis original).

In Aro W.'s case, *no* adult sentence could issue absent resolution of the Kent factors. Since these factors were not decided by a jury or held to the standard of beyond a reasonable doubt, Aro W.'s Sixth Amendment right to a jury trial was violated.

Pursuant to State v. Hughes, this case cannot be remanded to convene a jury to decide the Kent factors. Therefore, Aro W. may only be tried in juvenile court.

Under the recent WA Supreme Court ruling in State v. Hughes, __Wn.2d__, 110 P.3d 192 (2005), trial courts are not empowered to empanel juries to decide aggravating facts to support an exceptional sentence, post-Blakely, and in the absence of a legislative fix. “Where the legislature has not created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judges to do so, we refuse to imply such a procedure” Hughes, 110 P.3d at 206.

This principle enunciated by the Hughes Court, would also apply to juvenile declination hearings. Since the legislature has not created a procedure for juries to find the Kent factors and has, instead, explicitly provided for judges to do so, the juvenile court is not empowered to imply such a procedure. Therefore, Aro W. may only be tried in juvenile court.

Issue No. 2. The juvenile court abused its discretion in finding that evidence considered under the Kent factors weighed in favor of declination of juvenile court jurisdiction.

A case filed in juvenile court may be transferred for adult criminal prosecution upon a finding that the declination of juvenile court jurisdiction would be in the best interest of the juvenile or the public.

RCW 13.40.110(2). In making this determination, the juvenile court is to consider:

- (1) the seriousness of the alleged offense and whether the protection of the community requires declination;
- (2) whether the offense was committed in an aggressive, violent, premeditated or willful manner;
- (3) whether the offense was against persons or only property;
- (4) the prosecutive merit of the complaint;
- (5) the desirability of trial and disposition of the entire case in one court, where the defendant's alleged accomplices are adults;
- (6) the sophistication and maturity of the juvenile;
- (7) the juvenile's criminal history; and
- (8) the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system.

State v. Holland, 98 Wn.2d 507, 515, 656 P.2d 1056 (1983) (citing Kent v. United States, 383 U.S. 541, 566-67, 86 S.Ct. 1045, 1059-60, 16 L.Ed.2d 84 (1966)); State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993).

All eight of these factors need not be proven; their purpose is to focus and guide the juvenile court's discretion. State v. Toomey, 38 Wn.App. 831, 833-34, 690 P.2d 1175 (1984), *rev. denied*, 103 Wn.2d 1012, *cert. denied*, 471 U.S. 1067, 105 S.Ct. 2145, 85 L.Ed.2d 501 (1985). The court's decision will be reversed only if there has been an abuse of that discretion. State v. Furman, 122 Wn.2d at 447, 858 P.2d 1092, (citing In re Harbert, 85 Wn.2d 719, 538 P.2d 1212 (1975)). The juvenile court's discretion is subject to reversal when "the discretion has been exercised

upon a ground, or to an extent, clearly untenable or manifestly unreasonable.’ “ In re Harbert, 85 Wn.2d at 723, 538 P.2d 1212.

Herein, having previously retained juvenile jurisdiction over the co-defendant in the murder case, the juvenile court determined Kent factor 3 to be neutral in its decision. The juvenile court found Aro W.’s lack of prior convictions, probations or commitments in the juvenile system favored retention therein, under Kent factor 7. (Decline CP 41-42)

As to the first Kent factor,¹⁰ the juvenile court merely made a conclusory statement in her oral ruling and finding of fact:

Murder in the First Degree is considered an A+ felony and First Degree Robbery is an A felony. These offenses are both serious offenses that require community protection.

(Decline RP 659; Decline CP 40) Aro W. concedes the charges are serious, but the juvenile court gave no explanation why protection of the community requires declination of juvenile jurisdiction as to him. The statute mandates a declination finding “shall be supported by relevant facts.” RCW 13.40.110(3). The findings of fact must be explicit. *See, e.g., State v. Toomey*, 38 Wn.App. at 833, 690 P.2d 1175. A reviewing court must be able to determine the trial court’s reasons for declining

¹⁰ Assignment of Error 2.

jurisdiction, in order to review their sufficiency. *See Holland*, 98 Wn.2d at 517. This finding of fact is not sufficiently specific to permit meaningful appellate review, and is therefore inadequate to justify declination based on this factor. *Id.*

The juvenile court found that the second Kent factor,¹¹ the degree of premeditation, willfulness, violence, and aggression involved in the alleged offense, supported declination.

