

NO. 34575-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN TORRES,

Appellant.

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

APPELLANT'S OPENING BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESiii

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR . 3

D. STATEMENT OF THE CASE 4

E. ARGUMENT..... 6

1. THE FAILURE OF THE TRIAL COURT TO PROVIDE BENJAMIN WITH A TRIAL BY JURY DEPRIVED HIM OF HIS DUE PROCESS RIGHTS..... 6

2. THE WASHINGTON CONSTITUTION AFFORDS JUVENILES THE RIGHT TO A JURY TRIAL. 7

 a. The Washington Constitution is more protective of the right to jury trial than the federal constitution. 7

 b. In Smith, the Court disavowed the Gunwall analysis it employed in State v. Schaaf with respect to jury trial for juveniles. 9

 c. The scope of the state constitutional right to a jury is triggered by the “criminal stigma” which attaches to the proceeding rather than the label attached to the proceeding. 10

 d. There are no significant distinctions between juvenile and adult proceedings which justify the denial of the right to a jury trial. 15

 e. RCW 13.04.021 violates Article I, § 21 and § 22..... 23

3. THE SIXTH AMENDMENT REQUIRES A JURY IN CRIMINAL PROSECUTIONS..... 23

 a. The Sixth Amendment makes no distinction between adults and juveniles. 23

 b. The original intent of the Sixth Amendment guarantees juveniles the right to a jury trial. 25

4. THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE CRIME OF ROBBERY IN THE FIRST DEGREE.	26
a. Dismissal is required where the government fails to prove each element of the crime charged beyond a reasonable doubt.	26
b. Benjamin did not use force to take or retain stolen property.	27
c. Taking photographs for the future investigation of a crime is not a means of resistance.	29
d. Benjamin was not acting on his employer’s behalf to prevent a robbery when he took photographs of the fleeing vehicle.	31
e. The government failed to establish that J. M. had an interest in the property taken, or dominion and control over it.	31
f. The failure to establish sufficient evidence of robbery requires dismissal.	33
F. CONCLUSION	34

TABLE OF AUTHORITIES

Cases

<i>Alleyne v. United States</i> , 570 U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)	25
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	26
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	13, 16, 17, 25
<i>Hurst v. Florida</i> , ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016)	25
<i>In re Det. of Anderson</i> , 185 Wn.2d 79, 368 P.3d 162 (2016).....	12, 19
<i>In re Det. of M.K.</i> , 168 Wn. App. 621, 279 P.3d 897 (2012)	30
<i>In Re Gault</i> , 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).....	24
<i>In Re Juveniles A, B, C, D, E</i> , 121 Wn.2d 80, 847 P.2d 455, 457 (1993)	12
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	26
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	26
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971)	24
<i>Monroe v. Soliz</i> , 132 Wn.2d 414, 939 P.2d 205 (1997)	6
<i>Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1983)	13, 14, 15
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002).....	30
<i>State v. Chavez</i> , 163 Wn.2d 262, 180 P.3d 1250 (2008)	6
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	27
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	i, 7, 9
<i>State v. Hall</i> , 54 Wn. 142, 102 P. 888 (1909).....	32
<i>State v. Hummel</i> , ___ Wn. App. ___, 383 P.3d 592 (Wash. Ct. App. 2016)	27, 34
<i>State v. Johnson</i> , 155 Wn.2d 609, 121 P.3d 91 (2005)	28
<i>State v. Latham</i> , 35 Wn.App. 862, 670 P.2d 689 (1983).....	32
<i>State v. Lawley</i> , 91 Wn.2d 654, 591 P.2d 772 (1979)	6
<i>State v. Manchester</i> . 57 Wn. App 765, 790 P.2d 217 (1990).....	28
<i>State v. Maynard</i> , 183 Wn.2d 253, 351 P.3d 159 (2015)	22

