74000-8

No. 74000-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent

v.

Nicholas S.,

Respondent.

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

BRIEF OF APPELLANT

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2. The trial court erred by entering Finding of Fact 28, in the absence of substantial evidence in the record, as to the lack of evidence of Nicholas "mov[ing] his hand back" toward the other males. CP 43.[1]

3. The trial court erred by entering Findings of Fact 11, 12, 13, 18, 19, 20, 21, 23, 24, 26, 27, 44, 45, 46, and 48, in the absence of substantial evidence in the record, and as these findings rely on the erroneous identification of Nicholas. CP 41-44.

4. The trial court erred by entering Finding of Fact 47, in the absence of substantial evidence in the record. CP 44.

5. The trial court erred by entering Finding of Fact 50, in the absence of substantial evidence in the record. CP 44.

6. The trial court erred by entering Finding of Fact 51, in the absence of substantial evidence in the record. CP 44.

[1] The trial court's Findings of Fact and Conclusions of Law are attached as an appendix.

7. Federal and state due process requires juveniles to be afforded the right to a jury trial when accused of crimes.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a defendant of attempted robbery in the first degree, the State must prove beyond a reasonable doubt each essential element. In the absence of consistent and reliable evidence, and particularly in light of the evidence of witness inconsistency and bias, must Nicholas's conviction be reversed?

2. Under the federal and state constitutions, juveniles enjoyed the right to a jury trial until it was denied by the Legislature. Since that time, the distinction between juvenile and adult courts has become increasingly blurred. Juveniles face many of the same consequences adults face, without the procedural protections afforded to adults. Were Nicholas's due process rights under the federal and state constitution denied when the court failed to provide him with a jury trial?

C. STATEMENT OF THE CASE

On January 9, 2015, Matthew S. was excused from school early. RP 142, 282-83.[2] A freshman at Ballard High School, Matthew had an

[2] Because both students are juveniles, first names or initials are used to preserve confidentiality.

appointment that day after school, so his mother had arranged to pick him up in the high school parking lot at approximately 2:00 p.m. Id.

Matthew later said that as he waited for his mother in the school lot, he was approached by three young men. RP 286. Matthew said that one of the youngsters demanded his Beats© headphones and then pulled a gun on him. RP 289-92. According to Matthew, this demand, accompanied by profanity, was repeated four times. Id. Matthew refused to relinquish his headphones and reportedly "calmly shoved off" and walked away from the assailant, unharmed. RP 298.

Matthew stated at trial that he did not tell anyone about this attempted gun-point robbery, including his mother, who was waiting for him in the same parking lot. RP 300. His mother, Mrs. S., verified that Matthew initially said nothing about this allegation when she picked him up at Ballard High. RP 150. The two did some errands together, including going shopping at Goodwill. RP 150-51. At some point, when Mrs. S. asked her son whether he had heard about some recent robberies at the high school, Matthew mentioned, "yeah, that happened to me before I got into the car." RP 300. Mrs. S. noted her son did not seem upset or afraid about being held up at gunpoint,

explaining that he is an "upbeat kid." RP 155. Matthew stated that the alleged incident simply "wasn't a big deal to me." RP 300.

Mrs. S. called Ballard High School, and the school security office asked for Matthew to come back to the school immediately to give a statement concerning his allegations. RP 153. Since Mrs. S. had to pick up her younger child from elementary school, she sent Matthew back to the high school from their shopping expedition on foot. RP 153-54. Neither she, nor the Ballard security staff, nor even the Seattle Police Department (SPD), seemed wary of setting Matthew back on the street with an allegedly armed assailant still out there. Matthew, as well, seemed comfortable with "jogging" over to the school. RP 304.

Meanwhile, Ballard High School security officer Craig Plummer had been following Nicholas, a young man against whom Plummer had already requested a no-trespassing warrant, since Nicholas had been expelled from the high school. RP 233, 240-43. Nicholas lives less than a block from Ballard High School. RP 583; CP 2.[3] Plummer also seemed to have a longstanding grudge against Nicholas, which became clear when Plummer threatened to "beat the

[3] Nicholas's father told the court that since the family lives less than a block from Ballard High School, the 500-foot prohibition of the no-trespass order was untenable. RP 583.

hell out of" Nicholas in front of law enforcement. RP 240-43.[4] When confronted with the SPD in-car video of his tirade, Plummer could only suggest that his statements to Nicholas were taken out of context. RP 244. Plummer also maintained he was only "trying to wise him up." RP 244.

As Plummer followed Nicholas with a criminal trespassing warrant, Plummer decided to call SPD officers in order to have Nicholas detained in connection with Matthew's allegations. RP 233, 252-53. When SPD Officer Trung Nguyen arrived, Plummer pointed out Nicholas to him, saying, "That's the young man, there." RP 252-53.

