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No. 36385-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

F.B.T.,

(D.O.B. 12/02/2004)

Appellant.

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

APPELLANT'S AMENDED OPENING BRIEF

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A. INTRODUCTION

F.B.T., a 13-year-old special education student who had previously been found incompetent by a prior court, was isolated and interrogated by police about allegations that resulted in the charges of child molestation, indecent liberties, and intimidating a witness. F.B.T. gave a contradictory, incriminating confession that was admitted at trial over his objection.

F.B.T. was held in detention pre-trial, where he was abused by other juveniles due to his low intellectual and social functioning. A State evaluator later found him competent when both parties again raised competency prior to trial. F.B.T. was convicted as charged. The court imposed a manifest injustice sentence intended to keep F.B.T. incarcerated until age 18 based on aggravating factors which F.B.T. had no notice of prior to adjudication, which were not authorized by statute, and which were based on insufficient evidence. The trial court then impermissibly modified F.B.T.'s disposition after he filed his notice of appeal.

F.B.T.'s constitutional rights were violated from interrogation through sentencing, requiring reversal of his conviction, or in the alternative, remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that F.B.T. knowingly, intelligently and voluntarily waived his *Miranda* rights and that his confession was voluntary.

2. The court erred in imposing a manifest injustice sentence where F.B.T. did not receive notice of the aggravating factors.

3. The court exceeded its authority in imposing a manifest injustice disposition upward based on a non-statutory aggravating factor.

4. Absent sufficient evidence, the court erred in finding the aggravating factor that the victims were particularly vulnerable.

5. Absent sufficient evidence, the court erred in finding the aggravating factor that F.B.T. failed to comply with a diversion order.

6. Absent sufficient evidence, the court erred in entering finding of fact 5, 8, 12, 13, 14, 22, 24, 25, 26, and 27.

7. The court erred in modifying F.B.T.'s disposition order after he filed his notice of appeal.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Courts consider the totality of the child's particular circumstances to determine the validity of a *Miranda* waiver and the voluntariness of a confession. Did the court err in determining F.B.T. knowingly, intelligently, and voluntarily waived his rights and offered a

voluntary confession when F.B.T. had previously been found incompetent, had known intellectual and emotional disabilities, and was repeatedly pressured him to “tell the truth” by the police, ignoring F.B.T.’s requests to go home? U.S. Const. Amends. V, XIV; Const. Art. I, § 9.

2. Where social science establishes children under 15 are generally incapable of understanding and waiving their *Miranda* rights, should this court require children like 13-year-old F.B.T. to have access to an attorney or other adult during police interrogation? Const. art. I, § 9.

3. The court imposed a manifest injustice sentence based on aggravating factors of which F.B.T. was not given notice. Did this violate F.B.T.’s state and federal constitutional rights to notice and due process? Const. Art. I, § 3; U.S. Const. Amend. VI, XIV.

4. Where the court lacked sufficient evidence of the statutory aggravating factors, is reversal of the manifest injustice sentence required?

5. Did the court exceed its authority by imposing a manifest injustice sentence based on aggravating factors not contained in the JJA, and which also violated the JJA’s prohibition on committing a child to a State institution based on a lack of community-based facilities?

6. Did the court’s modification of F.B.T.’s disposition order after he filed his notice of appeal violate RAP 7.2(e)?

D. STATEMENT OF THE CASE

a. F.B.T.'s young life is marked by abuse, mental health, and special education needs.

Thirteen-year-old F.B.T. went through more in his young life than anyone should have to. RP 228. His mother physically and sexually abused him from a young age. CP 24, 27. His stepfather physically abused him. CP 24. F.B.T. lived in three foster homes before moving in with his father and stepmother at age 10 in 2015. CP 27. Even then F.B.T. was afraid his mother would kidnap him if she knew where he was because she had done so in the past. CP 24, 27.

The Juvenile Department began contact with F.B.T. through the diversion process in October of 2016. CP 24. The Juvenile Court Administrator, Larry Barker, documented a number of explosive, violent behaviors at home. CP 24-26. F.B.T.'s school reported similar behaviors. CP 24-26.

F.B.T. inflicted self-harm and was medicated with antipsychotic medication and for ADHD, depression, anxiety, and sleep disturbance. CP 24, 27. He threatened suicide many times, beat his head against the wall, scratched himself, poked his eyes, and bit his lip. CP 25. He heard voices in his head, specifically his mother's and sister's. CP 24.

F.B.T.'s school reported he had an IQ of 70. CP 25. F.B.T. received special education services. CP 8. He was found incompetent through the diversion process as a 12-year-old in September of 2017. CP 26. Mr. Barker noted that even after this finding of incompetency, F.B.T.'s parents continued to use "local law enforcement as their first line of offense or defense, you know, regarding parenting skills." RP 36.

It is unclear what sort of mental health treatment F.B.T. was receiving. Probation noted only that F.B.T. "was involved" with mental health treatment. CP 24. F.B.T.'s father reported "the mental health folks refused to place [F.B.T.] in a local mental health facility." CP 25. F.B.T.'s family had little support and complained about receiving mixed messages, with law enforcement telling F.B.T.'s father to "whoop his ass," and CPS telling him he could not do that. CP 26.

b. F.B.T. acts out sexually.

Child protective services, F.B.T.'s parents, and Probation were aware F.B.T. had been sexually abused by his mother and were concerned about F.B.T.'s interactions with younger children. CP 24. F.B.T.'s stepmother expressed a concern that F.B.T. tried to hang out with a six-year-old. CP 25. And a diversion counselor let child protective services know F.B.T. wanted to hang out an eight-year-old girls. CP 26. There is

no evidence safeguards or a specific treatment plan were not put in place based on these apparent concerns.

F.B.T. spent a lot of time at the house of his friend, P.M. RP 90. F.B.T. stayed the night at P.M.'s house, where they slept in the living room with P.M.'s 11-year-old sister, R.M. RP 91-92; CP 1. P.M. awoke to see F.B.T. on top R.M., playing with his "wiener," or "penis" while naked. RP 92. His sister was in a deep sleep. RP 93. R.M.'s shirt was folded up to her shoulders, and she was nude on her lower half. RP 94. P.M. only saw F.B.T. touch the inside of his leg to the outside of her legs. RP 94. P.M. observed sperm on F.B.T.'s fingers that P.M. thought F.B.T. was trying to wipe on his sister's private area, but did not, because he got up and walked away when P.M. woke up. RP 95.

F.B.T. went in the kitchen and got a knife. RP 96. P.M. said F.B.T. said he would stab P.M. if he told anyone about this. RP 96. P.M. testified F.B.T. was "shaking a little bit and I didn't really think he would stab me." RP 97. P.M. said he thought it was kind of a joke to F.B.T. that P.M. took only a "little bit" seriously. RP 97, 102. After this, the two boys then went back to sleep in the same room. RP 104. F.B.T.'s conduct in no way discouraged P.M. from sharing what happened with anybody. RP 102.

J.R. is the three-year-old daughter of P.M.'s parents' friends. RP 110-111. One night, F.B.T. was in P.M.'s living room under a blanket

with three-year-old J.R. watching YouTube. RP 98, 111, 126. P.M. went to the kitchen. RP 98. F.B.T. and J.R. were not under the blanket for long when J.R. ran away, screaming for her mom. RP 98, 112. Denise McDonald, P.M.'s mother, was in the kitchen and could hear what was going on in the living room. RP 115. J.R. was upset. RP 113-114.

J.R.'s mother, Jennifer McEwan, was not at the McDonald home then, but she arrived soon after to find J.R. coughing, crying, and upset. RP 118-119. J.R. could not testify at trial but the court admitted the statements she made to her mother. RP 126-129. Ms. McEwan testified that J.R. told her F.B.T. "choked her" and touched her "pee pee." RP 120, 123. Ms. McEwan took her daughter for a sexual assault exam, and she said J.R. told her F.B.T. "stuffed two fingers in her." RP 123.