<i>State v. O’Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	22
<i>State v. Richie</i> , 191 Wn. App. 916, 365 P.3d 770 (2015).....	32
<i>State v. Robinson</i> . 73 Wn. App. 851, 872 P.2d 43, 46 (1994).....	29
<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987).....	passim
<i>State v. Smith</i> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	passim
<i>State v. Strong</i> , 167 Wn. App. 206, 272 P.3d 281, 286 (2012)	33
<i>State v. Thomas</i> , 102 Wn. App. 721, 371 P.3d 58 (2015)	28, 30
<i>State v. Tvedt</i> , 153 Wn.2d 705, 107 P.3d 728 (2005).....	32
<i>State v. Wright</i> , 165 Wn.2d 783, 203 P.3d 1027 (2009).....	27

Statutes

Code of 1881, ch. 87, § 1078.....	6, 8
Juvenile Court Act of Illinois (1899).....	24
Laws 1909, ch. 190, § 12.....	9
Laws of 1937, ch. 65, § 1.....	8
Laws of 1997, ch. 338, § 40.....	19
RCW 10.05	21
RCW 10.97.050	18
RCW 13.04.021	i, 23
RCW 13.04.240	11
RCW 13.40.0357	21
RCW 13.40.070	21
RCW 13.40.077	12
RCW 13.40.127	21
RCW 13.40.160	21
RCW 13.40.165	21
RCW 13.40.215	12
RCW 13.40.280	19
RCW 13.50.260	12, 19
RCW 13.50.260(4).....	19
RCW 2.30.010	20
RCW 3.50.330	21
RCW 3.66.068	21
RCW 35.50.255	21
RCW 43.43.735	18
RCW 43.43.754	18

RCW 43.43.830	14, 18
RCW 72.01.410	19
RCW 9.94A.030	12
RCW 9.94A.670	21
RCW 9A.04.050	9
RCW 9A.20.010	14
RCW 9A.44.130	14, 18
RCW 9A.44.143	19
RCW 9A.56.190	27
RCW 9A.56.200	14
RCW13.40.480	12

Other Authorities

Court of Appeals, Div. III, <i>In Re the Matter of Court Administration Order Re: Case Caption Change in Juvenile Offender Matters</i> (Nov. 4, 2016)	20
Julian Mack, <i>The Juvenile Court</i> , 23 Harv. L. Rev. 104 (1909)	24, 26
LEAD, Law Enforcement Assisted Diversion	21
Monrad Paulsen, <i>Kent v. United States: The Constitutional Context of Juvenile Cases</i> , 1966 Sup. Ct. L. Rev. 167 (1966)	24
RCW 9.92.060	21
U.S. Dep’t of Justice, <i>Dru Sjodin National Sex Offender Public Website</i>	15

Rules

JuCR 7.12	12
-----------------	----

Constitutional Provisions

Const. Art I, § 22	passim
Const. Art. I, § 21	passim
Const. art. I, § 3	4, 26
U.S. Const. amend 6	passim
U.S. Const. amend. 14	2, 3, 4

A. INTRODUCTION

Benjamin¹ was deprived of his right to a jury trial by the legislature's decision to divest youth of this right, despite it having been granted to juveniles in the Washington constitution. Juveniles charged with crimes originally had the right to a jury trial in Washington, but this right was taken from them when the legislature determined juvenile court was designed for rehabilitation. As juvenile sentences have become increasingly more punitive and adult sentences more rehabilitative, this distinction has eroded. Juveniles charged with crimes are entitled to a jury trial under Article I, § 21 and § 22 of the Washington Constitution and the Sixth Amendment.

To establish sufficient evidence of robbery, the government must establish force was used in the taking or retention of the stolen property. While the facts established Benjamin displayed a firearm, he did not do so until after the theft and any escape from the theft had taken place. The failure of the government to prove this essential element requires this Court to dismiss this charge.

¹ This case involves many persons who were youths when these acts occurred. Out of respect for their privacy interests, only their first names or initials will be used.

B. ASSIGNMENTS OF ERROR

1. The failure of the Juvenile Courts and Juvenile Offenders Act to provide juveniles with the right to a jury trial violates Article I, § 21 and Article I, § 22.

2. The failure of the Juvenile Courts and Juvenile Offenders Act to provide juveniles with the right to a jury trial violates the Sixth and Fourteenth Amendments.

