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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

T.M., APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. Is the trial court required to consider a juvenile defendant's age when determining whether the State proved every element of the offense of second degree assault?
2. Was there sufficient evidence to prove T.M. committed second degree assault?
3. Did the trial court err in excluding evidence that appeared to invade the province of the trier of fact?

## **II. STATEMENT OF THE CASE**

T.M., a fourteen-year-old male, was charged with one count of second degree assault in the juvenile department of the Spokane County Superior Court. CP 37. The information charged T.M. with second degree assault, either by strangulation or by reckless infliction of substantial bodily harm. CP 37. The matter proceeded to an adjudicatory hearing.

On June 2, 2017, at the end of the school day, eighth graders T.M., A.C., and B.S., along with other classmates, and substitute teacher, Cody Ableman, returned to the classroom from playing outdoors. CP 86. A.C. sat on a desk and talked to B.S. CP 88. B.S. observed T.M. walk up to A.C. from behind and place him in a choke hold; T.M. said nothing to A.C. before doing so. CP 87. A.C. felt pain and was unable to breathe; B.S. believed A.C. was afraid. CP 87-88. B.S. estimated T.M. squeezed A.C.'s neck for

approximately ten to fifteen seconds. CP 87. T.M., who admitted to placing A.C.'s neck in a "wrestling hold," estimated he held the "hold" for five to ten seconds. CP 89. B.S. stood in shock as he watched T.M. with his arm around A.C.'s neck. CP 88.

Mr. Ableman was stacking chairs when he heard a voice he recognized to be T.M.'s say "Don't tap out."<sup>1</sup> CP 86. Mr. Ableman turned to observe T.M. behind A.C. squeezing A.C.'s neck with one arm, with his other arm holding the first in place around A.C.'s neck. CP 86. Mr. Ableman yelled to T.M. to let go of A.C.; T.M. let go within a second and A.C. fell to the ground, unconscious. CP 86. T.M. testified that he let go of A.C. because he felt A.C. "get heavy." CP 89.

A.C. did not remember anything else, other than waking up on the floor. CP 88. A.C. got up from the floor and was bleeding profusely from a gash under his chin that required six sutures; he also sustained a cut to his nose. CP 86. The defendant stipulated that A.C.'s injuries, also including a broken jaw that was wired shut for six weeks, constituted "substantial bodily harm." CP 88.

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<sup>1</sup> B.S. testified T.M. said, "fight 'til you tap out." CP 87. T.M. testified he said "something" to A.C. about "tapping out." CP 89.

There was no animosity between T.M. and A.C. CP at *passim*; RP at *passim*. Multiple witnesses all believed T.M. to be remorseful and apologetic. CP 87-89.

T.M. and B.S. had been on the school's wrestling team. CP 87. The maneuver used by T.M. on A.C. was not an official wrestling move taught by their wrestling coach. CP 87. T.M. admitted that the choke hold he used is a "pro wrestling" or "UFC" (Ultimate Fighting Championship) move. CP 89. T.M. had seen the move in UFC fights, and acknowledged that the referee usually stops the fight when the move is applied. CP 89. T.M. also knew, prior to the incident, that this choke hold can cause a person to cease breathing, and can result in unconsciousness. CP 89. However, he applied the move to A.C. because he wanted to show the move to a friend. CP 89. T.M. did not intend to cut off A.C.'s blood or air flow, but intended to control A.C.'s body. CP 89. T.M. testified that he believed he had permission to place A.C. in the choke hold as long as he did not hurt A.C. because it is common among the boys at his school to roughhouse by pushing, shoving, and playing punching games. CP 89.

Based upon the above, the trial court entered its findings of fact and conclusions of law. CP 85-92. In addition to hearing testimony from the above witnesses, the court also heard testimony from Dr. Paul Wert, a psychologist. Dr. Wert testified, and the court found, that many adolescent

brains are not totally developed until they are in their 20s. Dr. Wert testified, and the court also found, that lack of brain development and hormones can affect decision making, especially in young males. CP 90.

Based upon its findings of fact, the trial court found T.M. guilty, and determined the State had proven both alternative means beyond a reasonable doubt. CP 92. In reaching this conclusion, the court determined T.M. intentionally assaulted A.C. by grabbing his neck and squeezing it, and that this touching would be offensive to an ordinary person. CP 91. The court concluded that T.M. intended to place a choke hold on A.C. to “control his body” and the fact that he “controlled it to the point where [A.C.] lost consciousness was more than [T.M.] expected.” CP 91. The court also concluded that the control applied by T.M. to A.C. was accomplished by obstructing A.C.’s airway, and that this result constituted a crime. CP 91.