Ms. McEwan also made a police report. RP 131. An officer then came to F.B.T.'s home and drove him to the station. RP 147, 196. The officer told F.B.T.'s parents they would return him that night. RP 143.

c. The police interrogate F.B.T. without a parent or attorney.

The prosecutor characterized the police interrogation of F.B.T. as "super long" with confessions of "multiple criminal acts." RP 81. Two officers were present and F.B.T. had no adult or advocate present. RP 147-148, 196-197. An officer read F.B.T. *Miranda* warnings, which he said he understood. RP 149.

The officers who interrogated F.B.T. knew him for years. RP 179. They repeatedly urged F.B.T. to “tell the truth.” RP 153, 164, 173, 179, 183. The officers ignored F.B.T.’s numerous requests to go home. RP 143-144, 175, 182, 190. F.B.T. forthrightly told the officers he could not control the sexual urges he has felt since his mom raped him. RP 150, 170, 189. Though F.B.T. started out telling the officers information they did not believe, the officers’ promises like “you’re not in trouble,” and commands to “tell the truth” resulted in a statement that both contradicted and admitted to the conduct underlying the charged offenses. RP 152-189. Rather than take F.B.T. home as promised, he was taken to detention. RP 144.

The juvenile court administrator and F.B.T.’s father unsuccessfully requested F.B.T.’s release from detention and onto home monitoring because F.B.T. was the target of violence and manipulation in detention. RP 29, 32-33. F.B.T. was preyed on “because of his incapacity to know what’s going on and his incapacity to use social skills appropriately.” RP 35-36.

The court ordered another competency evaluation. RP 23. F.B.T. was found competent. RP 47; CP 15. Though competent, the report confirmed F.B.T. is somewhat developmentally delayed or disabled. CP 27. The evaluator suggested that the information in the report “may

provide a starting point” for additional assessments related to F.B.T.’s “social functioning” and “communication” deficits. CP 28.

The trial admitted F.B.T.’s confession over his objection, determining it was voluntary. RP 191-192, 197-198. He was convicted by bench trial of child molestation of J.R., indecent liberties against R.M., and intimidating a witness. CP 19-22; 30.

d. F.B.T. is incarcerated for the remainder of his childhood.

F.B.T. faced a standard range sentence of 45-108 weeks. RP 218. The Juvenile Department filed a manifest injustice report, alleging statutory and nonstatutory factors in support of a manifest injustice sentence. CP 23-29. The juvenile court administrator told the court a minimum 104 week term was needed for treatment. RP 222; CP 28. The prosecutor alleged several aggravating factors, requesting incarceration until F.B.T. turned 18, double the standard range and the time needed for treatment. RP 218-222.

F.B.T. was sorry for what he did and wanted help, specifically the tools he would get in therapy. RP 227. But he also wanted to “be like a kid for a while too longer.” RP 227.

The court recognized F.B.T. had “been through a lot,” “more than any person ever should have to deal with.” RP 228. The court recognized these hardships caused F.B.T.’s problems and that F.B.T.’s deficiencies

were his low IQ, mental health, and need for treatment. RP 228, 231. The court also noted that F.B.T. was pretty “forthright” with the officers when he talked to them about his “urges.” RP 230. The court hoped that F.B.T. would get help, treatment, and “solace” from his pain. RP 228.

Rather than impose the minimum 104 months needed for treatment, the trial court imposed a sentence over double the statutory maximum based on the aggravating factors alleged for the first time at sentencing, which included “the victim was particularly vulnerable,” “recent criminal history” or failure to comply with diversion agreement, and the non-statutory aggravating factor of “parents incapable of controlling child, high risk of re-offending.” CP 31. The Court first sentenced F.B.T. to 196 to 216 weeks, or until age 18. RP 231. But when the prosecutor pointed out F.B.T. had been in jail pending for 113 days already, the court increased its sentence to 206-232 weeks concurrent, to ensure F.B.T. would stay incarcerated until his 18th birthday. RP 234.

After F.B.T. file his appeal, the court again reworked F.B.T.’s sentence to obtain the desired result of detaining F.B.T. until he turns 18, imposing consecutive sentences of 70 weeks for counts 1 and 2, consecutive to a 66-92 week sentence imposed on count three. CP 51.

E. ARGUMENT

1. F.B.T., a 13-year-old special education student previously deemed incompetent prior to police interrogating him, did not voluntarily waive his *Miranda* rights, rendering his confession involuntary.

a. When as here, a child is subject to custodial interrogation, the State has the burden of establishing the child knowingly, intelligently, and voluntarily waived his rights.

The State may not compel a suspect in a criminal case to be a witness against himself. U.S. const. amend. V; Const. Art. I, §. 9. The Due Process Clause of the Fourteenth Amendment also demands that the State refrain from tactics designed to procure confessions through either physical or psychological coercion. U.S. Const. amend. XIV; *Rogers v. Richmond*, 365 U.S. 534, 540, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961); *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008).

Recognizing the “inherently coercive nature of custodial interrogation,” the Supreme Court “adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination.” *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)). Police must advise a suspect that he has the right to remain silent, any statements made be used as evidence against him, and that he has the right to an attorney. *Id.* If the State seeks to admit a statement made during custodial interrogation, it

must establish the accused “voluntarily, knowingly and intelligently” waived his *Miranda* rights. *J.D.B.*, 564 U.S. at 269-270. Whether a juvenile knowingly and voluntarily waives his rights is determined by examining the “totality-of-the-circumstances.” *Dutil v. State*, 93 Wn.2d 84, 89, 94, 606 P.2d 269 (1980). Courts review the validity of a claimed *Miranda* waiver de novo. *State v. Campos-Cerna*, 154 Wn. App. 702, 708, 226 P.3d 185 (2010).

Here, F.B.T. was taken into custody where the officer read him the *Miranda* and juvenile warnings. RP 141-143, 149, 196-197. The State presented no evidence the police went over a written form that F.B.T. signed. RP 148-149. After a CrR 3.5 hearing, the trial court ruled F.B.T.’s statements were voluntary without analyzing the totality of the circumstances, citing only that F.B.T. was read his *Miranda* warnings, and finding “at no time was F.B.T. ever advised that if he just tells us this, then he will get to go home.” RP 147, 191-92, 198.

b. A child’s specific circumstances must be factored into determining the validity of a *Miranda* waiver.

The totality of the circumstances analysis requires “inquiry into all the circumstances surrounding the interrogation.” *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L.Ed.2d 197 (1979). This includes “evaluation of the juvenile’s age, experience, education, background, and

intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.” *Id.*

The Supreme Court has long recognized a child is much less able to assert his rights in the face of an interrogation than an adult:

[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protest his own interests or how to get the benefits of his constitutional rights.

Gallegos v. Colorado, 370 U.S. 49, 54, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962). Courts must account for the pressures children feel during interrogation: “[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” *J.D.B.*, 564 U.S. at 264–65. Interrogation “can induce a frighteningly high percentage of people to confess to crimes they never committed,” especially children. *Id.* at 269. Children are “less mature and responsible than adults,” “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” and “are more vulnerable or susceptible to...outside pressures than adults.” *Id.* at 272.

Social science confirms juveniles are less capable of understanding or asserting their rights when interrogated by police and do not meaningfully comprehend *Miranda* rights. Kaitlyn McLachlan, Ronald Roesch, Kevin S. Douglas, *Examining the Role of Interrogative Suggestibility in Miranda Rights Comprehension in Adolescents*, 35 *Law & Hum. Behav.* 165, 166 (2011); *see also* Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions*, 20 *U. Pa. J. Const. L.* 1211, 1220 (2018) (citations omitted). Children are unable to engage in the reasoning required to understand and waive their *Miranda* rights, due in large part to their physiological immaturity. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 *Wis. L. Rev.* 431, 435-441 (2006). These limitations are even greater for children like F.B.T., who suffer from mental illness, impaired understanding, learning disabilities, parental abuse, and neglect. *Id.* at 443-444.

c. F.B.T. did not voluntarily waive his *Miranda* rights under *Fare*'s totality of the circumstances analysis.

