Supreme Court No. 96089-5
(COA No. 34575-1-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN TORRES,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
A. IDENTITY OF PETITIONER 1
B. COURT OF APPEALS DECISION 1
C. ISSUES PRESENTED FOR REVIEW 1
D. STATEMENT OF THE CASE 2
E. ARGUMENT 3
1. This Court should address whether changes in the way adults and juveniles are treated now requires court to return the right to a jury trial to juveniles charged with crimes. 3
a. Juvenile court provides insufficient protection to justify denying Benjamin his right to a jury trial. 4
b. The Sentencing Reform Act conflicts with Benjamin's lack of a right to a jury trial. 7
c. The denial of jury trial rights for children is contrary to the Sixth Amendment. 9
d. The jury trial guarantees of the State Constitution provide juveniles the right to a jury. 11
e. The failure to provide Benjamin with the right to have his case heard before a jury denied him his due process. 13
2. Review should be granted to determine whether the government established that force was used in the taking retaining stolen property was sufficient to prove robbery in the first degree. 13
3. Review should be granted to determine whether the government established that the off-the-clock employee against whom force was allegedly used had an ownership interest in or dominion and control over the property stolen from Safeway. 15
F. CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) 8
Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 8
Blakely v. Washington, 542 U.S. 296, 124 S .Ct. 2531, 159 L. Ed. 2d 403 (2004) 8
Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) 8
In re Det. of Anderson, 185 Wn.2d 79, 368 P.3d 162 (2016) 5, 6
In Re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) 9
In re L.M., 286 Kan. 460, 186 P.3d 164 (Kan. 2008) 4
Monroe v. Soliz, 132 Wn.2d 414, 939 P.2d 205 (1997) 4
Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) 8
Southern Union Co. v. United States, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012) 8
State v. Chavez, 163 Wn.2d 262, 180 P.3d 1250 (2008) 4
State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 11
State v. Lawley, 91 Wn.2d 654, 591 P.2d 772 (1979) 4
State v. Manchester, 57 Wn. App. 765, 790 P.2d 217 (1990) 14, 15
State v. Maynard, 183 Wn.2d 253, 351 P.3d 159 (2015) 7
State v. Newlum, 142 Wn. App. 730, 176 P.3d 529 (2008) 8
State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) 7
State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015) 15, 16
State v. Robinson, 73 Wn. App. 851, 872 P.2d 43 (1994) 14, 15
State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987) 12
State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) 11, 13
United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) 8

Statutes

Ch. 18, § 2, 1905 Wash. Laws 12
Ch. 65, § 1, 1937 Wash. Laws 12

Code of 1881, ch. 87, § 1078 4
RCW 10.05 7
RCW 10.97.050 5
RCW 13.04.011 5
RCW 13.40.0357 7
RCW 13.40.070 7
RCW 13.40.077 5
RCW 13.40.127 7
RCW 13.40.160 7
RCW 13.40.165 7
RCW 13.40.215 ..... 5, 6
RCW 13.40.230 4
RCW 13.40.280 5
RCW 13.40.480 5
RCW 13.50.260(4) 5, 6
RCW 2.30.010 6
RCW 3.50.330 7
RCW 3.66.068 7
RCW 35.50.255 7
RCW 43.43.735 5
RCW 43.43.754 5
RCW 43.43.830 5
RCW 72.01.410 5
RCW 9.94A.525 9
RCW 9.94A.670 7
RCW 9A.44.130 5
RCW 9A.44.143 6

Other Authorities

LEAD, Law Enforcement Assisted Diversion 7
Mack, Julian, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909) 9, 10
Paulsen, Monrad, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Sup. Ct. L. Rev. 167 (1966) 9
U.S. Dep't of Justice, *Dru Sjodin National Sex Offender Public Website* 6
Washington Courts, *Drug Courts & Other Therapeutic Courts* 6

Rules

JuCR 7.12 5
RAP 13.3..... 1
RAP 13.4..... passim

Constitutional Provisions

Const. art. I, § 21 ..... 11, 12
Const. art. I, § 22 ..... 11, 12
U.S. Const. amend. 14 8
U.S. Const. amend. 6 ..... i, 8, 9, 10

A. IDENTITY OF PETITIONER

Benjamin Torres, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Benjamin seeks review of the Court of Appeals decision dated June 12, 2018, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Are courts required to provide juveniles with the right to a jury trial under the state and federal constitutions?