3. The government failed to establish an essential element of robbery by failing to establish the threatened use of immediate force in the taking or retention of the property stolen.

4. The government failed to prove an essential element of robbery by failing to establish the stolen 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.

5. The government failed to prove an essential element of the crime of robbery by failing to establish the person against whom the force was used had an ownership interest in or dominion and control over the stolen property.

6. Finding of Fact 13 was entered in error as it is a conclusion of law improperly included in the trial courts findings of fact.

7. Finding of Fact 14 was entered in error as it is not consistent with the testimony.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Article I, § 21 and Article I, § 22 of the Washington Constitution provide for a jury trial for all individuals accused of a crime. The scope of the jury-trial right is determined by the framers' intent and the right as it existed at the time the Washington Constitution was adopted. Where, at the time the constitution was adopted, and for nearly 50 years thereafter, juveniles charged with crimes were afforded a jury trial, do Article I, § 21 and Article I, § 22 require a jury trial for a juvenile accused of a crime?

2. The Sixth and Fourteenth Amendments to the United States Constitution require the states to provide a jury trial to all individuals accused of a crime. The scope of this right is determined by the framers' intent and the right as it existed at the time the Sixth Amendment was adopted. Where, at the time the amendment was adopted, juveniles charged with crimes were afforded a jury trial, does

the Sixth Amendment require a jury trial for a juvenile accused of a crime?

3. The Fourteenth Amendment and Article 1, § 3 of the Washington Constitution require the prosecution to prove each element of the crime charged beyond a reasonable doubt. Robbery in the first degree requires the government to prove force was used in the taking or retention of the stolen property. The government must also establish the person against whom force was used had an ownership interest in or dominion and control over the stolen property when the force was used. Does the failure of the government to establish these essential elements require dismissal of this charge?

D. STATEMENT OF THE CASE

J. M. was on his way to start his shift at the Safeway on Mead Avenue in Yakima when he saw a boy walk quickly into the store. RP 10, 11. J. M. described himself as a “helper clerk.” RP 8. J. M. parked his car and started walking into the Safeway. RP 11. He saw the same boy come back out of the store holding 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. began to take pictures of the car with his cell phone. RP 12-13. He did not tell the people to stop. RP 28. 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, towards the roof of the car. RP 16, 30. When he saw the gun, J. M. 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 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. THE FAILURE OF THE TRIAL COURT TO PROVIDE BENJAMIN WITH A TRIAL BY JURY DEPRIVED HIM OF HIS DUE PROCESS RIGHTS.

Originally, children charged with crimes in Washington were afforded the right to a jury trial. This right was taken away from them when the legislature determined the primary purpose of juvenile court was rehabilitation and the primary purpose of adult court was accountability. Increasingly, this distinction has been eroded. Juveniles like Benjamin now face significant consequences from their convictions. Adults are now able to divert and otherwise avoid criminal convictions when they are able to demonstrate their rehabilitation.

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; *see also State v. Chavez*, 163 Wn.2d 262, 274, 180 P.3d 1250 (2008). Because this distinction is virtually non-existent, this court should find Benjamin's right to a jury trial was denied and reverse his conviction.

2. THE WASHINGTON CONSTITUTION AFFORDS JUVENILES THE RIGHT TO A JURY TRIAL.

a. The Washington Constitution is more protective of the right to jury trial than the federal constitution.

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 Supreme Court has concluded application of the criteria of *State v. Gunwall*² indicates a broader right to a jury trial under the Washington Constitution. *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). 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 manner in which crimes are prosecuted is a matter of local concern. *Id.* at 152.

Smith clarified:

in order to determine the scope of the jury trial right under the Washington Constitution, it must be analyzed

² *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

in light of the Washington law that existed at the time of the adoption of our constitution.

150 Wn.2d at 153.

Smith concluded the broader state guarantee did not require a jury determination of a defendant's prior "strikes" in a persistent offender proceeding. *Id.* *Smith* rested that conclusion on one principal 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. Therefore, 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. Code of 1881, ch. 87, § 1078. Even after the juvenile court's inception in 1905, juveniles were statutorily entitled to trial by jury until 1937 when the Legislature struck the right. Laws of 1937, ch. 65, § 1, at 211.³ Beginning in 1909, Washington's

³ 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." Laws of 1905 ch. 18, § 2 (repealed, 1937). This provision remained substantially unchanged through revisions of the statute in 1909, 1913, 1921, and 1929.