Both of these offenses involved aggressive, violent acts. The First Degree Robbery was committed after the victim was followed and initially contacted on a pretense. This clearly appears to this court to be premeditation. The meeting with the murder victim was planned in advance with the parties participating in the murder being armed with a loaded firearm. There is no indication that these acts involved any kind of negligence or accident, but that they were done with the intent of accomplishing the result reached.

(Decline RP 659-70; Decline CP 40-41) The very nature of first-degree murder and/or first-degree robbery is that of a violent crime, and so in virtually every case in which a juvenile is charged with these crimes, this factor will be satisfied. The juvenile court stated the alleged conduct was premeditated and/or willful, but cited no facts or reasons establishing why commission of the particular conduct in this case was so egregious as to require declination. There was no substantial evidence to support the

¹¹ Assignment of Error 2.

juvenile court's finding that the manner in which the crimes *herein* were alleged to have occurred weighed in favor of declination. See State v. M.A., 106 Wn.App. 493, 499, 23 P.3d 508 (2001).

Regarding the sixth Kent factor,¹² the juvenile court recalled some of the declination hearing testimony, then made her finding:

[T]hese facts show that Mr. Williams-Walker is far more sophisticated and mature than a typical 14-year-old and that he was been living a lifestyle of a young adult, not a child, at the time of these incidents. This factor weighs in favor of declining Juvenile Court jurisdiction.

(Decline RP 666; Decline CP 45) However, the bases for the juvenile court's finding either are not relevant to whether Aro W. is sophisticated or mature or show that he was, in fact, immature and unsophisticated.

The juvenile court relied in part on Ofc. McIntyre's testimony of some form of gang involvement, finding, "he is a principal member of an association whose primary purpose is criminal activity." (Decline RP 663; Decline CP 43) However, there was no evidence as to specific crimes committed by either A Street or Deuce Avenue. More importantly, there was no evidence that Aro W. himself was involved in any criminal activity by this or any other gang. Likewise, there were no reasons given by the

¹² Assignment of Error 2.

court why this particular basis showed his adult sophistication or maturity, rather than an adolescent joining a club. McIntyre's's general opinion that Aro W. was mature for his age and more sophisticated than the average 14-year old was not based on any personal knowledge, and is not substantively relevant to the juvenile court's ultimate decision.

The juvenile court saw being "beyond control and doing whatever he wanted" as indicative of a "more adult lifestyle," (Decline RP 664; Decline CP 43) when, instead, these attributes show adolescent immaturity. Contrary to the juvenile court's contention, sexual activity at this age is not in and of itself indicative of an adult lifestyle, and likewise shows adolescent immaturity. (Decline RP 664; Decline CP 43-44) The juvenile court noted that Aro W.'s referring to one of his two children's mother as his "fiancée" and stating they are planning to marry and raise the baby indicates he is living an adult lifestyle. (Decline RP 664-65; Decline CP 44) But such talk without action merely indicates an adolescent assuaging adult fears and concerns, or trying to impress his friends.

Notably absent from the evidence in this case were significant factors found to support findings of sophistication and maturity in other cases that resulted in declination. *See, e.g., In re Hernandez' Welfare*, 15 Wn.App. 205, 548 P.2d 340 (1976)(non-attendance at school for two years, leaving

the family home and residing with his girlfriend, seasonal employment as a field worker, and preference for adult companions) and State v. Toomey, 38 Wn.App. 831, 690 P.2d 1175 (1984)(living on her own for over one year, streetwise knowledge, and admitted participation in drug sales and prostitution). Herein, there were no such benchmarks suggesting that Aro W. had entered the emancipated status of an adult.

In further support of Kent factor 6, the juvenile court refers to observations made by Aro W.'s sixth grade teacher, and the principals of Glover and Garry Middle Schools, to the effect that Aro demonstrated leadership qualities. (Decline RP 665-66; Decline CP 44) The court assigned great importance to one principal's observation, pointing out "that a huge change occurred in Aro in the spring of 2002, ... he went from the boy, Aro, to a person who was no longer interested in the normal immature activities of a typical junior high student." (Decline RP 665; Decline CP 44; State's Exhibit 2 at page 13) But these findings alone suggest no more than a normally maturing adolescent. The juvenile court reveals no insight and provides no reasons why these particular qualities are instead indicative of adult sophistication and/or maturity.