At this point, the only individual who had identified a suspect was Plummer, the security guard who wanted to "beat the hell out of" Nicholas. RP 240-43, 252-53. Matthew had not given his mother a name of an alleged perpetrator – or even a physical description -- other than "male." RP 161, 167. Matthew's mother testified that the first time Matthew described this alleged assailant to her was an hour and a half after he returned home from the identification procedure at the

[4] At the time of the security officer's threats, Nicholas, the appellant, was 15 ½ years old. CP 4.

high school. RP 166-67.[5] Matthew's mother could not give the security officer the name or description of a suspect, since she did not have the information. RP 161, 164, 302. Thus, Nicholas was actually identified by security officer Plummer, not by Matthew.

When Matthew arrived on foot at Ballard High School, he was brought over to Nicholas, who was being held up against a patrol car. RP 308 (Nicholas described by Matthew as held "on the police car" with two officers). Matthew then identified Nicholas as the person who attempted to take his headphones. RP 312, 235-36. Plummer even boasted of engineering the identification procedure. RP 235. ("I kind of got them together").

Nicholas was charged with attempted robbery in the first degree. RCW 9A.28.020; RCW 9A.56.200(1)(a)(ii); CP 4-6. No gun was recovered; law enforcement officers testified they made no attempt to search for the reported gun in the vicinity. RP 87.

Following a bench trial, Nicholas was convicted as charged. CP 41-47 (court's findings of fact and conclusions of law).

[5] This out of court statement, made by Matthew at his home, was ultimately stricken as hearsay.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT NICHOLAS COMMITTED AN ATTEMPTED ROBBERY.

a. The State is required to prove every essential element of a charged crime beyond a reasonable doubt.

Due process requires the State to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). An accused person's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Drum, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

In order for a court's findings of facts to be sufficient, there must be substantial evidence to support a court's findings. State v. Mewes, 84 Wn. App. 620, 622, 929 P.2d 505 (1997) (citing Rae v.

Konopaski, 2 Wn. App. 92, 95, 467 P.2d 375 (1970)). Where findings of fact are not supported by substantial evidence, they are not binding on the reviewing court. See State v. Maxfield, 125 Wn.2d 378, 385, 886 P.2d 123 (1994).

b. The State failed to establish beyond a reasonable doubt the essential element of identity – indeed, the State failed to prove beyond a reasonable doubt that a crime even occurred.

The State did not prove beyond a reasonable doubt that Nicholas was responsible for trying to take Matthew's headphones that day. In fact, due to the lack of consistent evidence, the State did not prove that Matthew was a victim of a crime at all – this was the State's burden, and the State failed to meet it.

First, the State could not explain the conflicting evidence presented by its complaining witness. Matthew's nonchalant behavior was unusual, to say the least, for someone who had reportedly been held up at gunpoint moments earlier. RP 298, 300. Matthew testified that the alleged armed robbery was simply not "a big deal" to him, and that he remained calm throughout. Id.

Matthew also lied during his testimony, when confronted with pronounced inconsistencies in his account of the day's events. RP 315, 328, 331-32, 334-36. Matthew's impeachment with the police video

statement should cause great concern. Even when reminded of his original statement, Matthew refused to acknowledge his more accurate earlier statement. RP 328, 332.[6]

Not only had Matthew insisted on a completely different version of events in his videotaped statement -- his earlier statement had been recorded and relied upon by Detective Bach as the basis for the probable cause statement. CP 5-6. There are glaring inconsistencies between Matthew's testimony at trial and his version of events on January 9th, as given to detectives. Id. (For example, Matthew claimed at the time to have immediately told a friend at about the alleged incident; at trial, Matthew denied telling this friend, although the voice recording was played in open court). These contradictions cannot be explained away by the court's finding that that they are mere "inconsistencies" that are "not material and are explicable with the passage of time." CP 44 (FF 47, 50).

Other inconsistencies in Matthew's testimony indicate a lack of sufficient evidence. For example, Matthew testified that the assailant

[6] Memories do not improve over time. To the contrary, reactivation of a memory and subsequent recalls can be easily distorted. *See* Donna J. Bridge and Ken Paller, *Neural Correlates of Reactivation and Retrieval-Induced Distortion*, The Journal of Neuroscience 32 (August 29, 2012).

pulled a gun from his pants. RP 321. However, the pants that Nicholas wore that day did not have pockets of sufficient size to hold a firearm. RP 341. These "lounge pants," as Nicholas's father called them, were also too flimsy to support a firearm in the waistband. Id. Nicholas's father also testified that Nicholas is left-handed, which would preclude the version of events depicted by Matthew. RP 341, 320-21 (assailant described as holding gun in right hand).

In addition, although the court found that Matthew "observed the Respondent move his hand back toward the [other] males," there is no support for this finding in the record. CP 43 (FF 28). A review of the record reveals a lack of evidence as to the location of this alleged firearm, if one ever existed.