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 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 nearly 50 years thereafter. Under *Smith* that history leads to the conclusion that juveniles must be afforded a jury trial today.

b. In Smith, the Court disavowed the Gunwall analysis it employed in State v. Schaaf with respect to jury trial for juveniles.

In *State v. Schaaf*, the Court 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). *Schaaf* concluded that even though the right to a jury trial for juveniles 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 examination in *Schaaf* of the framers' intent based upon legislation that came decades later was disavowed in *Smith*.

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.

Smith, 150 Wn.2d at 154. *Schaaf's* reliance on a statute enacted nearly 50 years after the drafting of Article I, § 21 is incompatible with the standard announced in *Smith*. 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 later decision in *Smith* disavowed the analysis employed in *Schaaf*.

c. The scope of the state constitutional right to a jury is triggered by the "criminal stigma" which attaches to the proceeding rather than the label attached to the proceeding.

As the Court subsequently disavowed its own analysis in *Schaaf* it is important to address the other aspects of *Schaaf's* reasoning. *Schaaf* reasoned that the jury-trial right did not extend to juvenile adjudications because for several decades Washington had made every

effort “to avoid accusing and convicting juveniles of crimes.” 109

Wn.2d at 15. That observation is no longer true in law or fact.

The information in this case states:

By this Information, the Prosecuting Attorney accuses you of committing the following crime(s). . . .

CP 6 (Second Amended Information).

The filing of this Information is done in precisely the same manner as if Benjamin were an adult. The substantive offenses alleged are precisely the same in juvenile and adult proceedings. Any distinction in the manner of charging that *Schaaf* believed to exist is indiscernible and was certainly not appreciated by the prosecutor in this case. The prosecution plainly believed, and rightly so, it was charging Benjamin with a “crime.” CP 6.

What *Schaaf* seems to have meant was that the prosecution had made every effort to avoid calling juvenile offenses “crimes” and to use the term adjudication to avoid the term “conviction.” The Legislature has said “An order of court adjudging a child a juvenile offender or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime.” RCW 13.04.240. But that is not as categorical as it might appear, as the Legislature has also said “‘Conviction’ means an adjudication of guilt pursuant to Title 10 or 13

RCW” RCW 9.94A.030 (9). Indeed only a few years after *Schaaf* the Court held juvenile offenders had been “convicted” of a crime for purpose of a DNA collection statute, recognizing:

the Legislature’s use of “conviction” in statutes to refer to juveniles appears to be endemic. Numerous other statutes, including sections of the Sentencing Reform Act of 1981, RCW 9.94A, and the Juvenile Justice Act of 1977, RCW 13.40, use “convicted” to reference both adult and juvenile offenders.

In Re Juveniles A, B, C, D, E, 121 Wn.2d 80, 87-88, 847 P.2d 455, 457 (1993). More recently, the Court relied upon *A, B, C, D, E* to conclude a juvenile adjudication is a “conviction” upon which the state can predicate a petition for indefinite confinement as a sexually violent predator. *In re 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)). The Legislature has not truly sought to distinguish between “convictions” and “adjudications” or “offenses” and “crimes.”

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. 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 of the Sixth Amendment right. *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Just as the Legislature cannot avoid a jury determination of facts by terming them “aggravating factors” as opposed to “elements” it cannot deny a jury trial by terming a conviction an “adjudication.”

The Court has observed

As for those offenses which carry a criminal stigma and particularly those for which a possible term of imprisonment is prescribed, the constitution requires that a jury trial be afforded unless waived.

Pasco v. Mace, 98 Wn.2d 87, 100, 653 P.2d 618 (1983). *Mace*

recognized the mere possibility of incarceration triggered the right to

jury: “no offense can be deemed so petty as to warrant denying a jury if it constitutes a crime.” *Id.* 99. The Court explained any offense defined by the legislature as either a felony or misdemeanor is a “crime.” *Id.* (quoting RCW 9A.20.010). Robbery in the first degree is a class A felony. RCW 9A.56.200.

