

NO. 34575-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent

v.

BENJAMIN TORRES,

Appellant.

---

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**1. DUE PROCESS REQUIRES THAT JUVENILES ACCUSED OF CRIMES BE AFFORDED THE RIGHT TO A JURY TRIAL.**

The reliance upon history to argue against the right to a jury trial for youth is misplaced. Respondent’s brief at 6. To the contrary, a historical analysis of the right to a jury trial should compel this Court to conclude the current denial to youth of the right to a jury trial is both inconsistent with original intent and a denial of due process.

*a. The right to a jury trial for all persons accused of crimes is guaranteed by the Washington Constitution, regardless of age.*

The prosecution argues the right to a jury trial does not apply to juveniles under the Washington constitution. Respondent’s brief at 6. Article I, § 21, however, provides the right to a jury trial shall remain “inviolable.” 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.” Application of the *Gunwall* criteria indicates there is a broader right to a jury trial under the Washington Constitution than the federal right. *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)). The Court noted the textual differences between the state and federal provisions as well as the structural differences of the federal and state constitutions support such a conclusion. *Id.* at 150-52. So too, the fact that the manner in which crimes are prosecuted is a matter of local concern. *Id.* at 152.

When the Washington Constitution was adopted, jury trial rights were afforded to both juveniles and adults. Code of 1881, ch. 87, §1078. Even after the creation of a juvenile court in 1905, juveniles were statutorily entitled to trial by jury until the right was denied to them in 1937. Laws of 1937, ch. 65, § 1, at 211. Washington's juvenile laws made special provision for transfer to police court of cases where it appeared that "a child has been arrested upon the charge of having committed a crime." Laws 1909, ch. 190, § 12, at 675. The capacity statute, also enacted in 1909, specifically contemplated 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 nearly 50 years thereafter. Under *Smith* that history leads to the conclusion that juveniles must be afforded a jury

trial today. See *In the Matter of the Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 662, 374 P.3d 1123 (2016).

The respondent properly recognizes that *State v. Schaaf* concluded the history of providing juries to juveniles at the time of the adoption of the Constitution did not lead to the conclusion that juveniles must now be afforded a jury trial. 109 Wn.2d 1, 14, 743 P.2d 240 (1987); Respondent's brief at 11. *Schaaf* arrives at this conclusion even though the right to a jury trial for juvenile existed at all points prior to 1938 and was made inviolate by the framers of the Washington Constitution.

But *Smith* disavows this analysis. In *Smith*, the court found,

Because this law was not enacted until after the constitution was adopted, it could not have had any effect on the drafters' intent when they wrote article I, sections 21 and 22.

150 Wn.2d at 154.

The Supreme Court also recently affirmed this historical analysis in determining when there is a constitutional right to a jury trial. *M.W.*, 185 Wn.2d at 662. To determine whether there is a right to a jury trial, the court applies a two-part test, first determining the scope of the right when the Constitution was enacted and then if the type of action at issue is similar to one that would include the right to a jury

trial at that time. *Id.* (citing *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, 224 P.3d 761 (2010)).

*M.W.* and *Smith* make concrete that the proper analysis to determine whether there is a jury trial right should be based upon the historical right. Reliance by the government on a statute enacted nearly 50 years after the drafting of Article I, § 21 is incompatible with this precedence. The jury trial right protected in Article I, § 21 and § 22 is that which existed in 1889. Subsequently enacted statutes do not alter the scope of that right. The failure to provide Benjamin with the right to a jury denied him due process and requires reversal.

*b. The distinction between adjudications and convictions is no longer significant.*

The respondent argues the juvenile justice systems is sufficiently different to deny juveniles the right to a jury trial. Respondent's brief at 16. This argument is no longer true in law or fact.

In addressing the scope of the Sixth Amendment right to a jury, the United States Supreme Court noted the "label" attached to a fact or fact-finding process does not determine the scope Sixth Amendment right. *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Even if the Legislature had carefully drawn and observed a distinction between "offenses" and "crimes" and

“adjudications” and “convictions,” such a distinction does not determine the scope of the jury right. Neither Article I, § 21 or § 22 use the term “conviction” nor otherwise limit their reach based upon that term. Instead, Article I, § 21 simply guarantees “the right of trial by jury shall remain inviolate.” Article I, § 22 guarantees the right to an impartial jury to all persons in criminal prosecutions.

