

No. 34575-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT,

v.

BENJAMIN TORRES, APPELLANT.

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

	PAGE
TABLE OF AUTHORITIES .....	iii
I. ASSIGNMENTS OF ERROR .....	1
II. STATEMENT OF THE CASE.....	2
III. ARGUMENT .....	5
A. JUVENILES DO NOT HAVE A RIGHT TO A JURY TRIAL .....	5
1. The Juvenile Justice Act of 1977 measures up to the essentials of due process.....	6
2. The United States Supreme Court has held that trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement under the Sixth Amendment .....	7
3. The Washington State Supreme Court has held that a juvenile has no right to a jury trial .....	8
4. The juvenile and adult courts in Washington still retain significant differences in purpose, procedure and result.....	16
a. The primary purpose of the Juvenile Justice Act remains rehabilitation .....	16
b. The Juvenile Justice Act has become even less punitive since <i>State v. Chavez</i> .....	18
c. Collateral consequences of juvenile adjudications do not mandate jury trials for juveniles. ....	20
d. The vast differences in penalties in juvenile and adult court continue to demonstrate their unique purposes.....	22
e. Practical reasons dictate retaining our current system of informal juvenile proceedings.....	24

B.	THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE ELEMENTS OF FIRST DEGREE ROBBERY .....	25
1.	The State proved that a Safeway employee was acting as the representative of the owner of the property taken because he was an employee of the store and acting in his employer’s interests at the time of the robbery.....	28
2.	The State proved that fear was used by the defendant to retain possession of the stolen property when Torres displayed a gun so that he and his underage friends could retain their stolen beer and escape from the scene of the crime with the property .....	31
3.	The State did not charge the defendant with using fear to prevent or overcome resistance to the taking of property so the State did not have to prove this prong of the robbery definition. ....	35
4.	The State proved all the essential elements of first degree robbery. ....	36
IV.	CONCLUSION.....	38

## TABLE OF AUTHORITIES

### Cases

<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) .....	8
<i>In re Gault</i> , 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) .....	7, 9
<i>In re the Welfare of Estes v. Hopp</i> , 73 Wn. 2d 263, 438 P.2d 205 (1968) .....	6, 7, 9
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) .....	7
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) .....	25
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528, 91 S. Ct 1976, 29 L. Ed. 2d 647 (1971) .....	6-8, 12, 24
<i>Monroe v. Soliz</i> , 132 Wn.2d 414, 939 P.2d 205 (1997).....	21
<i>Post v. City of Tacoma</i> , 167 Wn.2d 300, 217 P.3d 1179 (2009) .....	6
<i>State v. B.J.S.</i> , 140 Wn. App. 91, 169 P.3d 34 (2007) .....	26
<i>State v. Blewitt</i> , 37 Wn. App. 397, 680 P.2d 457 (1984).....	29
<i>State v. Bray</i> , 52 Wn. App. 30, 756 P.2d 1332 (1988) .....	35
<i>State v. Chavez</i> , 163 Wn.2d 262, 180 P.3d 1250 (2008) .....	15, 20-22
<i>State v. Garcia</i> , 20 Wn. App. 401, 579 P.2d 1034 (1978).....	26
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	26
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	25
<i>State v. Gunwall</i> , 108 Wn.2d 54, 720 P.2d 808 (1986) .....	12, 13
<i>State v. Handburgh</i> , 119 Wn.2d 284, 830 P.2d 641 (1992).....	32
<i>State v. J.H.</i> , 96 Wn. App. 167, 976 P.2d 1121(1999).....	14, 21-23
<i>State v. Johnson</i> , 155 Wn.2d 609, 121 P.3d 91 (2005).....	32
<i>State v. Lawley</i> , 91 Wn.2d 654, 591 P.2d 772 (1979).....	6-7, 10, 16
<i>State v. Manchester</i> , 57 Wn. App. 765, 790 P.2d 217 (1990) .....	32, 34
<i>State v. Maynard</i> , 183 Wn.2d 253, 351 P.3d 159 (2015) .....	23
<i>State v. Rice</i> , 102 Wn.2d 120, 683 P.2d 199 (1984).....	27
<i>State v. Rice</i> , 98 Wn.2d 384, 655 P.2d 1145 (1982).....	17
<i>State v. Richie</i> , 191 Wn. App. 916, 365 P.3d 770 (2015).....	29
<i>State v. Robinson</i> , 73 Wn. App. 851, 872 P.2d 43 (1994) .....	34
<i>State v. Rupe</i> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	29