A juvenile adjudication, just like a felony conviction, or even the municipal court proceeding at issue in *Mace*, plainly carries a possible term of imprisonment. Moreover, whether it is formally termed a “criminal conviction” or not, an adjudication of first degree robbery carries the same stigma as an adult conviction. To most observers any distinction between an adjudication and a conviction is lost. Future landlords or employers are unlikely to appreciate any distinction when performing background checks as authorized by RCW 43.43.830(6).

Some youth are also required to register as a sex offender, provide public notification of his offense, just as any adult convicted of the crime. RCW 9A.44.130. 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.*⁴ Future neighbors or coworkers learning such information are not likely to distinguish their “offenses” from other convictions.

The criminal stigma and possibility of incarceration are the same regardless of the label the Legislature has attached to the proceeding. Indeed, the stigma and range of possible incarceration is far greater in this case than the municipal proceedings at issue in *Mace*. As *Mace* recognized, such proceedings must include a jury unless that right is waived. 98 Wn.2d at 100.

- d. *There are no significant distinctions between juvenile and adult proceedings which justify the denial of the right to a jury trial.*
- i. The degree to which juvenile proceedings “resemble” adult proceedings is not the constitutional standard for providing the right to a jury.

Schaaf concluded the right to a jury trial does not attach because “juvenile proceedings do not yet so resemble adult proceedings.” 109 Wn.2d at 13. That is a standard divorced from the language of Article I, § 21 and § 22. The constitutional provisions do not limit the jury right to proceedings which resemble adult proceedings. In fact, the absence of such a limitation is readily explained by the fact that in 1889, and

⁴ Available at <https://www.nsopw.gov/en>.

until 1937, juveniles were entitled to a jury. Thus, the framers had no basis to limit the right to only those cases which “resemble an adult proceeding.” The framers’ understanding based upon the then-existing law was that juries were provided in **all** proceedings. In light of that, it is nonsensical to ask how much one proceeding resembles another as a means to determine when a jury must be provided.

That standard is inherently manipulable. In *Blakely* the Court rejected challenges to its bright-line definition of an element as a fact which increases the penalty to which a person is exposed noting the alternative was to leave it to judges to determine whether the fact-finding went “too far” beyond undefined limits. *Blakely*, 542 U.S. at 308. The court rejected that alternative, observing:

Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them. . . .

. . . . [T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

Id.

The same can be said of the Washington Constitution. The degree to which one proceeding resembles another is inherently subjective, especially in the absence of any pronouncement of what

degree of resemblance is necessary; must one proceeding mirror the other in all respects or is 75% or 95% overlap sufficient? That, of course, assumes there is some means to even measure that overlap. As *Blakely* recognized, such a standard is a goalpost that can always be moved. The framers' inclusion of the right to a jury trial in two separate provisions of the Washington Constitution seems a likely indication they did not trust government to define the scope of that right, perhaps even less so than the federal framers who only included a single provision.

There is every reason to conclude the framers broadly extended the right based simply upon the belief and then-current practice that every person enjoyed the protections of a jury whenever charged with an offense. Indeed, when the juvenile courts were established less than 20 years later, there was no qualification of the right to jury trial. The metric of whether a proceeding resembles adult criminal proceedings was foreign to the framers and cannot determine whether one prosecution or another is afforded the protections of a jury.

ii. Juvenile proceedings do in fact resemble adult felony and misdemeanor proceedings in all meaningful respects.

Even if one employs the malleable “resemble” standard, it is difficult if not impossible to distinguish juvenile and adult proceedings. Importantly, the relevant comparison is not just with adult felonies but misdemeanors as well, as each group is afforded the jury-trial right without reservation. Further, that comparison cannot be limited to current adult felony procedures but must account for historical practices too, as adult felony defendants have always enjoyed the protections of a jury despite the various historical procedural permutations.

