Supreme Court No. 93782-6

No. 74000-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

N.J.S,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

N.J.S., appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. N.J.S. appealed his juvenile conviction for attempted robbery in the first degree in King County Superior Court. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

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, was the Court of Appeals decision in conflict with decisions of this Court, requiring that this Court review this decision? RAP 13.4(b)(1)?

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, since juveniles face many of the same consequences adults face, without the procedural protections afforded to adults. Were N.J.S.'s due process rights under the federal and state constitution denied when the court failed to provide him with a jury trial, and as such, does the Court of Appeals require review? RAP 13.4(b)(1), (4)?

D. STATEMENT OF THE CASE

On January 9, 2015, Matthew S. was excused from school early. RP 142, 282-83.[1] A Ballard High School freshman, Matthew had an appointment that day after school, so his mother had arranged to pick him up early. Id.

Matthew later said that as he waited for his mother in the school parking 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

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

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 a reportedly armed assailant still on the loose. Matthew, as well, seemed comfortable "jogging" over to the school. RP 304.

Meanwhile, Ballard High School security officer Craig Plummer had been following N.J.S., a young man against whom Plummer had already requested a no-trespassing warrant, since N.J.S. had been expelled from the high school. RP 233, 240-43. N.J.S. lives

less than a block from Ballard High School. RP 583; CP 2.[2] Plummer also seemed to have a longstanding grudge against N.J.S., which became clear when Plummer threatened to "beat the hell out of" him in front of law enforcement. RP 240-43.[3] When confronted with the SPD in-car video of his tirade, Plummer could only suggest that his statements to N.J.S. were taken out of context. RP 244. Plummer also maintained he was only "trying to wise him up." RP 244.

As Plummer followed N.J.S. with a criminal trespassing warrant, Plummer decided to call SPD officers in order to have N.J.S. detained in connection with Matthew's allegations. RP 233, 252-53. When SPD Officer Trung Nguyen arrived, Plummer pointed out N.J.S. 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" N.J.S.. 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

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[2] N.J.S.'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.

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

Matthew described this alleged assailant to her was an hour and a half after he returned home from the identification procedure at the high school. RP 166-67.[4] 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, N.J.S. was actually identified by security officer Plummer, not by Matthew.

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

N.J.S. 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.

N.J.S. was convicted, following a bench trial. CP 41-47 (court's findings of fact and conclusions of law).

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

He timely appealed his juvenile conviction, raising the constitutional violations raised herein. On September 26, 2016, the Court of Appeals affirmed his conviction. Appendix.

He seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND BECAUSE THE JURY ISSUE IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(b)(1), (4).

1. There was insufficient evidence to prove that N.J.S. was guilty of the crime of conviction.

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).

Here, the State failed to prove the essential element of identity. The State did not prove beyond a reasonable doubt that N.J.S. 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.[5]

The contradictions in the State's case 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); see also Slip Op. at 5-6.

[5] The many inconsistencies in the State's case are discussed at length in Appellant's Opening Brief.

Other inconsistencies in Matthew's testimony indicate a lack of sufficient evidence, rather than mere passage of time. For example, Matthew testified that the assailant pulled a gun from his pants. RP 321. However, the pants that N.J.S. wore that day did not have pockets of sufficient size to hold a firearm. RP 341. These "lounge pants," as N.J.S.'s father called them, were also too flimsy to support a firearm in the waistband. Id. N.J.S.'s father also testified that N.J.S. 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, several of the State's witnesses were biased against N.J.S., which colored their testimony. Ballard High School security guard Plummer was captured on police videotape threatening to "beat the hell out of" N.J.S., a 15 ½ year-old former student. RP 240-43. It was due solely to Plummer's actions that N.J.S. 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.[6]

It was no coincidence that N.J.S. – 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 N.J.S.). When Matthew identified N.J.S., N.J.S. 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 N.J.S.'s interrogation at the North Precinct on January 9, 2015. RP 193-95. Although defense counsel did not object, N.J.S. 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.