<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987) .....	11-13, 22, 25
<i>State v. Smith</i> , 150 Wn.2d 135, 75 P.3d 934 (2003) .....	13
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980) .....	26
<i>State v. Truong</i> , 168 Wn. App. 529, 277 P.3d 74, 79 (2012) .....	27
<i>State v. Tvedt</i> , 116 Wn. App. 316, 65 P.2d 682 (2003) .....	29

**Statutes**

RCW 10.99.030 .....	19
RCW 13.04.021 .....	8
RCW 13.40.010 .....	17, 18
RCW 13.40.0357 .....	22
RCW 13.40.127 .....	18
RCW 13.40.265 .....	19
RCW 13.40.280 .....	21
RCW 13.40.300 .....	24
RCW 13.40.308 .....	19
RCW 13.50.260 .....	19
RCW 7.68.035 .....	20
RCW 9.94A.010.....	17

**Other Authorities**

Engrossed Substitute H.B. 2906, 64th Leg., Reg. Sess., Chapter 136 (Wash. 2016) .....	18, 19
--	--------

**Rules**

CrR 3.3(b) .....	24
JuCR 7.8(b).....	24

**Constitutional Provisions**

U.S. CONST. amend. VI .....	7
U.S. CONST. amend. XIV, § 1.....	6
Wash. Const, art. I, § 21.....	8

**Jury Instructions**

WPIC 10.51.....	27
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WPIC 37.02..... passim

**I. ASSIGNMENTS OF ERROR**

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- A. Do juveniles have a right to a jury trial?
- B. Was there sufficient evidence to support the elements of first degree robbery?

**II. STATEMENT OF THE CASE**

By way of an amended information, the appellant, Benjamin Torres, was charged in juvenile court with two counts: 1) first degree robbery-accomplice, and 2) possession of a controlled substance, alprazolam. Clerk's Papers (CP) 6-7. He was convicted of both after a bench trial. Verbatim Report of Proceedings (RP) 113, CP 15-6.

The convictions stemmed from the following facts:

On April 17, 2016, seventeen-year-old Jesus Moreno-Perez 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, Jesus believed that the beer was stolen. RP 28.

Jesus pulled out his phone so he could take pictures of the teenager and car involved. RP 12, 14, 28; State's Exhibits (SE) 5-9. Jesus 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 to leave so the driver, a female later identified as Emma Rangel, started pulling out of the parking spot. RP 40-1. At the same time, Jesus 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 Jesus. RP 16-17, 29, 39, 41, 94. Jesus, who was the only one outside and less than 20 feet away, turned and saw the firearm. RP 29-30, 42. Jesus 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.

Jesus 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. Jesus 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. Jesus wrote a statement for them and an officer took photos of the pictures on Jesus’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 Jesus 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 it's 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.

Detective 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 both counts, first degree robbery in count one, and possession of a controlled substance in count two. RP 113. The trial court also found that he committed the robbery while armed with a firearm. RP 113. On count one, he was sentenced to a standard range of 103 to 129 weeks, plus 6 months for the firearm enhancement. CP 18. He was not sentenced to any days on count two. CP 18. Findings of Fact and Conclusions of Law were filed. CP 12-16. This appeal followed.

### **III. ARGUMENT**

#### **A. JUVENILES DO NOT HAVE A RIGHT TO A JURY TRIAL.**

The appellant argues that he should have been afforded a jury trial and the trial court's failure to provide for a trial by jury violated his rights under the Sixth Amendment to the United States Constitution and Article 1, §21 and §22 of the Washington State Constitution. Torres further argues that because the juvenile system is becoming more and more akin to our adult system the right to a jury trial for juveniles should be restored. These arguments have been made at both the state and federal levels for

literally decades and have consistently been denied throughout history. These arguments are contrary to long-standing precedent and they are without merit.

**1. The Juvenile Justice Act of 1977 measures up to the essentials of due process.**

Torres summarily claims that he was deprived of his due process rights because he was not provided with a jury trial. Brief of Appellant at 6. His argument is without merit.