Benjamin is required to provide the court with a collection of his personal data. He must provide a DNA sample and submit to fingerprinting and photographing by the Sheriff upon arrest. RCW 43.43.735; RCW 43.43.754. No statutory provisions require future destruction of these records and 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).

Juveniles convicted of sex offenses or kidnapping must register with their local sheriffs. RCW 9A.44.130. And while juveniles have a

greater ability to be removed from the registration list than adults, there is no guarantee they will be removed. *See* RCW 9A.44.143(2). Just as in adult convictions, juveniles can be subject to involuntary commitment under RCW 71.09. *Anderson*, 185 Wn.2d at 86.

Children convicted in juvenile court may be housed in adult prisons. RCW 13.40.280. When the prosecution 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.

Not all juvenile records are eligible for sealing. RCW 13.50.260 (1). Since 1997, the legislature has prohibited juveniles convicted of sex offenses from sealing their records. *See* Laws of 1997, ch. 338, § 40 (11). Even when recent legislation eased sealing requirements for many juveniles, children with certain sex offenses are exempted from sealing their records. RCW 13.50.260(4).

Such is the case as well, with juveniles who appeal their conviction in Division III of the Court of Appeal, which recently recognized that juveniles convicted of crimes do not enjoy the same privacy rights as other juveniles involved in other court proceedings.

See Court of Appeals, Div. III, *In Re the Matter of Court Administration Order Re: Case Caption Change in Juvenile Offender Matters* (Nov. 4, 2016). This distinction, which limits the use of initials for juveniles who appeal their convictions, makes it increasingly clear juveniles convicted of crimes shall be treated like adults and not like other youth involved in the court system. *Id.*

As juvenile convictions take on an increasingly punitive focus, the options available to adults charged with felonies have become increasingly broadened to include a greater focus on rehabilitation. 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.”). Eighty-three therapeutic courts have been created in Washington. Washington

Courts, Drug Courts & Other Therapeutic Courts.⁵ These courts are intended to rehabilitate, focusing on addiction, domestic violence, mental health and veterans. *Id.*

Every rehabilitative program created in juvenile court has an equivalent for adults. 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. 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, options long available to adult misdemeanor defendants and increasingly available for adult felony defendants. 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.⁶ Suspended sentences and probation-only sentences have long been available to misdemeanor defendants, and prior to the 1984 advent of the Sentencing Reform Act, were available for all but the most serious adult felonies. RCW 9.92.060.

⁵ Available at https://www.courts.wa.gov/court_dir/?fa=court_dir.psc.

⁶ Available at <http://leadkingcounty.org/>.

Indeed, for felonies committed prior to 1984, such sentences are still available today.

Minors and young persons 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. *See 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 an adult convicted of a felony is entitled to have the sentencing court consider youthfulness as a factor in sentencing the person below the standard range. *State v. O'Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015).

It is clear 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. Rehabilitative models in adult sentencing have never justified the denial of the right to a jury trial for adults. Nor could one seriously contend that altering the purposes of the Sentencing Reform Act to focus more on rehabilitation would permit the denial of jury trials in adult criminal case. A rehabilitative approach to juvenile or adult prosecutions cannot be determinative or alter the right to a jury trial.

e. RCW 13.04.021 violates Article I, § 21 and § 22.

Smith requires courts define the right to a jury trial by the right which existed in 1889. Subsequent, or even nearly contemporaneous, Legislative acts cannot enter the inquiry. In so holding, the Court disavowed the analysis employed in *Schaaf*. Because juveniles had the right to a jury trial in 1889, they have that right today. The Legislature's effort to strip away that right in RCW 13.04.021 deprives juveniles of that right.

3. THE SIXTH AMENDMENT REQUIRES A JURY IN CRIMINAL PROSECUTIONS.

a. 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. But, 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). The rationale was questionable. Paulsen 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, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (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 in 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.

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

Recent United States Supreme Court cases including *Blakely*, *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), and *Alleyne v. United States*, 570 U.S. ___, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013) demonstrate that in interpreting the Sixth Amendment, issues of reliability, efficiency and semantics are unimportant. The only relevant question is “what was the intent of the Framers?” Here 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 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.

4. THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE CRIME OF ROBBERY IN THE FIRST DEGREE.

a. Dismissal is required where the government fails to prove each element of the crime charged beyond a reasonable doubt.

The prosecution is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; Const. art. 1, § 3; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An essential element of due process is that “no person shall be made to suffer the onus of a criminal conviction” except upon “evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.” *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); accord *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628

(1980). A reviewing court may affirm 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*, 443 U.S. at 319. Reversal for insufficient evidence is “equivalent to an acquittal” and bars retrial for the same offense. *State v. Hummel*, ___ Wn. App. ___, 383 P.3d 592, 608 (Wash. Ct. App. 2016) (quoting *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009)).

b. Benjamin did not use force to take or retain stolen property.

The government failed to establish force was used to take or retain the beer stolen from the Safeway. When Benjamin displayed his firearm, both the taking and the escape had occurred. The display of the firearm is unrelated to the taking or retention of the beer. Instead, it was an attempt to intimidate J. M. from taking further pictures or potentially report the crime.

To prove robbery, the government must establish the use or threatened use of immediate force. RCW 9A.56.190. “[T]he force must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance ‘to the taking.’” *State v. Johnson*, 155 Wn.2d 609,

611, 121 P.3d 91 (2005). This definition recognizes that not all force used when a theft occurs converts the theft into a robbery. Instead, the force must relate to the taking or retention of the stolen property. *Id.*

This definition was extended by the trial court, when it relied upon *State v. Thomas* to find a robbery had occurred even though the firearm was not brandished until after the theft and the escape had both taken place. 102 Wn. App. 721, 727, 371 P.3d 58 (2015). In *Thomas*, the robbery takes place when the defendant threatens the owner of the restaurant, pulls out his pocket knife and unfolds it as the owner confronts the defendant about not paying his food bill. *Id.* at 722. Mr. Thomas' use of force occurred during a confrontation with the owner of the restaurant and was an aid in his escape, as the owner immediately retreated inside his restaurant after the threats had been made. *Id.*; see also *State v. Manchester*. 57 Wn. App 765, 767-67, 790 P.2d 217 (1990) (where defendant displayed his weapon after security guard placed his hands upon him in attempt to recover stolen property and use of force effectuated escape).

No such force was used here. Instead, the theft was completed when Benjamin displayed the firearm. The theft and the force were unrelated to each other. In this way, the facts are similar to those found

in *State v. Robinson*. 73 Wn. App. 851, 857, 872 P.2d 43, 46 (1994). In *Robinson*, a co-defendant jumped out of a vehicle and stole a purse from the passenger of another vehicle. *Id.* The 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.*

Here, the theft had been completed when Benjamin displayed his firearm. 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. *Robinson*, 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. Taking photographs for the future investigation of a crime is not a means of resistance.

The trial court found that when J. M. took pictures of the fleeing car, this was a means of resisting the taking of the beer. CP 14 (Finding of Fact 13). This is a conclusion of law entered as a finding of fact. This legal conclusion is central to the question of whether Benjamin committed a robbery. Because this “finding” addresses an ultimate

issue, it should be treated as a legal conclusion. *See Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002) (a conclusion of law is a conclusion of law wherever it appears); *In re Det. of M.K.*, 168 Wn. App. 621, 624 n.4, 279 P.3d 897 (2012) (whether person is gravely disabled is a legal conclusion, not a finding of fact). It should be reviewed by this Court as a conclusion of law and not a finding of fact.

In reviewing this conclusion, this Court should find taking photographs is not a “means of resistance.” CP 14 (Finding of Fact, 13). While the trial court relied upon *Thomas* to make this conclusion, such an analysis does not flow from the case. Instead, *Thomas* analyzes force used by a defendant. *Thomas*, 102 Wn. App. at 722. The question of whether force was used in *Thomas* is clear. The issue the Court of Appeals analyzed in *Thomas* was whether making threats after being demanded to pay a food bill constitutes a robbery. *Id.* The “means of resistance” happened when the restaurant owner had a confrontation with Mr. Thomas. *Id.* This is very different from the passive act of taking photographs, which involves no confrontation and is not an attempt to stop or otherwise prevent a theft from taking place.