A reviewing court may look to the entire record, including the court's oral opinion, to determine the sufficiency of the juvenile court's factual

reasons to decline jurisdiction. Holland, 98 Wn.2d at 518. Herein, the juvenile court's findings are inadequate to establish that Aro W. possessed a sophistication and/or maturity beyond that of a normally developing adolescent that would weigh in favor of declination. The court's oral ruling is rendered verbatim in her written findings. Because the juvenile court has therefore provided no relevant factual reasons to support her finding under Kent factor 6, this Court may not peruse the entire record to supplant the given reasons. Holland, 98 Wn.2d at 518. This factor does not weigh in favor of declination. See State v. M.A., 106 Wn.App. at 499.

As to the eighth Kent factor,¹³ the juvenile court failed to consider the prospects for Aro W.'s rehabilitation within the juvenile court system.

The adult system provides a longer time of guaranteed public protection. ... The Department of Corrections Youthful Offender Project does offer some rehabilitative services, but their primary focus is on security. ... The safety of the Community is more certain under the adult system of longer incarceration and parole. This Court finds that this factor also weighs in favor of declining Juvenile Court jurisdiction.

(Decline RP 666, 669; Decline RP 45, 47)

The juvenile court noted Aro W. did well in school and in a community basketball program, but outside of those activities lapsed into

¹³ Assignment of Error 2.

inappropriate behavior and gang activity. (Decline RP 667-68; Decline CP 46) The juvenile court discounted Aro W.'s full and positive participation in detention activities as probably not "genuine [or] long lasting." (Decline RP 667-68; Decline CP 46, 47) The juvenile court made no factual findings as to what services or treatment might be warranted to rehabilitate Aro W. in regard to her concerns, and as to whether the juvenile system could adequately or inadequately provide such services.

The juvenile court acknowledged Dr. Clay Jorgensen's testimony that Aro W. was amenable to treatment and rehabilitation, and could be rehabilitated through the juvenile system. (Decline RP 667; Decline CP 45) The court then noted that Dr. McKnight "raises some excellent points that do cast a shadow on the conclusions reached by Dr. Jorgensen". (Decline RP 667; Decline CP 45-46) Dr. McKnight was called as the State's expert witness, and testified solely based on his review of Dr. Jorgensen's report. (Decline RP 545, 570) The court did not articulate these "points" or how they may detract from Dr. Jorgensen's opinion. Her statement regarding Dr. McKnight is merely conclusory, and should be disregarded.

The juvenile court similarly ignored the recommendation of Mr. Fuller, supervising teacher at the detention center, that Aro W. be retained

because he could be successfully rehabilitated in the juvenile system.

(Decline RP 667; Decline CP 46) Likewise, the juvenile court ignored the same recommendation made by Mr. Zumwalt, the court's own investigating probation officer, who had years of experience in the Spokane County juvenile system, as well as direct contact and observation of Aro. W., and who conducted an exhaustive investigation before making his recommendation. (Decline RP 461-62, 466-67, 480-81; State's Exhibit 2)

In her final set of reasons regarding Kent factor 8, the juvenile court acknowledged the focus of the adult system is security, while the focus of the Juvenile Rehabilitation Administration is rehabilitation.

However, the court continued:

The question is not generally what can be done but specifically what can and will be done to this defendant. The defendant is not a typical juvenile and this Court is not sure that the services available through the Juvenile Rehabilitation Administration will be useful to him. What this court is faced with, then, is that the defendant may be amenable to treatment and rehabilitation, but he may not. If he is amenable to treatment, it may be accomplished in the next six (6) years, or it might not. The safety of the community is more certain under the adult system of longer incarceration and parole. This Court finds that this factor also weighs in favor of declining Juvenile Court jurisdiction. [emphasis in original]

(Decline RP 669; Decline CP 47) The juvenile court's query is *precisely* the question she needed to answer in order to factually support this finding: "Specifically what can and will be done to this defendant?"

The eighth Kent factor has two parts: prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system. While the juvenile court is not required to balance the two parts, it *must* consider both. State v. M.A., 106 Wn.App. at 505 [emphasis added]. Herein, the juvenile court clearly considered protection of the public, even to the point of finding that the period of parole added on to the adult sentence of incarceration would make the community even safer. (Decline CP 47) However, the juvenile court did not substantively consider the second part of factor 8, the likelihood of rehabilitation through services offered in the juvenile system.

