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23023-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ARO Tè WILLIAMS-WALKER, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

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BRIEF OF RESPONDENT

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I.

APPELLANT'S 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.

(3) The juvenile court erred in finding and concluding that juvenile court jurisdiction should be declined.

(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.

II.

ISSUES PRESENTED

(1) Does Blakely v. Washington, --- U.S. ---, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), have any application to the decision to decline juvenile court jurisdiction?

(2) Did the juvenile court abuse its discretion in concluding that juvenile court jurisdiction should be declined because defendant was unusually mature for his age and that the need to protect the public outweighed the uncertainty of his amenability to treatment?

(3) Did the trial court err in concluding that Officer McIntyre was an expert on gang affiliation and activity?

(4) Did the trial court abuse its discretion in admitting “gang” evidence to establish motive and the relationships of the participants in this case where the defense agreed the evidence should be admitted and was also offered by the defense?

(5) Would the invited error doctrine preclude any claim of error in the admission of “gang” evidence?

(6) Was any error in the return of the enhancement verdict harmless where the only weapon used in the crime was a firearm?

### III.

#### STATEMENT OF THE CASE

Defendant/appellant Aro T. Williams-Walker was charged, initially, in the Juvenile Division of the Spokane County Superior Court with first degree felony murder and first degree robbery. CP 6, 51-52. He also was charged with an unrelated first degree robbery. Both crimes were committed when the defendant was age 14. The State sought to have the Juvenile Court decline jurisdiction over the offenses. CP 9.

The decline hearing was held before the Honorable Ellen K. Clark. JRP 1 *et seq.*<sup>1</sup> The State presented evidence concerning the nature of the two crimes as well as details concerning defendant's leadership role in a street gang and the services available to young offenders imprisoned in the Department of Corrections. JRP 6-75, 83-192, 198-304, 382-447. The defense presented a psychologist, Dr. Clay Jorgenson, who evaluated defendant and recommended "with reservations" maintaining him in the juvenile court system. JRP 304-373. The juvenile probation officer likewise found the matter to be a close call, but recommended retention in the juvenile system. JRP 461-526, 596-603. Both of them admitted that this particular case had features that

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<sup>1</sup> JRP denotes the juvenile court proceedings before Judge Clark. RP denotes the trial proceedings before Judge Leveque.

supported going with either court system. JRP 351, 503-506. Dr. Thomas McKnight, a psychologist called by the prosecution, discussed several flaws with Dr. Jorgenson's evaluation technique. JRP 528-591.

The prosecutor argued that defendant was a "young adult" by nature of his life style and was not amenable to rehabilitation in the juvenile system and needed the post-release supervision of the adult system. JRP 616-635, 651-656. The defense contended that defendant, who had never been offered the services available through the juvenile court system, worked well in structured environment and could be rehabilitated by age 21. JRP 635-651.

Judge Clark issued her ruling two days after hearing argument. JRP 658 *et seq.* Her ruling addressed the eight Kent v. United States, *infra*, factors at great length. She found that the first four factors – the seriousness of the offense, the manner of commission, the nature of the victims, and prosecutorial merit – all favored declination. JRP 659-660. The fifth factor, the treatment of co-defendants, was "neutral" as one co-defendant was retained in juvenile court and one was sent to adult court. JRP 661. The seventh factor, prior history in juvenile court, favored retention of jurisdiction. JRP 661-662. The court considered the sixth and eighth Kent factors – the defendant's maturity and possible rehabilitation versus protection of the public – to be the two significant factors. JRP 662.

The court found the maturity factor to favor declination. Defendant was a long time (3 year) leader of a street gang, was the father of two children by two different young women, and was beyond the control of his mother. Defendant was far more sophisticated and mature than the typical fourteen-year-old. RP 662-666. The final factor, weighing the protection of the public against the chances for rehabilitation, likewise favored declination. The adult system provided a longer term of protection for the public, while it was unclear if defendant was amenable to treatment, let alone treatment within the six year period that the juvenile system could control him. JRP 666-669. She ordered that jurisdiction be declined to adult court. JRP 669-670. Written findings in support of the ruling were promptly entered. CP 39-48.