In fact, J. M. was clear that he had no intention of trying to stop the fleeing persons. RP 27, 29. No facts support the conclusion that J.

M. attempted to stop the theft from taking place, especially by taking photographs. RP 28.

d. Benjamin was not acting on his employer's behalf to prevent a robbery when he took photographs of the fleeing vehicle.

The trial court also found that while J. M. had not yet begun his shift, he was nonetheless doing his employer's bidding as he took the pictures of the escaped vehicle. CP 14 (Finding of Fact 14). This is contrary to the evidence heard at trial. J. M. stated he works as a helper clerk. RP 8. He stocks the shelves, helps people with their groceries, sweeps, cleans the restrooms and gets the garbage. RP 8. J. M. had no intention of trying to stop the theft from taking place and had no desire to try to take the property back. RP 27. J. M. knew it was company policy for regular employees to take no part in the recovery of stolen property. RP 27. He understood that he would get in trouble if he tried to get the stolen property back. RP 27. This testimony is contrary to the trial court's findings of fact.

e. The government failed to establish that J. M. had an interest in the property taken, or dominion and control over it.

The government also failed to establish J. M. had an interest in the property taken. 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. *State v. Richie*, 191 Wn. App. 916, 922, 365 P.3d 770 (2015) (citing *State v. Hall*, 54 Wn. 142, 143–44, 102 P. 888 (1909)). Robbery requires the government to prove the person who forced was used upon had (1) an ownership interest in the property taken, or (2) some representative capacity with respect to the owner of the property taken, or (3) actual possession of the property taken. *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).

In *Richie*, the court found the store clerk was acting in her capacity as a Walgreen’s employee when the theft took place. *Richie*, 191 Wn. App. at 776. But in *Richie*, the clerk took affirmative actions to retain the property. *Id.* She tried to find a manager before the theft had taken place and alerted other employees about the potential theft. *Id.* at 775-76. 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.* at 773. 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 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 was a passive act and was not an attempt to recover the property.

f. The failure to establish sufficient evidence of robbery requires dismissal.

These facts do not describe a robbery. *See State v. Strong*, 167 Wn. App. 206, 214, 272 P.3d 281, 286 (2012). The display of the firearm took place 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. *Hummel*, 383 P.3d at 608.

F. CONCLUSION

The Washington and federal constitutions require that Benjamin be afforded the right to a jury trial. The failure to provide him with one requires a new trial.

The Washington and federal constitutions mandate that the government prove all essential elements of crimes charged beyond a reasonable doubt. The failure to prove force was used in the taking or retention of the property against a person who had an ownership interest in or dominion and control over the property requires dismissal of this charge.

DATED this 11 day of May 2017.

Respectfully submitted,

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

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

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MAY, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TAMARA HANLON	()	U.S. MAIL
[tamara.hanlon@co.yakima.wa.us]	()	HAND DELIVERY
YAKIMA CO PROSECUTOR'S OFFICE	(X)	AGREED E-SERVICE
128 N 2 ND STREET, ROOM 211		VIA COA PORTAL
YAKIMA, WA 98901-2639		

[X] BENJAMIN TORRES	(X)	U.S. MAIL
ECHO GLENN CHILDREN'S CENTER	()	HAND DELIVERY
33010 SE 99 TH ST	()	E-MAIL BY AGREEMENT
SNOQUALMIE, WA 98065		VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF MAY, 2017.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

May 11, 2017 - 3:35 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34575-1
Appellate Court Case Title: State of Washington v. Benjamin Torres
Superior Court Case Number: 16-8-00215-4

The following documents have been uploaded:

- 345751_Briefs_20170511153217D3529867_6601.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was washapp.org_20170511_151338.pdf

A copy of the uploaded files will be sent to:

- wapofficemail@washapp.org
- kate@washapp.org
- tamara.hanlon@co.yakima.wa.us
- travis@washapp.org
- joseph.brusic@co.yakima.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20170511153217D3529867