The court determined that T.M. acted recklessly by intentionally placing A.C. in a choke hold because “even [T.M.] testified that he knew there was a possibility,” and disregarded that possibility, that a wrongful act may occur by placing a person in a choke hold, because T.M. knew the use of a choke hold could cause loss of air to the victim. CP 91 (CL ¶ 45). The court concluded the conduct also was an assault by strangulation because T.M. restricted A.C.’s ability to breathe. CP 92.

T.M. requested the court make a “manifest injustice” finding, and impose a downward departure from the standard range commitment of 15-36 weeks to the Juvenile Rehabilitation Administration (JRA). CP 56-64. The trial court did so, finding that, although certain aggravating factors existed, mitigating factors also existed – primarily the defendant’s age and lack of criminal history.<sup>2</sup> CP 74. The court imposed 12 months of supervision, 80 hours of community service, and 14 days of electronic home monitoring. CP 75-77. T.M. timely appealed.

### **III. ARGUMENT**

Defendant argues that the *mens rea* applicable to the adult criminal code should not be applied in juvenile adjudicatory proceedings. Br. at 17-18. The defendant cites recent developments in state and federal juvenile sentencing law in justification for his argument that there should also be a “child-centric *mens rea* standard in juvenile cases.” Br. at 14-17.

The defendant’s argument fails for several reasons. First, the defendant’s argument is unpreserved and should not be considered. Second, cases involving juvenile sentencing or *Miranda* are inapplicable to this case. Third, the juvenile justice system already accounts for differences between

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<sup>2</sup> Defendant also requested the court find that T.M. did not contemplate that his conduct would cause serious bodily injury. CP 58. The trial court did not make this finding at the disposition hearing. CP 74.

juveniles and adults. Fourth, in juvenile adjudicatory proceedings, a trial court must find the applicable mens rea has been proven beyond a reasonable doubt, meaning, the State has proven the respondent actually formed the requisite mens rea required under the criminal code.

The defendant secondarily challenges an evidentiary ruling by the court. This claim also fails because (1) the defendant has not demonstrated the court abused its discretion, and (2) even if the court erred, any error was harmless.

**A. RAP 2.5 PRECLUDES THE DEFENDANT FROM ARGUING, FOR THE FIRST TIME ON APPEAL, THAT THE COURT SHOULD HAVE APPLIED A CHILD-CENTRIC MENS REA.**

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates

appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

*Strine*, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.<sup>3</sup> Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, defendant alleges that the trial court erred by failing to consider evidence of the defendant’s age, the context of his relationship to the victim, and the impact of brain development in the young adolescent on the court’s culpability determination. Br. at 1-2. The failure to raise this

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<sup>3</sup> An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

issue at the trial court is not reviewable on appeal because the defendant has failed to demonstrate that the alleged error is manifest and constitutional in nature.

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.” Here, any error relating to the trial court’s failure to *sua sponte* “apply – at the guilt phase – the proper mens rea standard appropriate to behavior common to adolescents within their social cohort,” Br. at 13, or in other words, a “child-centric mens rea standard,” Br. at 17, is not “manifest” or “obvious on the record.”

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclan*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

*State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant’s claim that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge

trying the case should have *sua sponte* applied a “child-centric mens rea” rather than the legislatively mandated mens rea required under Washington law.

While, as discussed below, juvenile brain science has led to changes in juvenile sentencing and confession procedures, it has not yet had any effect on substantive determinations of culpability. Even the law review article cited by T.M. admits, by its title, that “juvenile mens rea” is a *theory*. J. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 64 N.C. L. Rev. 539 (2016). The article also admits that “thus far, courts have declined to extend [juvenile sentencing and confession/*Miranda*] analysis to culpability standards contained in the substantive criminal law concept of mens rea,” and that the principle goal of the article is to “lay the foundation for the application of adolescent neuroscience in the sphere of substantive criminal law.” 94 N.C. L. Rev. at 543. An issue cannot be “manifest” or obvious when the authority for that claim is grounded only in theory that has not gained traction in the courts or other controlling law.<sup>4</sup> See 94 N.C. L. Rev. at 589 (“courts have been reluctant to rely on neuroscience outside of sentence mitigation”). The court should decline to review this issue as it is not manifest.

