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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

F.B.T., APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF KLICKITAT COUNTY

---

**BRIEF OF RESPONDENT**

---

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## I. ISSUES PRESENTED

1. Longstanding caselaw establishes that article I, section 9, of the Washington Constitution is no more protective than the Fifth Amendment to the United States Constitution. Should this Court use the Fifth Amendment “totality of the circumstances” test to evaluate F.B.T.’s claim that his confession was involuntary?

2. A police officer who had known 13-year-old F.B.T. for at least two years questioned him for less than 45 minutes after he read F.B.T. the appropriate *Miranda* warnings. F.B.T. said he understood the warnings, never asked for an attorney or any other adult to be present, and never said that he did not wish to speak to the officers. Under the totality of the circumstances, did the trial court correctly conclude that F.B.T.’s waiver of his Miranda rights was voluntary?

3. Washington courts have consistently refused to apply the Sixth Amendment holdings of *Apprendi* and *Blakely* to juvenile court proceedings. Should this Court similarly hold that these Sixth Amendment cases do not require specific pre-adjudication notice of potentially applicable aggravating factors?

4. In addition to the aggravating and mitigating factors set forth by statute, the juvenile court may rely on non-statutory factors when imposing a manifest injustice disposition, provided those factors were not

contemplated by the legislature in setting the standard range for the crime and the factor is sufficiently compelling to distinguish the particular offender from similarly situated cases. Did the trial court properly exercise its discretion by relying on evidence of F.B.T.'s serious risk of re-offending and lack of parental control in imposing a manifest injustice disposition?

5. The record establishes that F.B.T. sexually offended against one child when she was deeply asleep and against another who was only three years old. Is there sufficient evidence to support the trial court's finding that F.B.T.'s victims were particularly vulnerable?

6. The Juvenile Court Administrator's presentencing report indicates that F.B.T. was charged with several offenses, which were handled through the diversion process, and that he had not completed his diversion conditions when arrested on the current charges. The report also establishes that F.B.T. has committed numerous assaults that, while necessitating police intervention, did not lead to charges. Is there sufficient evidence to support the trial court's finding that F.B.T. has a recent criminal history or has failed to comply with conditions of a diversion agreement?

7. The evidence establishes that F.B.T. has engaged in dozens of violent assaults, threats and incidents of self-harm, and property destruction at home and in school, resulting in 29 calls to the Goldendale Police Department in the two years preceding the charges in this case.

F.B.T.'s parents—the most frequent victims of his violence—are afraid of him, and his teachers are so unable to control him that they must remove all other students from the room when he acts out. F.B.T.'s statement to police demonstrates that F.B.T. understands that his conduct is criminal but cannot stop himself from sexually offending against girls. Does the trial court's finding of "lack of parental control, high risk of reoffending" violate the prohibition on sentencing a juvenile to an institution "solely because of the lack of facilities, including treatment facilities, existing in the community"?

8. The trial court modified the disposition order after F.B.T. filed his notice of appeal without permission from this Court. Is the modification void?

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

### **A. PROCEDURAL FACTS.**

The State charged 13-year-old F.B.T. with indecent liberties involving 11-year-old R.M.; child molestation in the first degree against 3-year-old J.R.; and intimidating a witness, 13-year-old P.M. CP 16-17. Because F.B.T. received special education services for a developmental disability and had been found not competent within 12 months of the new charges, the trial court ordered a competency evaluation. CP 8-14. After an evaluation by a developmental disabilities professional, F.B.T. was found competent. CP 10, 15. The trial court denied F.B.T.'s motion for release

pending adjudication, finding him to be “a danger to the community if he is released from custody.” CP 15.

During the adjudication proceeding, the parties litigated whether F.B.T.’s recorded interview with police was admissible. CP 81-82. After pertinent testimony by one of the officers who interviewed F.B.T. and listening to the interview, the court found that the officers provided appropriate *Miranda* warnings, that F.B.T. validly waived his right to remain silent and agreed to speak to the officers, that F.B.T.’s statements were voluntary, and that the statements were sufficiently corroborated by other evidence to establish corpus delicti; the recording was admitted at trial. RP 137, 197-98; Ex. 1.

The State presented testimony by P.M., who had witnessed F.B.T.’s conduct with P.M.’s younger sister, R.M., and visiting toddler J.R. RP 89-104. R.M. and her mother also testified. RP 105-15. J.R., only four years old at the time of the adjudication, was incompetent to testify. RP 77. The court admitted some of J.R.’s statements to her mother as child hearsay and excited utterances. RP 79, 116-29.

F.B.T. did not testify or present any other evidence. RP 199.