Due process violations are reviewed de novo. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009). The Fourteenth Amendment bars “any state [from] depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. Nonetheless, our State Supreme Court has held that the Juvenile Justice Act (JJA) measures up to the essentials of due process. *State v. Lawley*, 91 Wn.2d 654, 591 P.2d 722 (1979). In *Lawley*, our court noted that even under the former juvenile act, due process did not require jury trials. *Id.* at 655 (citing *In re the Welfare of Estes v. Hopp*, 73 Wn.2d 263, 265-68, 438 P.2d 205 (1968)). In reaching its holding, the *Lawley* court relied on *McKeiver v. Pennsylvania*, 493 U.S. 528, 91 S. Ct 1976, 29 L. Ed. 2d 647 (1971), which requires a juvenile trial “measure up to the essentials of due process and fair treatment.” *Id.* at 659. The court held that the JJA did not

violate due process, and declined to adopt a more stringent rule under the state constitution. *Id.* at 659.

**2. The United States Supreme Court has held that trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement under the Sixth Amendment.**

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 at 541. The Washington State Supreme 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 at 659. Thus, RCW 13.04.021(2), which states that “cases in the juvenile court shall be tried without a jury,” does not violate the Sixth Amendment.

“The applicable due process standard in juvenile proceedings is fundamental fairness as developed by *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), and *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), which emphasized factfinding procedures,

but in our legal system the jury is not a necessary component of accurate factfinding.” *McKeiver v. Pennsylvania*, 403 U.S. at 528. “We would not assert...that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.” *Id.* at 543 (citing *Duncan v. Louisiana*, 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)).

**3. The Washington State Supreme Court has held that a juvenile has no right to a jury trial.**

Appellant argues that the Washington State Constitution affords juveniles the right to a jury trial. Brief of Appellant at 7. As Torres points out, Article 1, § 21 of the Washington State Constitution provides, “The right of a trial by jury shall remain inviolate...” *Id.* Article 1, § 22 also provides, “[i]n criminal prosecutions the accused shall have the right...to have a speedy public trial by an impartial jury...” Wash. Const, art. I, § 22. This right to a jury trial, however, does not apply to juveniles. Thus, RCW 13.04.021(2), which provides that, “[c]ases in the juvenile court shall be tried without a jury” does not violate Article 1, § 21 or § 22 of our Washington State Constitution.

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. Torres does not provide a sufficient basis to overrule long-standing precedent in Washington State.

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 recognized, “[s]ince the adoption of the first juvenile court act in 1899 in the State of Illinois, the concept of juvenile courts has been that a child who has committed a criminal offense who is wayward, incorrigible, or ungovernable, is to be recognized as ‘delinquent’ and subject to treatment under a system of probation and rehabilitation, rather than as a criminal.” *Id.* at 265-66. The Court in *Estes v. Hopp*, however, was asked to reexamine the right to jury trials as they pertain to juveniles given the United States Supreme Court’s 1967 decision in *In re Gault*.

The Court in *Estes v. Hopp* considered the decision of *In re Gault*, 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, in modern times, when the substantial benefits of the informal juvenile process are still recognized.

The Supreme Court of Washington 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 argument was almost identical to the one here. In that case, 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, the Washington Supreme Court held that despite such amendments, juvenile proceedings remained rehabilitative in nature and they were distinguishable from adult criminal proceedings. 109 Wn.2d at 16. Thus, the Court determined that such amendments created no right to a trial by jury. *Id.* at 15-7.

The Court in *Schaaf* recognized that while the United States Supreme Court in *McKeiver v. Pennsylvania* declined to require jury trials for juveniles under the federal constitution, the Court recognized that states were free to utilize a juvenile justice system with a right to a jury trial. *Id.* at 13. “That, however, is the State’s privilege and not its obligation.” *Id.* (quoting *McKeiver v. Pennsylvania* at 547).

The Court in *Schaaf* 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. Despite this analysis, the Court in *Schaaf* 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.

Torres argues that *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003), should be persuasive regarding the analysis of the *Gunwall* factors. In *Smith*, the court held there is no right to a jury trial on facts of prior convictions. The court based this finding on the fact that there was no provision for jury sentencing at the time the State constitution was enacted. 150 Wash 2d. at 154. Torres argues that this applies to this very different issue of juveniles and jury trials. Brief of Appellant at 9. Torres argues that because a juvenile in 1889 had the right to a jury, a juvenile has the right to a jury trial today. *Id.* at 23. The Court in *Smith*, however, did not consider whether a juvenile offender has a right to a jury trial under the *Gunwall* analysis. The Court in *Schaaf* did. Thus, *Schaaf* is controlling precedent as to this issue. Interestingly, *Schaaf* did consider this same argument made here:

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. The 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 was asked to consider the same issue raised in this appeal, which is 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 under the United States or Washington State constitutions. After a lengthy analysis of this issue, 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, the Washington State Supreme 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). *Chavez*, who was found guilty of three counts of attempted first degree murder, robbery in the first degree, assault in the second degree while armed with a firearm, and other serious felony offenses, argued that the right to jury trials should be extended to those charged with serious violent offenses even if other juveniles do not have such right.