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[6] N.J.S. was acquitted of the other robbery allegations.

The evidence presented at trial was simply inadequate to prove N.J.S. was the person involved in this incident – or indeed, that any incident occurred at all. His conviction, rested on insufficient evidence. Jackson, 443 U.S. at 318; Winship, 397 U.S. at 364.

This Court should grant review. RAP 13.4(b)(1).

2. The failure to provide N.J.S. a jury trial 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 N.J.S. 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 N.J.S.'s right to a jury trial was denied and reverse his conviction.

a. Juvenile court provides insufficient protection to justify denying N.J.S. 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, N.J.S. 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 N.J.S. with jury trial rights violated due process and entitles him to a new trial; for this reason, this Court should grant review. RAP 13.4(b)(4)

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

Juveniles like N.J.S. 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 N.J.S.'s "adjudication" are severe. N.J.S. 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.[7]

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;

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

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 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 N.J.S.'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 N.J.S., 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 N.J.S. 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, N.J.S.'s adjudication will have a nearly indistinguish-able 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 N.J.S. 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 N.J.S. 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 N.J.S. his jury trial rights, thus granting review of this issue of substantial public interest. RAP 13.4(b)(4).

Accordingly, because the Court of Appeals decision is in conflict with decisions of this Court, this published decision requires the review of this Court. RAP 13.4(b)(1), (4).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1). In addition, because the juvenile right to a jury trial is an issue of substantial public interest, review should be granted. RAP 13.4(b)(4).

DATED this 26th day of October, 2016.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICHOLAS J. SPRINGFIELD, B.D. 7/9/99, Appellant.	)	No. 74000-8-I DIVISION ONE UNPUBLISHED OPINION FILED: September 26, 2016

APPELWICK, J. — Springfield appeals his juvenile conviction of attempted robbery in the first degree. He contends that the evidence presented at trial was insufficient to sustain his conviction. He also contends that his federal and state constitutional rights were violated when the trial court did not allow a jury trial for his juvenile adjudication. Lastly, Springfield submitted a statement of additional grounds for review in which he alleges judicial bias, prosecutorial misconduct, and police misconduct. We affirm.

FACTS

M.S. left class at Ballard High School early on January 9, 2015 for an appointment. M.S. walked through an alley that led to the parking lot. He observed three young men in the alley. At the time, M.S. was wearing a pair of headphones. One of the young men in the alley approached him as he walked by. The young

man demanded M.S.'s headphones. He then removed a gun from his pants and pressed it against M.S.'s leg. M.S. refused to hand over his headphones and walked away to meet his mother in the school parking lot. M.S. later identified Nicholas Springfield, a juvenile, as the attempted robber. M.S. estimated that he was face-to-face with Springfield for approximately 10 seconds.

M.S. initially did not tell his mother about what had just occurred. Before taking M.S. to his appointment, M.S. his mother drove to a nearby Goodwill storeM.S., where M.S. told her about the attempted robbery. M.S.'s mother immediately called the school. She and M.S. then spoke with Ballard security guard Vilando Wynter via phone. During this conversation with Wynter, M.S. stated the number of people present during the encounter and the location, but he did not identify the individual who demanded the headphones. After a short conversation, M.S. returned to school to meet with security.

M.S. met security near Ballard High. Seattle Police officers had had detained Springfield and frisked him for weapons. The officers did not recover any weapons.

The officers then met with Ballard High School Security Officer Craig Plummer. M.S. testified that when he approached the officers and Plummer, he observed Springfield in the custody of the officers. M.S. then identified Springfield as the individual who attempted to rob him. M.S. testified that he recognized him and knew his name from previous encounters. Springfield was charged with attempted robbery.

At trial, M.S. identified Springfield as the individual that demanded his headphones at gun point. The trial court found that M.S.'s testimony and identification of Springfield was sufficiently reliable. Accordingly, the trial court convicted Springfield of attempted robbery in the first degree. The court sentenced Springfield to 27 weeks of commitment to the Juvenile Rehabilitation Administration, and nine months of court-ordered supervision. Springfield appeals.