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<sup>4</sup> T.M. concedes that the trial court considered his youth at the time of disposition, which comports with the current state of the law. Br. at 13 n.3.

Additionally, the defendant does not establish that his claim of error implicates a constitutional right. Besides citing the Eighth Amendment (in the context of juvenile sentencing cases) and the Fourth Amendment (in the context of *Miranda*'s reasonableness analysis), Br. at 14-16, defendant fails to explain how this claim is constitutional in nature. Without demonstrating which constitutional provision was offended by the trial court's failure to apply the theoretical concept of "juvenile mens rea," the defendant has not established that his claim is constitutional in nature. Neither the State nor this Court should be required to guess as to the constitutional authority for his claim. This Court should decline to address this unpreserved issue.

**B. THE JUVENILE BRAIN SCIENCE CASES APPLICABLE TO JUVENILE SENTENCING OR *MIRANDA* ARE INAPT TO THIS CASE AND THE LAW REVIEW RELIED UPON BY RESPONDENT IS MERELY THEORETICAL.**

There is little question that evolving research on adolescent brain development has significantly altered the legal landscape in the area of criminal sentencing. *See Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 718, 732, 193 L.Ed.2d 599 (2016), *as revised* (Jan. 27, 2016) (states must ensure prisoners serving sentences of life without parole for offenses committed before the age of 18 have benefit of individualized sentencing procedure that considers their youth and immaturity at the time of the offense); *Miller v. Alabama*, 567 U.S. 460, 476-77, 132 S.Ct. 2455,

183 L.Ed.2d 407 (2012) (same); *see also State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018). And, it is logical that this research which, in general, demonstrates that children have an underdeveloped sense of responsibility, and are more susceptible to negative influences and peer pressure, would counsel that children, therefore, have “lessened culpability” making them “less deserving of the most severe *punishments.*” *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *as modified* (July 6, 2010) (emphasis added).

However, none of the above cases (or the other cases cited by the defendant), stand for the proposition that a juvenile court should (or may) apply a “child centric” mens rea in determining whether a minor violated a criminal statute. Neither does *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), in which the Supreme Court held that the “age of a child subjected to police questioning is relevant” to determine whether the defendant has been taken into custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

Furthermore, as briefly discussed above, J. Carroll’s law review article expresses her theory that juvenile brain science should impact not only sentencing and *Miranda* issues, but should also affect the manner in which courts determine whether a particular mens rea has been satisfied in a criminal prosecution. However, her article’s admitted agenda is to take “a

first step” in laying the foundation for the application of juvenile neuroscience to substantive criminal law. Further, the article concedes a number of problems with the author’s theory:

What proof problems would a juvenile-centric mens rea approach create? How would substantive defenses be affected? Is such an approach likely to change outcomes? What does such an approach suggest about the criminal justice system itself?

94 N.C. L. Rev. at 543.

The author also admits that *even proponents* of the use of juvenile neuroscience in the Eighth Amendment context “have cautioned against its premature use in substantive criminal law,” *id.* at 544; that courts have been reluctant to rely on neuroscience outside of the sentencing mitigation, *id.* at 589; that “neuroscience offers little insight into *individual* behavior,” *id.* at 588 (emphasis added); and that, “in those rare instances in which courts have used neuroscience outside of sentencing, scholars have noted confirmation bias – the process by which the fact finder uses the evidence to confirm preconceptions about the defendant, rather than acquire some new understanding,” *id.* at 589.

The Supreme Court of Connecticut has also observed that applying neuroscience to alter the mens rea analysis for a juvenile “would require the

Court to rewrite the entire Penal Code.”<sup>5</sup> *State v. Heinemann*, 282 Conn. 281, 920 A.2d 278, 309 (2007). Ostensibly, however, that is what T.M. now requests this Court do. This Court should decline that invitation, as discussed further, below.

**C. WASHINGTON’S JUVENILE JUSTICE SYSTEM IS DESIGNED TO ACCOUNT FOR DIFFERENCES BETWEEN JUVENILES AND ADULTS.**

1. The purpose of the Juvenile Justice Act is to hold juvenile offenders accountable while still recognizing they are, in fact, children.