The Court in *Chavez* rejected this argument and in reviewing the history of this argument over the past several decades, determined: “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. The Court held “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 this appeal, Torres asks this Court to completely disregard long-established precedent in the State of Washington. His arguments are without merit and his appeal should be denied.

**4. Juvenile and adult courts in Washington still retain significant differences in purpose, procedure and result.**

As the Court in *Lawley* aptly noted, the pivotal question is whether the juvenile proceedings are so akin to an adult criminal prosecution that the constitutional right to a jury trial is necessary. *State v. Lawley*, 91 Wn.2d at 656. Appellant argues that because the juvenile system is becoming sufficiently like the adult criminal system, the right to a jury trial for juveniles should be restored. Brief of Appellant at 6. Many of the arguments posed by the appellant have been considered and rejected by our courts. Juvenile and adult courts in Washington State still retain very significant differences at all levels and thus, jury trials are not necessary to protect the rights of youth accused of offenses.

**a. The primary purpose of the Juvenile Justice Act remains rehabilitation.**

The primary purpose of the adult criminal justice system remains punishment, while the primary purpose of the juvenile system is still

rehabilitation of delinquent youth. *State v. Rice*, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982). This is clear from a comparison of RCW 9.94A.010, which sets forth the purposes of the Sentencing Reform Act (SRA), with RCW 13.40.010, which sets forth the purposes of the Juvenile Justice Act. The first three prongs of RCW 9.94A.010 still use the term “punishment.” In addition, one of the primary purposes of the Sentencing Reform Act is to “[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history.” RCW 9.94A.010(1).

RCW 13.40.010(2), however, provides, “It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders and their victims...be established.” Under the JJA, the Legislature sets standard ranges with the understanding that the time frame would address the needs of youthful offenders and that rehabilitation take place in Juvenile Rehabilitation under the Rehabilitation Administration of the Washington State Department of Social and Health Services.

Engrossed Substitute House Bill 2906 further clarifies the intent of the Legislature with regard to rehabilitation of juvenile offenders within the juvenile justice system in our State. Engrossed Substitute H.B. 2906,

64th Leg., Reg. Sess., Chapter 136 (Wash. 2016). This act is known as SOAR (Strengthening Opportunities and Rehabilitation for Reintegration of Juvenile Offenders). With this act, several changes were made to the Juvenile Justice Act, Title 13, as well as related laws affecting juvenile offenders.

For example, the act was amended to provide an additional purpose of the JJA, to “[p]rovide for the rehabilitation and reintegration of juvenile offenders.” RCW 13.40.010(2)(f). In addition, RCW 13.40.020(2) was amended to add restorative justice programs to the definition of community-based rehabilitation. Further, RCW 13.40.127, which sets forth the criteria for deferred dispositions, was amended to include the following language: “In all cases where the juvenile is eligible for a deferred disposition, there shall be a strong presumption that the deferred disposition will be granted.” RCW 13.40.127(2). Prior to this amendment, the court was simply to consider whether the offender and the community would benefit from a deferred disposition.

**b. The Juvenile Justice Act has become even less punitive since *State v. Chavez*.**

In addition to the above amendments, E.S.H.B. 2906 amended several laws, removing some of the punitive effects of juvenile adjudications. These amendments removed all mandatory minimum fines

for juvenile adjudicated of motor vehicle crimes. RCW 13.40.308. In addition, RCW 10.99.030 was amended to allow for prosecutorial discretion in charging domestic violence crimes involving family members. Furthermore, RCW 13.40.265 and related statutes were amended so that Department of Licensing (DOL) was only notified of second or subsequent juvenile adjudications involving unlawful possession of alcohol, drugs, or firearms. Previously under these statutes, DOL notification was required on first offenses, which triggered license suspension even if a case was diverted.

