No. 96089-5-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT,

v.

BENJAMIN TORRES, APPELLANT.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the unpublished court of appeals decision filed on April 24, 2018, in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Does the unpublished court of appeals decision meet the criteria for review under RAP 13.4(b)?

D. STATEMENT OF THE CASE

After a bench trial, the appellant, Benjamin Torres, was convicted in juvenile court with first degree robbery-accomplice, and possession of a controlled substance. CP 6-7. He did not seek a jury trial or argue he had a right to a jury trial. The convictions were based on the following facts:

On April 17, 2016, seventeen-year-old J.M. went to work at Safeway where he is a clerk. RP 7-9. He arrived at 4:08 p.m., a few minutes late for his 4:00 shift. RP 9-10. He had his Safeway name tag on and was carrying a bright orange vest with fluorescent stripes. RP 10, 25-6. As he was pulling into the parking lot, he saw a male teenager, later identified as Jacob Tello, walking into the store. RP 11. He stopped his car to let the teenager pass. RP 11. In less than a minute, the teenager ran out of the store with a case of beer. RP 12, 38, 75. Because of how fast

the male came out of the store, and the fact that he did not look 21 years of age, J.M. believed that the beer was stolen. RP 28.

J.M. pulled out his phone so he could take pictures of the teenager and car involved. RP 12, 14, 28; SE 5-9. J.M. testified, "I pulled out my phone so I could take photos who it was and the car it was because there was no one else nearby like my managers or the loss prevention guy." RP 12. He also testified that he took photos so he would have evidence. RP 12-3. The photos were later admitted as evidence at trial. SE 5-9.

The teenager with the beer then got in a parked car. RP 15-6. Everyone in the car yelled at the driver, Emma Rangel, to leave so she started pulling out of the parking spot. RP 40-1. At the same time, J.M. was walking into Safeway with his back to the car. RP 14-5, 28-29. At that point, the front seat passenger, fifteen-year-old Benjamin Torres, held a handgun up in the air and yelled, "hey, hey" at J.M. RP 16-17, 29, 39, 41, 94. J.M., who was the only one outside and less than 20 feet away, turned and saw the firearm. RP 29-30, 42. J.M. testified he was scared when he saw the gun. RP 24. He stated, "I thought they were going to like shoot at me because they didn't want to get in trouble." RP 24.

J.M. went into Safeway and told other employees what had happened. RP 18-19. He began looking for Safeway's loss prevention officer (LPO), Nicholas Bacus. RP 19. J.M. testified that he wanted to

talk to the LPO "because he's the guy who stops people from stealing, kind of like an undercover guy who stops people from stealing from the store." RP 19. He found LPO Bacus and told him that someone selected a case of Corona and went out the door too quickly to have purchased it. RP 72-3.

LPO Bacus called the police immediately. RP 19-20, 30, 73. Police officers arrived at Safeway within a couple minutes. RP 20. J.M. wrote a statement for them and an officer took photos of the pictures on J.M.'s phone. RP 22-3, 30; SE 5-9.

Meanwhile, Officer Meyers was also responding to the robbery call. RP 52. Dispatch gave her the plate number, described the color of the vehicle and stated that the hood had a different color than the rest of the car. RP 52. She was dispatched to the address of the car's registered owner, 504 Peach Street. RP 52. She arrived in about five minutes, at 4:28 p.m., and saw a vehicle that matched the description given by dispatch. RP 53; SE 16.

A high-risk stop was conducted. RP 54; SE 16. There were four individuals inside the car, including Torres who was in the front right passenger seat. *Id.* A field show-up was conducted at 4:47 p.m. and J.M. identified each occupant as being involved. RP 20-21, 57; SE A. No one in the car was 21 years old or older. RP 38.

At Safeway, LPO Bacus pulled up surveillance video that showed a teenager enter the store, select a case of Corona off a display at the door, pass all points of sale, and then exit. RP 76; SE 15. The teenage male was in the store for 24 seconds. RP 77; SE 15. LPO Bacus took some still images from the video footage. RP 73. He testified that Safeway employees very often report property crimes to him and that if the crime is in progress, he will go and observe and try to apprehend the suspect. RP 72. If the crime has already occurred, he will pull up video footage and drop it off to detectives for investigation. RP 72.

Detecteve Deloza subsequently obtained a search warrant for the car involved. RP 87. He found the stolen 12-pack case of Corona and a backpack. RP 89. Inside the backpack was a black and silver 9mm Luger Smith & Wesson semiautomatic handgun, three Xanax pills, and Torres's state and school identification. RP 89, 91; SE 26-7. A pill was tested by the crime lab and found to contain a controlled substance. RP 82-3.