Most<sup>6</sup> juvenile offenders who are determined to have the capacity<sup>7</sup> to commit criminal offenses, or those who are presumptively able to commit criminal offenses, are prosecuted in juvenile court under the Juvenile Justice Act. The purposes of the Juvenile Justice Act (JJA) include holding offenders accountable and providing restitution for victims while providing rehabilitation and necessary treatment for juvenile offenders. RCW 13.40.010(2)(c), (f), (g), (i); *State v. J.A.*, 105 Wn. App. 879, 886,

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<sup>5</sup> J. Carroll is unwilling to deny this assertion, claiming instead, “to achieve an accurate assessment of mens rea for juvenile offenders, courts *may not need to alter state of mind terminology*, but they do need to alter the perspective through which that terminology is interpreted.” 94 N.C. L. Rev. at 594 (emphasis added).

<sup>6</sup> This case does not involve those situations where a juvenile is prosecuted in adult court, which generally occurs after a “decline” hearing during which the court determines a number of factors.

<sup>7</sup> Capacity to commit a crime is further discussed below.

20 P.3d 487 (2001) (“Although the JJA seeks a balance between the poles of rehabilitation and retribution, the purposes of accountability and punishment are tempered by and at times must give way to the purposes of responding to the needs of the juvenile”). The juvenile justice system has been designed by our legislature to provide punishment to juvenile offenders that is “commensurate with the age, crime, and criminal history of the juvenile offender.” RCW 13.40.010(2)(d).

Under the JJA, an “offense” is “an act designated a violation or a crime if committed by an adult under the law[s] of this state” or under any ordinance, federal law or under the law of another state if the act occurred in that State. RCW 13.40.020(21). Thus, the legislature expressly required that juveniles who have the capacity to commit criminal offenses are to be prosecuted under the same substantive criminal law as adults.

At a juvenile dispositional hearing, however, the court must consider certain mitigating factors, to include, among others: (i) that the respondent did not cause, threaten to cause, or contemplate that his or her conduct would cause or threaten to cause serious bodily injury; (ii) that the respondent acted under strong and immediate provocation; and (iii) the respondent suffered from a mental or physical condition that significantly reduced his or her culpability for the offense though failing to establish a defense. RCW 13.40.150(3)(h). Each of these factors reflects those

principles that have been identified as characteristic of youthful offenders by the above discussed cases addressing juvenile brain science in the area of juvenile criminal sentencing.

2. The juvenile justice system is concerned with the capacity of the juvenile to commit a criminal offense, and for those who have capacity to commit a crime, the law requires their guilt to be determined beyond a reasonable doubt.

At common law, children below the age of seven were conclusively presumed incapable of committing a crime and children over the age of 14 were presumed to be capable; children between those ages were rebuttably presumed incapable of committing a crime. *State v. J.P.S.*, 135 Wn.2d 34, 954 P.2d 894 (1998). Ultimately, Washington codified those presumptions, reducing the age of presumptive capacity to twelve years of age:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

RCW 9A.04.050.

For children between the age of 8 and 12 to be criminally prosecuted, the state must rebut the presumption of incapacity by clear and convincing evidence. RCW 9A.04.050; *State v. Q.D.*, 102 Wn.2d 19, 26, 685 P.2d 557 (1984). “Infancy defenses,” like insanity defenses, focus on the actor’s lack of capacity to form the mens rea of a crime. *State v. Linares*,

75 Wn. App. 404, 412, 880 P.2d 550 (1994), *as amended on denial of reconsideration* (Sept. 26, 1994). However, a child need not know that an act is illegal, in order to be capable of committing a criminal act. *J.P.S.*, 135 Wn.2d at 38.

For those juveniles who are presumed to have capacity to commit a crime, i.e., those between the age of 12 and 18, the court must still determine, beyond a reasonable doubt, that the juvenile committed the given crime. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995) (State must prove every element of the charged crime beyond a reasonable doubt); JuCR 7.11(a). In other words, the court must find, beyond a reasonable doubt, that the juvenile formed and acted with the requisite mens rea necessary to establish the commission of a crime. As discussed below, the court did so here.

3. Legislative change is necessary to incorporate a “child-centric” mens reas into Washington’s criminal code.

As discussed above, the Washington legislature has defined a juvenile “offense” as “an act designated a violation or a crime if committed by an adult under the law[s] of this state.” RCW 13.40.020(21). Thus, the legislature has defined that juvenile offenses are to be proven by the same elements as adult offenses.