Second, several of the State's witnesses were biased against Nicholas, which colored their testimony. Ballard High School security guard Plummer was captured on police videotape threatening to "beat the hell out of" Nicholas, a 15 ½ year-old former student. RP 240-43. It was due solely to Plummer's actions that Nicholas was seized and held for identification by Matthew. RP 233, 252-53. In fact, Plummer even told Matthew's mother that there were other incidents going on at the high school, and they could be looking for the same person who

"perpetrated those incidences" in connection with Matthew's complaint." RP 164.[7]

It was no coincidence that Nicholas – a young man that Plummer was eager to keep away from the high school -- was stopped and held while Matthew jogged over. RP 240-43 (Plummer had trespass warrant ready for Nicholas). When Matthew identified Nicholas, Nicholas had no weapon, but officers did not even bother to canvas for one. RP 87. This raises the question: what could have been more important to police officers than getting a firearm off the premises of a school, if they truly believed one had existed?

Third, the trial court disclosed a prior "close relationship" with the lead detective on the case. RP 187. Detective Scotty Bach, with the Major Crimes Task Force, was the detective in charge of Nicholas's interrogation at the North Precinct on January 9, 2015. RP 193-95. Although defense counsel did not object, Nicholas did not waive any conflict arising from this "close relationship" between the finder of fact and Detective Bach. CJC 2.11(A) (requiring judges to disqualify themselves whenever their impartiality "might reasonably be questioned"); see also Section 2.

[7] Nicholas was acquitted of the other robbery allegations.

Under a rational view of the evidence analyzed in the light most favorable to the State, this Court should reject the claim that Nicholas was the person who attempted to rob Matthew of his headphones. Other than walking in the same vicinity as Ballard High School – which is less than a block from his home – the State failed to show Nicholas's participation in this offense. Nicholas did not flee from school security officers or police, even when threatened, and did not have a weapon when arrested. The evidence presented at trial was simply inadequate to prove Nicholas was the person involved in this incident – or indeed, that any incident occurred at all. His conviction, therefore, cannot be sustained. Jackson, 443 U.S. at 318; Winship, 397 U.S. at 364.

c. This Court should reverse because the State failed to prove all essential elements beyond a reasonable doubt.

Because the State failed to prove beyond a reasonable doubt that an attempted robbery occurred, and that Nicholas committed it, the charges should be reversed and dismissed with prejudice.

2. THE FAILURE TO PROVIDE NICHOLAS WITH A TRIAL BY JURY DENIED HIM DUE PROCESS.

Originally, children charged with crimes in Washington were afforded the right to a jury trial. Ch. 18, § 2, 1905 Wash. Laws

(repealed, 1937). This right was taken away when the Legislature determined the primary purpose of juvenile court was rehabilitation and the primary purpose of adult court was accountability. See RCW 13.40 (Juvenile Justice Act of 1977). Washington courts have indicated that should the juvenile system become sufficiently like the adult criminal system, the right to a jury for juveniles should be restored. See, e.g., State v. Lawley, 91 Wn.2d 654, 591 P.2d 772 (1979); Monroe v. Soliz, 132 Wn.2d 414, 939 P.2d 205 (1997); see also Code of 1881, ch. 87, § 1078; State v. Chavez, 163 Wn.2d 262, 274, 180 P.3d 1250 (2008).

Increasingly, the distinction between juvenile and adult court has eroded. Juveniles like Nicholas now face significant consequences from their convictions, including difficulty removing their convictions from their records. Adults are now able to divert and otherwise avoid criminal convictions when they are able to demonstrate their rehabilitation. Because this distinction is now virtually non-existent, this Court should find Nicholas's right to a jury trial was denied and reverse his conviction.

a. Juvenile court provides insufficient protection to justify denying Nicholas his right to a jury trial.

While the stated purposes of the juvenile and adult courts may be different, in many respects, the goals of the adult and juvenile

systems have reached similar balances in terms of punishment and rehabilitation. Because Washington's juvenile court system has become more punitive while the adult system has focused upon rehabilitation, Nicholas should have been afforded the right to a jury trial. In re L.M., 286 Kan. 460, 460, 186 P.3d 164 (Kan. 2008) ("Because the Kansas Juvenile Justice Code has become more akin to an adult criminal prosecution, it is held that juveniles henceforth have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments."). The failure to provide Nicholas with jury trial rights violated due process and entitles him to a new trial.

i. The advantages of remaining in juvenile court have decreased.

Juveniles like Nicholas increasingly find themselves sentenced much like adults. Juvenile court sentences have been lengthened and the Legislature has added a "clearly too lenient" aggravating factor to allow manifest injustice sentences above the standard range. RCW 13.40.230(2). Although courts nominally distinguish between an "adjudication" and a "conviction," the code makes plain the lack of distinction. See RCW 13.04.011(1) ("[a]djudication" has the same meaning as "conviction" in RCW 9.94A.030, and the "terms must be construed identically and used interchangeably"); see also, In re Det. of

Anderson, ___ Wn.2d ___, 91385-4, 2016 WL 454049, at *2 (Wash. Feb. 4, 2016) (citing RCW 13.40.077 (recommended prosecutorial standards for juvenile court), RCW 13.40.215(5) (school placement for "a convicted juvenile sex offender" who has been released from custody), RCW13.40.480 (release of student records regarding juvenile offenders); RCW 13.50.260(4) (sealing juvenile court records); JuCR 7.12(c)-(d) (criminal history of juvenile offenders).