The matter ultimately proceeded to jury trial in the adult court system before the Honorable Jerome Leveque. RP 1 *et seq.* A motion *in limine* concerning the use of “gang” evidence was heard before testimony was taken. RP 75-141. The prosecutor presented Spokane Police Department officer Sandra McIntyre as the sole witness at the hearing. McIntyre testified that she worked as a gang intelligence officer whose job was to compile information on gangs and gang members. She had been with the force for nine years and had spent the last three years as one of the two “gang officers” for the department. RP 75-77. She and her

partner attended monthly trainings and every six months went to gang training sessions in other states. She had attended gang training sessions for the last five years. McIntyre was a member of the Northwest Gang Investigators Association. RP 79-80.

The court questioned the officer about her training and experience in the field. RP 91-92. Judge Leveque concluded: "I do believe that this witness has demonstrated sufficient training and expertise in the area of gang and gang-related activities in this community to qualify as someone who can render opinions in this regard, so I am going to allow her to be qualified as an expert." RP 92. The officer then testified to both the nature of criminal street gangs and the relationships between various members of defendant's gangs. RP 92-131.

The prosecutor sought to admit the evidence at trial for several reasons: (1) demonstrate the relationships between the various people involved in the case; (2) motive for the crime; (3) why people behaved as they did after the crime (instigating a cover-up and a false confession). RP 134-138. The defense attorney noted that he objected to the court's ruling qualifying McIntyre as an expert witness and was granted a continuing objection for the trial. RP 139. He then went on to tell the court that other than the "expert" status for McIntyre, "I am not opposing the information the State is talking about." RP 139. The judge

ruled that the evidence would be admissible subject to any appropriate foundation for specific opinion evidence. RP 140-141.

The primary issue at trial was the identity of the killer. Defense counsel told the jury that his client was not present and that the other co-defendant supported that position. RP 617-618. The testimony focused on the particulars of a drug deal set up for that day. Jackie Karol came in to possession of a vial of "sherm" from her former boyfriend. Rather than hold it for him, she asked her friend Gene Chamberlin to help her sell it so that she could obtain money. He placed phone calls and located a buyer. RP 684-688. Ty (Trey) Harkin picked Chamberlin and Karol up and drove to the location where the transaction was to take place. RP 679, 681, 688-690. En route to the deal, Hardin called the buyer who then discussed the deal with Karol. The sherm was supposed to sell for \$1,000. RP 689-692.

At the sale location in north Spokane, Karol got out of the car and left it to the two men to conduct the sale from the car while she stood by a nearby building. RP 702-703. Two young men, one black and one Hispanic, came up to the car from the direction of a nearby apartment complex. Karol judged them to both be about 16, although she also described the black male as "a little kid." She did not know the two and could not later identify them. RP 704-706, 712, 721.

The prospective buyers asked to smell the sherm, so Karol walked back to the car, gave the vial to Chamberlin, and got into the backseat. RP 707-708. The black male pulled out a silver .22 gun and fired one shot into the air. He then shot Chamberlin and ran off. The sherm was missing when Karol got out of her seat. RP 711, 715. Chamberlin was not responsive; Hardin pulled him from the car and drove off, leaving Karol with the body. She called for aid. RP 713-714.

Ty Hardin testified that he knew the defendant, whose nickname was "Psycho," through drug activities. Hardin knew Chamberlin for about a week to ten days. RP 753-754. Chamberlin came over to the apartment Hardin was visiting and asked if anyone knew someone who wanted to buy some sherm. Hardin called Psycho between 10 and 11 p.m. Psycho did not know anyone looking for the product, but called back between 1 and 2 a.m. to say he was interested. RP 755-758. Hardin found Chamberlin and had him talk to Psycho. Those two talked for about 10 or 15 minutes. Chamberlin then asked Hardin to drive him to the north side for the sale. RP 758-760.