The trial court found F.B.T. guilty as charged. RP 204-09; CP 19-22. The standard sentencing range for each of the offenses was 15-36 weeks, for a cumulative term of 45-108 weeks in custody. RP 218.

At sentencing, the State relied on the report and recommendation of Juvenile Court Administrator Larry Barker. CP 23-29; RP 218. Barker recounted F.B.T.'s troubled history and frequent contacts with police. CP 24-27. Barker recommended sex offender treatment as well as instruction in "many of the developmental and necessary skills" to function appropriately in the community. CP 29. Since sex offender treatment alone required 104 weeks, and F.B.T.'s deficits require much more than that before he can be safe in the community, Barker recommended a manifest injustice disposition committing F.B.T. to Juvenile Rehabilitation "for treatment and services until he reaches at least the age of 18." CP 29.

The trial court agreed with the Juvenile Department that a sentence within the standard range would effectuate a manifest injustice. RP 229. The court found "a number of statutory and non-statutory factors" justified the manifest injustice determination, including F.B.T.'s recent criminal history, his failure to complete a previous diversion, the victims' particular vulnerability, the inability of F.B.T.'s parents to control him, and F.B.T.'s "very high likelihood of re-offense." RP 229-31. Noting that 104 weeks was the "bare minimum" required for sex offender treatment and that F.B.T. has "a number of other issues" requiring "socialization ... and mental health treatment," the trial court imposed a sentence of 206-232 weeks on each count, to be served concurrently. RP 231, 234-35. The sentence was

expressly intended to provide structured treatment and instruction until F.B.T.'s eighteenth birthday. RP 234; CP 29.

F.B.T. entered a notice of intent to appeal on the day of sentencing, October 18, 2018. CP 40. On November 27, 2018, the trial court entered an order modifying the disposition to correct the erroneous imposition of concurrent sentences for the three separate offenses. CP 51. The court modified the disposition to instead impose consecutive terms of 70 months for indecent liberties, 70 months for child molestation, and 66-92 weeks for intimidating a witness. CP 51.

## **B. SUBSTANTIVE FACTS**

### **1. F.B.T.'s Background.**

F.B.T. is a troubled adolescent boy. He was physically and sexually abused in his mother's care at an early age and lived in several foster homes before coming to live with his father and step-mother. CP 27. F.B.T. has had counseling for various mental health issues and was on four different psychiatric medications at the time of trial. CP 27. It appears that he carries diagnoses of ADHD, mood disorder, and bipolar disorder. CP 27. F.B.T. reports that he hears voices and has been prescribed antipsychotic medication. CP 27. His I.Q. is between 70 and 80, and he received special education services. CP 27. He was in counseling before committing the current offenses. RP 150; CP 24.

F.B.T. is prone to assault, self-harm, and property destruction. CP 24-26. Between September 2016 and June 2018, F.B.T.'s parents called the police for help with his behavior on 29 separate occasions. CP 24. F.B.T. has broken windows, punched holes in walls, torn doors off their hinges, threatened to kill his parents and burn their house down, and repeatedly assaulted his father and step-mother. CP 24-26. He has also threatened suicide and engaged in self-harm behavior like poking his eyes, beating his head with his hands or against a wall or table, and severely scratching himself. CP 24-26. His parents report that they are afraid of F.B.T. "especially during the night time hours" and "simply don't know what to do with him." CP 28. F.B.T. is also problematic at school. He has been in fights, has been suspended for cussing and for biting another student, and was "so disruptive the school had [to] remove all the other children in the classroom." CP 25. As a result, F.B.T.'s teachers "have expressed a level of fear as he grows and continues with his outbursts." CP 28.

F.B.T. was charged with assault in the fourth degree in October 2016 and diverted. CP 24. He was charged with disorderly conduct in February 2017 and diverted. CP 24. He was charged with assault in 2017, but the charge was dismissed when F.B.T. was found incompetent. CP 26. In May 2018, F.B.T. was diverted for an assault in the fourth degree and malicious

mischievous that occurred in March 2018. CP 26. F.B.T. was “still working on” his diversion conditions when he was charged in this case. CP 27.

2. Indecent Liberties and Witness Intimidation.

In 2018, F.B.T. regularly spent time at the McDonald household, with his classmate P.M. and P.M.’s 11-year-old sister, R.M. (dob 3/6/07). Once, when the three children were staying in the living room, P.M. awoke to find F.B.T. “on top of my sister, messing with himself.” RP 90. P.M. testified that F.B.T. was naked and masturbating over R.M., who was asleep. RP 92-93. P.M. said that R.M.’s “shirt was folded up to her shoulders and her pants were completely off” and described F.B.T. straddling the girl with his knees on the ground and the inside of his legs touching the outside of R.M.’s legs. RP 94. P.M. testified that F.B.T. had a “sticky” substance on his hand and tried to wipe it on R.M.’s private area. RP 95. This was the basis of Count I, indecent liberties with someone incapable of consent. CP 16.