At the trial, the State called Emma Rangel, a female who was in the car with Torres. RP 36. She testified that Jacob Tello drove them to the store. RP 36-7. She saw Jacob go into the store and run out with a case of beer. RP 38. He asked her to drive and she did. RP 39. She said that Torres, the front seat passenger, was yelling at a guy who she thought was an employee. RP 39, 41. She remembered that the employee had his

phone out and was about 20 feet from the car. RP 40-1. When she pulled out of the parking spot, she saw Torres pointing a black gun at the employee. RP 41-3. She then drove to Jacob's house and they were there not more than five minutes when officers pulled up. RP 43.

Benjamin Torres did not testify or call any witnesses during the trial. RP 101. He was found guilty of first degree robbery and possession of a controlled substance. RP 113. The trial court also found that he committed the robbery while armed with a firearm. RP 113. Findings of Fact and Conclusions of Law were filed. CP 12-16.

E. ARGUMENT

1. COURTS ARE NOT REQUIRED TO PROVIDE JUVENILES WITH THE RIGHT TO A JURY TRIAL

No Washington Supreme Court or United States Supreme Court decision affords the juvenile a right to a jury trial. The argument that juveniles have a right to a jury been made at both the state and federal levels for literally decades and has consistently been denied throughout history. As such, the Court of Appeals was correct in finding that Torres did not show a manifest constitutional error.

The Sixth Amendment to the United States Constitution provides that, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S. CONST. amend. VI. Juvenile court proceedings, however, are not *criminal prosecutions* within

the "meaning and reach of the Sixth Amendment" and therefore the Sixth Amendment right to a jury trial does not apply to juvenile proceedings. *McKeiver v. Pennsylvania,* 403 U.S. 528, 541, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971). This Court has since held that *McKeiver v. Pennsylvania* is controlling as to the federal constitution and has declined to adopt a more stringent rule under the Washington State Constitution. *State v. Lawley,* 91 Wn.2d 654, 659, 591 P.2d 772 (1979).

This issue has been analyzed repeatedly throughout the history of juvenile court proceedings in Washington State and our courts have repeatedly rejected arguments that are identical to the ones raised here. Despite many changes to the law over time, our courts in Washington State have consistently found that no right to a jury trial exists for juveniles. And Torres has not provided a compelling argument to now overrule these cases and provide juveniles with a right to a jury trial.

In 1968, the Washington State Supreme Court held that jury trials in juvenile proceedings are not a constitutional requisite. *In re the Welfare of Estes v. Hopp,* 73 Wn.2d 263, 438 P.2d 205 (1968). The Court in *Estes v. Hopp* considered the decision of *In re* Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 Sup. Ct. 1428 (1967), which extended many rights held by adults to juveniles. The Court, however, clarified that the Supreme Court was

quite careful to narrowly define both the scope of its inquiry and the effect of its holding. *Id.* at 267. The Court in *Estes v. Hopp* thus concluded:

> We do not believe that the Supreme Court's opinion in *Gault, supra*, is to be considered as a mandate to abandon this beneficial concept of the juvenile court system. Rather, it is a direction that the juvenile be offered the benefits of an informal hearing at which rules of fairness and basic procedural rights are to be observed. Such results can be obtained without the formality of a jury trial. One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of the jury.

Id. at 268. This rationale is still applicable today, when the substantial benefits of the informal juvenile process are still recognized.

This Court was again asked to reconsider jury trials for juvenile delinquent youth in 1979 after sweeping legal changes were made by the 1977 Juvenile Justice Act (JJA). The Court held that a juvenile charged with an offense under the JJA is not constitutionally entitled to a jury trial. *State v. Lawley,* 91 Wn.2d 654, 591 P.2d 772 (1979). In *Lawley,* the appellant argued that the JJA altered the law's focus from concern for treatment and rehabilitation to punishment. *Id.* at 656. While the Court in *Lawley* recognized that the act "substantially restructured the manner in which juvenile offenders are to be treated," the Court rejected the

invitation to extend jury trials to juvenile proceedings. *Id.* The Court in *Lawley* concluded:

> In summary, the legislature has changed the philosophy and methodology of addressing the personal and societal problems of juvenile offenders, but it has not converted the procedure into a criminal offense atmosphere totally comparable to an adult criminal offense scenario. We find *McKeiver* v. *Pennsylvania, supra*, to be controlling as to the federal constitution and decline to adopt a more stringent rule under our state constitution. Because the Juvenile Justice Act of 1977 measures up to the 'essentials of due process,' jury trials are not necessary in juvenile adjudicatory proceedings.

Id. at 659.