The consequences of Nicholas's "adjudication" are severe. Nicholas is required to provide the court with a collection of his personal data. CP 37. He must provide a DNA sample. CP 37. He also submitted to fingerprinting and photographing by the Sheriff upon arrest and again upon disposition. CP 39. There are no provisions which require the Sheriff to ever destroy these records. In fact, no restrictions exist on the dissemination of juvenile records. RCW 10.97.050. Background checks apply equally to adults and to children tried in juvenile court. RCW 43.43.830(6).

Youth who are convicted in juvenile court may be housed in adult prisons. RCW 13.40.280. When the State seeks to transfer a child to an adult prison, it is the child's burden to demonstrate why they should not be transferred. Id. Likewise, juveniles who are tried in

adult court and who enjoy the right to a jury trial, may serve their sentences in a juvenile facility until they are twenty one. RCW 72.01.410.

ii. Adult courts are adopting a more rehabilitative model for offenders.

Meanwhile, our adult courts increasingly act to rehabilitate defendants. Therapeutic court programs have been created with the purpose of rehabilitation, rather than punishment. RCW 2.30.010 ("The legislature further finds that by focusing on the specific individual's needs, providing treatment for the issues presented, and ensuring rapid and appropriate accountability for program violations, therapeutic courts may decrease recidivism, improve the safety of the community, and improve the life of the program participant and the lives of the participant's family members by decreasing the severity and frequency of the specific behavior addressed by the therapeutic court."). Washington now has 83 therapeutic courts. Washington Courts, Drug Courts & Other Therapeutic Courts, available at https://www.courts.wa.gov/court_dir/?fa=court_dir.psc. These courts

are intended to rehabilitate, focusing on addiction, domestic violence, mental health and veterans. Id.[8]

Every rehabilitative program created in juvenile court has an equivalent in adult court. For example, juveniles who are convicted of a sex offense may ask the court for a community based alternative sentence, as can adults. RCW 13.40.160; RCW 9.94A.670. Both juveniles and adults with drug dependency problems may seek drug treatment instead of a standard range sentence. RCW 13.40.0357; RCW 13.40.165. Juveniles may seek diversion and deferred sentences, but adults are increasingly able to seek local pre-filing diversion programs, "agreed orders of continuances," and deferred prosecutions. RCW 13.40.070; RCW 13.40.127; RCW 35.50.255; RCW 3.66.068; RCW 3.50.330; RCW 10.05; see also LEAD, Law Enforcement Assisted Diversion, available at http://leadkingcounty.org/.

Minors and young persons who are tried in adult court with the right to a jury trial have the ability to be sentenced as if they were juveniles, even when jurisdiction lapses. State v. Maynard, 183 Wn.2d 253, 264, 351 P.3d 159 (2015) (remedy caused by ineffective assistance is to remand to adult court for further proceedings in accordance with

[8] Juveniles may not choose this type of therapeutic court.

the Juvenile Justice Act). Even where a young person over eighteen is prosecuted in adult court, youthfulness is a factor the court may consider in sentencing the person below the standard range. O'Dell, 183 Wn.2d at 688.

b. The Sentencing Reform Act is in conflict with Nicholas's lack of a right to a jury trial.

Increasingly, the Sentencing Reform Act treats juvenile criminal history as seriously as it does convictions which a person receives as an adult. With no right to a jury, juvenile history should not be scored for adult convictions at all. In striking down Florida's death penalty sentencing scheme, the United States Supreme Court reaffirmed the importance of the right to a jury trial where facts are used to impose a more significant punishment. Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016).

The Sixth Amendment and the Fourteenth Amendment require that each element of a crime be proved to a jury beyond a reasonable doubt. Alleyne v. United States, 570 U.S. ___, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013); U.S. Const. amend. VI; XIV. Any fact which exposes a person to a greater punishment than that authorized by the jury's guilty verdict is an "element" that must be submitted to a jury. Apprendi v. New Jersey, 530 U.S. 466, 494, 120 S.Ct. 2348, 147

L.Ed.2d 435 (2000). This constitutional right has been applied to plea bargains, Blakely v. Washington, 542 U.S. 296, 304, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, United States v. Booker, 543 U.S. 220, 230, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, Southern Union Co. v. United States, 567 U.S. ___, 132 S.Ct. 2344, 2357, 183 L.Ed.2d 318 (2012), mandatory minimums, Alleyne, 570 U.S., at ___, 133 S.Ct., at 2166 and capital punishment. Ring v. Arizona, 536 U.S. 584, 608, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

While prior convictions do not need to be proven to a jury for sentencing purposes, it is because the underlying facts have already been presented to a jury, except in the case of juvenile's adjudications. State v. Newlum, 142 Wn. App. 730, 744, 176 P.3d 529 (2008) ("Imposition of an exceptional sentence based solely on a defendant's criminal history does not violate the Sixth Amendment because a defendant's prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."); see also RCW 9.94A.535.