2. Did the government present sufficient evidence force was used in the taking and retention of the property stolen from Safeway when the evidence established Benjamin only brandished a weapon after the property had been taken and the escape effectuated?

3. Did the government present sufficient evidence an off-the-clock employee who had no intention of recovering stolen property had sufficient dominion and control of the property to establish robbery in the first degree?

D. STATEMENT OF THE CASE

J. M. was on his way to start his shift at the Mead Avenue Safeway in Yakima when he saw a boy walk quickly into the store. RP 10, 11. J. M. parked his car and started walking into Safeway. RP 11. The same boy came back out of the store with a twelve pack of beer. RP 12. The boy got into a car with four other young persons. RP 14. The person driving the car left the lot at a slow speed. RP 16.

As the car was leaving the lot, J. M. took pictures of the car with his cell phone. RP 12-13. He made no attempt to stop the car. RP 28. Instead, J. M. took three pictures and then turned to go into the store. RP 13, 28-29. As he turned to go into the store, he heard someone from the car say "Hey" three times. RP 1, 29. He looked up to see the front passenger, identified as Benjamin, holding a firearm. RP 17, 29. This firearm was not pointed at J. M. but rather pointed up into the air. RP 16, 30. When J. M. saw the gun, he thought it was displayed so the young people would not get into trouble. RP 24.

J. M. stated he had no intention of stopping the theft. RP 27. He understood his company's policy is for employees to not resist thefts and that they get into trouble when they do. RP 27. He made no attempt

to stop the young people from leaving the scene, stand in their way or even yell at them to stop. RP 29.

J. M. continued into the Safeway, where he found the loss prevention officer, Nicholas Bacus. RP 19. Mr. Bacus was able to use the information given to him by J. M. to provide a description of the vehicle to the police. RP 73. The young persons were arrested shortly after the police were alerted. RP 43.

E. ARGUMENT

1. **This Court should address whether changes in the way adults and juveniles are treated now requires juveniles to be afforded the right to a jury trial.**

While the Court of Appeals held that Benjamin was not entitled to a jury trial, one of the members of the Court agreed that he should have been granted the right to jury trial, but that precedent prevented the Court of Appeals from providing Benjamin with this right. Slip Op. 4. This Court should grant review of this issue to address whether Benjamin was entitled to a jury trial when he was prosecuted in juvenile court. RAP 13.4(b).

When Washington enacted its constitution, children charged with crimes had the right to a jury trial. This Court has stated 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). Because this distinction is virtually non-existent, this Court should grant review to determine whether it is now time to provide juveniles with the right to a jury trial. RAP 13.4(b).

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

The goals of the adult and juvenile systems have reached similar balances in terms of punishment and rehabilitation. The juvenile court system has become more punitive while the adult system has focused upon rehabilitation. *In re L.M.*, 286 Kan. 460, 460, 186 P.3d 164 (Kan. 2008). This Court should take review to determine whether the failure to provide Benjamin with jury trial rights violated his due process.

i. <u>The advantages of remaining in juvenile court have decreased.</u>

Juveniles like Benjamin increasingly find themselves sentenced much like adults. Juvenile sentences have been lengthened and the legislature has added a "clearly too lenient" aggravating factor to allow manifest injustice sentences. RCW 13.40.230(2). Although courts

distinguish between an "adjudication" and a "conviction," this distinction is not apparent in the code. *See* RCW 13.04.011(1); *see also In re Det. of Anderson*, 185 Wn.2d 79, 85-86, 368 P.3d 162 (2016) (citing the lack of a distinction between RCW 13.40.077, RCW 13.40.215(5); RCW 13.40.480, RCW 13.50.260(4); and JuCR 7.12(c)-(d)).

This is apparent in the true-life consequences Benjamin must deal with. Benjamin is required to provide the court with his personal data, including his DNA and fingerprints. RCW 43.43.754, RCW 43.43.735. No restrictions exist on the dissemination of his record. RCW 10.97.050. Background checks apply equally to him as to an adult. RCW 43.43.830(6).