While driving up to the sale, Hardin called Psycho so that Karol could talk to him. Hardin again called Psycho when they arrived at the agreed upon location. RP 766-768, 771-772. The defendant and another young man, whom Hardin thought to be Native American,

approached the car. Hardin knew the defendant from his prior transactions with him; he told Chamberlin "that's them." RP 772-775. Hardin, too, described the purchasers as checking out the sherm before a gun was displayed and a demand made that it be turned over. Hardin, however, testified that it was the other young man, not Psycho, who committed the robbery and fired the two shots. RP 780-783. Panicked, Hardin pulled Chamberlin out of the car, gave the phone to Karol, and drove off to a friend's house. RP 783-784.

Brandon Silva, 11 at the time of the shooting, testified that he was recruited by the defendant's brother and mother to take responsibility for the killing. He was a member of the A Street gang, which was headed by the defendant's older brother. He was promised to be made an "OG" for taking the fall. The defendant's mother gave him \$20 after he made a statement to defendant's then-attorney taking responsibility for the crime. When asked to read part of his statement to the jury, Silva told jurors he could not read. RP 845-849, 861-875.

Silva initially told the investigating detective that he was responsible for the killing. After talking to his father, however, he decided that it was "dumb" to "take the rap" and told the detective he was not involved. RP 876-880. He told the jury he was not present at the shooting. RP 882.

Officer McIntyre was qualified as an expert before the jury. RP 1098. She explained the general nature and organization of street gangs, and the levels of participation and advancement within such organizations. RP 1098-1104. She testified that the A Street and Deuce Avenue gangs were closely related and engaged in recognized gang activities. RP 1104-1107. She identified various people involved in this case as members of one or the other of those two gangs and told the jurors the nicknames associated with each. RP 1111-1114. The officer was involved in obtaining search warrants for residences related to the defendants. Various items of evidence obtained during the searches were admitted during her testimony. RP 1115-1128.

Using her training and experience, she described the robbery and murder of a drug dealer as an “ultimate crime.” The offenses were gang related since they involved gang members and associates, were done to gain respect, and there were efforts at intimidation and asking another member to take “the hit” for the crime. RP 1129. Gang members were expected to assist others and act in concert in order to maintain position within the organization. RP 1129-1130. Word of this shooting did spread quickly among the various Spokane gangs. The A Street and Deuce Avenue gangs received “a lot” of “juice” for the killing. RP 1146.

The investigating detective testified to the statement given by the defendant a few days after the murder. RP 1153 *et seq.* When told that he had been identified as being one of the people involved in the crime and that cell phone records would confirm it, defendant admitted his involvement in the crimes with Carlos Fuentes. RP 1171-1173. The defendant provided a drawing of the crime scene and described the event. He claimed that the victim pulled a gun and that it discharged while he and the defendant were struggling over it. RP 1173-1177. When told that the victim did not have a .22 caliber gun, defendant admitted that it was his gun. However, he said that he pulled his gun out in response to the victim pulling a gun. He fired one shot in the air, then pointed his gun at the victim and it “went off.” RP 1177. Defendant then changed his story and claimed that Fuentes and Brandon Silva were involved in the crime instead of him. RP 1179-1181. After further reflection, defendant again admitted being the shooter. He first fired the gun when he saw that the victim had a weapon tucked in his pants. The victim did not actually pull the gun out until after the defendant had fired his first shot. RP 1183-1188. He again maintained that his gun simply “went off” after he pointed it at the victim. RP 1188-1189. That was his final version of the events. RP 1204-1205.

Carlos Fuentes testified for the defense. RP 1236 *et seq.* He claimed to have committed the robbery with Brandon Silva. The defendant was not involved at all. RP 1239. He brought a gun to the drug deal and was the one who fired the weapon. RP 1263-1264. Silva was present but did not do anything. RP 1264.

Defendant took the stand in his own defense. RP 1382 *et seq.* He admitted receiving one telephone call from Hardin about purchasing "wet," which is a slang phrase for PCP. He did not talk to Hardin again. RP 1397. He left the Wedgewood apartments and went to his mother's house. RP 1398-1400. When he awoke in the morning, Silva and Fuentes had come over. RP 1402-1403. Silva told him about the murder and said that Fuentes shot the victim. RP 1403-1404. Defendant told the jurors that he falsely confessed to the detective in order to protect his "home boys." RP 1407-1408. It was expected of him because of "the laws in your gang." RP 1408. He told jurors that he was a member of the A Street gang at the time and that he confessed out of fear that the gang might retaliate if he did not. RP 1409.