In *Fare*, the Court determined there were “no special factors” indicating a “16 ½-year-old juvenile with considerable experience with the police” lacked the intelligence necessary to understand the rights he

waived. *Fare*, 442 U.S. 726. By contrast, F.B.T. possessed ample “special factors” that must be considered in determining his ability to waive his *Miranda* rights, including his extreme youth, incompetency, special education status, history of trauma, and his lack of sophistication.

i. F.B.T. lacked the ability to intelligently waive his rights.

Courts have long recognized the importance of age in determining the voluntariness of a juvenile confession. For example, the Supreme Court considered that a juvenile’s “tender and difficult age” of 15 a significant factor favoring suppression the child’s confession. *Haley v. State of Ohio*, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948). This concern is directly supported by social science, which shows juveniles, “especially those under fifteen,” are unable to meet the adult standard for adequately comprehending *Miranda* rights. Sahdev, *supra*, at 1220.

Courts must not only consider the chronological age, but also the specific capabilities of the youth. *J.D.B.*, 564 U.S. at 272. F.B.T.’s chronological age of 13 is very young, but his developmental and cognitive age was even younger. F.B.T. was a special education student with had an individualized education plan. RP 24-25; CP 8, 27. He had an IQ of 70 and was considered developmentally delayed or disabled. CP 25, 27. Probation reported F.B.T.’s intellectual functioning was measured at 70-80, which is borderline intellectual functioning. *American Psychiatric*

Ass'n Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000) (DSM–IV–R); CP 27. F.B.T.'s low functioning endangered him at the youth detention facility where he was housed pre-trial. RP 29, 32.

Even though the court found F.B.T. competent for trial, at the time of the interrogation, in June of 2018, F.B.T. had been deemed incompetent only nine months earlier in September 2017. RP 22-24; CP 26. He was not declared competent by a second evaluator until three months after the interrogation, in September 2018. CP 15. This was after F.B.T. was detained in a juvenile facility, had legal proceedings initiated against him, and was assisted by an attorney. RP 29, 46-47, 140. That he was able to express adequate knowledge about the legal system after his interrogation by no means establishes he possessed this same capacity at the time of his interrogation. *See State v. Sergeant*, 27 Wn. App. 947, 950, 621 P.2d 209 (1980) (suppression required where the defendant was incompetent to stand trial at the time that he gave the statement).

F.B.T.'s extreme youth and his well-established cognitive and emotional deficits rendered it error for the court to find that F.B.T.'s *Miranda* waiver was voluntary.

ii. The officers exploited F.B.T.'s youth and intellectual deficits, further rendering his confession involuntary.

The voluntariness of a confession also involves analysis of the police conduct. *State v. Cushing*, 68 Wn. App. 388, 392, 842 P.2d 1035 (1993); *see also Fare*, 442 U.S. at 726. Factors relevant to the totality-of-the-circumstances analysis are the length of the interrogation, its location, continuity, the suspect's maturity, education, physical health, and whether *Miranda* warnings were provided. *Unga*, 165 Wn.2d at 101.

In *Cushing*, the court determined there was no indication that the detectives exploited Cushing's mental illness. *Cushing*, 68 Wn. App. at 395. Police read Cushing his rights at least four times and carefully explained their meaning, specifically pointing out he did not have an attorney present. *Id.* at 394. The detectives spoke to Cushing in a normal, non-threatening manner. They relied primarily on open-ended questions. *Id.* The detectives did not press Cushing when he indicated he did not remember. *Id.* They offered him breaks, drinks, and ended the interview when he said he was tired. *Id.* The "precautions taken by the detectives in conducting the interview were clearly intended to take Cushing's mental impairments into account." *Id.*

By contrast, an officer read F.B.T. his *Miranda* and juvenile warnings once. RP 149. There is no evidence the officers reviewed a

written form with F.B.T. Rather than explain the meaning his rights, the officer told F.B.T. he was in trouble, saying: “[s]o, basically, you know why you’re here.” RP 149.

A promise made by law enforcement does not render a confession involuntary, but is a factor in deciding whether a confession was voluntary. *Unga*, 165 Wn.2d at 101 (citing *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed 302 (1991)). Here, the officer took F.B.T. from his home in the evening with the false promise he would return that night. RP 143, 187. Two officers alternated questioning. When the first officer did not get the answer he wanted, he falsely assured F.B.T.: “Like I said, you’re not in trouble. We’re just talking,” before following up with an incriminating question. RP 158. The officer also told F.B.T. his statements would help, not hurt him: “Because I can’t get you help; I can’t, you know, you have to be truthful, okay?” RP 179.

Removing F.B.T. from his home, false assurances he was not in trouble, and cajoling him to “tell the truth” are tactics known as the “Reid Technique,” which involves “isolation, confrontation, and minimization.” Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 Wash. & Lee L. Rev. 385, 412 (2008). Even the authors of this technique note “special precautions” must be taken when interrogating juveniles. Sahdev, *supra*, at 1221. “Because

adolescents are impulsive, highly suggestible, and susceptible to the influences of authority figures, the effects of interviewer bias, guilt-presumption, and the Reid Technique can be especially pernicious.” Birckhead, *supra*, at 419.

An officer’s repeated challenge to a child, accusing him of lying, “is a technique which could easily lead a young boy to ‘confess’ to anything.” *A.M. v. Butler*, 360 F.3d 787, 800 (7th Cir. 2004). Here, the officers rejected F.B.T.’s statements when they did not match what the officers believed to be true, repeatedly urging F.B.T. to tell the truth:

- “I just want the truth” RP 153;
- “Remember what we said about telling the truth?” RP 157;
- “Remember what we said about telling the truth?” RP 163;
- “So why don’t you tell us the truth. Just tell us the truth. I mean, you don’t have to think about the truth.” RP 163;
- “You’re lying to me, F.B.T. I can tell you’re lying. This is not the first time we’ve met, okay? You’re doing good. I think you’re telling us some of the truth, you’re not telling the whole truth, okay? Remember, you want to tell the truth in this situation, okay? Lies get everybody in trouble. So just tell us the truth about what happened.” RP 163-164;
- “I think there’s more to that story you’re not telling us. Remember, the truth, F.B.T. Tell us the truth.” RP 164;
- “Tell us the truth, F.B.T.,” RP 172;
- “You’re getting close to telling the truth, there F.B.T. what is it you think that we’re going to find when we send all her clothes to the

Crime Lab? What do you think is going to be on her underwear?" RP 173.

- "Tell us the truth, F.B.T." RP 174;
- "Remember what we said about the truth, F.B.T.?" RP 178;
- "[Y]ou have to be truthful, okay?" RP 179;
- "I've dealt with you the last probably six years and I know when you're lying to me...we're not playing games here, okay? I need the truth from you." RP 179.
- "...[E]very time, when you start lying, you start swearing on the Bible, you start praying to God, you start doing a lot of things except for saying the truth. It's pretty obvious that you're lying to us. I've been doing this job for 18 years, F.B.T. I've dealt with you the last probably six years and I know when you're lying to me." RP 179;
- "So, F.B.T., tell me the truth. Was her underwear on or off?" RP 183.
- "Tell me the truth, F.B.T." RP 184.

These repeated admonitions to "tell the truth" compelled F.B.T. to change his answers until the officers were satisfied, which resulted in highly incriminating, contradictory statements. RP 153-189.

The officers isolated F.B.T., first by removing him from his home at night and driving him to the police station without an adult to help him, and then by denying his repeated requests to go home:

F.B.T.: I wish I could go home.

OFFICER: Hmm?

F.B.T.: I wish I could go home, I need a snack or I'll get grumpy.

OFFICER: Well, when we're done here we'll get you a snack. We'll take care of it, okay? So I think that clears up most the stuff.