In her oral and written findings, the juvenile court did not identify the specific behavioral or emotional problems she saw in Aro W, the specific services or treatment she deemed necessary to rehabilitate him, whether those services or treatments were available in the juvenile system and whether if so, rehabilitation could be accomplished in the six years remaining until Aro W. turned 21. The juvenile court simply failed to

properly and factually consider Aro W.'s *present* prospects for rehabilitation within the juvenile court system.¹⁴

The juvenile court provided no relevant factual reasons to support declination under Kent factor 8. Therefore, this factor does not weigh in favor of declination. See State v. M.A., 106 Wn.App. at 499.

In addition to the Kent factors, the court's exercise of discretion must be consonant with the stated purposes of the Juvenile Justice Act of 1977, which are, broadly, to provide for the handling of juvenile offenders through a separate and independent system providing both punishment and treatment where necessary. RCW 13.40.010(2)¹⁵; State v. Foltz, 27 Wn.App. 554, 556-57, 619 P.2d 702 (1980). The listed factors are declared to be equally important. RCW 13.40.010(2).

At the outset of her written decision, the juvenile court stated "This Court has also carefully considered the purposes and intent of the Juvenile

¹⁴ The juvenile court made a rather odd finding that suggests she mistakenly believes rehabilitation can not be addressed until the period of parole or probation that occurs after serving an adult sentence:

An important consideration is what happens after incarceration. If the defendant goes to prison for 25 years, he will be 40 years old when he gets out. He will have another 30 or 35 years left in his life. The question that has to be asked is, what happens then? What kind of person will we be releasing back to the community? *That is where rehabilitation comes in.* [emphasis added]

(Decline CP 45) This belief is erroneous. Most if not all criminal law practitioners would agree that rehabilitation efforts must be made up front and be continuing in nature, if they are to have any chance to be successful.

¹⁵ The text of RCW 13.40.010 is attached to this brief as **Appendix A.**

Justice Act.” (Decline CP 40, Finding of Fact 2) However, nowhere in her oral ruling or written findings of fact and conclusions of law did the court discuss and weigh Aro W.’s potential punishment and treatment within the juvenile system versus the adult system. Thus, the record does not reflect that the juvenile court actually considered whether her decision to decline jurisdiction was consistent with the purposes of the Juvenile Justice Act.

In summation, the juvenile court abused its discretion in not properly considering the evidence relating to the Kent factors. It further abused its discretion in not considering the evidence in light of the purposes of the Juvenile Justice Act. The juvenile court did not set forth factual reasons to support her finding as to each Kent factor and therefore the findings are inadequate to permit meaningful review. For all these reasons, the juvenile court’s determination to decline jurisdiction over Aro W. was untenable, and the order declining jurisdiction must be reversed. State v. Foltz, 27 Wn.App. at 557-58, 619 P.2d 702.

Issue No. 3. The trial court abused its discretion in allowing Officer McIntyre to testify as an expert regarding gang-affiliation and gang-related activity where she did not qualify as an expert.

The admissibility of expert testimony is governed by ER 702, ER 703 and ER 404(b). ER 702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under the rule, (1) the witness must be qualified as an expert, (2) the opinion must be based upon a theory generally accepted by the scientific community, and (3) the expert testimony must be helpful to the trier of fact. State v. Black, 109 Wn.2d 336, 341, 745 P.2d 12 (1987) (citing State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)).

Qualifications. Repeated observations of gang-related events does not transform a mere observer into a gang expert without inquiry, analysis or experimentation. Burrell, Gang Evidence: Issues for Criminal Defense, 30 Santa Clara L.Rev. 770 (1990) (citations omitted). Nor does street experience transform officers into behavioral scientists who can predict individual or group behavior.

McIntyre's qualifications were not sufficient to consider her an "expert." Her work history was not extensive, having been a patrol officer for 6-1/2 years before being assigned to the gang investigative unit only 3 years ago. (RP 76) Much of her expertise is based upon investigations, arrests and interviews of gang members, and she routinely checked out and

tested the information they gave for validity or reliability. (RP 82-86, 115, 129-31)

Generally accepted scientific theory. Expert testimony based on novel scientific evidence is admissible only if it satisfies the stringent standard contained in Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923), and is properly admissible under ER 702. State v. Cauthron, 120 Wn. 879, 885, 846 P.2d 502 (1993). Under Frye, the court must determine whether the scientific principle from which deductions are made is sufficiently established to have gained general acceptance in the scientific community and whether there are techniques, experiments, or studies using that theory that are capable of producing reliable results. Cauthron, 120 Wn.2d at 888-89. The general acceptance standard serves as a shorthand method for judges in deciding whether novel scientific evidence, or evidence which is in the “twilight zone” between the “experimental and demonstrable stages,” has a valid scientific basis. Cauthron, 120 Wn.2d at 887.