The case was argued to the jury on competing theories about the identity of the killer. RP 1530-1541, 1546, 1550-1560, 1563-1567. The jury convicted the defendant of first degree robbery and

first degree felony murder. The jury found that both crimes were committed with a “deadly weapon.” RP 1617-1618; CP 298-301.

The trial court imposed standard range sentences. CP 666-678. This appeal timely followed. CP 683-686.

#### IV.

#### ARGUMENT

##### A. THERE IS NO RIGHT TO A JURY DETERMINATION OF WHETHER A PERSON SHOULD BE DECLINED FROM JUVENILE COURT JURISDICTION.

The first of several arguments directed against the decision to decline juvenile court jurisdiction is a claim that Blakely v. Washington, *supra*, requires that a jury make the factual determinations necessary to support a decline decision. His argument has been rejected by other courts and is based on an untenable reading of Blakely. There is no right to a jury determination of a legal ruling, particularly in a court where there is no right to a jury trial.

Defendant reads Blakely very broadly as holding that any time a “fact” has any relationship to punishment it must be proven to a jury. This approach is wrong on several levels, but only two points will be stressed here. First, when the Blakely court was talking about “facts,” it

was doing so in the context of discussing the evidence about the defendant's criminal behavior. In Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the court ruled: "Other 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." The Blakely court adhered to this rule. 159 L. Ed. 2d at 412. What was new about Blakely is that the court defined the Apprendi concept of "statutory maximum" to mean the top end of the standard range as computed by the trial court. Id. at 413.

When the court's opinions in Apprendi and Blakely reference "facts" used to exceed the "statutory maximum," they do so in the context of the "facts" of the crimes themselves. Thus, in Apprendi it was the factual determination that the crime was based on racial hatred that allowed the trial judge to exceed the punishment that was allowable without that determination. In Blakely it was a determination that the crime was committed with deliberate cruelty that empowered the judge to exceed the so-called "statutory maximum." Thus, nothing in either case says that every "fact" that has something to do with determining the ultimate punishment in the case is one that must be proven to the jury. It is only evidentiary facts about the defendant's criminal behavior that must be established before a jury, if those facts alter the maximum punishment.

The “factual” determinations made in a decline hearing involve facts about the offender, the offense, and the ability to rehabilitate the offender versus the need to protect the public. Those are not the type of evidentiary facts that were at issue in Apprendi and Blakely. Those cases simply do not impact the decline decision.

The second reason that those cases are inapplicable has to do with the underlying right to a jury trial. In Blakely and Apprendi, the offender had a Sixth Amendment right to a jury trial. However, juveniles have no such right under the constitution. State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987). The Blakely and Apprendi decisions simply protect the existing right to a jury trial. They do not create a new right to a jury trial that does not otherwise exist. For these reasons, the decision in Blakely simply did not change the law.

Prior cases have already rejected appellant’s arguments. In State v. H.O., 119 Wn. App. 549, 81 P.3d 993 (2003), *review denied* 152 Wn.2d 1019 (2004), Division One faced the same arguments raised by an appellant after the Apprendi decision but before Blakely. The court concluded that Apprendi was not meant to cover discretionary decisions involving court jurisdiction. Accordingly, it rejected the arguments, made by appellant here, that there was a right to a jury trial on the declination factors and that they had to be established by proof beyond a reasonable

doubt. The standards for adjudication of guilt at trial simply did not apply to jurisdictional determinations. Id. at 554-556.

A recent post-Blakely decision also rejected one of appellant's arguments. In State v. Tai N., 127 Wn. App. 733, 113 P.3d 19 (2005), the court again concluded that nothing in Blakely or Apprendi altered the fact that juveniles do not have a right to a jury trial under the federal or state constitutions.