RP 175. Surely a child's request to go home should be understood as a sufficient "expression of an objective intent to cease communication with interrogating officers." *State v. I.B.*, 187 Wn. App. 315, 321, 348 P.3d 1250 (2015). Rather than stop or even allow F.B.T. to take a break, the officers continued to press him for more incriminating details, which F.B.T. supplied. RP 176-182. F.B.T. again tried to end the interrogation, stating, "And that's all...So now can I come home?" RP 182. The officers ignored F.B.T.'s request and continued to interrogate him, to which F.B.T. responded, "and then after that can I be done?" RP 182. Later, F.B.T. again asked: "Are we done yet? My parents are probably worried about me." RP 187. The officer lied in response, stating "No, I told them I'd bring you back. And I told them what's going on, okay?" RP 187.

The officers' questioning continued, with F.B.T. denying the accusation he touched R.M. with his penis, begging, "[n]ow can I go, please?" RP 187. Ignoring this plea, the officers continued to question F.B.T. about his "urges." RP 188. The officers resumed questioning about

J.R., and F.B.T. admitted, “my whole body had an urge except my head¹... Now can I just go home please?” RP 189-190.

F.B.T.’s emotional and cognitive limitations establish he could not knowingly waive his *Miranda* rights. His age and intellect made him particularly susceptible to police tactics known to be especially pernicious for juveniles. These tactics were designed to overbear F.B.T.’s will and render his confession involuntary. *See e.g.* Birckhead, *supra*, at 419.

d. The remedy is reversal and remand for a new trial without F.B.T.’s statements.

The State bears the burden of proving the admission of statements that violate of *Miranda* is harmless beyond a reasonable doubt, which requires the state to demonstrate the confession did not contribute to the conviction. *Fulminante*, 499 U.S. at 292-97.

The State cannot meet this burden. The Court noted that without F.B.T.’s admissions, the evidence supported an “attempted” indecent liberties. RP 135-136. Indeed, the court relied on F.B.T.’s statement in making key findings of fact. FF #6, 8, 10, 12, 13, 14, 22, 23, 26. The court specifically emphasized F.B.T.’s admission of “urges” to establish F.B.T. acted with sexual motivation. CP 21, FF# 22, 24, 25, 27, 28.

¹ The VRP contains slight inaccuracies regarding this statement; this quotation is transcribed from the audio itself. Exhibit 1 at 47:45.

Further, the already weak evidence of intimidating a witness would have been far weaker without F.B.T.'s statements. P.M. first described F.B.T.'s conduct with the knife as a "joke" and P.M. did not really think F.B.T. would stab him. RP 97. P.M.'s testimony at best established the threat seemed "a little bit" serious. RP 101. There is no question that the police urging of F.B.T. to say he told P.M. he would "murderize" him and "cut you in too many pieces," was necessary to establish F.B.T. used a threat to induce P.M. to not report what he had seen. RCW 9A.72.110; RP 167. This is especially true when after this supposed threat, both boys went back to sleep in the same room without incident, and it did not stop P.M. from telling other people about what he saw. RP 102, 104.

e. Article I, section 9 should be interpreted to provide more protection than its federal counterpart for children who are subjected to police interrogation.

F.B.T. is entitled to reversal of his conviction because his confession was involuntary under the federal constitution. However, adequate and independent grounds for reversal also exist under article I, section 9 of Washington's Constitution. *See Michigan v. Long*, 463 U.S. 1032, 1040, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

In evaluating a state constitutional claim, the context of the specific claim is critical. Sometimes analogous state and federal constitutional provisions will demand the same rule. But this does not

mean they always do: “when the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context.” *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994). In *Russell*, the court rejected the argument that because a previous decision had declined to give it a broader reading than the Fifth Amendment, it was precluded from analyzing whether article I, § 9 was more protective in another context. *Id.* Because the context was different, a *Gunwall* analysis was appropriate and useful. *Id.* at 59-62 (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.3d 808 (1986)).

Before *Gunwall* was decided, the state supreme court ruled *Fare*’s totality of the circumstances approach was adequate to ascertain the voluntariness of a child’s confession. *Dutil*, 93 Wn.2d at 87-90, 94. The Court declined to require additional protections on independent state grounds, but left open the possibility of additional safeguards should there be evidence of their necessity. *Dutil*, 93 Wn.2d at 94.

Since *Dutil*, Washington has acknowledged the need for different standards in the treatment of children in the criminal justice system, consistently applying the *Miller* principle that “children are different.” *State v. Bassett*, 192 Wn.2d 67, 81, 428 P.3d 343 (2018) (citing *Miller v. Alabama*, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012)).

The same should be true for interrogations, where social science confirms courts' longstanding concern that children under age 15 do not understand and cannot meaningfully waive *Miranda*. See §1(b), *supra*.

This Court should hold article I, section 9 is more protective than the Fifth Amendment, requiring suppression of F.B.T.'s statements.

i. Article I, section 9 should be more protective than the Fifth Amendment in the context of police interrogation of a young child.

To determine whether a state constitutional provision offers broader protections than its federal counterpart, this Court evaluates six nonexclusive *Gunwall* criteria. *Gunwall*, 106 Wn.2d at 61-62.

a) Differences in the text and language of article I, section 9 and the Fifth Amendment.

State courts have the power to interpret their state constitution as more protective than the parallel provisions of the federal constitution. *State v. Simpson*, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980). Doing so “is particularly appropriate when the language of the state provision differs from the federal, and the legislative history of the state constitution reveals that this difference was intended by the framers.” *Id.* This is the case with article I, section 9.

The differences between the text of article I, section 9 and the Fifth Amendment demonstrate the framers of our constitution intended to confer stronger protection against self-incrimination than that provided by

the federal constitution. *See Gunwall*, 106 Wn.2d at 65. Article I, section 9 provides, “No person shall be compelled in any criminal case to give evidence against himself...” This language is significantly different from the Fifth Amendment, which provides that no person “shall be compelled in any criminal case to be a witness against himself.”

In using the word “witness,” the federal constitution’s focus is on guaranteeing the right not to testify against oneself at trial. *See Michigan v. Tucker*, 417 U.S. 433, 440, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974) (the language of the Fifth Amendment “might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify”); *Cf. Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (a “witness” is a person who “bears testimony”). But our framers explicitly rejected a proposed version of article I, section 9 which would have only protected the right of a person not to “testify against himself.” *Journal of the Washington State Constitutional Convention: 1889*, 498 (B. Rosenow ed. 1962). Instead, they favored the broader “give evidence” language. *Id.* In so doing, they provided strong protections at the investigatory stage. *Contra, Russell*, 125 Wn.2d at 59.

The Vermont Constitution uses similar language “nor can a person be compelled to give evidence against oneself.” Vt. Const. CH I, art. X.

Vermont interprets this provision to provide greater protections against self-incrimination to youth than is required under federal law:

The following criteria must be met for a juvenile to voluntarily and intelligently waive his right against self-incrimination and right to counsel under chapter I, article 10 of the Vermont Constitution: (1) he must be given the opportunity to consult with an adult; (2) that adult must be one who is not only genuinely interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and (3) the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile

In re E. T. C., 141 Vt. 375, 379, 449 A.2d 937 (1982).

Other states have adopted similar additional procedural protections for juveniles either by case law or statute. *See e.g.* Colo. Rev. Stat. Ann. § 19-2-511(1)(West 2018); Ind. Code § 31-32-5-1; *Matter of B.M.B.*, 264 Kan. 417, 432, 955 P.2d 1302 (1998); *Com. v. Smith*, 471 Mass. 161, 165, 28 N.E.3d 385 (Mass. 2015).

The textual differences in Washington's constitutional protections against self-incrimination justify additional procedural protections to youth interrogated by police. *See E.T. C.*, 141 Vt. at 379.

b) Constitutional history and preexisting state law.

The third and fourth *Gunwall* factors, constitutional and common-law history and pre-existing state law, also support the determination that art. I, section 9 provides stronger protections than the Fifth Amendment.