P.M. confronted F.B.T. about his conduct. RP 93. F.B.T. stopped what he was doing, went to the kitchen and got “a huge knife” with “a nice, sharp blade,” and told P.M. something along the lines of “if you tell anyone about this, I am going to stab you.” RP 96, 101-02. P.M. said F.B.T. was shaking and “a little bit scared” when he made the threat. RP 97. P.M.

appeared unsure whether F.B.T. was serious or not. RP 97, 102. This was the basis of Count III, intimidating a witness. CP 17.

R.M. slept through the contact with F.B.T. RP 96, 103. She confirmed, however, that F.B.T. sometimes stayed the night at her house and said that she tried to avoid him. RP 107. She said she did not know if F.B.T. ever tried to have sex with her. RP 108.

### 3. Child Molestation.

On a different occasion, F.B.T. was at the McDonald residence with P.M. and R.M. when their neighbor, three-year-old J.R. (dob 9/24/2014), came over. RP 98, 117. P.M. testified that he saw F.B.T. under a blanket with J.R., after which J.R. became upset and ran down the hall screaming for her mom. RP 98. P.M.'s mother saw that J.R. was crying and upset. RP 113-14. When J.R.'s mother returned some time later, J.R. was coughing and crying and upset. RP 119. She ran up and hugged her mom and told her that F.B.T. choked her and hurt her "peepee." RP 120, 122, 124. J.R.'s mother called the police and took J.R. to the hospital. RP 123. The next day, J.R. clarified that "F.B.T. had stuffed two fingers in her." RP 123. This was the basis for Count II, child molestation in the first degree.

### 4. F.B.T.'s Police Interview.

Officer Stelljes knew F.B.T. and had had frequent contact with him in the two years before these incidents. RP 139, 179. He and Officer Smith

conducted a recorded interview with F.B.T. at the Goldendale Police Department (GPD).<sup>1</sup> RP 140-41, 147. After being advised of and waiving his Miranda<sup>2</sup> rights, F.B.T. made incriminating statements.

F.B.T. told the officers that he had repeatedly tried to kiss R.M. but she always pushed him away. RP 149-50, 152. He said that he has sexual “urges” whenever he sees a woman and attributed that to suffering sexual abuse by his mother when he was four years old. RP 149-50. F.B.T. said he asked R.M. to have sex and she said no. RP 153, 155. He said that he tried to remove her underwear twice. RP 154, 156. He admitted that he masturbated while “hovering” over R.M., that he touched her “butt cheek,” and that he ejaculated onto her blanket. RP 160, 170-72; Ex. 1. F.B.T. further volunteered that after he was confronted by P.M. and P.M. went back to sleep, F.B.T. continued to touch R.M. inappropriately by lying on her, touching her breast, and “pressing” the area around her vagina. RP 174-76, 183-85.

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<sup>1</sup> The interview was played during the fact-finding hearing and transcribed, albeit with many errors and indiscernible portions. The interview was admitted as Exhibit 1, and has been designated for this Court’s review. Because the transcript that is part of the verbatim report of proceedings is unreliable, the State urges this Court to listen to the interview for itself.

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

F.B.T. confided that he “was realizing in my head I should not be doing this,” but his sexual urges were “taking over me because my head was like going crazy” and he had already decided “I won’t take no for an answer.” RP 150, 169-70. F.B.T. tried to tell himself “you just need to get off of her and lay down. And I was thinking – I was thinking – I was praying to God, why did I do that? And that’s when I fell asleep.” Ex. 1; RP 177.<sup>3</sup>

F.B.T. confirmed that he was confronted by P.M. while he was masturbating over R.M. RP 162. F.B.T. admitted that he grabbed a knife from the kitchen and told P.M. not to tell anyone or he would “murderize” P.M., which meant “cut you up in a million pieces.”<sup>4</sup> RP 167; Ex. 1. He claimed this was a joke, but admitted that P.M. took it “in a bad way” and “may think I was going to hurt him with that.” RP 167.

The officers also spoke to F.B.T. about the allegations involving J.R. F.B.T. confirmed that he spent time under a blanket with J.R. at the McDonald home. RP 178. F.B.T. knew J.R. was only three years old. RP 188. She was wearing a diaper. RP 181. F.B.T. had an erection because

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<sup>3</sup> Instead of “I was praying to God, why did I do that,” the transcript reads, “all’s I thought why did I do that.” RP 177.