An appellate court gives the plain meaning of statutory language full effect, even where the results seem harsh under the circumstances, and does not question the wisdom of the policies enacted by the legislature. *See Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997); *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992). If the legislature dislikes the impact of a statute as enacted, then it is up to the Legislature, and not the court, to undertake the responsibility to change it. *Boyd*, 133 Wn.2d at 88. Therefore, any changes to Washington's criminal code, in so far as it applies substantive criminal offenses to juveniles, must be accomplished by legislative change, rather than by judicial opinion.<sup>8</sup>

**D. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL TRIER OF FACT TO DETERMINE THAT THE DEFENDANT FORMED THE REQUISITE MENTES REAE NECESSARY TO COMMIT THE CRIME OF SECOND DEGREE ASSAULT.**

Absent an express constitutional or statutory basis for his claim, the defendant's challenge amounts to a sufficiency of the evidence<sup>9</sup> challenge: he argues based on the evidence presented, no rational trier of fact could find that he formed the requisite mentes reae to commit the crime of second

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<sup>8</sup> This is especially true, where, as here, the defendant has failed to prove, or even allege, that the constitution has been offended by the application of Washington's substantive criminal law to juvenile conduct.

<sup>9</sup> A sufficiency of the evidence claim is constitutional in nature and is grounded in the due process clause of the Fourteenth Amendment, which allows for a criminal conviction only upon proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

degree assault. In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). As this Court stated in *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010): "Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact." In like manner, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Additionally, in the context of a bench trial, the court determines whether substantial evidence supports a trial court's challenged findings of fact and, in turn, whether they support the conclusions of law. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722

(1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002) The court reviews challenges to a trial court's conclusions of law de novo. *Id.* Here, the defendant does not challenge any findings of fact; thus, they are verities. The defendant's sole challenge is to the court's conclusions of law that the defendant acted with intent or recklessness.

The defendant was convicted of two alternative means of committing second degree assault – assault by reckless infliction of substantial bodily harm, and assault by strangulation. The court found, beyond a reasonable doubt, T.M. had committed second degree assault by each means. CP 92.

1. Assault by reckless infliction of substantial bodily harm.

The term “assault” is not defined in the criminal code. Courts use common law to define the term. *State v. Krup*, 36 Wn. App. 454, 457, 676 P.2d 507 (1984); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681 (1942). Three definitions of assault have been recognized by Washington courts: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted common law battery); (2) an unlawful touching with criminal intent (completed common law battery);

and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm (common law assault). *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988), *disapproved of on other grounds by State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *accord, State v. Madarash*, 116 Wn. App. 500, 513, 66 P.3d 682 (2003). At issue in this case is whether T.M. assaulted A.C. by an unlawful touching with criminal intent (actual battery).

a. Intentional assault.

RCW 9A.36.021(1)(a) provides a person is guilty of assault in the second degree if he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm. “This crime is defined by an act (assault) and a result (substantial bodily harm)... And the mens rea of intentionally relates to the act (assault), while the mens rea of recklessly relates to the result (substantial bodily harm).” *State v. Keend*, 140 Wn. App. 858, 866, 166 P.3d 1268, 1272-73 (2007). Assault by completed battery requires an intentional striking or touching of another in a harmful or offensive manner, but it does not require specific intent to accomplish some further result, such as inflicting substantial bodily harm. *State v. Daniels*, 87 Wn. App. 149, 155, 940 P.2d 690 (1997), *review denied*, 133 Wn.2d 1031 (1998); *State v. Esters*, 84 Wn. App. 180, 927 P.2d 1140 (1996), *as amended* (Jan. 31, 1997).

The touching or force used is not unlawful if there is consent by the “victim,” but a victim cannot consent to an assault if the activity is against public policy or is a breach of the peace. *State v. Hiott*, 97 Wn. App. 825, 828, 987 P.2d 135 (1999) (a juvenile could not consent to a game in which the victim and defendant were shooting each other with BB guns); *but see*, *State v. Shelley*, 85 Wn. App. 24, 929 P.2d 489 (1997) (consent is a defense to an assault occurring during an athletic contest when the conduct was reasonably foreseeable to the participants, regardless of whether the conduct was permitted by the rules of the athletic event; the defendant was not entitled to argue consent when he broke the victim’s jaw throwing a punch over a disagreement that occurred in the course of a basketball game).