Though the JJA provides that a juvenile is entitled to “the same privilege against self-incrimination as an adult,” this was not always the case. RCW 13.40.140(8). Under the repealed version of RCW 13.04.120,² when a juvenile was taken into police custody, he had to be brought directly to court, which limited the ability of police to interrogate the child.³ This statute was intended to prevent the police from taking advantage of a juvenile’s “naivete,” “imprudence,” and “inexperience.” *State v. Luoma*, 88 Wn.2d 28, 36, 558 P.2d 756 (1977). Though the statute did not forbid police questioning children, it restricted the practice by not allowing police to “delay the process of taking the child directly to the juvenile authorities.” *Prater*, 77 Wn.2d at 533. Thus, courts did not previously “approve of the full custodial questioning of a juvenile prior to the arrival of a juvenile officer.” *Luoma*, 88 Wn.2d at 36. This shows our State’s historical protection of a juvenile’s right against self-incrimination.

When considering this factor, it is “perhaps even more instructive to look at how our jurisprudence on juvenile law has evolved to ensure greater protections for children.” *Bassett*, 192 Wn.2d at 81. Washington

² Laws of 1959, ch. 58, § 1, *repealed by* Laws of 1977, Ex. Sess., ch. 291, § 81.

³ “When, in any county where a juvenile court is held, a child under the age of eighteen years is taken into custody by a parole, peace, police or probation officer, such child shall be taken directly before such court, or placed in the detention home or place under the jurisdiction of such court, or into the custody of the court probation officer.” *State v. Prater*, 77 Wn.2d 526, 533, 463 P.2d 640 (1970) (*quoting* Laws of 1959, ch. 58, § 1).

protects juveniles because “children are different.” *See, e.g., State v. Houston-Sconiers*, 188 Wn.2d 1, 19, 391 P.3d 409 (2017). The Supreme Court also broadly approved of *Graham*’s declaration that “...criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Houston-Sconiers*, 188 Wn.2d at 8 (*quoting Graham v. Florida*, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

And in *State v. O’Dell*, the Court used the psychological and neurological studies discussed in *Miller*, *Roper*, and *Graham* to hold that age may mitigate a defendant’s culpability, even if the defendant is older than 18. *Bassett*, 192 Wn.2d at 81 (*citing State v. O’Dell*, 183 Wn.2d 680, 691-96, 358 P.3d 359 (2015)). Where social science confirms children under age 15 do not understand the rights at stake in *Miranda* warnings, this Court should find special protections must apply to juveniles subject to police interrogation.

c) Structural differences and matters of particular state concern.

The fifth factor, “differences in structure between the state and federal constitutions,” always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the state’s power. *Bassett*, 192 Wn.2d at 82 (citations omitted).

The Sixth factor also supports a broader interpretation of article I, section 9. Law enforcement measures are a matter of state and local concern. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). The protection of juveniles is also of particular concern. *See Bassett*, 192 Wn.2d at 81-82.

Article I, section 9 should require that before police seek a *Miranda* waiver from a child, especially one under age 15, that the child be able to consult with an attorney or non-adversarial, genuinely interested adult who understands the child's legal rights. *See E.T.C.*, 141 Vt. at 379. Washington's constitution should require this additional protection because children are "not equal to the police in knowledge and understanding," and children have a limited ability to understand *Miranda* rights. *Gallegos*, 370 U.S. at 54; *see e.g. McLachlan, supra*, at 166.

ii. This court should reverse and remand for suppression of F.B.T.'s statement under Article I, section 9.

F.B.T.'s young age, immaturity, and intellectual disability rendered the standard *Miranda* warnings wholly inadequate. This Court should find the admission of F.B.T.'s statements made while subject to police interrogation without the presence or advice of a non-adversarial adult or attorney was error. *See E.T.C.*, 141 Vt. at 379. This failure to provide this necessary protection requires reversal and remand under Article I, sec. 9.

2. The court erred in imposing a manifest injustice disposition without giving F.B.T. notice of the aggravating factors.

Due process entitled F.B.T. to notice of the specific aggravating factors the State alleged in support of a manifest injustice disposition.

a. Children are entitled to due process in juvenile proceedings.

The Due Process Clause specifically extends to proceedings in which a juvenile may be adjudged delinquent. *United States v. Doe*, 155 F.3d 1070, 1073 (9th Cir. 1998) (citing *In re Gault*, 387 U.S. 1, 31-35, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967)); *In re Winship*, 397 U.S. 358, 359, 90 S. Ct. 1068, 25 L. Ed. 2d. 368 (1970); U.S. Const. amends. 5, 14; Const. art. I, § 3.

Notice is the cornerstone of due process. Const. art. I, § 22; U.S. Const. amend. 6. Constitutionally adequate “notice requires a reasonable opportunity to prepare” and it must “set forth the alleged misconduct with particularity.” *Gault*, 387 U.S. at 33. *Gault* specifically prohibits “a hearing to be held in which a youth’s freedom and his parents’ right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.” *Gault*, 387 U.S. at 33-34. Parents and children must be given notice “in writing, of the specific charge or factual allegations to be considered at the hearing.” *Id.* at 33.

Gault's due process requirements firmly establish that the mere possibility of a manifest injustice departure through the existence of a statute permitting it is not adequate notice. Before a court imposes a manifest injustice sentence, which directly affects a “youth’s freedom” and “his parents’ right to his custody,” the child is entitled to the minimum due process requirement of notice of the specific allegations and issues they must meet, prior to the hearing. *Gault*, 387 U.S. at 34.

b. The due process requirements of *Apprendi* and *Blakely* must apply with equal force to juvenile manifest injustice sentences.

Like the Sentencing Reform Act, the Juvenile Justice Act has a standard sentencing range. RCW 13.40.357. This limits judicial discretion unless there is proof, beyond a reasonable doubt, that aggravating factors justify a departure from the standard range. *State v. Tai N.*, 127 Wn. App. 733, 742, 113 P.3d 19 (2005).

The JJA provides statutory aggravating factors the court may consider, which are comparable to the SRA’s aggravating factors. RCW 13.40.150(3)(i); RCW 9.94A.535(3). Some of the aggravating factors are nearly identical, such as one of the statutory factors at issue in F.B.T.’s case, “that the victim or victims was particularly vulnerable.” CP 31; RCW 13.40.150(3)(i)(iii); RCW 9.94A.535(3)(b).

“Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 2355, 147 L. Ed. 2d 435 (2000). The Fourteenth Amendment requires the same for state charges. *Apprendi*, 530 U.S. at 476.

“The ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis in original). *Apprendi* does not alter the ability of “judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute.” *Apprendi*, 530 U.S. at 481 (emphasis in original). But where the court seeks to impose a sentence outside of the standard range, *Apprendi* requires “procedural protections in order to provide concrete substance for the presumption of innocence, and to reduce the risk of imposing such deprivations erroneously.” *Apprendi*, 530 U.S. at 484 (citing *Winship*, 397 U.S. at 363) (internal quotations omitted)).

Apprendi emphasized a person’s due process right to notice is implicated when the State seeks a sentence above the standard range:

if a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484.

Washington’s legislature amended the SRA to comport with these requirements. *In re Beito*, 167 Wn.2d 497, 507, 220 P.3d 489 (2009) (citing the “*Blakely*-fix Laws” of 2005, ch. 68, § 4). Now, before a court can impose an exceptional sentence, the accused must be provided notice of the State’s intent to seek a sentence above the standard range and notice, prior to trial, of the alleged aggravators. RCW 9.94A.537(1); *State v. Siers*, 174 Wn.2d 269, 272, 282, 274 P.3d 358 (2012).

The fact that a juvenile is tried by a judge instead of a jury cannot be used to deny a juvenile due process protections in juvenile proceedings, especially in light of the fact that *Apprendi*’s holding flowed from *Winship*, which applied due process protections to juvenile adjudications. *Apprendi*, 530 U.S. at 477 (citing to *Winship* in defining the central due process protections that support the Court’s ruling).