McIntyre’s testimony did not meet the Frye standard because there is no reliable, generally accepted body of knowledge upon which her opinions could rest. A University of Chicago study points out there are few reliable sources of information because gang members themselves are

unreliable sources of information; the media exaggerates/sensationalizes gang problems; political motivations cause prosecution, probation, corrections, public service and non-profit agencies to minimize as well as to exaggerate the extent of gang problems; there has not been a consistent method of data collection by law enforcement or social agencies; a variety of theoretical and methodological problems have hindered the development of adequate knowledge about gangs; an adequate empirical data base has not existed; and the variations among gangs across neighborhoods, cities and countries, and probably across schools, prisons and other institutions have often been disregarded. I. Spergel, Youth Gangs: Problems and Response: A Review of the Literature (Assessment Part I), (National Youth Gang Suppression and Intervention Project, A Cooperative Project with the Office of Juvenile Justice and Delinquency Planning, U.S. Department of Justice, and the School of Social Service Administration, University of Chicago, note 2, at 10-14 (1990)).

Additionally, contrary to McIntyre's testimony, the study determined that there can be no broad sweeping statements that gangs involve criminal activity since some members join gangs not for criminal motivations, but for identity or recognition, for protection against other gangs, or for fellowship or brotherhood. Id. at 3-5. For the majority of

youth gang members, the gang functions as an extension of the family. Herein, allowing “gang” evidence to be presented to the jury allowed them to potentially draw unfounded and negative conclusions about the defendant, which prejudicially impaired the fairness of the trial.

Helpful to trier of fact. Expert testimony is not admissible unless it will be helpful to the trier of fact (Allery, 101 Wn.2d at 596), i.e. the subject matter is otherwise beyond common understanding. The jury herein, comprised of persons of ordinary experience and knowledge, could draw its own inferences from evidence presented by the State as to gang affiliation or gang-related motive. The improper use of McIntyre’s “expert” testimony placed emphasis on this subject in a manner that could only be prejudicial to the defendant. The issue of helpfulness includes the question whether the prejudicial nature of the testimony is so great as to render the testimony inadmissible. State v. Black, 109 Wn.2d at 348, 745 P.2d 12.

McIntyre testified extensively about gangs, e.g., that gangs were formed to make profits, protect individual members, commit violence, and that older members have much influence over younger gang members. (RP 92-131, 1097-1148) She gave evidence specifically about the A Street and Deuce Ave gangs, stating their ongoing involvement in violent

crimes and criminal activities typically including selling drugs, robberies, assaults, shoplifting and other thefts. She further identified Aro W., his brother, Alan Penson-Way, Brandon Silva, Aaron Maxwell and Carlos Fuentes as members of these gangs and close associates of one another.

However, McIntyre presented no evidence of specific crimes in fact committed by either of these two gangs, and no evidence of any crimes attributed to these five people. McIntyre ultimately opined this case was a gang-related robbery of a drug dealer and a gang-related homicide, and that these individuals were acting as gang members for purposes of the incident. Her testimony impermissibly constituted opinions as to the defendant's guilt of the crimes charged.

No witness, lay or expert, may testify to his or her opinion as to the defendant's guilt whether by direct statement or inference. Black, 109 Wn.2d at 348. The admission of McIntyre's testimony allowed the jury to hear an "expert" state that because the alleged incident appears gang-related and that because gangs are known for violence and that because the defendant is a gang member, then the defendant must be guilty.

McIntyre's testimony did not provide a gang motive for the charged crimes; it was merely character evidence that gang members are the type of people to commit crimes of violence. The proposed testimony invaded the

province of the jury. It should not have been admitted, and violated Aro W.'s state and federal constitutional rights to have the jury try him solely on the evidence against him.

Issue No. 4. There was an insufficient nexus between the alleged crimes and allegations of gang affiliation to be admissible under ER 404(b).

Evidence of other crimes, wrongs, or acts may be admissible to show motive, intent, identity, preparation, plan, and absence of mistake or accident. State v. Campbell, 78 Wn.App. 813, 821, 901 P.2d 1050, *rev. denied*, 128 Wn.2d 1004, 907 P.2d 296 (1995); State v. Boot, 89 Wn.App. 780, 788, 950 P.2d 964, *rev. denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998). It cannot be used to show conformity. State v. Dennison, 115 Wn.2d 609, 627, 801 P.2d 193 (1990).