In 1987, this question was again raised. In *State* v. *Schaaf,* 109 Wn.2d 1, 743 P.2d 240 (1987), appellants argued that recent developments in the law mandated jury trials for juveniles. Considering amendments to the JJA that increased emphasis on punishment of juveniles, this Court held that despite such amendments, juvenile proceedings remained rehabilitative in nature and they were distinguishable from adult criminal proceedings. *Id.* at 16. As such, the amendments created no right to a jury trial. *Id.* at 15-7.

The *Schaaf* court then went through the analysis established in *State v. Gunwall,* 108 Wn.2d 54, 720 P.2d 808 (1986), to determine

whether our state constitution extends broader rights to citizens than does the federal constitution. *Id*. at 14-17. This Court concluded:

> After full consideration of all aspects of the matter, new and previously raised, we conclude that we should remain with the majority of states which deny jury trials in juvenile cases. Our examination of the *Gunwall* factors leaves us convinced that juvenile offenders are not entitled to jury trials under our state constitution. This is particularly true with respect to the preexisting state law factor, and the statutory insistence of long standing that there be a unique juvenile justice system in this state. Weighted with our consideration of this longstanding precedent is our previous discussion of the current state of the law governing juvenile offenders, under which juvenile proceedings are still distinguishable from adult criminal prosecution, both in terms of procedure and result. We conclude that jury trials are not necessary to fully protect a juvenile offender's rights.

Id. at 16-17. *Schaaf* considered the same argument raised in this case:

> This court has said that section 21 preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Based thereon, defendants claim that section 21 guarantees them jury trials since juveniles charged with criminal acts would have been guaranteed a jury trial at the time this state was a territory. This latter argument, however, overlooks the salient fact that territorial lawmakers did not anticipate the enactment of a separate juvenile justice system. Washington did not

> create a separate juvenile court system until 1905, and did not pass comprehensive legislation concerning the juvenile justice system until 1913. It does no violence to our state's common law history to give credence to a 70-year-old legal system that was nonexistent in our territorial days.

109 Wn.2d at 14. This Court further opined: "We are not impressed by the implicit suggestion that the state of Washington should regress to territorial days and adopt a system where juveniles are treated like adult criminals and are afforded no special protections." *Id.*

Later, in 1999, Division I was asked to reconsider this issue in *State* v. *J.H.,* 96 Wn. App. 167, 976 P.2d 1121 (1999). This came after the 1997 amendments to the juvenile justice code. The court of appeals was asked to consider whether changes to the law have made juvenile proceedings so similar to adult criminal proceedings that juvenile offenders should be entitled to a jury trial. The court concluded:

> The penalties and procedures under the juvenile system thus remain significantly different from those under the adult criminal system after the 1997 amendments. While those amendments somewhat increased its punishment aspect, they also increased its rehabilitative scope. The juvenile system continues to focus to a greater degree on the needs of the offender and on the goal of rehabilitation, rather than on punishment, which is the primary focus of the adult system. The continued existence of these differences compels us to conclude that the

> right to a jury trial does not apply to juvenile proceedings.

Id. at 182.

More recently, in 2008, this Court was asked to reconsider jury trials for juvenile offenders charged with serious violent offenses *in State v. Chavez,* 163 Wn.2d 262, 180 P.3d 1250 (2008). This Court in *Chavez* rejected this argument, stating "This court has consistently concluded that because of well-defined differences between Washington's juvenile justice and adult criminal systems, the JJA does not violate these constitutional provisions." *Id.* at 267. This Court noted that "the juvenile justice system has not been so altered that juveniles charged with violent and serious violent offenses have the right to a jury trial." *Id.* at 272. In sum, Torres fails to make a compelling argument that juveniles have a right to a jury trial. As such, his petition for review should be denied.

2. THE COURT'S DECISION DOES NOT CONFLICT WITH *STATE V. ROBINSON*.

Torres argues that this case conflicts with *State v. Robinson*, 73 Wn. App. 851, 856, 872 P.2d 43 (1994). He claims that when he displayed the firearm at J.M. he was not aiding in the commission of the theft, nor effectuating the escape.

One of the elements of robbery is "That…fear was used by the defendant to…retain possession of the property." WPIC 37.02. The force

necessary to support a robbery conviction need not be used in the initial acquisition of the property. *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641, 645 (1992). Rather, the retention, via force against the property owner, of property initially taken peaceably . . .is robbery."); *see also State v. Manchester*, 57 Wn. App. 765, 769-770, 790 P.2d 217 (1990).