DISCUSSION

Springfield makes three arguments on appeal. First, he argues that the evidence at trial was insufficient to sustain a conviction for attempted robbery. Second, he argues that the trial court violated his state and federal constitutional rights by not permitting a jury trial for his juvenile proceeding. Third, he asserts judicial bias, prosecutorial misconduct, and police misconduct.

I. Sufficient Evidence of Attempted First Degree Attempted Robbery

Springfield argues that the trial court erred in ruling that the evidence was sufficient to sustain a conviction of attempted robbery in the first degree. Specifically, Springfield argues that there was insufficient evidence to prove that he was the person who committed the attempted robbery, and thus the prosecution failed to carry its burden with respect to identity. Springfield asserts that, because he was identified by only M.S. and M.S.'s credibility was called into question at trial, the evidence was insufficient to prove identity beyond a reasonable doubt.

When faced with a challenge to the sufficiency of the evidence, this court asks whether any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). In doing so, we view the evidence in the light most favorable to the State. Id. at 221. A claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact, and we do not review them on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

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. RCW 9A.56.190. A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A person commits a robbery in the first degree if the defendant is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon. RCW 9A.56.200(1).

Springfield points to various portions of the record to support his argument that the evidence presented was insufficient to support a conviction of attempted robbery. First, Springfield cites M.S.'s conflicting accounts of whom he told first about the attempted robbery. At the bench trial, M.S.'s testimony contained some inconsistencies compared to his original statement to police. Most notably, M.S. originally told police in a recorded statement that he saw a friend immediately prior to the attempted robbery and told the friend to leave as Springfield approached

him. But, in his testimony, M.S. stated that he did not remember anyone else being present in the alley at the time of the incident. M.S. also told police that he had told a friend about the incident once they "were inside." During his testimony, M.S. stated that the first person he told about the incident was his mother and that he could not recall telling a friend about the incident. Springfield also notes that M.S. testified that Springfield removed the gun from either his pocket or waistband. But, there was evidence that the pants Springfield was wearing that day had pockets that were too small and a waistband that was too flimsy to hold a gun.

Springfield claims that this identification was not reliable due to "the lack of consistent evidence." This court will not second guess a fact-finder's credibility determination. Camarillo, 115 Wn.2d at 71. We will not disturb the trial court's finding that M.S.'s identification was credible.

Springfield next argues that Plummer, a Ballard High security guard, deliberately facilitated a false identification of Springfield based on personal disdain for Springfield. He points to Plummer's postarrest statement to N.J.S., " '[I'll] beat the hell out of you,' " as evidence of this bias against N.J.S.[1] Plummer's disdain for Springfield does not establish that a false identification by M.S. occurred. No other evidence supports that theory. During his testimony, M.S. specifically identified Springfield as the individual who attempted to rob him. M.S.

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[1] N.J.S. also argues that the trial judge's fully disclosed prior relationship with a testifying detective warranted recusal. But, a prior relationship with a witness would only be grounds for recusal if nonrecusal is " 'manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.' " State v. Gentry, 183 Wn.2d 749, 763, 356 P.3d 714 (2015) (quoting Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999)). Nothing in the record suggests that the trial court's actions were manifestly unreasonable.

testified that he knew N.J.S.'s name and physical appearance from previous encounters. And, other witnesses testified that M.S. identified Springfield during the meeting with police shortly after the attempted robbery took place. The trial court found this testimony credible, and we will not disturb that finding.

Viewing the evidence in the light most favorable to the state, we hold that sufficient evidence supports Springfield's conviction for attempted robbery in the first degree.

II. Juvenile Right to Jury Trial

Springfield also argues that the trial court violated Springfield's federal and state constitutional rights by not providing him with a trial by jury. He argues that this violated both the Sixth Amendment of the U.S. Constitution, and article I sections 21 and 22 of the Washington Constitution. In effect, this argument seeks to invalidate RCW 13.04.021(2), which states that "[c]ases in the juvenile court shall be tried without a jury." In support of this argument, N.J.S. asserts that consequences of juvenile adjudications have become "nearly indistinguishable" from adult adjudications, and therefore require a trial by jury.