Youth convicted in juvenile court may be housed in adult prisons. RCW 13.40.280. Likewise, juveniles who are tried in adult court with the right to a jury trial may serve their sentences in a juvenile facility. RCW 72.01.410.

If Benjamin had been a sex offender, the consequences would be even more serious. Registration would be required. RCW 9A.44.130. And even though youth have a greater ability to be removed from the registration list than an adult, there it is no guarantee they will

be. *See* RCW 9A.44.143(2). Notice must be provided to law enforcement and to the schools. RCW 13.40.215. The Department of Justice maintains an easily searchable national registry of sex offenders, including those convicted in juvenile court. *See* U.S. Dep't of Justice, *Dru Sjodin National Sex Offender Public Website*.[1] Even when sealing was made easier for juvenile offenders, children with convictions from some sex offense were exempted. RCW 13.50.260(4). Juvenile sex offenders may also be involuntarily committed without ever committing an adult sex offense. *See, e.g.*, *Anderson*, 185 Wn.2d at 93. Recognizing many of the provisions in RCW 71.09 do not differentiate between youth and adults, this Court found they "nevertheless clearly apply to both." Id.

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

Meanwhile, adult courts increasingly act to rehabilitate defendants. Therapeutic courts have been created with the purpose of rehabilitation. RCW 2.30.010. These courts are intended to rehabilitate, focusing on addiction, domestic violence, mental health, and veterans. Washington Courts, *Drug Courts & Other Therapeutic Courts*.[2]

[1] Available at https://www.nsopw.gov/en.
[2] Available at https://www.courts.wa.gov/court_dir/?fa=court_dir.psc.

Every rehabilitative program created in juvenile court has an equivalent in adult court. Alternative sentences exist for juvenile and adult sex offenders and those with drug dependency. RCW 13.40.160; RCW 9.94A.670; RCW 13.40.0357; RCW 13.40.165. Diversion and deferred sentences are also available for both juveniles and adults. 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*.[3]

Minors and young persons who are tried in adult court with the right to a jury trial can be sentenced as if they were juveniles, even when jurisdiction lapses. *State v. Maynard*, 183 Wn.2d 253, 264, 351 P.3d 159 (2015). Even where a young person over eighteen is prosecuted in adult court, youthfulness is a factor the court may consider. *State v. O'Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015).

b. The Sentencing Reform Act conflicts with Benjamin's lack of a right to a jury trial.

The Sentencing Reform Act increasingly treats juvenile criminal history the same as it does for adult convictions. With no right to a jury, juvenile history should not be scored for adult convictions at all. *See,*

[3] Available at http://leadkingcounty.org/.

e.g., *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616, 621-22, 193 L. Ed. 2d 504 (2016). The Sixth and Fourteenth Amendments require that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 104, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); U.S. Const. amend. 6; 14. Facts which expose 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 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. 343, 360, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), mandatory minimums, *Alleyne*, 570 U.S. at 121 and capital punishment. *Ring v. Arizona*, 536 U.S. 584, 608, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Prior convictions do not need to be proven to a jury for sentencing purposes because the underlying facts have already been presented to a jury. *State v. Newlum*, 142 Wn. App. 730, 744, 176 P.3d 529 (2008).

For Benjamin, this criminal history will score if he is ever convicted of a future offense because no provision exists to "wash-out" his conviction. RCW 9.94A.525(2)(a).Thus, Benjamin's adjudication will have a nearly indistinguishable effect from an adult conviction. Yet, unlike an adult conviction, Benjamin's "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. <u>The Sixth Amendment makes no distinction between adults and juveniles.</u>

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

Most challenges to this system 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). The rationale was questionable. Monrad Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Sup. Ct. L. Rev. 167, 173 (1966) ("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*, a fractured court found that a state juvenile justice scheme that did not provide for a jury trial was constitutionally permissible. 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971). The plurality concluded that juvenile proceedings were not "yet" considered "criminal prosecutions" and thus the due process did not require the guarantee of the right to trial by jury in juvenile courts. *McKeiver*, 403 U.S. at 541.