Torres argues that the theft was completed and that, therefore, the use of fear was unrelated to the theft. However, 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 is ongoing until the assailant has effected an escape. *Id*. at 770. The definition of "robbery" includes "violence during flight immediately following the taking." *Id.*; *see also State v. Robinson*, 73 Wn. App. 851, 856, 872 P.2d 43 (1994) ("Pursuant to [the transactional view of robbery], a robbery can be considered an ongoing offense so that, regardless of whether force was used to obtain property, force used to retain the stolen property or to effect an escape can satisfy the force element of robbery.").

The *Robinson* case is distinguishable. In that case, the force was used to *take* the property, a purse. 73 Wn. App. at 857. The defendant's friend jumped out of the car Robinson was driving and grabbed the purse of a 14-year-old girl. *Id.* at 852. It was undisputed that after the

defendant's friend used force to take the purse, he simply got into the defendant's car. *Id.* He did not use any additional force to retain the purse or to try to escape. *Id.*

Unlike the force used in *Robinson*, here the force was used to retain the property and effect an escape. As such, the Court of Appeals did not create a conflict with *Robinson*. A co-participant, Jacob, went into a store and stole beer. SE 15. As the suspects tried to get away, a store employee held up his phone to take photos. SE 5-9. Torres yelled at the employee and threatened him with a firearm. SE 27. He displayed the firearm as they were slowly pulling out of a parking spot at Safeway. CP 14. Findings of Fact 15 through 20, which are verities on appeal, are consistent with the testimony on this fact. CP 14.

Torres claims that the Court of Appeals expanded *Manchester*. He claims that unlike *Manchester*, the evidence did not establish that Torres threatened anyone with a gun to prevent the recovery of property. However, based on the facts of this case, a rational trier of fact could find that the reason Torres used fear was so that they could all leave with the stolen beer. There was no testimony that the firearm was shown to J.M. for any other reason. In fact, the *only* logical reason was that Torres wanted to escape with the stolen beer. In sum, a rational trier of fact could

have concluded that the gun was displayed so that the minors could retain their stolen beer and complete their escape from the scene of the crime.

3. THE COURT'S DECISION DOES NOT CONFLICT WITH *STATE V. RICHIE*.

Torres argues that this case conflicts with *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015). In *Richie*, the defendant argued that a Walgreens employee was not acting in a representative capacity at the time because she was not on duty at the time of the incident, her Walgreens shirt and identification were not visible, and she was standing in line like any other customer. *Id.* at 926. The court held that a rational jury could have found that regardless of whether the employee was on duty, she was acting in her employer's interests at the time of the robbery. *Id.* The court pointed out that the cases do not require that the defendant actually know that the victim is acting in a representative capacity at the time of the robbery. *Id.* As such, the court held that the State presented sufficient evidence of the implied element of first degree robbery – that the victim have an ownership, representative, or possessory interest in the property taken. *Id.*

The *Richie* case was recently overruled in part by *State v. Nelson*, 191 Wn.2d 61, 419 P.3d 410 (2018). In *Nelson*, this Court stated that

> Relying on earlier cases, the *Richie* court reversed the conviction and held that in order for an employee to have a representative interest in property, she has to have "care, custody, control, or management of the property." This reasoning by the Court of Appeals in *Richie* must be rejected. Requiring the State to establish care, custody, control, or management of the property by an employee for purposes of proving representative interest is unnecessary.

191 Wn.2d at 76.

Here, J.M. was walking into his place of employment, Safeway. He had his Safeway name tag on and was carrying his orange vest. After witnessing a theft of store property, he took photos in order to give Safeway's loss prevention officer the license plate number of the vehicle. RP 13; SE 5-9. The only reason J.M. would do this would be to help his employer locate the suspects and get the store's property back. In fact, that is exactly what happened. His actions resulted in Safeway recovering the stolen property and finding out who was responsible for the crime so they could be held accountable. He was not taking photos for his own personal use. He took the photos to help his employer, Safeway. He then told the Safeway LPO what happened and showed the photos to a police officer.

As explained in *Nelson*, "the State does not need to separately prove . . .that the victim had care, custody, control, or management of the property." 191 Wn.2d at 77. As such, the Court of Appeals decision does not create a conflict with *Richie*.

F. CONCLUSION

This case does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United States is not involved. Lastly, the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court. As such, his petition for review should be denied.

Respectfully submitted this 17th day of August, 2018,

s/Tamara A. Hanlon
TAMARA A. HANLON, WSBA 28345
Senior Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on today's date, August 17, 2018, by agreement of the parties, I emailed a copy of Answer to Petition for Review to Travis Stearns at travis@washapp.org.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of August, 2018 at Yakima, Washington.

s/ Tamara A. Hanlon
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