<sup>4</sup> The trial transcript indicates that F.B.T. said “murderize” means “cut you in too many pieces.” RP 167.

“she was a cute little girl.” RP 188.<sup>5</sup> Even though F.B.T. “was thinking in my head F.B.T. get your hand off,” F.B.T. held J.R.’s leg and “I slipped down right there and I didn’t press, I was just rubbing.” RP 188; Ex. 1.<sup>6</sup> He said, “I didn’t go inside the diaper or nothing. And I just groped it a little bit.” RP 181; Ex. 1. F.B.T. knew it was inappropriate: “I was like just put my hand there, then I – then I said, you know, it’s not just for me; it’s not for me. I said it’s not for me. I put back my body – I put my hand on her crotch, I mean, that’s – but I’m catching myself, F.B.T., take your hand off of her, take your hand off of her, F.B.T., take your hand off. Then after two minutes I took my hand off.” RP 180. F.B.T. explained that he cannot resist his sexual urges; he feels them in his “whole body except my head and my heart[.]” RP 189.

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<sup>5</sup> The trial transcript indicates that F.B.T. said “I don’t know. I don’t have a (indiscernible) urge.” RP 188. The exhibit is more accurately transcribed as “I had a boner, so. Every time I have a boner, I have an urge.” Ex. 1.

<sup>6</sup> The trial transcript indicates that when asked what his urge was, F.B.T. said, “To hold her leg and then I was thinking in my whole body (indiscernible), I was thinking in my head F.B.T. get your hand off. But I (indiscernible) on her. I still (indiscernible) and I didn’t (indiscernible). Why do you click your key?” RP 188, ll. 15-29.

### III. ARGUMENT

#### A. IT IS WELL ESTABLISHED THAT ARTICLE 1, SECTION 9, OF WASHINGTON'S CONSTITUTION OFFERS NO BROADER PROTECTION THAN THE FIFTH AMENDMENT.

F.B.T. contends that his *Miranda* waiver was involuntary and his interview with police should have been suppressed. The standard for evaluating such claims 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); *Dutil v. State*, 93 Wn.2d 84, 89, 606 P.2d 269 (1980). F.B.T. argues this test is insufficient to protect juveniles from self-incrimination under the state constitution, and advocates for additional protections. The law is clear, however, that our state constitution offers the same protection in this context as the Fifth Amendment.

Our Supreme Court has long held that article 1, section 9 of the Washington Constitution affords no greater protection to Washington juveniles than does the Fifth Amendment to the United States Constitution. *Dutil*, 93 Wn.2d at 86 (citing *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971)). After *State v. Gunwall*, 106 Wn.2d 54, 720 P.3d 808 (1986), explained how courts should determine whether to conduct an independent analysis under the state constitution, our courts have consistently refused to extend the protections guaranteed by the Fifth Amendment in the context of

custodial interrogations. *See State v. Russell*, 125 Wn.2d 24, 59-62, 882 P.2d 747 (1994) (refusing to extend greater protection through article 1, section 9, than that provided by the federal constitution to the use of un-*Mirandized* statements); *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) (“[R]esort to the *Gunwall* analysis is unnecessary because this court has already held that the protection of article 1, section 9 is co-extensive with, not broader than, the protection of the Fifth Amendment”); *State v. Horton*, 195 Wn. App. 202, 380 P.3d 608 (2016), *rev. denied*, 187 Wn.2d 1003 (2017) (article 1, section 9 of the Washington Constitution does not afford greater protections than the United States Constitution regarding waiver of counsel during custodial interrogations). As recently as 2008, the court maintained that “[t]he protection provided by the state provision is coextensive with that provided by the Fifth Amendment.” *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

Indeed, with respect to *Miranda*, article 1, section 9 is arguably less protective than the Fifth Amendment. Our Supreme Court stated in numerous cases before *Miranda* that it was unnecessary to advise a suspect of the right not to answer questions. *See, e.g., State v. Craig*, 67 Wn.2d 77, 83, 406 P.2d 599 (1965); *State v. Boyer*, 61 Wn.2d 484, 486-87, 378 P.2d 936 (1963); *State v. Brownlow*, 89 Wash. 582, 154 P. 1099 (1916).

Although F.B.T. provides a *Gunwall* analysis in support of his claim that the state constitution offers greater protection to a juvenile in the context of custodial interrogations, this Court should adhere to established law and maintain that “[t]he Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution. There is no compelling justification for its expansion.” *Moore*, 79 Wn.2d at 57.