The Legislature has made it abundantly clear, in the passing of E.S.H.B. 2906, that the purpose of the juvenile justice system remains rehabilitative in nature, rather than punitive. There are clearly significant differences between adult and juvenile courts which still afford juveniles a multitude of special protections not offered to adults.

Prior to the SOAR act, significant changes were also made that lessened potential consequences of juvenile adjudications. In 2014, RCW 13.50.260 was amended to make it much easier for juveniles to seal their records. RCW 13.50.260 now requires that administrative sealing hearings be set for most offenses and allows for sealing upon age 18 if supervision terms are completed. And in 2015, many laws were amended to reduce mandatory fees and costs for juvenile offenders. For example,

RCW 7.68.035 was amended to eliminate the previously mandatory Crime Victim's Compensation in most cases. In addition, RCW 13.40.127 was amended in 2015 to allow a deferred disposition to be dismissed despite there being unpaid restitution. These numerous changes demonstrate that the Juvenile Justice Act has become even less punitive since *State v. Chavez*.

**c. Collateral consequences of juvenile adjudications do not mandate jury trials for juveniles.**

Appellant makes many other arguments that were all considered and rejected by *State v. Chavez*: 1) juveniles must provide a DNA sample, 2) juveniles must submit to fingerprinting and photographing upon arrest, 3) juveniles have the possibility of being housed in an adult prison, and 4) some juvenile records, such as those involving sex offenses, may not be sealed. Brief of Appellant at 18-23; *State v. Chavez*, 163 Wn.2d at 268.

While considering these same arguments, the court in *Chavez* held that the reasoning in *State v. Schaaf* still applies. Enough distinctions still exist between juvenile court proceedings and adult proceedings to justify denying juvenile offenders the right to a jury trial. *State v. Chavez*, 163 Wn.2d at 269. As pointed out in *Chavez*, "... the claim that changes to the juvenile justice system make its focus punitive and no longer rehabilitative has been posited and consistently rejected by this court." *Id.* at 269-70.

The Court in *Monroe v. Soliz*, 132 Wn.2d 414, 420, 939 P.2d 205 (1997), also considered RCW 13.40.280, which allows juvenile offenders to be transferred to the Department of Corrections if they are determined to be a continuing and serious threat to the safety of others. The Court emphasized that a criminal conviction carries far more serious ramifications than a juvenile adjudication regardless of where the juvenile serves his or her time, and, applying the reasoning in *Schaaf*, concluded the amendment did not create a right to a jury trial. *State v. J.H.*, 96 Wn. App. at 171-172 (discussing *Monroe v. Soliz*).

The Court in *State v. J.H.* also considered these arguments, regarding the collateral consequences of a juvenile adjudication, and reached the same conclusion as the Court in *State v. Chavez*. The Court in *J.H.* determined that amendments to the Juvenile Justice Act, which “may have increased the stigma of a juvenile adjudication does not by itself compel the conclusion that the juvenile system is no longer more rehabilitative in its treatment of offenders or more responsive to the needs of offenders than the adult criminal system.” *Id.* at 177.

**d. The vast differences in penalties in juvenile and adult courts continue to demonstrate their unique purposes.**

The penalty, rather than the act committed, is yet another factor that distinguishes the juvenile code from the adult criminal system. *State v. Chavez*, 163 Wn.2d at 271 (citing *State v. Schaaf*, 108 Wn.2d at 7-8). While Torres was ordered to serve a range of 103-129 months in Juvenile Rehabilitation (formerly JRA) pursuant to RCW 13.40.0357, he would have faced 31 to 41 months in prison for the same offense under the Sentencing Reform Act of 1981. In addition, in the juvenile system, Torres was sentenced to only 6 months for a firearm enhancement, CP 18, compared to 5 years that adults receive for a firearm enhancement. This further emphasizes the rehabilitative versus punitive results of the juvenile and adult sentencing systems.

The Court in *State v. Chavez* analyzed this issue by reviewing *State v. J.H.*:

In *J.H.* the Court of Appeals noted that the juvenile code provides for much more lenient penalties, a difference that weighs heavily in the balance between the two systems for purposes of a juvenile's right to a jury trial. The Court suggested that such lenience and access to programs available only through the JRA were reasons why none of the 12 juveniles involved in the appeal requested the juvenile court decline jurisdiction and transfer the matter to the

adult criminal system where a jury trial would have been available. We agree.

*Id.* at 271 (citing *State v. J.H.*, 96 Wn. App. at 182).