Because there is no right to a trial in juvenile court, the decisions in Blakely and Apprendi have no bearing on the decision to decline jurisdiction. Even if there were a right to a jury trial, it does not extend beyond the necessity to prove evidentiary facts about the offense to the jury. The decision to decline jurisdiction involves factors beyond the narrow confines of evidentiary facts which must be proven to a jury. For both reasons, appellant's argument for a jury trial over the declination decision should be rejected.

**B. THE COURT DID NOT ABUSE ITS  
DISCRETION IN DECLINING JUVENILE COURT  
JURISDICTION.**

The trial court took seriously its obligation to decide which court was the appropriate one to hear the trial of this case. The record

reflects careful consideration of the appropriate factors. The court's discretionary decision was not an abuse of its discretion.

A trial court's decision to decline juvenile court jurisdiction is reviewed on appeal for abuse of discretion. State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993); State v. Holland, 98 Wn.2d 507, 515-516, 656 P.2d 1056 (1983); State v. H.O., supra at 887. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The test also is sometimes viewed in a second way: whether any reasonable judge would rule as the trial judge did. State v. Nelson, 108 Wn.2d 491, 504-505, 740 P.2d 835 (1987).

The juvenile court's decision, however, must be "informed" by the eight criteria of Kent v. United States, 383 U.S. 541, 566-567, 16 L. Ed. 2d 84, 86 S. Ct. 1045 (1966). As noted in Furman, Kent requires the juvenile court:

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.

122 Wn.2d at 447.

Here, Judge Clark expressly considered these eight factors on the record and struck the balance in favor of declination. That is not surprising since she found that six of the eight factors favored declining jurisdiction, while only one favored retention. JRP 659-669. The court also considered, as required, the purposes of the Juvenile Justice Act, and determined that the need for protection of the community tilted the balance of those factors towards declining jurisdiction. JRP 666-669.

Defendant largely reiterates his factual arguments from the trial court proceedings and argues that the court did not give enough weight to his ability to be rehabilitated. Judge Clark's evaluation of the Kent factors was quite reasonable and her assessment of which factual arguments she believed is largely unreviewable.

Whether or not defendant could be rehabilitated in the juvenile system was questionable. To expect any correctional system to in six years install a moral system that his parents had been unable to accomplish in his first fifteen years is largely wishful thinking. None of the experts said that JRA could accomplish the task; rather, the emphasis of the defense witnesses was whether or not JRA had a better chance of

doing so than DOC would. JRP 503-506. Both defense experts also recognized that post-release supervision would be critical to long-term success. However, the juvenile system would not involve any supervision past age 21. Under these circumstances, it simply was not reasonable to believe defendant would be rehabilitated.

The trial court found that prospects for rehabilitation were unclear, while the need to protect the public was significant. Defendant argues that the court was required to look specifically at his needs. There is nothing in the eighth Kent factor that requires such. The court must simply engage in a balancing of the prospects for rehabilitation (which, as the quote in appellant's brief shows, the trial court found to be unclear) with the need for community protection. The record shows the court did engage in that balancing – it found the need for community protection to outweigh the unclear prospects of rehabilitation. There is no requirement that the trial court go further and attempt to formulate and weigh a specific program of treatment and adjudge its likelihood of success.

Defendant also attacks the court's determination that his lifestyle was more that of young adult than of a developing juvenile. The record adequately supports this determination. Defendant was essentially beyond the control of his mother, had led a gang life for three years while steadily advancing into a leadership role, and had fathered children by two

different women, one of who he intended to marry when he could legally do so. The trial court considered these factors indicia of being a “young adult.” That is an accurate assessment. Defendant simply was not a typical young teen. Starting a family and engaging in a regular (if illegal) line of work, is behavior more akin to being an adult than a junior high student. His choices may be poor, but they are adult lifestyle behaviors. The trial court could, as it did, wonder if juvenile treatment geared at the less sophisticated offender would really be meaningful to this offender.