After *Apprendi* and *Blakely*, though Washington courts have refused to apply the Sixth Amendment jury trial right to the State's proof of aggravating factors for juvenile dispositions, the court continues to require that juvenile "proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause." *Tai N.* at 738 (citing *Schall v. Martin*, 467 U.S. 253, 263, 104 S. Ct. 2403, 81 L. Ed.2d 207 (1984)); see also *State v. Meade*, 129 Wn. App. 918, 925-926, 120 P.3d 975 (2005). Notably, these decisions were not decided as a matter of constitutional due process. *Tai N.*, 127 Wn. App. at 742; *Meade*, 129 Wn. App. at 925.

Post-*Blakely* and *Apprendi*, the Washington Supreme Court found that even though juveniles do not have a jury trial right, the strength of a juvenile's due process rights means that subsequent courts can rely on the juvenile adjudications as if they were convictions, for example to determine an adult offender score. *State v. Weber*, 159 Wn.2d 252, 264, 149 P.3d 646 (2006).

Since the JJA, like the SRA, allows a court to impose a sentence above the standard range based on facts not reflected in the verdict, the JJA too must be governed by *Blakely* and *Apprendi*. This requires notice, before adjudication, of the aggravating factors that will be alleged when the State seeks a sentence above the standard range. *Siers*, 174 Wn.2d. at 282; *Gault*, 387 U.S. at 33.

c. The court imposed a manifest injustice sentence based on aggravating factors of which F.B.T. was not notified prior to his adjudication, in violation of due process.

F.B.T. faced a standard range sentence of 15-36 weeks, consecutive for each offense. RCW 13.40.0357; RCW 13.40.180(1). The standard range sentence for these offenses was 45 to 108 weeks. RP 218.

F.B.T. was not notified prior to his adjudication that the State would seek a sentence twice the standard range, or on what grounds.⁴ CP 23, RP 215 (Manifest Injustice Report filed October 18, 2018, the same day as the disposition hearing). Had F.B.T. known the State would seek to imprison him for the remainder of his childhood based on aggravating factors, he could have litigated those issues differently during the adjudicatory phase or may even have considered an agreed recommendation for a guilty plea differently. The State's failure to allege the aggravating factors to support a manifest injustice sentence before adjudication requires remand for a sentencing within the standard range. *In re Beito*, 167 Wn.2d at 500.

⁴ Though F.B.T.'s attorney did not object, this due process claim is constitutional error subject to RAP 2.5(a) analysis.

3. The court lacked evidence sufficient to find the statutory aggravating factors of “particularly vulnerable victim” and “failure to comply with conditions of diversion agreement.”

The trial court imposed a manifest injustice sentence based on the statutory aggravating factors that the “victims were particularly vulnerable” and “respondent has a recent criminal history or has... failed to comply with conditions of a recent diversion agreement.” CP 31; RP 229-230. Neither of these aggravators were supported by substantial evidence.

On review, the disposition court’s reasoning for imposing a manifest injustice sentence is held to a “stringent standard.” *State v. Payne*, 58 Wn. App. 215, 219, 795 P.2d 134 (1990). This Court must find the reasons supplied by the disposition judge are supported by the record and that those reasons support the conclusion beyond a reasonable doubt that a disposition within the range would constitute a manifest injustice. RCW 13.40.230(2)(a),(b); *Tai N.*, 127 Wn. App. at 741.

a. The State produced insufficient evidence that F.B.T. violated a diversion agreement or had any recent criminal history.

Without evidence of the diversion agreement in the record, it is unknown whether it met the minimal constitutional requirements necessary to serve as a basis for increasing F.B.T.’s sentence. *See State v. Quiroz*, 107 Wn.2d 791, 800, 733 P.2d 963 (1987); *see also State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012).

Probation stated F.B.T. had no criminal history “per se” because his cases were handled through the diversion. CP 27. The prosecutor provided no evidence of a diversion agreement, much less one that was violated, or criminal convictions. Rather, the prosecutor appeared to rely on series of reports to law enforcement and the probation department to argue F.B.T. had criminal history supporting a manifest injustice upwards:

Now the report prepared by the Juvenile Department says that it doesn’t have any criminal history, per se. I want to remind the Court that diversions do count as criminal history in the Matrix in the Juvenile System anyways. And the Matrix that I laid out includes multiple diversions.

The factual pattern laid out and allegations made in a multi-page breakdown of the interactions with the Court system, with law enforcement, with the Juvenile Department have many other instances also of...conduct of a criminal nature that also did not result in charging, largely as a result of the finding of incompetency by Dr. Curt Johnson in early 2017. It would have been irresponsible to charge so soon after that determination.

RP 221. Probation notes that on October 25, 2016, F.B.T. was charged with assault IV and “diverted.” CP 24. The report also states F.B.T. was placed in diversion for the charge of “Disorderly Contact [sic]” in January 2017. CP 24. This entry was followed by a number of reported disruptions and outbursts at home and school that reflect F.B.T.’s acute mental health needs. CP 25.

The Probation report also states F.B.T.’s defense counsel requested a competency evaluation in June of 2017, and that F.B.T. was found

incompetent in September of 2017. CP 25-26. Subsequent to this competency finding, Probation's report states the prosecutor "declined charges" for another disturbance in his home. CP 26.

And because it was discovered through the course of this unconfirmed diversion process that F.B.T. was incompetent, it is unlikely that he could be held liable for any agreement he entered into. In Washington, "no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050.

RCW 13.40.080(1) defines a diversion agreement as "a contract between a juvenile accused of an offense and a diversion unit whereby the juvenile agrees to fulfill certain conditions in lieu of prosecution." JuCR 6.3 requires that a child understand his rights and consult with counsel before entering a diversion agreement, including with the attorney assisting the youth to "help me understand my rights, and help me decide whether I should enter into a diversion process or go to juvenile court." JuCR 6.4 requires an extensive advisement of rights, and there was not evidence F.B.T. was competent to understand and waive those rights.

Absent evidence of the existence of the diversion agreement, much less its constitutionality, it should not have been used to increase F.B.T.'s

sentence. The court's finding that F.B.T. had a "recent criminal history" is thus not supported by substantial evidence. RP 229; CP 31.

b. There was insufficient evidence of the aggravating factor of particularly vulnerable victims.

The court found that the "victims in this case were vulnerable," noting that the "three-year-old child" was not "even competent enough to testify." RP 230. The court determined that R.H. was particularly vulnerable because she "was sleeping." RP 230. Both of these factors are accounted for in F.B.T.'s adjudications and should not have provided the basis for a manifest injustice sentence.

"The court may not rely on factors necessarily considered by the Legislature in defining the standard range, or which inhere in the charged crime." *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003). The asserted aggravating factor must be "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *State v. Scott*, 72 Wn. App. 207, 213-214, 866 P.2d 1258 (1993), *overruled on other grounds*, *O'Dell*, 183 Wn.2d at 694-696.

Particular vulnerability of the victim is statutory aggravating factor in both the JJA and SRA. RCW 13.40.150(3)(i)(iii); RCW 9.94A.535(3) (b). This requires the State to prove "(1) that the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that

vulnerability must have been a substantial factor in the commission of the crime.” *State v. Suleiman*, 158 Wn.2d 280, 291–92, 143 P.3d 795 (2006). For the offense of child molestation, the child is by definition, already vulnerable because of being a child. *See State v. S.H.*, 75 Wn. App. 1, 10, 877 P.2d 205 (1994), *abrogated on other grounds by State v. Sledge*, 83 Wn. App. 639, 922 P.2d 832 (1996). “Generally speaking, it would be unfair to use the victim’s age to increase the punishment when his or her age is already factored into the sentencing guidelines.” *State v. Wood*, 42 Wn. App. 78, 80, 709 P.2d 1209 (1985).

The State perversely argued F.B.T.’s “developmental delays and different issues” made others perceive him as younger than his actual age. RP 220. But the fact that F.B.T.’s cognitive deficits made him more like the child victims means he possessed the same vulnerability of youth they did. F.B.T. should not be more culpable for possessing the same vulnerability as his victims. *See Suleiman*, 158 Wn.2d at 291-292.