For Nicholas, this criminal history will score if he is ever convicted of a future offense. RCW 9.94A.525(2)(a). All felony

dispositions in juvenile court shall be counted as criminal history for purposes of adult sentencing, except under the general "wash-out" provisions that apply to adult offenses. Id. Should Nicholas be convicted of a future violent offense, this conviction would "double score," in exactly the same way an adult conviction is considered. RCW 9.94A.525(8). Because no provision exists to "wash-out" his conviction, it will be scored should he be convicted of any other offense during his lifetime. RCW 9.94A.525(2)(a).

Thus, Nicholas's adjudication will have a nearly indistinguishable effect from an adult conviction. Yet, unlike an adult conviction, his "adjudication" was obtained without the fundamental protections afforded by a jury.

c. The denial of jury trial rights for children is contrary to the Sixth Amendment.

i. The Sixth Amendment makes no distinction between adults and juveniles.

The Sixth Amendment makes no distinction between adults and juveniles. In fact, at the time of the drafting of the amendment, there was no such distinction.

> Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility, seven at common law and in some of our states, ten in others, with a chance of escape

> up to twelve, if lacking in mental and moral maturity. The majesty and dignity of the state demanded vindication for infractions from both alike. The fundamental thought in our criminal jurisprudence was not, and in most jurisdictions is not, reformation of the criminal, but punishment; punishment as expiation for the wrong, punishment as a warning to other possible wrongdoers. The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act -- nothing else -- and if it had, then of visiting the punishment of the state upon it.

Julian Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 106 (1909).

The original Juvenile Court Act of Illinois (1899) was a model quickly followed by almost every state in the Union. See Monrad Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup. Ct. L. Rev. 167, 174 (1966).

Constitutional challenges to these new juvenile systems, which did not provide the full panoply of constitutional rights to juveniles, were made. However, most challenges were rebuffed by "insisting that the proceedings were not adversary, but that the State was proceeding as *parens patriae*." In Re Gault, 387 U.S. 1, 16, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). This rationale was questionable. Paulsen, supra, at 173 ("How could the reformers create this kind of court within a constitutional framework that insisted upon many of the institutions

and procedures then thought to be irrelevant or subversive of the job of protecting children?").

Nonetheless, in McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971), a fractured Court found that a state juvenile justice scheme that did not provide for a jury trial was constitutionally permissible. Writing for a four-member plurality, Justice Blackmun concluded that juvenile proceedings in Pennsylvania and North Carolina were not "yet" considered "criminal prosecutions" and thus, the due process requirements of fundamental fairness did not impose the Sixth Amendment guarantee of a right to trial by jury on juvenile courts. McKeiver, 403 U.S. at 541. The plurality questioned the necessity of a jury to accurate fact-finding and emphasized the unique attributes of the juvenile system that, 25 years ago, still differentiated it from adult criminal prosecutions. McKeiver, 403 U.S. at 543-51.

ii. The original intent of the Sixth Amendment guarantees juveniles the right to a jury trial.

The current United States Supreme Court cases, including Hurst and Alleyne, demonstrate that in interpreting the federal constitution, issues of reliability, efficiency and semantics are unimportant. Hurst, 136 S.Ct. at 619; Alleyne, 133 S.Ct. at 2156. The only relevant

question is "what was the intent of the Framers?" The actual language of the Sixth Amendment made no distinction between adults and juveniles in regard to the right to a jury trial. And we know from the commentators that, at the time, all persons over the age of seven and charged with criminal activity were tried by a jury. Mack, supra, at 106. Thus, no matter what rationale or label is applied to avoid the constitutional guarantee, where a person is charged with an act that results in imprisonment, the only proper safeguard envisioned by the Framers is a jury trial.

d. The jury trial guarantees of the State Constitution provide juveniles the right to a jury.

Article I, § 21 provides the right to a jury trial shall remain "inviolate." Article I, § 22 provides "In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The Washington Supreme Court has recognized that the right to a jury trial may be broader under Washington's Constitution than under the federal constitution. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003) (applying the factors in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)). Smith noted the textual differences between the state and federal provisions, as well as the structural

differences of the federal and state constitutions supported such a conclusion. Id. at 150-52. In addition, the manner in which crimes are prosecuted is a matter of local concern. Id. at 152.

Smith, however, concluded this potential broader reach of the state guarantee did not require a jury determination of a defendant's prior "strikes" in a persistent offender proceeding. Id. In making this determination, the Court clarified the scope of the jury-trial right must be determined based on the right as it existed at the time the constitution was adopted. 150 Wn.2d at 153. Smith based its conclusion on one basic fact -- that there was no provision for jury sentencing at the time the State constitution was enacted, as an 1866 law had done away with the practice. Id. at 154. Thus, because the right did not exist at common law or by statute at the time of the enactment of the State constitution, it was not embodied within the jury trial rights of Article I, § 21 and Article I, § 22.