While the Legislature distinguishes at times between a conviction and a juvenile adjudication, the Legislature also says “‘Conviction’ means an adjudication of guilt pursuant to Title 10 or 13 RCW . . . .” RCW 9.94A.030(9). In many statutes, the term “conviction” is used to describe the requirements a juvenile must comply with when found guilty of a crime. *See, e.g., Matter of Juveniles A, B, C, D, E*, 121 Wn.2d 80, 87-88, 847 P.2d 455 (1993) (“the Legislature’s use of ‘conviction’ in statutes to refer to juveniles appears to be endemic). The Supreme Court has relied upon this holding to conclude a juvenile adjudication is a “conviction” upon which a petition for indefinite confinement as a sexually violent predator may be predicated. *In re the Det. of Anderson*, 185 Wn.2d 79, 86, 368 P.3d 162 (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)).

Benjamin must comply with many of the same consequences as he would have had he been convicted as an adult. He must provide a DNA sample and is subject to fingerprinting and photographing. RCW 43.43.754; RCW 43.43.735. No restrictions exist on the dissemination of his records and there is no distinction with regard to background checks between youth and adults. RCW 10.97.050; RCW 43.43.830(6).

Any sentence Benjamin may have served could have been served in adult prison. Youth who are convicted in juvenile court may be housed in adult prisons. RCW 13.40.280. When the government seeks to transfer a child to an adult prison, it is the child’s burden to demonstrate why they should not be transferred. *Id.* And while the respondent argues that provisions of RCW 13.40.010 have been amended to incorporate restorative justice and increase the likelihood a youth will be found eligible for a deferred disposition, these provisions

are not applicable to youth like Benjamin. RCW 12.40.010, Respondent's brief at 18.

For youth convicted of a sex offense, this is even more serious as they must register as a sex offender, just like an adult. RCW 9A.44.130. While there is a greater ability to be removed from the list as a youth, there is no mandatory removal for some youth. *See* RCW 9A.44.143(2). This information is easily searchable, as the United States Department of Justice maintains an easily searchable national registry of registered sex offenders, including those convicted in juvenile court. *See* U.S. Dep't of Justice, Dru Sjodin National Sex Offender Public Website, available at <https://www.nsopw.gov/en>. Additionally, youth convicted of some sex offenses may never be able to have their records sealed. RCW 13.50.260(1); *see also* Laws of 1997, ch. 338, § 40(11). Likewise, involuntary commitment under RCW 71.09 based solely upon juvenile offenses is also possible. *Anderson*, 185 Wn.2d at 86. Recognizing many of the provisions in RCW 71.09 do not differentiate between youth and adults, the court found they "clearly apply to both." *Id.*

Meanwhile, every rehabilitative program created in juvenile court has an equivalent in adult court. Juveniles who are convicted of a

sex offense may ask the court for a community based alternative sentence, as can adults. RCW 13.40.160; RCW 9.94A.670. Both juveniles and adults with drug dependency problems may seek drug treatment instead of a standard range sentence. RCW 13.40.0357; RCW 13.40.165. Juveniles may seek diversion and deferred sentences, but adults are increasingly able to seek local pre-filing diversion programs, “agreed orders of continuances,” and deferred prosecutions. RCW 13.40.070; RCW 13.40.127; RCW 35.50.255; RCW 3.66.068; RCW 3.50.330; RCW 10.05; *see also* LEAD, Law Enforcement Assisted Diversion, available at <http://leadkingcounty.org/>.

Juvenile prosecutions differ from current and historical adult felony and misdemeanor prosecutions in only two ways – the name attached and the absence of a jury. This is an insufficient basis for denying Benjamin the right to a jury trial. Because Benjamin was denied his due process right to a jury trial, reversal is required.

*c. The framers of the United States Constitution did not exclude juveniles from the Sixth amendment right to a jury trial.*

The respondent attempts to distinguish between the right to a jury trial under the federal constitution by arguing juveniles are not

subject to criminal prosecution in juvenile court. Respondent's brief at 7. As with the Washington constitution, this is not a valid distinction.

The Sixth Amendment makes no distinction between adults and juveniles. At the time of the drafting of the amendment, there was no such distinction. Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909). When challenges to a non-jury trial system created after the Constitution was enacted were denied, it was because "the [juvenile] proceedings were not adversary" and "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). As argued above, this is not a valid distinction in Washington State.

More importantly, there is no indication the right to a jury trial was ever intended to be denied to juveniles. The only relevant question in determining whether this right was intended to be excluded from juveniles is to examine the framer's intent. Issues of reliability, efficiency and semantics are unimportant. *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016); *Alleyne v. United States*, 570 U.S. \_\_\_, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013). And we know from the commentators that, at the time, all persons over the age of 7 and charged with criminal activity were tried by a jury.