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

The United States Supreme Court's opinions on the jury trial right demonstrate that issues of reliability, efficiency, and semantics are unimportant when interpreting the Constitution. The only relevant question is "what was the Framer's intent?" The language of the Sixth Amendment made no distinction between adults and juveniles regarding the right to a jury trial. And at the time of enactment, all persons over the age of seven charged with crimes were tried by a jury. Mack at 106. Thus, no matter what 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. Review should be granted to uphold this important constitutional right. RAP 13.4(b).

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 . . . [a] trial by an impartial jury . . ." This Court has recognized that the jury right 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 *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 constitutions, supported such a conclusion. *Id*. at 150-52. So too, does the fact that the prosecution of crimes 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*. The Court determined the scope of the jury-trial right must be determined based on the right as it existed when the constitution was adopted. 150 Wn.2d at 153. *Smith* based its conclusion on one principal fact: there was no

provision for jury sentencing when the State constitution was enacted. *Id*. at 154. Because the right did not exist when the Constitution was enacted, it was not embodied within the jury trial rights of Article I, § 21 and Article I, § 22.

By contrast, when the Washington Constitution was adopted, no differentiation existed between the right to a jury for juveniles or adults. Juveniles were still statutorily entitled to a trial by jury until 1937 when the Legislature struck the right. Ch. 65, § 1, 1937 Wash. Laws at 211. The original juvenile court statute 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 made in 1909, 1913, 1921, and 1929.

In *State v. Schaaf*, the Court concluded the absence of a separate juvenile court at the time of the Constitution's adoption did not mean 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 jury trial right existed prior to 1938, the framers of the Constitution could not know of later efforts to legislate away the right. The effort in *Schaaf* to limit the

framers' intent 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 2017 still has the right to a jury trial.

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

The recognition that children are constitutionally different impacts their right to a jury trial. If children are to be held to the same standards as adults, they must enjoy the same due process rights.

The failure to provide Benjamin with a jury denied him due process. With the purposes of adult and juvenile court continuing to merge, the constitutional right to a jury trial for juveniles becomes clear. This Court should grant review to address this important constitutional question.

2. Review should be granted to determine whether the government established that force was used in the taking retaining stolen property was sufficient to prove robbery in the first degree.

The Court of Appeals relies on *State v. Manchester* to hold that the government established force was used in retaining the property shoplifted from Safeway. Slip Op. at 6 (citing *Manchester*, 57 Wn.

App. 765, 770, 790 P.2d 217 (1990)). Unlike *Manchester*, the evidence here did not establish that Benjamin threatened anyone with a gun to prevent the recovery of property. In *Manchester*, the defendant displayed his weapon after the security guard placed his hands on him in an attempt to recover the property, effectuating his escape. *Id*. at 767.

By extending Manchester, the Court of Appeals creates a conflict with *State v. Robinson*. 73 Wn. App. 851, 857, 872 P.2d 43 (1994). In *Robinson*, a co-defendant jumped out of a vehicle and stole a purse from the passenger of another vehicle. *Id*. The Robinson Court found that Mr. Robinson, who was driving the vehicle used to escape from the completed robbery, could not be found guilty of robbery, as the robbery was a completed act when Mr. Robinson drove away from the scene of the theft. *Id*.

When Benjamin displayed his firearm, the theft had been completed. The car he was sitting in was leaving the parking lot. RP 16. The gun was held in the air and it was not pointed at J. M. RP 16. No threats were made to J. M. RP 28-29. Like *Robinson*, the theft was complete. 73 Wn. App. at 857. The display of the firearm did not aid in the commission of the theft, nor was it used to effectuate the escape.

By relying on *Manchester*, the Court of Appeals expands the definition of robbery in the first degree and creates a conflict with *Robinson*. Because the Court of Appeals decision here is in conflict with *Robinson*, this Court should accept review. RAP 13.4(b).

3. Review should be granted to determine whether the government established that the off-the-clock employee against whom force was allegedly used had an ownership interest in or dominion and control over the property stolen from Safeway.

The Court of Appeals relies on *State v. Richie* to hold that the government established that J.M, an off-the-clock employee of Safeway, had dominion and control of the shoplifted property. Slip Op. 7 (citing *Richie*, 191 Wn. App. 916, 923, 365 P.3d 770 (2015).