Here, the defendant intentionally touched A.C., by his own admission. His reasons, whether to “control” A.C.’s body or to “show off” a wrestling move, have little bearing on the analysis. The manner in which T.M. touched A.C. was harmful, and would be offensive to any person of reasonable sensibilities – being choked to the point of losing blood flow or consciousness is something that is likely to offend any person, whether child or adult. T.M. did not need to intend to hurt A.C. He did not need to wish ill will or injury on A.C. For this reason, his instant remorse also bears little on the analysis of the intent issue. His intentional act of placing his arms

around T.M.'s neck and squeezing sufficed to establish the intentional act required for second degree assault.

Even assuming choking an unexpected student, while in a classroom, were at all similar to childhood roughhousing, it would not be an activity that A.C. could "consent" to. *Hiott*, 97 Wn. App. at 828. Under *Shelley*, 85 Wn. App. 24, consent could be a defense to assault if the choking occurred during a wrestling match. However, as observed in *Shelley*, courts have generally declined to apply the defense of consent in the context of a school child's consent to hazing, a school child's consent to fight, or a gang member's consent to a beating. *Id.* at 30. For that matter, even if roughhousing were an activity that could be consented to, like a sports activity, it would not be foreseeable that the roughhousing would extend from the playground to inside a classroom, during the last period of a school day. *See id.* at 31 (consent issue is determined by whether the defendant's conduct constituted foreseeable behavior in the play of a game).

b. Reckless infliction of substantial bodily injury.

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur, and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010(1)(c).

The defendant's claim that "not only did [he] not intend harm, but he was not mindful of a risk of harm when he put his arms around A.C.'s neck" is belied by his own testimony at trial. T.M. had actual knowledge that, in U.F.C. fights, the referee usually stops the fight when a choke hold is used, and that this choke hold can cause a person the inability to breathe, and can result in unconsciousness. CP 89. Thus, T.M. knew of and disregarded the substantial risk that injury could occur by the use of the "maneuver." The trial court did not err in concluding that T.M. acted recklessly, thereby causing A.C. substantial injury.

2. Assault by strangulation.

RCW 9A.36.021(1)(g) provides a person is guilty of assault in the second degree if he or she assaults another by strangulation or suffocation. "Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, *or* doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26) (emphasis added). Thus, in order to prove that T.M. assaulted A.C., the State need not prove that T.M. *intended* to cut off A.C.'s blood flow or ability to breathe. It suffices that T.M. intentionally assaulted A.C. by compressing A.C.'s neck, and obstructed his blood flow or ability to breathe – the statute applies equally to complete and partial obstructions of either a victim's

blood flow or ability to breathe. *State v. Rodriquez*, 187 Wn. App. 922, 930-36, 352 P.3d 200 (2015), *review denied*, 184 Wn.2d 1011 (2015).

As discussed above, the defendant's act of placing his arms around A.C.'s neck and squeezing was an intentional assault. Here, A.C. was rendered unconscious by the choke hold T.M. applied to his neck. T.M. compressed A.C.'s neck to the point that he felt A.C. "get heavy." When T.M. finally released A.C., A.C. fell to the floor, unconscious. Whether the unconsciousness was caused by A.C.'s inability to breathe or the obstruction of his blood flow is irrelevant – the unconsciousness was caused by one or both. The trial court did not err in concluding that T.M. intentionally assaulted A.C. and did so by strangulation.

**E. THE TRIAL COURT DID NOT ERR IN SUSTAINING THE STATE'S OBJECTION TO A DEFENSE QUESTION POSED TO THE DEFENSE EXPERT; ANY ERROR WAS HARMLESS.**

1. The trial court did not err by disallowing a poorly worded question that appeared to be cumulative and would require the witness to invade the province of the trier of fact.

The defendant next assigns error to the trial court's limitation of Dr. Wert's testimony at trial.

The State moved, in limine, to limit Dr. Wert's testimony regarding the respondent's intentions in placing his arms around A.C.'s neck. CP 31-34. Dr. Wert's opinion, as expressed in his pre-trial report, was that T.M. "did not have the intent to choke [A.C.] into a state of unconsciousness

which would then result in a fall with [A.C.] receiving serious injuries.” CP 31. The State argued that this testimony was both irrelevant and speculative. CP 31. The defendant conceded that Dr. Wert could not testify about T.M.’s actual intent at the time of the incident. CP 22. However, the defense proffered Dr. Wert’s testimony to demonstrate the impulsivity of T.M.’s action, that the action was “an impulsive sort of accident” “typical of a male in this category.” Rosadelavazquez RP 23. Defense counsel also argued that because the crime of second degree intentional assault requires “reckless indifference,” and “reckless indifference requires [a] reasonable person,” the behaviors of the reasonable 14-year-old male would be relevant. *Id.* at 24.