Mack, 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.

**2. THE PROSECUTION FAILED TO PROVE EVERY ELEMENT OF FIRST DEGREE ROBBERY BEYOND A REASONABLE DOUBT.**

The prosecution argues sufficient evidence was presented to the jury to find Benjamin guilty of robbery in the first degree.

Respondent's brief at 25. The Due Process Clause of the Fourteenth Amendment requires the government to prove every element of the crime charged beyond a reasonable doubt. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the government must establish to garner a conviction. *Winship*, 397 U.S. at 364.

While reasonable inferences are construed in favor of the prosecution, they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is

insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010).

*a. J.M. was not acting on his employer's behalf when he took photographs of the fleeing car with his cell phone.*

The prosecutor argues that J.M. was acting as a representative of Safeway when he took photos of the fleeing vehicle. Respondent's brief at 29. And while the respondent cites *State v. Richie* for this proposition, *Richie* instead holds that 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. 191 Wn. App. 916, 922, 365 P.3d 770 (2015) (citing *State v. Hall*, 54 Wn. 142, 143–44, 102 P. 888 (1909)).

In *Richie*, the employee took affirmative actions to retain the property. 191 Wn. App. at 776. J.M. made clear he had no intention of trying to recover the property. RP 27. In fact, company policy forbade J.M. from acting in such a manner. RP 27. And while the government argues the only reason J.M. took photos was to help his employer get the property back, this is not the same as acting as a representative of the store. Respondent's brief at 30. Instead, the government must

establish beyond a reasonable doubt that J.M. was acting as a representative of Safeway. With insufficient proof J.M. was acting in some representative capacity for the Safeway store, the act of brandishing a weapon when J.M. took photographs of the fleeing car is insufficient to establish robbery. *State v. Latham*, 35 Wn.App. 862, 864-65, 670 P.2d 689 (1983); *see also State v. Tvedt*, 153 Wn.2d 705, 714, 107 P.3d 728 (2005).

*b. J.M. was not acting on his employer's behalf when he took photographs of the fleeing car with his cell phone.*

The respondent argues force was used to retain the property stolen from the Safeway and this is sufficient to establish robbery. Respondent's brief at 31. However, the evidence adduced at trial demonstrated both the robbery and the escape had taken place before the firearm was brandished.

There is no disagreement that when force is used to retain property, there is sufficient evidence of robbery. But, in order for the evidence to be sufficient, the government must establish the force was used directly in the taking or retention of the property. *State v. Johnson*, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). The trial court improperly extended this definition when it relied on *State v. Thomas* to find a robbery occurred. 102 Wn. App. 721, 727, 371 P.3d 58 (2015). In

Thomas, the defendant pulled his knife out when the owner confronted him about not paying his bill, and not after the escape had been completed, as is the case here. *Id.*; see also *State v. Manchester*, 57 Wn. App 765, 767-67, 790 P.2d 217 (1990).

And while the prosecutor attempts to extend the time in which the display of force can help define a robbery, this court has recognized there are limits. Respondent's brief at 34. In *State v. Robinson*, a co-defendant jumped out of a vehicle and stole a purse from the passenger of another vehicle. 73 Wn. App. 851, 857, 872 P.2d 43 (1994). This 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. Robinson* cannot be distinguished from the facts here. The car 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. The government presented insufficient evidence of use of force.

*c. The failure to establish sufficient evidence of robbery requires dismissal.*

While the government argues that it presented sufficient evidence of robbery the findings made by the court do not describe a robbery. *See State v. Strong*, 167 Wn. App. 206, 214, 272 P.3d 281 (2012). The firearm was not brandished until after the escape had been effectuated. RP 16. The young persons had already returned to their car and were exiting the parking lot. RP 16. The theft had taken place and the young persons did not use force to escape.

The government failed to establish Benjamin used force in the course of a theft. When the gun was displayed the robbery had been completed and the escape had been completed. Further, taking pictures is not a means of resistance. Finally, the government failed to establish J. M. had an ownership interest in the property, representative or otherwise. Because the government has failed to establish these essential elements, dismissal of this charge is required. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016).

B. CONCLUSION

Benjamin asks this Court to dismiss his conviction for robbery in the first degree. In the alternative, he asks this Court to order a new trial and afford him the right to a jury.

DATED this 27 day of August, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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	)	
Respondent,	)	
	)	NO. 34575-1-III
v.	)	
	)	
BENJAMIN TORRES,	)	
	)	
Juvenile Appellant.	)	

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