By contrast, at the time the Washington Constitution was adopted, there was no differentiation between juveniles and adults for purposes of the provision of a jury. Even after the juvenile courts' inception, juveniles were statutorily entitled to trial by jury from 1905 until 1937, when the Legislature struck the right to a jury trial in

juvenile court. Ch. 65, § 1, 1937 Wash. Laws at 211. The original juvenile court statute in Washington State provided that "[i]n all trials under this act any person interested therein may demand a jury trial, or the Judge, of his own motion, may order a jury to try the case." Ch. 18, § 2, 1905 Wash. Laws (repealed, 1937). This provision remained substantially unchanged through revisions of the statute in 1909, 1913, 1921, and 1929.

Beginning in 1909, our juvenile laws made special provision for transfer to a "police court of cases" where it appeared that "a child has been arrested upon the charge of having committed a crime." Ch. 190, § 12, 1909 Wash. Laws at 675. The capacity statute, also enacted in 1909, specifically contemplates the possibility that a "jury" will hear a case where a child younger than 12 stands accused of committing a "crime." RCW 9A.04.050. Thus, juveniles were entitled to jury trials at the time the Washington Constitution was adopted in 1889 and for more than 40 years thereafter – until the Juvenile Justice Act was amended to delete that right.

In State v. Schaaf, the Court concluded the absence of a separate juvenile court at the time of the adoption of the Constitution did not lead to the conclusion that juveniles were now entitled to a jury trial.

109 Wn.2d 1, 14, 743 P.2d 240 (1987). Schaaf concluded that even though the right to a jury trial existed at all points prior to 1938, the framers of the Washington Constitution could not know of later efforts to legislate away the right, and thus could not have intended to provide the right in the first place or intended to foreclose its denial in the future. The effort in Schaaf to limit the framers' intent based on legislation that came decades later is directly at odds with Smith. Smith held the right to a jury trial guaranteed by the state constitution is precisely the right which existed by statute and common law in 1889. 150 Wn.2d at 153. Because a juvenile in 1889 had the right to a jury, a juvenile in 2016 has the right to a jury trial.

e. The failure to provide Nicholas with the right to have his case heard before a jury denied him due process.

Where children are held to the same standards of conduct as adults, they must enjoy the same due process rights. The failure to provide Nicholas with his right to a jury denied him due process under both the federal and state constitutions. With the purposes of adult and juvenile court continuing to merge, the constitutional right to a jury trial for all persons accused of crimes becomes clear. This court should adopt the original intent of the federal and state constitutions and return to Nicholas his jury trial rights.

E. CONCLUSION

The State failed to produce sufficient evidence to establish beyond a reasonable doubt that Nicholas committed an attempted robbery in the first degree, this Court should reverse and dismiss with prejudice. In the alternative, because Nicholas has the right to a jury trial, reversal and a new trial by jury should be granted.

Respectfully submitted this 11th day of March, 2016.

s/Jan Trasen
_____
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Washington Appellate Project
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APPENDIX

FILED

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

The Honorable Judge John Erlick
Hearing Date: August 28, 2015 1:30 P.M.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON, Plaintiff, vs. NICHOLAS SPRINGFIELD, B.D. 07/09/1999 Respondent.	No. 15-8-00016-2 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 6.1(d)

THE ABOVE-ENTITLED CAUSE having come on for trial on July 6-7, 2015 before the undersigned Judge in the above-entitled Court; the State of Washington having been represented by Deputy Prosecuting Attorney Leila Curtis; the RESPONDENT appearing in person and having been represented by his attorney, George Eppler; the Court having heard sworn testimony and arguments of counsel and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

The following events took place within King County, Washington:

1. At the fact finding hearing, the Court heard testimony of the following witnesses called by the State: Officer Trung Nguyen, Seattle Police Department; Officer Gilles Montaron, Seattle Police Department; Detective Scotty Bach, Seattle Police Department; Detective Daniel Cockbain, Seattle Police Department; Detective Todd Jakobsen, Seattle Police

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Department; Sonja Schultz, civilian witness and victim's mother; and Matthew Schultz, victim. The Court also heard testimony from the following witnesses called by the defense: Craig Plummer, civilian witness; and Vilando Wynter, civilian witness.