The Court in *Chavez* also found persuasive the differences in serving a disposition at Juvenile Rehabilitation and noted that, “[t]hough several of Chavez’s offenses made him ineligible for alternative dispositions, the State correctly notes that rehabilitative services in incarceration are still available and include education services, treatment options, and spiritual and cultural programs.” *Id.* at 272. This remains true today.

The Washington State Supreme Court recently recognized in *State v. Maynard*, 183 Wn.2d 253, 351 P.3d 159 (2015), that there are still many important benefits for youth in juvenile court when compared to adult criminal proceedings. In *State v. Maynard*, the Washington State Supreme Court determined that the remedy for ineffective assistance of counsel, which caused the loss of juvenile court jurisdiction, was a remand to juvenile court for proceedings consistent with the JJA. The Court in *Maynard* explained:

Although a defendant has no constitutional right to be tried as a juvenile, we have recognized that juvenile court offers an offender important benefits. See *State v. Dixon*, 114 Wn.2d 857, 860, 792 P.2d 137 (1990). For example, an adjudication as a

juvenile avoids the stigma of an adult criminal conviction. *Id.* It also provides less harsh penalties. *Id.* By statute, a juvenile defendant loses the benefits of the JJA if the court does not extend jurisdiction before the defendant turns 18. RCW 13.40.300(l)(a).

183 Wn.2d at 259-260.

**e. Practical reasons dictate retaining our current system of informal juvenile proceedings.**

While the juvenile and adult systems not only retain unique qualities, there are also many practical reasons that the courts have declined to extend the right to a jury trial to juvenile proceedings. “If the jury trial right were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system...” *McKeiver v. Pennsylvania*, 403 U.S. at 550. Injecting the jury trial right into the juvenile system would most likely also have unintended consequences, such as an inevitable amendment of JuCR 7.8(b), which currently provides for a speedy factfinding within 30 days for youth held in detention and 60 days for youth not held in detention. This rule would most likely be amended to be consistent with CrR 3.3(b), which would lengthen the amount of time the State has to bring juvenile offenders to a factfinding hearing.

The prospect of other unintended consequences, which would inevitably make the juvenile system more akin to the adult system is concerning, especially for youth in desperate need of a rehabilitative system responsive to their needs. As the Court in *State v. Schaff* aptly determined, “[j]uvenile offenders are afforded special protections under the present system, and we perceive no valid reason to jeopardize those protections by making juvenile proceedings fully akin to adult proceedings.” 96 Wn. App. at 181. Injecting a jury trial into juvenile proceedings as a matter of right would bring into the juvenile system delay, informality, and an adversarial system that would have many unintended consequences for our youth.

**B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE ELEMENTS OF FIRST DEGREE ROBBERY.**

Torres claims that there is insufficient evidence of first degree robbery. In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will

be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. *Id.* Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. *State v. Jackson*, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. *State v. Garcia*, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

If an appellant does not assign error to any of the trial court's factual findings, the findings are treated as verities on appeal. *State v. B.J.S.*, 140 Wn. App. 91, 97, 169 P.3d 34 (2007). In this case, Torres only assigned error to two of the trial court's findings of fact (numbers 13 and 14). Therefore, the rest of the factual findings are verities on appeal.

Here, Torres was charged with being an accomplice to first degree robbery. A person is guilty as an accomplice “if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: 1) solicits, commands, encourages, or requests another person to commit the crime; or (ii) aids or agrees to aid another person in planning or committing the crime. WPIC 10.51. The word “aid” means:

“...all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.”

*Id.*

Where criminal liability is predicated on accomplice liability, the State must prove only that the accomplice had general knowledge of his coparticipant’s substantive crime, not that the accomplice had specific knowledge of the elements of the coparticipant’s crime. *State v. Truong*, 168 Wn. App. 529, 540, 277 P.3d 74, 79 (2012) (citing *State v. Rice*, 102 Wn.2d 120, 125, 683 P.2d 199 (1984)). The seven essential elements of first degree robbery, in pertinent part, are as follows:

“(1) That on or about (date), the defendant unlawfully took personal property...in the presence of another;

- (2) That the person...was acting as a representative of the owner of...the property taken;
- (3) That the defendant intended to commit theft of the property;
- (4) That the taking was against the person's will by the defendant's...threatened use of immediate force, violence, or fear of injury to that person...;
- (5) That force or fear was used by the defendant to obtain or retain possession of the property...;
- (6)(b) That in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm...; and
- 7) That any of these acts occurred in the State of Washington."