Moreover, the evidence established these offenses were crimes of opportunity resulting from F.B.T.’s momentary loss of control. F.B.T. regularly spent the night at his friend P.M.’s house; there was no evidence he arranged this relationship and circumstances to commit sexual assault. RP 90. As for the molestation charge, F.B.T. was in an open area of a house where F.B.T. only visited and J.R. happened to be visiting. RP 98.

There is no evidence he arranged access to J.R. F.B.T. expressed that he was unable to control his urges, tried to stop, but could not. RP 180.

Similarly, the court's second finding of specific vulnerability based on R.M. sleeping at the time cannot be an aggravator because her sleeping status inheres in the offense of indecent liberties. A person commits this offense when he "knowingly causes another person to have sexual contact with him or her or another...when the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless." RCW 9A.44.100(1)(b); CP 1. A sleeping victim who is unconscious, or otherwise incapable of communicating unwillingness, constitutes physical helplessness for the offense of indecent liberties. *State v. Puapuaga*, 54 Wn. App. 857, 860, 776 P.2d 170 (1989). Because R.M.'s status falls so squarely into the conduct penalized by statute, it cannot be used as an aggravator. *E.A.J.*, 116 Wn. App. at 789.

c. Absent sufficient evidence, reversal and remand for imposition of a standard range sentence is required.

If the trial court's reasons for imposing a manifest injustice sentence are not supported by sufficient evidence, reversal and remand for entry of a standard range sentence is required. RCW 13.40.230(3).

Here, the prosecutor failed to supply evidence of a diversion agreement to increase F.B.T.'s sentence. Where the offense of child

molestation has as an element the age difference between perpetrator and victim, the victim's specific vulnerability as it relates to age is already accounted and should not be considered as a statutory aggravating factor. This is especially true where F.B.T.'s low functioning made him more like the child victims. The same is true for the offense of indecent liberties. Because there was insufficient evidence of the aggravating factors, remand for resentencing within the standard range is required. RCW 13.40.230(3).

4. The court erred in imposing a manifest injustice disposition based on prohibited nonstatutory factors.

The court imposed a manifest injustice sentence twice the standard range based in part on the non-statutory aggravating factor of "parents incapable of controlling child, high risk of reoffending." CP 31. This is not authorized by the JJA.

a. The court's sentencing authority is limited by the JJA.

Juvenile courts derive their sentencing authority solely by statute. RCW 13.04.450 explicitly states that RCW 13.04, the Basic Juvenile Court Act, and 13.40, the Juvenile Justice Act of 1977, "shall be the exclusive authority for the adjudication and disposition of juvenile offenders except where otherwise expressly provided."

Courts have consistently recognized that juvenile courts lack inherent authority to act outside of the statutory scheme. *See, e.g., State v.*

D.P.G., 169 Wn. App. 396, 400, 280 P.3d 1139 (2012) (court erred in failing to follow “clear command” and terms and conditions of statute in dismissing deferred disposition); *State v. Mohamoud*, 159 Wn. App. 753, 760-65, 246 P.3d 849 (2011) (court not authorized to grant deferred disposition without specific statutory authority). The interpretation of a statute is reviewed de novo. *State v. Bacon*, 190 Wn.2d 458, 463, 415 P.3d 207 (2018).

The Washington Supreme Court recently affirmed this notion. In *Bacon*, the Court rejected a child’s claim that juvenile courts possessed authority to grant a suspended disposition where it was not explicitly authorized by the JJA. *Bacon*, 190 Wn.2d at 463. The Court emphasized the legislature’s role in determining punishment and sentences and reaffirmed the principle that a juvenile court’s ability to impose exceptional sentences is limited to its statutorily granted authority. *Id.*

Bacon calls into serious question previous appellate court decisions permitting a court to find a manifest injustice sentence based on “nonstatutory” aggravating factors. *See e.g. State v. T.E.C.*, 122 Wn. App. 9, 17, 92 P.3d 263 (2004); *State v. J.V.*, 132 Wn. App. 533, 540-41, 132 P.3d 1116 (2006). Absent legislative authorization, this Court should reject a trial court’s imposition of a manifest injustice sentence based on nonstatutory aggravating factors. *See Bacon*, 190 Wn.2d at 464.

b. The legislature has provided an exclusive list of statutory factors for a manifest injustice sentence.

The JJA provides the factors a court must consider when imposing a manifest injustice sentence, which does not include a catch-all inclusion.

The JJA presumes the imposition of a standard range sentence is appropriate, and a court may impose a greater sentence only if the court finds the imposition of a standard range sentence would “effectuate a manifest injustice.” RCW 13.40.160(1),(2); RCW 13.50.0357. For sentences above the standard range, the legislature includes eight specific mitigating and aggravating factors that courts shall consider in imposing a disposition. RCW 13.40.150(3)(h) and (i) (emphasis added).

RCW 13.40.150 does not state that this is a non-exhaustive list permitting consideration of other aggravating or mitigating factors. When interpreting the meaning and scope of a statute, the court’s “fundamental objective is to determine and give effect to the intent of the legislature.” *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). The plain language of the statute is “the surest indication of legislative intent.” *Id.* (citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotations omitted)). When the statute’s meaning is plain on its face, then the court “must give effect to that plain meaning as an expression of legislative intent.” *Id.* The statute’s plain language is ascertained by the

text of the statutory provision and the “context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Id.* Courts “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language,” and must “assume the legislature means exactly what it says.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Here, had the legislature intended the JJA’s list of aggravating and mitigating factors to be a non-exclusive list, it would have said so. In fact, the legislature did just this for the list of aggravating and mitigating factors in the SRA. RCW 9.94A.535(1) allows the court to impose a sentence below the standard range based on mitigating circumstances which the legislature specified are “illustrative only and are not intended to be exclusive reasons for exceptional sentences.” And prior to *Blakely*, the list of aggravating factors authorizing a sentence above the standard range was specifically “illustrative” and not intended to be “exclusive.” Laws of 2005, Ch. 68, § 3. After *Blakely*, which required that any factor used to increase the sentence above the standard range meet the requirements of the Sixth and Fourteenth Amendments, the Legislature specifically stated that the factors used to increase a sentence above the standard range was “an exclusive list.” *Id.*; RCW 9.94A.535(3).

The JJA unambiguously lists the aggravating and mitigating factors a court shall consider. It does not say that the aggravating and mitigating factors are “illustrative” and not intended to be “exclusive” as the SRA did before the *Blakely* amendments. It must be assumed the legislature “means exactly what it says,” which is that the court must consider the listed factors, not additional factors outside the statute, when it imposes a manifest injustice sentence *Delgado*, 148 Wn.2d. at 727. Cases holding otherwise fail to identify a juvenile court’s statutory authority to consider such factors or rely on a now-rejected understanding of sentencing law since *Blakely* and should be disregarded in the wake of *Bacon*.

c. The nonstatutory aggravating factor of “lack of parental control, high risk of reoffending” violates the JJA’s prohibition against sentencing a youth to an institution “solely because of the lack of facilities” in the community.

F.B.T. is incarcerated for the rest of his childhood based on a factor that establishes a lack of resources available to meet his mental health and treatment needs, which is prohibited by the JJA.

The JJA prohibits courts from ordering a commitment to JRA “solely because of the lack of facilities, including treatment facilities, existing in the community.” RCW 13.40.150(5). The court recognized F.B.T. needed treatment. RP 228, 231. But the record is almost silent

about addressing F.B.T.'s needs for treatment through community-based options. *See e.g.* Brief of Team child and Mockingbird Society as Amicus Curiae Supporting Appellant, *State v. B.O.J.*, 2 Wn. App. 2d 1014 (Wash. Ct. App. 2018), *Petition for review granted*, no. 95542-5 (https://www.courts.wa.gov/search/index.cfm?fa=search.start_search)(last accessed 5/1/2019) (providing wide range of community based treatment options available to youth as alternative to detention).