To prove dominion and control, the government must establish the property was taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it. *Richie*, 191 Wn. App. at 922. By relying on *Richie*, the Court of Appeals expands the definition of dominion and control. In *Richie*, the clerk took affirmative actions to retain the property that were not taken here. *Id*. at 920. She tried to find a manager before the theft had taken place and alerted other employees about the potential theft. *Id*. She then

reached out to him as he removed the bottles of alcohol from the shelf and stated: "you need to pay for these." *Id*. After being hit on the head with a bottle, the clerk reached for the other bottle and was dragged out of the shop by Mr. Richie, as she was still holding on to the stolen bottle of alcohol. *Id*.

J. M. made clear he had no intention of recovering the property. RP 27. J. M. abided by company policy which forbade employees from attempting to secure the stolen property. RP 27. Instead, J. M. took pictures of the car while it was being driven away from the Safeway. RP 12. This was so he would be able to tell the loss prevention officer the license plate number of the vehicle. RP 13. This passive act was not an attempt to recover the property.

By expanding Richie, the Court of Appeals creates a conflict with current case law. This Court should accept review to correct this error. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, petitioner Benjamin Torres respectfully requests this that review be granted. RAP 13.4(b).

DATED this 12 day of July 2018.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

Table of Contents

Court of Appeals Opinion.....1APP

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

STATE OF WASHINGTON, Respondent, v. BENJAMIN TORRES, Appellant, JACOB ERASOM TELLO, Defendant.	)	No. 34575-1-III ORDER GRANTING MOTION FOR RECONSIDERATION; MOTION TO MODIFY OPINION AND AMENDING OPINION

THE COURT has considered respondent's motion for reconsideration; motion to modify opinion; RAP 12.4(c); RAP 3.4 and is of the opinion the motion should be granted. Therefore,

IT IS ORDERED, the motion for reconsideration; motion to modify opinion of this court's decision of April 24, 2018, is hereby granted.

IT IS FURTHER ORDERED the opinion filed April 24, 2018, is amended as follows:

The caption of the opinion shall be amended to change the appellant's and defendants initials to their full names.

The pseudonym “Bob Tresh” for appellant shall be changed to “Benjamin Torres.”

PANEL: Judges Fearing, Korsmo, Lawrence-Berrey

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY, Chief Judge

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

STATE OF WASHINGTON,	)	
	)	No. 34575-1-III
Respondent,	)	
	)	
v.	)	
	)	
B.T.,	)	UNPUBLISHED OPINION
	)	
Appellant,	)	
	)	
J.E.T.,	)	
	)	
Defendant.	)	

FEARING, J. — Bob Tresh appeals his conviction in juvenile court for first degree robbery. He contends that a bench trial violated his constitutional right to a jury trial and that insufficient evidence supported his conviction. We disagree with both contentions and affirm his conviction.

FACTS

We bestow pseudonyms on all minors, including the appellant. This prosecution arises from appellant Bob Tresh's participation in a theft from a Safeway store where principal witness and victim Joshua Morency worked.

On April 17, 2016, Joshua Morency arrived minutes late to work as a clerk at a Safeway grocery store. His work duties included stocking shelves, assisting customers, sweeping, mopping, and garbage collection. As he arrived in his car on April 17, Morency looked for a parking spot in the parking lot when he stopped to allow a male, later identified as Joseph Tate, to cross the parking lot to enter the store. Morency parked and walked through the parking lot toward the store while wearing his Safeway name tag and carrying a bright orange vest with fluorescent stripes. As Morency approached the store entrance, Tate fled the store with a twelve pack of Corona beer. Because of Tate's speed and youthful appearance, Morency believed the teenager had stolen the beer. Tate jumped into a parked car occupied by three other teenagers, including Bob Tresh. The car's occupants yelled at the driver, Elaine Rush, to leave the parking spot.