2. At the time of the incident, Matthew Schultz (hereinafter "Matthew") was a student at Ballard High School in the City of Seattle, County of King, State of Washington.
3. On the afternoon of Friday, January 9, 2015, Matthew planned to leave his 6th period class at Ballard High School early for a prescheduled appointment.
4. Matthew arranged for his mother, Sonja Schultz (hereinafter "Sonja"), to pick him up early outside of Ballard High School.
5. Sonja arrived in her vehicle and waited at the north entrance of the Ballard High School parking lot to pick up her son, Matthew, from school.
6. While she waited for her son, Sonja observed 3 individuals standing in an alleyway near a designated school bus loading zone for Ballard High School students at the north entrance of the school.
7. Sonja described the 3 individuals as "male," but was unable to provide additional identifying information.
8. Sonja observed the 3 individuals for approximately 5-7 minutes in the alleyway before she was required to move her vehicle further to the east from the school bus loading zone.
9. Matthew departed from his 6th period class at approximately 2:05 PM to meet his mother in the back parking lot of Ballard High School, which is on the north side of the school.
10. Matthew walked through a shaded area in an alleyway, running alongside Ballard High School toward the school's north entrance, to meet his mother.
11. Matthew observed a young man in the alleyway, later identified as the Respondent, Nicholas Springfield, and 2 other white males, who were approximately the same age as or slightly older than Matthew.
12. Matthew observed the Respondent sitting on a ledge in the alleyway, and the other 2 males standing nearby.
13. Matthew described the Respondent as wearing a gray sweatshirt with black designs on the apparel.
14. Matthew was wearing a pair of pink "Beats," a type of headphone, over his head.
15. Music was played through the Beats, which did not cover Matthew's ears.
16. Matthew observed school busses parked at the end of the same alleyway, approximately 30 yards away from his location.
17. Matthew walked through the alleyway, toward where he had arranged to meet his mother while the 3 males in walked in the opposite direction.
18. As Matthew passed the group, the Respondent turned around and moved in front of Matthew, saying, "Give me your f---in' beats."
19. The Respondent pulled a gun from his pants and pointed it at Matthew's leg.
20. Matthew described the gun used by the Respondent during the incident as a "real" gun that was black with a brown handle.
21. The Respondent pointed the gun and then placed it directly on Matthew's leg, on top of his thigh.
22. Matthew could feel that the gun pressed against his thigh was made of real metal.
23. Matthew noticed that the Respondent sounded angry and demanding.
24. Matthew observed the Respondent for approximately 10 seconds and the parties stood face-to-face with one another.

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25. Matthew estimated that the total time period that he was in the alleyway during this incident was approximately 3 minutes.
26. Although he did not know the Respondent by name at that time, Matthew recognized the Respondent as having been a student at Ballard High School, and as having seen him on an estimated 11-12 occasions.
27. Matthew shrugged this encounter with the Respondent off and headed toward his mother after refusing to give up his Beats.
28. At one point, Matthew looked back toward the Respondent and the other males, and observed the Respondent move his hand back toward the males.
29. Matthew arrived at his mother's vehicle, which was parked on other side of a school bus at that time.
30. Sonja had waited an estimated total of 8-10 minutes for her son from the time she had arrived at the high school.
31. From Ballard High School, Matthew and Sonja drove to Goodwill, where his mother initiated a conversation with him about whether he had heard about recent robberies at Ballard High School.
32. Matthew replied that he had just been a victim of an attempted robbery.
33. Sonja responded to her son's disclosure by calling Ballard High School's security office on her cellular phone.
34. Sonja handed her cell phone to Matthew, who spoke with Ballard High School security officer Vilando Wynter, known as "Lando," a person whom Matthew knew well and talked with nearly every day.
35. Matthew spoke with Lando for approximately 3 minutes and provided him with details of what had occurred in the alleyway of the school before the call ended.
36. Lando called Matthew back shortly after their conversation and told him that he had to return to Ballard High School.
37. Matthew did not identify the respondent to his mother or to school officials by name when he was reporting the robbery.
38. By that time, Sonja had to pick up Matthew's younger brother, so Matthew jogged back to Ballard High School, which took approximately 5-7 minutes as the school was approximately 7 blocks away.
39. Matthew went inside of Ballard High School to look for Lando before he walked around the school building toward the southwest corner of the school where 15TH AVE NW intersects with NW 65TH ST.
40. At that location, Matthew observed several police cars, and the Respondent with two police officers along with security officer Craig Plummer, known as "Bear."
41. Lando approached Matthew and asked him to tell him more about the incident.
42. A few minutes later, a police officer, described by Matthew as "Asian" and identified at trial as Seattle Police Officer Nguyen, approached Matthew.
43. Officer Nguyen asked Matthew his name, about the incident, and whether he could identify the suspect.
44. At the scene, Matthew identified the Respondent as the individual who attempted to rob him in his alleyway alongside Ballard High School.
45. Matthew also identified the Respondent in the courtroom at the time of trial as the person who attempted to rob him of his "Beats."
46. The testimony of victim Matthew Schultz is credible.

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47. Although Defense counsel effectively challenged Matthew's perception and memory of the event, this does not alter the Court's opinion or conclusion that the event occurred or that Nicholas Springfield committed the crime of which he is charged.
48. Matthew's testimony was inconsistent from an earlier taped interview on the issue of whether the Respondent pulled a gun from his right pant pocket or directly from the front of his pants.[1]
49. Additionally, there is contradictory testimony about whether Matthew with his friend at the time that he saw the 3 males in the alleyway behind Ballard High School or whether he had previously told his friend to return to class.
50. The Court finds that these inconsistencies are not material and are explicable with passage of time.
51. The Court finds that the victim has no motivation to fabricate this story and he had ample opportunity to observe the perpetrator, Nicholas Springfield, who attempted to rob him of his "Beats."