The court ruled that “obviously [Dr. Wert] can’t testify to the ultimate issue in the case, but that it would reserve on the other issues raised by the State until Dr. Wert testified. The court also ruled that it would allow “generalized [testimony about] how children react at this age.” *Id.* at 28.

At trial, Dr. Wert testified, in part:

[D]evelopment in adolescents was slow, it tended to go in spurts, it involved different parts of the brain at different times, and in terms of brain functioning, the prefrontal cortex is what -- it’s the area of the brain that controls executive -- what they call executive functioning or decision making and judgment are from the limbic system and controls emotions and in adolescents it was found that the prefrontal cortex was not fully developed until the individual was in his twenties

and sometimes as late as age 25, which was something that was not assumed to be the case before maybe 20 years ago.

Q And so -- thank you. Thank you for that clear explanation. So if an individual, an adolescent brain prefrontal cortex is not developed until not as late as 25, what does that mean for their decision-making abilities?

A. Well, it impairs decision making in a lot of adolescents. That obviously doesn't mean they can't make good decisions but they are challenged, and I think it's particularly true with males due to hormonal influence probably more than females.

RP 53-54.

A. [T]here is no question in my mind adolescents, particularly the adolescents today do have a tendency to leap before they look and there's not a great deal of planning that goes into some of the impulsive acts and a lot of times they don't anticipate the consequences of what might occur given a specific behavior on their part.

RP 59.

Dr. Wert also discussed risk factors for violent behavior, and his findings as to those factors exhibited by T.M. Defense counsel then asked a series of questions to which the State objected:

Q ... Dr. Wert, again, I can't ask you to draw a legal conclusion so I'm not asking you to comment or opine if [T.M.] had intent to commit assault on June 2nd. However, what I want to ask you is your opinion on what the reasons, based on your knowledge of all the facts in interviewing [T.M.], the police report, for [T.M.] to have put this wrestling move on [A.C.].

MR. PLUNKETT: Objection, Your Honor.

THE COURT: I would sustain it to what's in his mind, actually the form of the question.

Q (By Ms. Lindholdt) Do you have an opinion on what [T.M.]'s goal was here?

MR. PLUNKETT: Objection, Your Honor.

THE COURT: I'll sustain it to the form of the question.

Q (By Ms. Lindholdt) Did [T.M.] tell you what his motives were when he put the wrestling move on [A.C.]?

MR. PLUNKETT: Objection, calls for hearsay.

THE COURT: It's hearsay of the defendant. I'll overrule.

A. I don't believe that I specifically asked Ty what motivated the behavior. I do know what he had -- I think I know what he had in mind when he executed the behavior but what may have motivated that or what may have been multiple motivators, and I think it would just be speculative on my part.

...

Q. So in your experience and knowledge when a young male is acting in -- when a young male takes an action and testosterone is involved, do results occur that weren't intended?

A. Yes.

Q. Okay. If you were the decision maker here, what characteristics or factors or facts would you look to in determining what the goal of the defendant is?

MR. PLUNKETT: Objection.

*Q. In the studies you read and were aware of, what factors have been contemplated in determining motivations for impulsive behavior?*

MR. PLUNKETT: Objection, Your Honor, as relevance.

THE COURT: And I would sustain as to relevance.

MS. LINDHOLDT: Your Honor, what I'm trying to get out is, if I haven't already, is what he would consider as the expert here of juvenile behavior, what he would consider as relevant for the decision maker when determining what the motivation was. So I'm not getting into intent but there are factors that scientists in this area have looked to and they would be interactions of the parties. They would be how –

...

THE COURT: Counsel, the whole point of this was to give some general knowledge about basically brain thinking in adolescents, but you're going into very specifics and the truth of the matter asserted, so at this point the Court is going to sustain it...

RP 59-62 (emphasis added).