In order to determine the admissibility of any evidence under ER 404(b), court must (1) identify the purpose for which the evidence is offered; (2) determine whether the evidence is relevant to prove an essential element of the crime charged; (3) weigh the probative value of the evidence against its prejudicial effect; and (4) decide by a preponderance that the bad acts actually occurred. *See* State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

A trial court must balance the probative and prejudicial value of the evidence on the record. When ER 404(b) is implicated, the trial court must identify on the record the purpose for which other crimes or misconduct are admitted. A trial court's failure to articulate its balancing process may be harmless if the record as a whole permits appellate review. [citations omitted]

State v. Acosta, 123 Wn.App. 424, 433, 98 P.3d 503 (2004).

Herein, the trial court failed to identify the purpose for which gang-related evidence was admitted. Nor did it balance relevancy against probative value, or determine that the alleged misconduct actually occurred. (RP 140-41)

In State v. Campbell, the gang testimony was held to be relevant to establish that the killings involved in the case were the result of gang rivalry, and to establish that the fact that the victims had shown disrespect for the defendants and intruded on their drug-selling turf, was grounds for retaliation and murder in the gang culture. Campbell, 78 Wn.App. at 822. Thus, there was substantial evidence establishing the nexus between gang culture, gang activity, drug dealing and the murders. The Court of Appeals found the fact that Campbell was a member of a gang and a drug dealer provided the basis for the State's theory of the case. Id., 78 Wn.App. at 821.

In State v. Boot, this Court upheld the admission of expert testimony of gang affiliation as probative of premeditation. The nexus

between the testimony and the crime was that the evidence reflected that “killing someone increased a gang member’s status” and “Mr. Boot’s prior acts involving a gun demonstrated his escalating gun use in the context of his quest for higher gang status.” Id., 89 Wn.App. at 789-90.

The facts of the present case make it easily distinguishable from Campbell and Boot. Herein, there is a marked contrast with the evidence of gang membership and its relevancy. There was no evidence that the acts alleged herein were committed by a gang, as a group, for the purpose of benefiting the group, and committed against a rival gang, as in Campbell, or committed by an actor actively seeking higher ranking in his gang, as in Boot.

Here, there simply was no evidence that the murder and robbery were related to gang affiliation. The State, however, argued and the trial court apparently agreed that evidence of gang affiliation was admissible under ER 404(b) to show two motives: (1) this was a gang-related “drug rip” using a gun, that was intended to increase Aro W.’s status within the gang, and (2) gang-related testimony would offer an explanation or motive why fellow gang members would later provide alibis or take responsibility for the shooting. (RP 134-38)

The trial court's ruling that gang-related testimony was admissible in this case for either motive was an abuse of discretion. As to the second alleged motive, "a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (*citing* State v. Dennison, 115 W.2d at 628, 801 P.2d 193)).

Herein, the crimes charged were premeditated or felony murder based on robbery. To the extent that a jury determines an alibi or false confession exists in any case, this evidence may arguably be relevant to proof of the crimes charged. However, the reasons why an alibi was given or false confession was made are not necessary to prove the elements of the crime. For example, Silva's testimony that Aro W. and others beat him into the A Street gang was irrelevant to prove that the shooting took place, and served no purpose other than to inflame the jurors. Allowing the State to augment run-of-the-mill alibi or false confession testimony with unnecessary gang-related evidence was highly prejudicial and an abuse of discretion.

Similarly, the State's assertion that this was a gang-related "drug rip" using a gun that was intended to increase Aro W.'s status within the

gang, is inconsistent with the testimony of the State's own witnesses. The testimony of those witnesses showed no gang-related basis for the defendant's intent or motive.