The 29 calls made to police by F.B.T.'s school and family reflect how F.B.T.'s acute mental health needs were handled by police and the courts rather than through treatment. RP 219; CP 24-27; RP 36 (“the parents have used local law enforcement as their first line of offense or defense...”); CP 26 (F.B.T.'s father receives mixed messages from law enforcement and CPS about disciplining F.B.T.); CP 25 (F.B.T.'s parents reported that they took F.B.T. to local mental health facility after he was beating his head against a wall and threatening to kill himself, and he was returned home). Pre-trial, F.B.T. was held in the juvenile jail. RP 29. He was continually subject to abuse by other more sophisticated juveniles. RP 29, 32. The court refused to release F.B.T. home to his father with monitoring. RP 33. There was no investigation of community-based treatment that would have met F.B.T.'s needs while also monitoring him to ensure compliance and prevent recidivism through appropriate care.

Locking a 13-year-old, intellectually disabled, abused and traumatized youth in detention for his entire childhood, rather than providing him community based treatment, is not just unconscionable, it is prohibited by the JJA.

d. The court's imposition of a manifest injustice sentence based on nonstatutory aggravating factors requires reversal.

Because juvenile courts have no authority to impose sentences except where specifically authorized by statute, and the trial court in F.B.T.'s case relied on a nonstatutory aggravating factors not enumerated in RCW 13.40.150(i), the court exceeded its statutory authority by imposing a manifest injustice sentence.

Because the court did not specify it would have imposed the same manifest injustice sentence without these impermissible factors, this Court should remand the case for resentencing. *See State v. S.S.*, 67 Wn. App. 800, 818, 840 P.2d 891 (1992). And because the nonstatutory aggravating factor found by the court amounts to incarceration due to the lack of other facilities available to meet F.B.T.'s needs, the manifest injustice sentence is also contrary to RCW 13.40.150(5).

5. The trial court modified the disposition order after F.B.T. filed his notice of appeal without permission from this Court, requiring reversal.

The trial court's amendment of the disposition order after F.B.T. filed his notice of appeal violated RAP 7.2(e), requiring reversal.

After review is accepted by the appellate court, RAP 7.2(a) limits the trial court's authority to act. RAP 7.2(e) grants the trial court authority to hear and determine post-judgment motions and actions to modify decisions in certain circumstances. However, "[i]f the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." RAP 7.2(e). The term "decision" in RAP 7.2(e) refers to the judgment being appealed. *Moro*, 117 Wn. App. at 925. Remand for resentencing is required when the trial court amends the order of a juvenile disposition without permission from this Court. *Id.*

The trial court entered the disposition order in F.B.T.'s case on October 18, 2018. CP 30. F.B.T. timely filed his notice of appeal of the disposition order that same day. CP 40. One month later, on November 18, 2018, the court entered an order modifying the disposition order. CP 52. Because the 206-232 week concurrent sentence for each offense violated RCW 13.40.180, the court modified the disposition to impose consecutive sentences of 70 weeks on count 1, 70 weeks on count 2, and 92 weeks on

count three. CP 51. The court's failure to obtain permission from this Court to change the disposition order on appeal requires reversal and remand for resentencing. *Moro*, 117 Wn. App. at 925.

F. CONCLUSION

F.B.T.'s confession should have been excluded because of his extremely young age, developmental disabilities, and the interrogation tactics employed by police, all of which rendered his confession involuntary under the federal and state constitutions.

F.B.T. was adjudicated guilty of the charged offenses without notice of the aggravating factors the probation officer and prosecutor would seek to prove in support of a manifest injustice sentence prior to adjudication. This violated F.B.T.'s due process rights, as did the court's imposition of a sentence twice the standard range based on factors not authorized by the JJA. These violations of F.B.T.'s constitutional rights, and the court's modification of the disposition order, requires reversal and remand for a new trial and sentencing.

DATED this 14th day of May 2019.

Respectfully submitted,

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2. He is friends with P.M. ("PM"). PM has a sister R.M. ("RM") who has a date of 3/06/2007.
3. Tenbusch is friends with the McEwen family who have a daughter J.R. ("JR") with a date of birth of 9/24/2014.
4. Tenbusch regularly spent time at the Denise McDonald (mother of PM and RM) residence.
5. On or about May 15, 2018 to June 27, 2018 RM awoke to find Tenbusch kneeling over the top of his sleeping sister RM who had shirt pulled up to her chin and no underwear or pants on.
6. Tenbusch was playing with himself masturbating and Tenbusch admitted to law enforcement he was masturbating over RM.
7. At that time Tenbusch had semen in his hand and was reaching to touch RM's groin when interrupted by Paul McDonald.
8. Tenbusch admitted to law enforcement that he touched RM when she was sleeping in an intimate area, including the buttocks, breasts and the area slightly above the vagina and his hand slipped down to her vagina area.
9. When Tenbusch was confronted by PM Tenbusch went into the kitchen area and grabbed a knife and made contact again with PM.
10. Tenbusch told PM that he would kill him if he told anyone, specifically stating he would "murderize" PM if he told anyone and that he would cut Paul up into pieces.
11. When he was holding the knife and making the threat his hand was trembling shaking with fear.

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- 12. The threat was not made in jest and was in response to being caught masturbating over PM's sister.
- 13. The threat was made with the purpose to influence PM not to tell anyone about what he had observed.
- 14. The threat was made on or about May 15, 2018 to June 27, 2018.
- 15. On June 23, 2018 Tenbusch was at the McDonald residence where the child JR was present.
- 16. At that time he was observed under the cover of a blanket with JR. JR then ran down the hallway crying and screaming wanting her mother who was not present.
- 17. Moments later JR's mother returned to the McDonald residence and JR told her mother that Tenbusch touched her "pee-pee."
- 18. JR's mother, Jennifer McEwen, immediately confronted Tenbusch and then called law enforcement.
- 19. The following day JR told her mother that Tenbusch inserted two fingers into her vagina.
- 20. Tenbusch was not and is not married to JR or RM.
- 21. Tenbusch is more than 36 months older than JR.
- 22. Tenbusch's statements were that he had physically contacted both RM and JR because of his urges he was having.
- 23. Tenbusch admitted to trying to kiss RM prior to the charged event and was pushed away.

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24. Tenbusch admitted to seeing women and having urges and getting erections.

25. Tenbusch touched RM for the purposes of sexual gratification based on the urges he was feeling at the time.

26. Tenbusch did made such contact when RM was asleep.

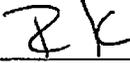
27. Tenbusch admitted touching the vaginal area of JR and admitted he did so as a result of urges and was for the purpose of sexual gratification.

28. Tenbusch admitted to knowing he should not touch JR.

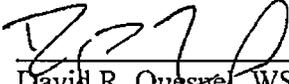
CONCLUSIONS OF LAW

- 1. Tenbusch is guilty beyond a reasonable doubt of Indecent Liberties – Incapable of Consent.
- 2. Tenbusch is guilty beyond a reasonable doubt of Intimidating a Witness.
- 3. Tenbusch is guilty beyond a reasonable doubt of Child Molestation First Degree.

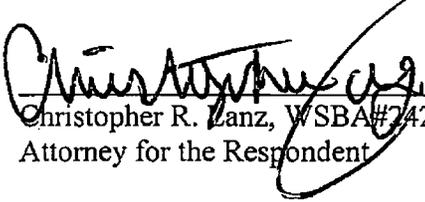
SIGNED this 18th day of October, 2018.



THE HONORABLE JUDGE RANDALL C. KROG

Presented by:
Klickitat County
Prosecuting Attorney


David R. Quesnel, WSBA#38579
Prosecuting Attorney

Approved as to Form


Christopher R. Lanz, WSBA#74220
Attorney for the Respondent

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36385-6-III
)	
F.B.T.,)	
)	
JUVENILE APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MAY, 2019, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID QUESNEL, DPA	()	U.S. MAIL
[davidq@klickitatcounty.org]	()	HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MAY, 2019.

X _____ 

WASHINGTON APPELLATE PROJECT

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