WPIC 37.02.

- 1. The State proved that a Safeway employee was acting as the representative of the owner of the property taken because he was an employee of the store and acting in his employer's interests at the time of the robbery.**

Regarding the second element of WPIC 37.02, Torres claims that Jesus Moreno-Perez "was not acting on his employer's behalf to prevent a robbery when he took photographs of the fleeing vehicle." Brief of Appellant at 31. He also assigns error to the finding that Jesus was "doing his employer's bidding as he took the pictures," and claims that the testimony is contrary to that finding. *Id.* at 3, 31.

With respect to this element, all that the State had to prove was that he was acting as a “representative of the owner.” WPIC 37.02. *State v. Richie*, 191 Wn. App. 916, 925, 365 P.3d 770 (2015), and *State v. Tvedt*, 116 Wn. App. 316, 65 P.2d 682 (2003), provide guidance as to what it means to act as a representative of the owner. In *Tvedt*, the court of appeals explained that the person must have “some representative capacity over the property taken by virtue of their employment.” 116 Wn. App. at 323. And, as explained in *State v. Richie*:

...a person with a representative capacity would include a bailee, agent, employee, or other representative of the owner if he or she has care, custody, control, or management of the property. *Latham*, 35 Wn. App. at 865; *State v. Rupe*, 101 Wn.2d 664, 693, 683 P.2d 571 (1984) (bank teller could be a robbery victim because she had responsibility for the money in her till and control over it); *State v. Blewitt*, 37 Wn. App. 397, 399, 680 P.2d 457 (1984) (stealing property in the presence of the owner’s employee can support a robbery conviction because the employee had the implied responsibility of exercising control over the property).

191 Wn. App. at 925.

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.*

Here, Jesus 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. This is agreed by Torres. *See* Brief of Appellant at 33.

The only reason Jesus 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. For example, he was not taking the photos to share with his friends or to post on social media, or to look at later on during the day. 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 such, a rational trier of fact could have found that Jesus was acting as a representative of Safeway, the owner of the property taken.

In addition, Torres argues that the victim did not have an interest in the property or dominion and control over it. Brief of Appellant at 31. But he did have an interest in the property. All that the State had to prove in this case was that Jesus “had some representative capacity with respect to the owner of the property taken.” Here, as in *Richie*, the State presented sufficient evidence to show that he had a representative interest in the property taken because he was an employee of the store and acting in his employer’s interests at the time. Safeway had an interest in getting their stolen property back. Jesus acted in a way that helped them do that. In sum, the court’s Finding of Fact 14 was supported by the testimony at trial. A rationale trier of fact could have found that Jesus was acting in a representative capacity at the time.

**2. The State proved that fear was used by the defendant to retain possession of the stolen property when Torres displayed a gun so that he and his underage friends could retain their stolen beer and escape from the scene of the crime with the property.**

In the fifth element of WPIC 37.02, the State must prove “That...fear was used by the defendant to...retain possession of the

property.” WPIC 37.02. The issue is why was the force or fear used by the defendant. The element goes to the defendant’s state of mind or motive.

Under the statute, the force used can be in *retaining* the property. 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) (holding “force necessary to support a robbery conviction need not be used in the initial acquisition of the property. 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). If a defendant abandons peaceably obtained property, the robbery ends because the force is not used to retain the property or to prevent or overcome resistance to the taking. *State v. Johnson*, 155 Wn.2d 609, 610-11, 121 P.3d 91 (2005).

Torres argues that the use of force was not to retain possession of the property. Instead, he argues it was “an attempt to intimidate Jesus from taking pictures or potentially reporting the crime.” Brief of Appellant at 27. Why would Torres not want photos taken or a report of the crime? Because he and his friends wanted to get away with the beer without getting caught. His motive was to retain the stolen property. This

was a logical and reasonable inference one could make from the evidence presented at trial.

Torres also argues that “the display of the firearm was unrelated to the taking or retention of the beer.” Brief of Appellant at 27. Here, there is no evidence of any other reason why Torres would threaten Jesus with a gun. There was no connection between the two individuals that would lead to another motive for displaying the firearm.

Torres also claims that the firearm was displayed as the car was leaving the parking lot. Brief of Appellant at 29. Actually, the car was just pulling out of the parking spot and was still in the parking lot of Safeway. Emma Rangel testified as follows:

Q: Can you say whether it was a handgun or a rifle?