On the evening before the early morning shooting, Ty Hardin was visiting his landlord, in her apartment. (RP 752, 754) Another tenant, Gene Chamberlin (the victim), came by to ask if they knew of anyone wanting to buy some "sherm." Ty Hardin knew Aro W., having previously bought drugs from him several times, and agreed to call him. (RP 752-53, 756-57) Aro W. said he didn't know, but then called Hardin back about 1:00-2:00 a.m. and spoke for 10-15 minutes with Chamberlin. (RP 757-59) Afterwards, Chamberlin asked Hardin to drive him and Jackie Karol to an address in North Spokane. (RP 759-63) Jackie had earlier acquired the vial of sherm from her ex-boyfriend, and wanted to sell it. (RP 681-83, 693)

Hardin called Aro W. upon their arrival in the parking lot, and Aro W. and another male emerged through nearby bushes. (RP 771-73) Hardin waited in the car while the other three talked behind the car for several minutes. (RP 777-78) Chamberlin then got back in the car, and the other male asked to "smell the sherm, make sure its real." (RP 778) As soon as the other male smelled it, he pointed a gun at Chamberlin, saying

“Give me the stuff.” (RP 779-80) He cocked the gun and shot it in the air, then reached in and shot Chamberlin. (RP 780-81) The two males then fled. (RP 781)

The bare facts of this event reflect a classic case of a common yet horribly tragic drug-deal gone bad. The entire testimony presented by the State provided no factual evidence to establish that instead Aro W. planned to participate in a violent drug rip in order to gain respect in his and other gangs and thereby increase his status in gang hierarchy.

McIntyre’s testimony about gang culture was extremely broad. Even where she spoke about Aro W.’s gang, the State’s expert could not be more specific than to say, ‘A Street Crips’ and ‘Deuce Avenue Crips’ have been involved and continue to be involved in violent crimes, as well as in criminal activities typically include selling drugs, robberies, assaults, shoplifting and other thefts, and that Aro W., his brother, Alan Penson-Way, Brandon Silva, Aaron Maxwell and Carlos Fuentes are members of those gangs, and are close associates of one another.

Notably absent from the State’s expert was any testimony whatsoever regarding specific crimes or other misconduct – by date, time and participant(s)’ name(s) – that her Gang Intelligence Unit attributed to the A Street and/or Deuce Ave gangs or, more importantly, attributed

directly to Aro W. Evidence of one's association is inadmissible when it proves nothing more than a defendant's abstract beliefs. Dawson v. Delaware, 503 U.S. 159, 164-67, 112 S.Ct. 1093, 1097-98, 117 L.Ed.2d 309 (1992). Herein, the evidence of Aro W.'s association proved nothing more than possible abstract beliefs. Therefore, the trial court's admission of that evidence was improper.

A simple robbery/drug deal gone wrong formed the true basis for the State's theory of the case, not a quest for higher gang status as the State falsely claimed. In closing, the State acknowledged its true theory of the case:

You know that the reason why Gene Chamberlin died in this particular case is because there was a planned robbery. There was the intent by Carlos Fuentes, and the State argues by the defendant, to take by threats and then by force something of value, and you know that.

In this particular case you had two males, two men acting in concert. They acted in concert to rob and they acted in concert to kill, and that's exactly what they did. And that's exactly what happened.

The State's true purpose in seeking admission of the gang affiliation evidence was to inflame the jury, causing undue prejudice toward the defendant. In closing, the State further urged the jury to focus on gang membership in general and its most stereotypical and negative attributes:

They were aiding each other. They were encouraging each other. *And what do you expect them to do? They're in a gang.*

Gene Chamberlin, obviously his life was centered around drugs, and it eventually destroyed him. It killed him. Jackie [Karol], obviously she got tied up in drugs, and she's trying to better her life. Ty Hardin, again involved in drugs. And these are just people trying to do the best they can, and they found themselves in a situation that they didn't believe was going to happen to them.

They found themselves in a situation in which another lifestyle, *a lifestyle full of violence, intimidation, weapons in the hands of young men who are willing to do whatever it took to promote themselves and their culture.* And that's exactly what they were faced with.

What did [Carlos Fuentes] tell you about Deuce Ave and A Street and its members? *Violent.* You heard from Sandi McIntyre, Officer McIntyre, and *the culture of gangs. Violent. ...*

Evidence of gang affiliation can be extremely prejudicial to a defendant,

for the reasons that such evidence may lead to the defendant's conviction 'merely because of his membership in an organization that is unpopular.' As a result, 'proof of membership is admissible only if there is also sufficient proof to show that membership is related to the crime charged,' ... [citations omitted]

People v. Ayala, 567 N.E.2d 450 (1990).