F.B.T. argues that recent developments in juvenile sentencing law related to the Eighth Amendment’s prohibition on cruel and unusual punishment and the state constitution’s corollary prohibition on cruel punishment undermines *Dutil*. He points to the courts’ frequently stated maxim that “children are different” and argues that the Washington Constitution should be interpreted to 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.” Br. of Appellant at 30. But the *Dutil* court was aware that children are different and still saw no reason to embrace a voluntariness test other than one that takes into account the totality of the circumstances:

Studies which the petitioners have called to our attention indicate that juveniles often do not understand the full import of the exercise or waiver of their rights. This is not

surprising. Indeed, we would be surprised if many adults can be said to have such comprehension. As this court held in *State v. Aiken*, 72 Wn.2d 306, 434 P.2d 10 (1967), the test is whether a person knew he had the right to remain silent, and that anything he said could be used against him in a court of law, not whether he understood the precise legal effect of his admissions. ... *If a juvenile understands that he has a right, after he is told that he has that right, and that his statements can be used against him in court, the constitutional requirement is met.*

*Dutil*, 93 Wn.2d at 90 (emphasis added). The court further noted that the legislature “has taken cognizance of the needs of children with respect to parental and legal assistance” by mandating that a valid waiver for a child under 12 must be made by a parent, guardian, or custodian. *Id.* at 91-93 (citing former RCW 13.40.140(9), now codified as RCW 13.40.140(11)). “The legislature apparently recognized that a youngster nearing the age of majority is more likely to have the ability to comprehend advice given him about his rights. This is particularly true, of course, where he has had previous experience in the juvenile court. As with adults, the question of whether his waiver was intelligent becomes one of fact rather than one of presumption.” *Id.* at 93.

Nothing in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), or *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), undermines or overrules *Dutil*, which remains the applicable test for evaluating whether a juvenile’s *Miranda* waiver is voluntary. The *Miller*

line of cases does not pertain to this issue and involves different constitutional provisions. Because the totality of the circumstances analysis is sufficient to protect the juvenile's rights, it is unnecessary and imprudent to "create a dogmatic rule, cloaking it in constitutional armor, and decreeing in advance that the presence of a parent or surrogate is essential to an intelligent waiver, without regard to the facts of the particular case." *Dutil*, 93 Wn.2d at 89. This Court should apply the totality of the circumstances analysis to determine that F.B.T.'s waiver was voluntary.

**B. F.B.T.'S TROUBLING ADMISSIONS WERE VOLUNTARY UNDER THE TOTALITY OF THE CIRCUMSTANCES.**

In *Dutil*, the court reiterated that the totality of the circumstances analysis is the test "adopted and approved by this court for juvenile court proceedings." 92 Wn.2d at 88-89. This test "mandates inquiry into all the circumstances surrounding the interrogation" including "evaluation of the juvenile's age, experience, background, and intelligence, and into whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.* at 88.

1. Standard of Review.

F.B.T. contends that his waiver of the right to counsel and right to silence was involuntary under the totality of the circumstances and should have been suppressed. This Court reviews findings of fact following a

CrR 3.5 motion to suppress for substantial evidence and determines de novo whether the findings support the conclusions of law. *State v. Chambers*, 197 Wn. App. 96, 132, 387 P.3d 1108 (2016). Here, the trial court found that F.B.T. was properly advised of his *Miranda* rights, that he waived the rights and agreed to speak with the officers, and that his statements were not rendered involuntary by F.B.T.'s later requests to go home. RP 197-98.

F.B.T. argues that his developmental disability, low I.Q, receipt of special education services, and a previous determination that he was not competent for trial show that he could not intelligently waive his constitutional rights. While those factors would give anyone pause, the trial court reasonably determined that F.B.T.'s waiver was voluntary under the totality of the circumstances.

2. F.B.T.'s Relatively Short Interview Was Not Coercive.

F.B.T. was taken to the police department for questioning that began at 8:03 p.m. and lasted only 49 minutes. RP 147, 190. He was not handcuffed. RP 141. The interview was not lengthy or conducted late at night. RP 147-90. F.B.T. knew Officer Stelljes, who had had frequent contact with F.B.T. for at least two years before this interview. RP 139, 179. F.B.T. had considerable experience with law enforcement and the juvenile justice system; he had been charged with assault and other offenses several times prior to the interview. CP 24-27. The officers did not use threatening

tones, did not raise their voices, and did not badger F.B.T. Ex. 1. The officers read F.B.T. appropriate *Miranda* warnings, including the additional warning for juveniles. RP 140-41, 148-49. F.B.T. said he understood his rights. RP 149. F.B.T. did not ask for a parent or lawyer, did not ask questions about his rights or how to exercise them, did not appear to be confused about his rights, and did not express any reluctance to speak to the officers. RP 149; Ex. 1. Neither officer threatened F.B.T. or made any promises to induce him to speak. RP 141-42. Even with F.B.T.'s limitations, the record—especially the audio recording—demonstrates that his waiver was voluntary.