Joshua Morency reacted to Joseph Tate's conduct by photographing, with his cell phone, Tate and the car he entered to show the Safeway loss prevention officer. Morency did not confront Tate or the occupants of the car because Safeway directs its employees to not resist thefts. After he photographed the car and turned his back to the car in order to enter the store, Morency heard someone yell "hey, hey." Report of Proceedings (RP) at 29. Morency turned to see fifteen-year-old Bob Tresh holding a handgun in the air. Morency grew frightened from worry that Tresh might shoot him to avoid trouble. Elaine Rush testified at trial that she first noticed Tresh handling the gun when she placed the car in reverse within its parking spot.

After entering the grocery store, Joshua Morency informed the Safeway Loss Prevention Officer Nicholas Bacus that someone selected a case of Corona and exited the store too quickly to have purchased the beer. Bacus called the police, who arrived at the Safeway within minutes. Morency showed an officer the pictures he had captured on his phone.

Yakima law enforcement officers traveled to the address of the pictured vehicle's registered owner. A vehicle that matched the photograph was parked near the address, and four young adults still occupied the car. Joshua Morency also journeyed to the address and identified each occupant as being involved in the theft at the Safeway store. After garnering a search warrant for the vehicle, officers found the stolen twelve-pack case of Corona and a backpack. The backpack contained a black and silver 9mm handgun, three Xanax pills, and Bob Tresh' state and school identification.

PROCEDURE

The State of Washington charged Bob Tresh in juvenile court with possession of a controlled substance and first degree robbery as an accomplice with a firearm enhancement. Tresh never argued to the juvenile court that the constitution afforded him a jury trial. During the bench trial, Tresh did not testify or call any witness to testify. The juvenile court convicted Tresh as charged.

LAW AND ANALYSIS

Jury Trial

On appeal, Bob Tresh contends that a bench trial violated his constitutional right to a jury trial and that insufficient evidence supported his conviction for first degree robbery. We address these assignments of error in such order.

Bob Tresh asserts a constitutional right to a jury trial under U.S. CONST. amend. VI and WASH. CONST. art. I, §§ 21 and 22. Nevertheless, both the United States Supreme Court and the Washington Supreme Court have held that a juvenile charged with a crime lacks a constitutional right to a jury trial under the respective constitutions. In *McKeiver v. Pennsylvania*, 403 U.S. 528, 541, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971), the nation's high Court held that juvenile court proceedings are not criminal prosecutions within the meaning and reach of the Sixth Amendment and thus a juvenile lacks a Sixth Amendment right to a jury trial. Our state high court has consistently ruled that a juvenile lacks a right to a jury trial under the Washington Constitution. *State v. Chavez*, 163 Wn.2d 262, 272, 180 P.3d 1250 (2008); *Monroe v. Soliz*, 132 Wn.2d 414, 419, 939 P.2d 205 (1997); *State v. Schaaf*, 109 Wn.2d 1, 16, 743 P.2d 240 (1987); *State v. Lawley*, 91 Wn.2d 654, 659, 591 P.2d 722 (1979); *In re the Welfare of Estes v. Hopp*, 73 Wn.2d 263, 265, 438 P.2d 205 (1968). One member of this court agrees with the arguments asserted by Tresh in favor of a right to a jury trial, but this court must follow the precedent of the two higher courts.

We note that Bob Tresh did not seek a jury trial before the superior court and did not argue before the superior court that he held a constitutional right to a jury. Thus, Tresh waived the right to assert this purported right on appeal. Since no Washington Supreme Court or United States Supreme Court decision affords the juvenile a right to a jury trial, Tresh does not show manifest constitutional error needed to forward his assignment of error on appeal. RAP 2.5(a)(3).

First Degree Robbery

Bob Tresh also challenges the sufficiency of evidence to convict him of first degree robbery. In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). We uphold the verdict if any rational trier of fact could have found each element proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The State may use circumstantial evidence to prove any element of a crime. *State v. Garcia*, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978).

RCW 9A.56.190 creates the crime of robbery. The statute declares:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of

> injury to that person or his or her property or the person or property of anyone. Such 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. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Robbery in the first degree constitutes:

> (1) A person is guilty of robbery in the first degree if:
> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
> (i) Is armed with a deadly weapon; or
> (ii) Displays what appears to be a firearm or other deadly weapon; or
> (iii) Inflicts bodily injury; or
> (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200.