A: A handgun.

Q: When did you see it?

A: At the time I was pulling out of the parking spot.

...

Q: How fast was the car going when you saw the gun?

A: It wasn't going very fast at all. It was going maybe five max. I was pulling out of the parking spot.

Findings of Fact 15 through 20, which are verities on appeal, are consistent with this testimony. CP 14.

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.”).

In this case, 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. Based on these facts, a rational trier of fact could find that the reason Torres used fear was so that they could all leave with the stolen property, or in other words, to “retain possession of the property.” There was no testimony that the firearm was shown to Jesus for any other reason. In fact, the *only* logical reason was that Torres wanted to escape with the stolen property.

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 State did not charge Torres with using fear to prevent or overcome resistance to the taking so the State did not have to prove this prong of the robbery definition.**

Torres claims that there was no resistance to the taking of beer in this case. Brief of Appellant at 29-31. However, the State did not charge Torres with using fear to prevent or overcome resistance to the taking. CP 6. As such, the State did not have to prove this element. Defendants must be informed of the charges against them, including the manner of committing the crime. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). In this case, the defendant was charged in every information with “using force, violence, or fear of injury...in order to obtain or retain the property taken.” CP 4-6.

Relying on the transactional view of robbery, the trial court concluded that “[t]he respondent acted with the intent to assist in stealing beer and to escape with the stolen beer.” CP 15. This is consistent with what the State specifically charged, using fear “to obtain or retain possession of the property.” CP 6. While the court did find that Jesus was “resisting the taking of the beer” in Finding of Fact 13, there was substantial evidence to support the charged prong. As such, assuming, for sake of argument, that there was any error in that finding, it was a harmless.

**4. The State proved all the essential elements of first degree robbery.**

In the previous sections, the State has set forth the evidence supporting the second and fifth elements of WPIC 37.02. The evidence was also sufficient to support findings for the remaining elements of first degree robbery.

As to the first element of WPIC 37.02, it is undisputed that on April 17, 2016, the principal took personal property in the presence of another, the store's employee, Jesus Moreno-Perez. This was established by testimony from Jesus and Emma, and the surveillance video. SE 15. And it was corroborated by the testimony that officers recovered beer shortly after the incident in the car Jesus was riding in. As to the third element, it is also undisputed that the co-participant, Jacob Tello, intended to commit theft of the property. One is presumed to intend the natural consequences of their actions. Here, Emma saw Jacob, who was under 21 years of age, go into the store and run out with beer. RP 38. This was also caught on surveillance video. SE 15. A logical and rational conclusion is that he intended to steal the beer since he was a minor and could not purchase it.

The fourth element that the State must prove is that “[t]hat the taking was against the person’s will by the defendant’s...threatened use of

immediate force, violence, or fear of injury to that person.” WPIC 37.02. Here, the taking was against the will of the employee by Torres’s threatened use of immediate force, violence or fear of injury to the employee. In this case, a threat of force was used to complete the taking of the stolen property. Testimony at trial established that Torres displayed a firearm in order to complete the taking of the stolen beer and leave with it. These facts were sufficient for a rational trier of fact to find that the State proved this element.

The sixth element that the State must prove is “[t]hat in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm...” WPIC 37.02. Here, there was substantial evidence that Torres displayed a firearm. Both Jesus and Emma testified that he displayed a firearm. RP 29-30, 41-3. When the suspect vehicle was located, a firearm was then found inside of Torres’s backpack. RP 89, 91; SE 26-7.

As to the seventh and final element there is no dispute that the acts in this case took place in the State of Washington. Jesus testified that he was working at the Safeway located in Yakima, Washington. RP 8-9.

In sum, each essential element of first degree robbery was supported by substantial evidence. A rational trier of fact could have found all the elements proven beyond a reasonable doubt.

#### **IV. CONCLUSION**

For the foregoing reasons, the State asks that the court affirm the convictions. Torres had no right to a jury trial. In addition, the evidence was sufficient for a rational trier of fact to find each element of first degree robbery.

Respectfully submitted this 25th day of August, 2017,

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 25, 2017, by agreement of the parties, I emailed a copy of the Brief of Respondent to Travis Stearns at [travis@washapp.org](mailto: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 25th day of August, 2017 at Yakima, Washington.

s/ Tamara A. Hanlon

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