F.B.T. points out that the officers frequently admonished him to tell the truth during the interview, suggesting that he simply changed his answers to appease the skeptical officers. It is true that F.B.T. sometimes gave different answers after the officers caught him in a lie. For example, at one point the officers ask whether F.B.T. touched R.M. “other places” while she was sleeping:

F.B.T.: I put my hand on her – I put my hand on her boobs on accident.

Officer: On accident?

F.B.T.: I was trying to put my hand on her stomach.<sup>7</sup>

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<sup>7</sup> The trial transcript reads, “I was trying to (indiscernible).” RP 174.

Officer: Tell us the truth, F.B.T.

F.B.T.: Yes, I put my hand on her boob.

RP 174; Ex. 1. But advising a suspect to tell the truth does not make a confession involuntary. *Unga*, 165 Wn.2d at 102; Royce Ferguson, 12 Wash. Prac., Criminal Practice & Procedure § 3319 (3d ed.) (“A mere exhortation to speak the truth or mere suggestion to an accused that he confess, however, will not exclude a confession”). *See also Ceja v. Stewart*, 97 F.3d 1246 (9<sup>th</sup> Cir. 1996) (police urging defendant to tell the truth did not make confession involuntary); *Currier v. State*, 294 Ga. 392, 754 S.E.2d 17 (2014) (“exhortation to tell the truth” permissible); *State v. Brown*, 285 Kan. 261, 173 P.3d 612 (2007) (“Urging the accused to tell the truth does not render a confession involuntary”); *State v. Wilmot*, 163 N.H. 148, 37 A.3d 422 (2012) (“exhortations to be truthful ... failed to render his statements involuntary”).

Further, it is not true that F.B.T. changed his story whenever the officers told him to tell the truth or suggested he was lying. For example, when the officers asked F.B.T. what he intended to do with the ejaculate on his hand, F.B.T. said “I was not trying to put it on her.” RP 172. F.B.T. maintained that position even after the officers twice told him to tell the truth, never corroborating P.M.’s statement that he saw F.B.T. try to wipe ejaculate onto R.M.’s private area. RP 101, 172-73. When the officers asked

F.B.T. whether R.M.'s underwear was on or off when he was touching her below the waist, F.B.T. maintained that R.M.'s underwear was on even after being told to tell the truth and that his story did not make sense. RP 182-83. When the officers asked F.B.T. whether he touched R.M.'s vagina, he maintained that he never touched her skin, even though the officers told him to tell the truth and indicated they believed he was lying. RP 184. When the officers asked, "when did you put your penis on her?," F.B.T. did not simply agree that he had done this because that is what the officers expected to hear—he insisted that he was "really sure" he had not done that. RP 187. Because F.B.T. did not simply accede to the officer's suggestions or change his story to satisfy them, it is clear that the exhortations to tell the truth did not "compel[] F.B.T. to change his answers until the officers were satisfied." Br. of Appellant at 20.

3. F.B.T.'s Mid-Interview Remarks About Going Home Were Not Unequivocal Assertions of the Right to Silence.

F.B.T. argues he invoked his right to silence by saying he "wish[ed]" he could go home, "need[ed] a snack or I'll get grumpy," and later asked if he could "be done" with the interview. RP 175, 182, 187. These remarks do not constitute unequivocal assertions of any right.

An accused's invocation of the right to silence must be clear and unequivocal. *Davis v. United States*, 512 U.S. 452, 458-59, 114 S.Ct. 2350,

129 L.Ed.2d 362 (1994). This is an objective, bright-line inquiry; a statement is either an assertion of *Miranda* rights or it is not. *State v. Piatnitsky*, 180 Wn.2d 407, 413, 325 P.3d 167 (2014) (citing *Davis*, 512 U.S. at 459). “In other words, an invocation must be sufficiently clear ‘that a reasonable police officer in the circumstances would understand the statement to be [an invocation of *Miranda* rights].’” *Id.* (alterations in original).

About 30 minutes into a 49-minute interview, F.B.T. said he “wish[ed]” he could go home. The officers asked a clarifying question, “Hmm?” RP 175; Ex. 1. F.B.T. clarified that he wished he could go home and that he would need a snack or he would become grumpy. The officers responded, “when we’re done here we’ll get you a snack. We’ll take care of it, okay?” RP 175; Ex 1. The interview ended less than 20 minutes later.