Defendant claims that the trial court erred in precluding Dr. Wert from testifying to the “factors [that] have been contemplated in determining motivations for impulsive behavior” on relevancy grounds. Br. at 2. The defendant does not assign error to any other evidentiary ruling by the trial court.<sup>10</sup>

The court reviews a trial court's rulings on the admissibility of evidence for abuse of discretion. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). A trial court abuses its discretion if its exercise of that

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<sup>10</sup> The other objections, responses, and ruling have been included to provide context to the reader.

discretion is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's decision is manifestly unreasonable or its grounds for a decision are untenable if the trial court relied on facts not in the record, applied an improper legal standard, or adopted a view "that no reasonable person would take." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is generally admissible; evidence which is not relevant is not admissible. ER 402. Although relevant, evidence may be excluded for a number of reasons, including that the evidence is needlessly cumulative. ER 403.

Here, defense counsel asked a poorly worded question: "In the studies you read and were aware of, what factors have been contemplated in determining motivations for impulsive behavior?" The question is also overly broad and vague, as it does not reference whether the "impulsive behavior" referred to is "juvenile" behavior; other impulsive behavior would be irrelevant.

Defense counsel's offer of proof and explanation of her question does little to establish its relevancy. First, counsel admits that the testimony

she has already elicited may be cumulative with the expected answer to this question. Dr. Wert had already testified that juvenile males are impulsive, they leap before they look, they do not anticipate the consequences of their actions, their hormones affect their thought processes, and that adolescents may experience impaired decision-making abilities because of their brain development. It is unclear from defense counsel's offer of proof what other, non-cumulative testimony she expected to elicit by this question.

Second, counsel appears to claim the testimony's relevancy is to establish "what [Dr. Wert] would consider as relevant for the decision maker when determining what the motivation was." Counsel's offer of proof appears to invite Dr. Wert to testify as to an ultimate issue of fact – whether the defendant actually had the requisite mens rea to commit the crime of assault. This is especially true in light of the preceding question, "*If you were the decision maker here, what characteristics or factors or facts would you look to in determining what the goal of the defendant is?*" This question would improperly require Dr. Wert to step into the shoes of the finder of fact and comment on the relevancy and weight of the evidence.

Even if that is not what defense counsel intended by either her questions or her explanation, it cannot be said that the trial court abused its discretion in disallowing this poorly worded question or its anticipated answer.

2. Any error in disallowing Dr. Wert to testify about “what factors have been contemplated in determining motivations for impulsive behavior” was harmless.

Even assuming the trial court should have allowed Dr. Wert to answer the final question posed by defense counsel, reversal is not required. An evidentiary error that is not of constitutional magnitude is subject to harmless error analysis. *See e.g., State v. Tharp*, 96 Wn.2d 591, 637, 637 P.2d 961 (1981). An error is harmless within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Id.*

As explained above, Dr. Wert was permitted to explain to the court recent developments in juvenile brain science. He was able to explain the causes of juvenile impetuosity, the effect of hormones on the juvenile body, and the fact that juveniles tend to leap before they look. However, he could not testify to the ultimately legal issue – whether T.M. actually formed the requisite mens rea to commit assault on the date of the offense. He testified that his beliefs about T.M.’s motivations were speculative.

And, ultimately, T.M. testified that he knew that choking another person could obstruct an individual’s ability to breathe. He testified that he knew that even in professional wrestling, referees stopped a fight when the the hold was applied. This testimony was sufficient for the court to find that,

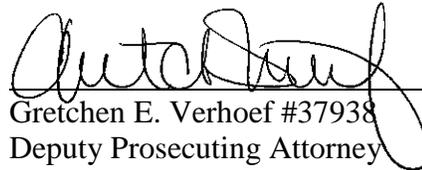
even if T.M. acted impetuously, he still acted with knowledge and disregard of a risk of substantial bodily injury. Any error was, therefore, harmless.

#### **IV. CONCLUSION**

The court properly considered the hallmark characteristics of youth when sentencing T.M. There was no indication, whatsoever, that T.M. did not have the capacity to form the requisite mens rea to commit the crime of assault, and his own testimony established that he did. The State respectfully requests this Court affirm T.M.'s adjudication and disposition.

Dated this 8 day of March, 2019.

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Prosecuting Attorney



Gretchen E. Verhoef #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
T.M.,  
  
Appellant.

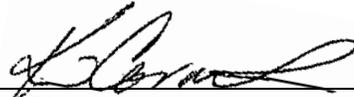
NO. 35957-3-III  
  
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 8, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jeffry Finer  
[jeffry@finerwinn.com](mailto:jeffry@finerwinn.com)

3/8/2019  
(Date)

Spokane, WA  
(Place)

  
(Signature)

# SPOKANE COUNTY PROSECUTOR

March 08, 2019 - 9:23 AM

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