Here, the evidence of gang affiliation was only relevant to show that the defendant was a criminal type, a purpose made legally irrelevant by ER 404(b). *See also State v. Trickler*, 106 Wn.App. 727, 734, 25 P.3d 445 (2001). Misconduct evidence tends to shift the jury's focus to the defendant's general propensities for crime, thus stripping away the presumption of innocence. State v. Bowen, 48 Wn.App. 187, 196, 738 P.2d 316 (1987). Where evidence is likely to stimulate an emotional

response rather than a rational decision, a danger of unfair prejudice exists. State v. Rice, 48 Wn.App. 7, 13, 737 P.2d 726 (1987). For these reasons, all references to any alleged gang affiliation and activities, herein, should have been excluded under ER 404(b). Aro W.'s conviction should be reversed and the case remanded for a new trial. Trickler, 106 Wn.App. at 734, 25 P.3d 445.

Issue No. 5. In accordance with Blakely v. Washington, it was unconstitutional for the trial court to impose firearm enhancements where the jury found only deadly weapon enhancements.

Aro W.'s sentence is unconstitutional under the controlling authority of Blakely v. Washington, *supra*; Apprendi v. New Jersey, *supra*, and State of Washington v. Recuenco, ___ Wn.2d ___, 110 P.3d 188 (April 14, 2005).

In Apprendi the Court held that under the Sixth and Fourteenth amendments, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490.

The statutory maximum for Apprendi purposes is not the statutory maximum under Washington law for a Class A, B or C felony, but is

instead the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict* or admitted by the defendant.

Blakely, 124 S. Ct. at 2537 (emphasis added). In other words, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he or she may impose without any additional findings. Id. When facts supporting a sentence beyond the statutory maximum are neither admitted by the defendant nor found by a jury, the sentence violates the defendant's Sixth Amendment right to trial by jury. Id.

In State v. Recuenco, *supra*, our Washington State Supreme Court held that the imposition of a firearm enhancement that was not supported by the jury's special verdict violated Recuenco's Sixth Amendment jury trial right as defined by Apprendi and Blakely.

Under RCW 9A.94.533(4)(a), a trial court is required to add *two* years to a Class A felony conviction if the jury finds the defendant was armed with a *deadly weapon*.

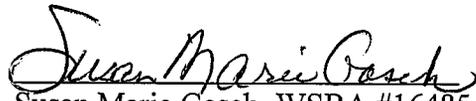
Under RCW 9A.94.533(3)(a), a trial court is required to add *five* years to a Class A felony conviction if the jury finds the defendant was armed with a *firearm*.

Herein, first degree robbery and murder in the first degree are Class A felonies. RCW 9A.56.200(2); RCW 9A.32.030(2). The jury convicted Aro W. of both charges, and found he was armed with a deadly weapon while committing each crime. However, the trial court imposed firearm enhancements on the counts by adding a total of ten years to the sentence. The defendant did testify and made no admissions regarding a firearm. Since the jury did not find firearm enhancements, but instead deadly weapon enhancements, the sentence imposed by the court was unconstitutional and must be reversed pursuant to Apprendi, Blakely, and Recuenco, *supra*.

D. CONCLUSION

For the foregoing reasons, this Court should vacate the declination order, dismiss the adult prosecution, and return this case for juvenile adjudication.

Respectfully submitted July 13, 2005.


Susan Marie Gasch, WSBA #16485
Attorney for Appellant

WEST'S REVISED CODE OF WASHINGTON UNANNOTATED
TITLE 13. JUVENILE COURTS AND JUVENILE OFFENDERS
CHAPTER 13.40. JUVENILE JUSTICE ACT OF 1977

13.40.010. Short title--Intent--Purpose

(1) This chapter shall be known and cited as the Juvenile Justice Act of 1977.

(2) It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders and their victims, as defined by this chapter, be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that communities, families, and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, the legislature declares the following to be equally important purposes of this chapter:

- (a) Protect the citizenry from criminal behavior;
- (b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;
- (c) Make the juvenile offender accountable for his or her criminal behavior;
- (d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;
- (e) Provide due process for juveniles alleged to have committed an offense;
- (f) Provide necessary treatment, supervision, and custody for juvenile offenders;
- (g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;
- (h) Provide for restitution to victims of crime;
- (i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels;
- (j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions, and community services;
- (k) Provide opportunities for victim participation in juvenile justice process, including court hearings on juvenile offender matters, and ensure that > Article I, section 35 of the Washington state Constitution, the victim bill of rights, is fully observed; and
- (l) Encourage the parents, guardian, or custodian of the juvenile to actively participate in the juvenile justice process.

[2004 c 120 § 1, eff. July 1, 2004; 1997 c 338 § 8; 1992 c 205 § 101; 1977 ex.s. c 291 § 55.]