Reasonable officers would understand F.B.T.’s statement as a request for food, not to remain silent. In fact, following F.B.T.’s statement about going home and getting a snack, the officer appeared to be winding up the interview, stating, “So I think that clears up most the stuff,” before asking the open-ended question, “Has anything else happened with R.M. that you’re not telling us?” RP 175-76. At that point, F.B.T. began to volunteer additional details about his interactions with R.M., informing the

police that he also laid on top of R.M. twice while she was sleeping and that he knew that was inappropriate. RP 176-77.

Thirty-nine minutes into the interview, after F.B.T. admits that he groped three-year-old J.R. over her diaper, he asks, “So now can I come home?” RP 181-82; Ex. 1. The officer says he wants to talk more about the incident with R.M., and F.B.T. asks, “And then after that can I be done?” RP 182. The officer responded, “We’re getting close,” and asked further questions. RP 182; Ex. 1.<sup>8</sup> Forty-four minutes into the interview, F.B.T. asks, “Are we done yet? My parents are probably worried about me.” RP 187; Ex. 1. The officer responds, “No, I told them I’d bring you back. And I told them what’s going on, okay?” RP 187. The interview then proceeds for less than five more minutes. RP 190; Ex. 1.

In context, F.B.T.’s questions are about how much longer the interview will take and what will happen next. Indeed, by asking, “And then after that can I be done?,” after the officers said they wanted to talk more about R.M., F.B.T. appears to agree to answer those questions. The officers truthfully answered that the interview would not take much longer, and

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<sup>8</sup> The trial transcript indicates that the officer responded, “(Indiscernible). So you said you were rubbing your hand against her right below the waist?” RP 182. In the audio recording, the officer is clearly heard to be saying “We’re getting close. So you said you were rubbing your hand against her right below the waist?” Ex.1.

F.B.T. willingly answered their remaining questions. His later question, “Are we done yet,” is accompanied by F.B.T.’s remark that “My parents are probably worried about me.” RP 187. The officers reasonably interpreted this question as concern about F.B.T.’s parents, and appropriately responded by assuring F.B.T. that his parents knew where he was and what was going on. RP 187. F.B.T. then willingly answered several more questions.

Substantial evidence supports the trial court’s finding that F.B.T. did not invoke his right to silence by indicating impatience with the interview and a preference to be at home. The questions do not constitute an unequivocal invocation of the right to silence. This Court should affirm the trial court’s conclusion that F.B.T.’s statement was voluntary and admissible in the adjudication.

**C. F.B.T. RECEIVED ADEQUATE NOTICE THAT THE COURT MUST CONSIDER ALL STATUTORY AGGRAVATING FACTORS BEFORE ENTERING A DISPOSITIONAL ORDER.**

F.B.T. contends that the juvenile court violated his right to due process by imposing a manifest injustice disposition because F.B.T. was not given pre-adjudication notice of the specific aggravating factors upon which the State would rely. This argument, which was not preserved, should be rejected.

1. By Failing to Object Below, and Failing to Establish a Manifest Error, F.B.T. Has Waived Review of This Claim.

F.B.T. did not object when the trial court imposed a manifest injustice disposition based on statutory and nonstatutory aggravating factors of which he was given no specific pre-adjudication notice. The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Even due process claims can be waived by the failure to object. *State v. J.A.B.*, 98 Wn. App. 662, 666, 991 P.2d 98 (2000).

A claim of error may be raised for the first time on appeal only if it is “‘manifest’ and truly of constitutional magnitude.” *Kirkman*, 159 Wn.2d 926. “The defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *Id.* at 926-27.

In this case, F.B.T. refers to RAP 2.5(a) in a footnote and points out that the due process claim is constitutional in nature, but he fails to explain how the alleged error caused actual prejudice in his case. Br. of Appellant at 36 n.4. The closest he comes is by asserting without explanation that, had F.B.T. known the State would seek a manifest injustice disposition, “he could have litigated those issues differently during the adjudicatory phase

or may even have considered an agreed recommendation for a guilty plea differently.” Br. of Appellant at 36. F.B.T. does not explain how he would have litigated the aggravating factors differently, and the assertion that he “may” have considered the State’s plea offer differently is too speculative to demonstrate actual prejudice. This Court should refuse to consider the issue.