And having made those Findings of Fact, the Court also now enters the following:

CONCLUSIONS OF LAW

I.

The above-entitled Court has jurisdiction of the subject matter and of the Respondent in the above-entitled cause.

II.

The following elements of the crimes charged have been proven by the State beyond a reasonable doubt:

Attempted Robbery in the First Degree

(1) That on or about 9 January 2015, the Respondent did an act that was a substantial step toward the commission of robbery in the first degree;
(2) That the act was done with the intent to commit; and
(3) That the act occurred in the State of Washington.

A person commits the crime of attempted robbery in the first degree when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime. A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation. A person commits the crime of robbery in the first degree when in the commission of a robbery he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon. A person commits the crime of robbery when he unlawfully and with intent to commit theft thereof takes personal property from the person of

[1] The Court believes that Respondent's counsel may have misheard the interview statement as 'back' pocket, but it was actually 'right' pocket.

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another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. A threat to use immediate force or violence may be either expressed or implied. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

In this case, to convict the Respondent, Nicholas Springfield, of the crime of attempted robbery in the first degree, each of the forgoing elements of the crime must be proven beyond a reasonable doubt.

On the issue of the identification of Nicholas Springfield by Matthew Schultz, a "show up," as occurred here, is inherently suggestive, but may not be *per se* impermissibly so. Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). State v. Rogers, 44 Wn.App. 510, 722 P.2d 1349 (1986). Under certain circumstances, a show-up may be unnecessarily suggestive. Foster v. California, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). State v. Traweek, 43 Wn.App. 99, 715 P.2d 1148 (1986) *disapproved of on other grounds by* State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). If a showing is made that a show-up is unduly suggestive, the Court will consider the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). Traweek, *supra*.

This Court need not review the totality of the circumstances here because there is no preliminary showing that the show-up was unnecessarily suggestive. State v. Guzman-Cuellar, 47 Wn.App. 326, 734 P.2d 966 (1987). In this instance, the perpetrator was a person known to the victim. Although Matthew Schultz did not know Nicholas Springfield by name, he recognized him as an individual who had attended Ballard High School and he was familiar with him from having seen him on several prior occasions.

Even if this Court were not to consider those factors, under a totality of the circumstances test, the reliability of Matthew's identification of Nicholas Springfield weighs heavily in favor of finding such an identification reliable. Under Washington law, the trial court considers the following factors:

1. The opportunity of a witness to view the criminal at the time of the crime
2. The witness' degree of attention
3. The accuracy of witness' prior description of the criminal
4. The level of certainty demonstrated at confrontation
5. The time between crime and confrontation

State v. Maupin, 63 Wn.App. 887, 822 P.2d 355 (1992). Here, Matthew had considerable opportunity, an estimate of 3 minutes, to witness the perpetrator at the time of the crime; he was face to face with the perpetrator; he recognized the perpetrator as someone with whom he had attended school; he spontaneously identified the perpetrator when brought to scene; and a relatively short period of approximately 30 minutes had passed between the commission of the crime and the identification of the Respondent. For these reasons, the Court concludes that the identification of Nicholas Springfield as the perpetrator of the attempted robbery at the time of the show-up outside Ballard High School by Matthew Schultz was both accurate and reliable.

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Based on this Court's Findings of Fact, the Court concludes that the State has carried its burden beyond a reasonable doubt, proving

(1) That on or about 9 January 2015, the Respondent, Nicholas Springfield, did an act that was a substantial step toward the commission of robbery in the first degree –specifically, the Respondent displayed a handgun and placed it on the thigh of victim, Matthew Schultz, while demanding that Matthew give the Respondent his "Beats" headphones worn on his head, and his actions constituted threatened use of immediate force, violence, or fear of injury to Matthew for the purpose of obtaining Matthew's property against his will;

(2) That the act was done with the intent to commit armed robbery because the Respondent acted intentionally in displaying the gun and making demands from the victim Matthew Schultz; and

(3) That the act occurred outside Ballard High School in the City of Seattle, County of King, in the State of Washington.

III.

Based on the forgoing Findings of Fact and Conclusions of Law, the Court adjudicates the Respondent, Nicholas Springfield, guilty of the crime of as charged in the

IV.

Judgment should be entered in accordance with Conclusion of Law.

DONE IN OPEN COURT this 28th day of August, 2015.

JUDGE JOHN P. ERLICK

Presented by:

Deputy Prosecuting Attorney
Leila Curtis, WSBA # 38098

Approved as to form:

Respondent
Nicholas Springfield

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74000-8-I
v.	)	
	)	
N.S.,	)	
	)	
Juvenile Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] [PAOJuvenileFiling@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] N.S. 6746 ALONZO AVE NW #1 SEATTLE, WA 98117	(X) ( ) ( )	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF MARCH, 2016.

X_____

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