Defendant has to show here that the trial court’s reasoning was untenable or something that no other judge would do. He can not make that showing. The vast majority of the Kent factors favored declination. The court gave careful consideration to the two factors primarily in dispute and decided that the evidence showed those factors supported declination of jurisdiction. Its reasoning was tenable and its decision to decline quite understandable. There was no abuse of discretion in deciding that this young adult should be handled by the adult court system.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECIDING THE GANG OFFICER QUALIFIED AS AN EXPERT WITNESS.

The first trial-related challenge is a contention that Judge Leveque erred in finding that officer McIntyre qualified as a gang expert.<sup>2</sup> The trial court had considerable discretion in this area and did not abuse that discretion.<sup>3</sup>

ER 702 states: “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.” A trial court’s determination that a witness qualifies as an expert is reviewed for abuse of discretion. State v. Holland, 77 Wn. App. 420, 427-428, 891 P.2d 49, *review denied* 127 Wn.2d 1008 (1995); State v. Flett, 40 Wn. App. 277, 284-285, 699 P.2d 774 (1985); State v. Lewellyn, 78 Wn. App. 788, 793, 895 P.2d 418 (1995) (*citing State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992)). When the basic

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<sup>2</sup> Defendant did not object to McIntyre’s qualifications at the declination hearing. JRP 27, 663.

<sup>3</sup> Defendant also challenges the content of some of McIntyre’s testimony. Those challenges are dealt with in the following section of this brief.

requirements are established, any deficiencies in training or experience go to the weight, not admissibility, of the expert testimony. State v. Flett, supra at 285 (internal citation omitted).

Here, McIntyre had spent the past three years working exclusively in the gang field and had experience with them while still a patrol officer. She had been to out-of-state trainings every six months for five years and was involved in monthly local training. She was a member of both the Northwest Gang Investigators Association and the California Gang Investigators Association. RP 75-80. The judge concluded that her training and experience qualified her as an expert. RP 91-92. That training certainly was a tenable basis for finding the witness had expertise in the field.

Defense counsel's objections to her qualifications seemed to be along the lines that attending training and working the field do not qualify a person as an expert. RP 89-90. The rule, however, expressly permits expertise to be founded on "knowledge, skill, experience, or training." No particular quantum of training or experience is required by ER 702. As this court has noted, practical experience is a sufficient basis for a finding of expertise. State v. Flett, supra at 284 [quoting case that itself was quoting other authority]. Police officers frequently obtain expertise based on their work. For example, in State v. Sanders,

66 Wn. App. 380, 385-386, 832 P.2d 1326 (1992), the court recognized that an officer's experience and training can qualify him as an expert.

Office McIntyre certainly had practical experience having served as an intelligence officer for three years. She also had attended quite a few training sessions over the previous five years. These were all reasonable bases for finding her qualified as an expert.<sup>4</sup> There was no abuse of the trial court's discretion.

**D. DEFENDANT WAIVED ANY CHALLENGE TO THE CONTENT OF THE EXPERT'S TESTIMONY.**

Defendant also challenges some of the content of officer McIntyre's testimony. He waived any such challenges in the trial court and also invited any error by putting on similar testimony. He can not now challenge the officer's testimony in this proceeding.

The basic problem here is that defendant's trial counsel told the court he had no objection to the content of officer McIntyre's testimony. RP 139. Indeed, the defendant himself testified to the duties of

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<sup>4</sup> Much of her testimony was factual in nature such as identifying the people that the department considered members of the two gangs. No expert standing was needed to provide that testimony. Her "expert" testimony dealt largely with the nature of street gangs and the characterization of these groups. Those topics were not seriously at issue in this case.

a gang member to “take one for the team” when he tried to justify his confession to the police. The motivation for his supposedly false confession was to protect his family from his gang. RP 1407-1409.

Defendant’s concession at trial that there was no objection to the content of McIntyre’s testimony waived any complaint on appeal. *E.g.*, State v. Nelson, 103 Wn.2d 760, 766, 697 P.2d 579 (1985) [defendant who let State proceed and then followed same process could not raise due process challenge to court’s procedures]; In re Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999) [defendant who agreed exceptional sentence was proper waived subsequent challenge to the sentence]; Id. at 313-314 (concurrency).