Bob Tresh challenges two of the elements of first degree robbery. First, Tresh argues that the State of Washington failed to establish that he employed force to take or retain the stolen property. He contends he displayed the firearm only after the completion of the taking and the escape. Yet, Washington has a transactional analysis of robbery whereby the force or threat of force need not precisely coincide with the taking. *State v. Manchester*, 57 Wn. App. 765, 770, 790 P.2d 217 (1990). The taking continues until the assailant effects an escape. *State v. Manchester*, 57 Wn. App. at 770. A robbery continues as an ongoing offense so that force used to obtain the property, force employed

to retain the stolen property, or force exerted to effect an escape satisfies the force element of robbery. *State v. Robinson*, 73 Wn. App. 851, 856, 872 P.2d 43 (1994).

We agree that Joseph Tate had completed his physical taking of the beer before Bob Tresh brandished his firearm. But, contrary to Tresh' contention, the occupants of the car had not accomplished their escape. The car remained in the Safeway parking lot. Elaine Rush, the driver, testified to seeing Tresh flaunt the gun when she pulled from the parking spot. Joshua Morency had not entered the grocery store and walked in the parking lot when Tresh yelled "Hey" two times while pointing the gun in the air. The wielding of the gun understandably frightened Morency because he viewed Tresh as using the gun in a threatening manner in order to avoid capture for theft. A rational trier of fact could have found that Tresh displayed the weapon to effectuate an escape.

Bob Tresh next argues that the State failed to show that the person Tresh threatened with the gun, Joshua Morency, owned or acted as a representative of the owner of the stolen property. For the taking of property in the presence of a person to constitute a robbery under RCW 9A.56.190, that person must have (1) an ownership interest in the property taken, (2) some representative capacity with respect to the owner of the property taken, or (3) actual possession of the property taken. *State v. Richie*, 191 Wn. App. 916, 923, 365 P.3d 770 (2015).

Safeway owned the purloined beer, so we must determine if Joshua Morency functioned as a representative of the grocery chain. A person with a representative

capacity includes a bailee, agent, employee, or other representative of the owner if he or she has care, custody, control, or management of the property. *State v. Richie*, 191 Wn. App. at 925. Stealing property in the presence of the owner's employee can support a robbery conviction because the employee has the implied responsibility of exercising control over the property. *State v. Blewitt*, 37 Wn. App. 397, 399, 680 P.2d 457 (1984).

In *State v. Richie*, 191 Wn. App. 916 (2015), a Walgreens store employee arrived early for her work shift. She entered the store wearing a coat over her store badge and store shirt. The employee selected a beverage to drink and ambled to the front register to pay for the beverage. The employee noticed Michael Richie walk toward the liquor section of the Walgreens. Richie then walked toward the front of the store carrying one bottle of alcohol in each hand and passed the employee at the register. The employee blurted, "'Sir, you need to pay for that here. Let me help you.'" *State v. Richie*, 191 Wn. App. at 920. Richie struck the employee in the head with one of the bottles and fled the store. On appeal, Richie argued that the Walgreens employee did not act in a representative capacity at the time of the assault because she was not on duty and her coat covered her Walgreens name tag and shirt. This court found a rational jury could have found she acted in the scope of her employer's interests at the time of the robbery regardless of whether she had begun her shift.

State v. Richie controls this appeal. As a store clerk, Joshua Morency held actual duties over the store inventory and in assisting customers and implied, if not express,

responsibility of controlling Safeway property. Whether Morency had begun his shift lacks relevancy. As he walked through the parking lot bearing the bright orange vest, Morency's Safeway nametag was visible. Morency photographed the vehicle so he could save "evidence" to show the loss prevention officer. He took this action in order to benefit the company. As such, a rational trier of fact could find that Morency acted in a representative capacity of Safeway.

Bob Tresh also argues that Joshua Morency's taking of photographs for a future investigation of a crime does not amount to a means of resistance. Because we hold that Tresh employed force, we need not address this additional argument.

CONCLUSION

We affirm Bob Tresh's juvenile court conviction for first degree robbery.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BENJAMIN TORRES, Petitioner.	)))))))))	COA NO. 34575-1-III

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JULY, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF JULY, 2018.

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