Whether a juvenile is constitutionally entitled to a trial by jury is a question of law that we review de novo. State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). The Washington Supreme Court addressed this question in State v. Chavez, 163 Wn.2d 262, 272, 180 P.3d 1250 (2008). In that case, Chavez argued that juvenile offenders have a right to a jury trial under the Sixth Amendment to the United States Constitution and under article I, sections 21 and 22 of the Washington State Constitution. Id. at 266. The court unequivocally rejected this

argument. Id. at 272. It reasoned that while punishment is the paramount purpose of the adult criminal system, the policies of the Juvenile Justice Act (JJA), ch. 13.40 RCW, are twofold: to establish a system of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders, and to hold juveniles accountable for their offenses. Id. at 267-68. Springfield's arguments are nearly identical to those made by Chavez. Although he asserts that the juvenile justice system has become similar to the adult criminal system such that a jury trial is required, Chavez still controls. Under Chavez, juveniles do not have a right to a jury trial under the Washington Constitution. Id. at 272. The trial court did not err in denying Springfield a jury trial.[2]

III. Statement of Additional Grounds for Review

Springfield makes three additional arguments in a statement of additional grounds for review. First, he argues that the trial court's findings were a result of a bias against Springfield. Second, he argues that the prosecution engaged in prosecutorial misconduct by presenting testimony that contradicted a videotape recording. Third, he argues that the police failed to properly investigate verbal abuse by Plummer and therefore his conviction should be overturned.

A. Judicial Bias

Springfield claims that a handful of the trial court's determinations reflect a judicial bias that influenced the trial court's findings. First, he claims that the trial

[2] We also note that, contrary to Springfield's arguments, the Sixth Amendment to the United States Constitution does not require a jury trial in juvenile proceedings. McKeiver v. Pennsylvania, 403 U.S. 528, 545, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); see also United States v. Juvenile, 228 F.3d 987, 990 (9th Cir. 2000).

court's finding that Wynter was not credible is evidence of bias. Wynter testified at a CrR 3.5 hearing regarding Springfield's willingness to speak with police. Although the trial court stated during a colloquy with counsel that it did not find Wynter credible, the court ultimately ruled in Springfield's favor on this issue. The court relied on a videotape recording in suppressing Springfield's later incriminating statements. Given that the trial court ruled in favor of Springfield and suppressed his statements, there is no evidence of bias with respect to the CrR 3.5 hearing. Moreover, a trial court's credibility determination alone is not sufficient to prove judicial bias, especially given that the trial court ruled in favor of Springfield on the ultimate CrR 3.5 issue. In re Pers. Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) ("Judicial rulings alone almost never constitute a valid showing of bias.").

B. Prosecutorial Misconduct

Springfield also claims that the prosecution committed misconduct by presenting false testimony. He asserts that the substance of a police video recording is indisputable, and because M.S.'s testimony contradicted an indisputable videotape recording, we must disregard it. According to Springfield, the videotape establishes that Plummer secretly suggested to M.S. that he identify Springfield as the individual who robbed him.

A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the fact-finder. State v. Larson, 160 Wn. App. 577, 594, 249 P.3d 669 (2011). But, Springfield has not designated the videotape as part of

the appellate record. Therefore, we cannot consider his prosecutorial misconduct arguments. State v. Wade, 138 Wn.2d 460, 465, 979 P.2d 850 (1999) ("An appellate court may decline to address a claimed error when faced with a material omission in the record.").

C. Police Misconduct

Finally, Springfield argues that his conviction should be overturned because police failed to report or investigate a threat by Plummer against Springfield. Shortly following his arrest, Plummer told Springfield that he "want[ed] to beat the hell out of you," or something similar. Even assuming Plummer's statement amounted to a crime, Springfield has failed to demonstrate how the police's failure to investigate is material to his case, let alone is grounds for reversal of his conviction.

We affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74000-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: October 26, 2016