Defendant went further than merely waiving his challenge to the admission of gang evidence. He presented his own evidence; indeed, use of such evidence was a critical component of the defense case because he needed it to explain why his confession to the crime was supposedly false. Under such circumstances, the invited error doctrine precludes a party from challenging on appeal an action of the trial court which he requested it take. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); State v. McNeil, 161 Wash. 221, 223, 296 Pac. 555 (1931) (“no rule of law is better established than the rule that a party will not be heard to complain of an error which he induced the trial court to commit”). The invited error rule

applies to constitutional as well as non-constitutional claims, and it exists because while

[a] criminal defendant is entitled to a fair trial **from the state**, including due process. He is not denied due process **by the state**, when such denial results from his own act, nor may the state be required to protect him from himself.

State v. Lewis, 15 Wn. App. 172, 177, 548 P.2d 587, *review denied*, 87 Wn.2d 1005 (1976) (emphasis in the original). The rule is designed to "prohibit[] a party from setting up an error at trial and then complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984).

Both of those doctrines preclude the arguments defendant makes in this appeal to the contents of officer McIntyre's testimony. Moreover, the testimony was much less detailed than that permitted in earlier cases. State v. Boot, 89 Wn. App. 780, 788, 950 P.2d 964, *review denied* 135 Wn.2d 1015 (1998); State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050, *review denied* 128 Wn.2d 1004 (1995).

When a party fails to challenge an evidentiary ruling at trial, no appellate challenge can be raised to the ruling. *E.g.*, State v. Coria, 146 Wn.2d 631, 641, 48 P.3d 980 (2002); ER 103(a)(1). Washington courts permit a party to raise an issue on appeal that was not presented to the trial

court only when manifest constitutional error is involved. RAP 2.5(a). That is simply not the situation here.<sup>5</sup>

For all of the noted reasons, defendant can not raise any substantive challenges to the testimony of officer McIntyre. His only trial court objection was to her expertise. The complaints presented here were waived and any error would be invited.

E. THE ERROR IN THE SPECIAL INTERROGATORY FORMS WAS HARMLESS UNDER THE FACTS OF THIS CASE.

The final issue presented is one that has merit but should be considered harmless. This court is bound to follow controlling precedent, but that precedent is wrong.

The trial court instructed the jury on the special verdict form and asked it to determine whether or not the crimes were committed with a “deadly weapon.” The jury so found. CP 299, 301. The court then imposed the mandatory “firearms” enhancements for use of a gun during the commission of the crime.

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<sup>5</sup> The one issue that defendant has preserved was his objection to Silva’s testimony about the identity of the people who beat him into the gang. The defense did not object to testimony that Silva was beat into the gang, but only to the identity of the beaters. RP 849-850. The prosecutor argued that the identities were important to show the influence those people had over Silva who had (falsely) confessed to the killing at their urging. The trial court admitted the evidence on that basis. RP 850-851. There was no abuse of discretion in that ruling.

The Washington Supreme Court subsequently determined that use of the “deadly weapon” form to establish a “firearm” enhancement was improper under Blakely. State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). The court ordered re-sentencing with a “deadly weapon” enhancement instead of a firearm enhancement. Id. at 164. That ruling was based on its earlier determination that Blakely-related error can never be harmless. *See* State v. Hughes, 154 Wn.2d 118, 110 P.3d 118 (2005).

This court is bound by those decisions. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). However, the State has filed a *certiorari* petition to the United States Supreme Court in Recuenco over the harmless error analysis.<sup>6</sup> Where, as in this case, there is no question that the “deadly weapon” was in fact a firearm, the error in the jury verdict form is clearly harmless beyond a reasonable doubt. No juror could have believed that some “deadly weapon” other than a firearm was used in this case.

The error in the special interrogatories was harmless.

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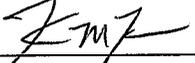
<sup>6</sup> *See* Washington v. Recuenco, no. 05-83.

V.

CONCLUSION

For the reasons stated, the convictions and sentence should be affirmed.

Respectfully submitted this 17<sup>th</sup> day of August, 2005.

  
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