2. F.B.T. Received Adequate Notice.

After the court found F.B.T. guilty as charged on October 5, 2018, the prosecutor and the juvenile department stated on the record the intent to seek a manifest injustice sentence above the standard range. RP 210. Sentencing was held October 18, 2018. RP 213. Despite almost two weeks’ notice, F.B.T. never sought information about which aggravating factors the prosecutor or juvenile department would rely on, did not seek a continuance to better respond to the juvenile department’s report, and F.B.T. made no effort to cross examine the Juvenile Court Administrator or to controvert anything in his report. RCW 13.40.150(1); RP 225. This is despite acknowledging that defense counsel “had an opportunity to review the Department’s report.” RP 225. Moreover, F.B.T.’s counsel conceded the report “is thorough and touches upon many of the problematic issues here” and that “I don’t have any grounds to argue against findings for the manifest injustice.” RP 225, 226.

In addition to actual notice two weeks before the sentencing date, F.B.T. was on notice that he may face a manifest injustice disposition because the Juvenile Justice Act (JJA) provides that a manifest injustice disposition is a possibility in every juvenile sentencing. *State v. Moro*, 117 Wn. App. 913, 73 P.3d 1029 (2003); RCW 13.40.160(2). Accordingly, no express notice is required before a court can consider the option. *Id.* at 923. Indeed, the JJA *requires* the juvenile court to “[c]onsider whether or not any of the following aggravating factors exist” before imposing a disposition in *every* case. RCW 13.40.150(3)(i). Accordingly, a juvenile court may impose a manifest injustice disposition above the standard range even if the State makes no such request. *Moro*, 117 Wn. App. at 923. Further, the JJA designates juvenile probation counselors as officers of the court with independent authority to prepare predispositional report. RCW 13.40.035; RCW 13.40.040(4).

In this case, it was the Juvenile Court Administrator who drove the sentencing recommendation and indicated which aggravating factors applied. CP 27-29; RP 218. Even if the prosecutor had the obligation to provide pre-adjudication notice of aggravating factors, that requirement would not bind the Juvenile Court Administrator, who operates under separate statutory authority.

F.B.T. highlights decisions pertaining to the Sixth Amendment right to juries for adults, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and asserts without authority that the principles in those decisions should also apply in the juvenile system. But juveniles do not have a Sixth Amendment right to a jury trial, and juvenile proceedings are generally not considered criminal prosecutions under the Sixth Amendment. *State v. Minor*, 133 Wn. App. 636, 648, 137 P.3d 872 (2006), *rev'd on other grounds*, 162 Wn.2d 796, 174 P.3d 1162 (2008).

Without a right of jury trial in juvenile cases, it is conceptually awkward to try to extract the due process component from Apprendi and Blakely and graft it onto nonjury juvenile dispositions. And it is unnecessary to do so because, as the State recognizes, the juvenile code already provides that a disposition harsher than the standard range must be supported by proof beyond a reasonable doubt.

*State v. Tai N.*, 127 Wn. App. 733, 741, 113 P.3d 19 (2005). Because a juvenile court must find proof of aggravating factors beyond a reasonable doubt, respondents' constitutional rights at sentencing are secure. *Tai N.*, 127 Wn. App. at 742 (“as the Juvenile Justice Act ... already provides this guaranty, we decline to decide whether *Apprendi* and *Blakely* require the same standard as a matter of constitutional due process”); *accord*, *State v. J.V.*, 132 Wn. App. 533, 539-40, 132 P.3d 1116 (2006) (Juvenile Justice

Act “clearly provide[s] notice that a manifest injustice disposition is a possibility in all juvenile sentences. This notice satisfies due process”).

F.B.T. had sufficient notice, both through statutes that require such a sentence be considered in every case and through pre-disposition notice on the record that the State and Juvenile Court Administrator would seek a manifest injustice disposition above the standard range. This is sufficient to satisfy due process.

#### **D. SUFFICIENT EVIDENCE SUPPORTS THE STATUTORY AGGRAVATING FACTORS**

F.B.T. challenges the evidentiary sufficiency of two aggravating factors used to support the manifest injustice disposition: the victims’ particular vulnerability; recent criminal history or violation of a diversion agreement. Because the record adequately supports the trial court’s findings, this Court should reject the claim.

##### 1. Standard of Review.

A finding of manifest injustice will be upheld if substantial evidence supports the reasons given, those reasons clearly and convincingly support the disposition, and the disposition is not too excessive or too lenient. *State v. T.J.S.-M.*, \_\_\_ Wn.2d \_\_\_, 441 P.3d 1181, 1185 (2019); RCW 13.40.230(2). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding’s truth. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The clear and convincing evidentiary standard is an

“intermediary standard” that is not the equivalent of the beyond a reasonable doubt standard. *T.J.S.-M.*, 441 P.3d at 1188.

2. Particularly Vulnerable Victims: Extreme Youth.

The trial court found that R.M. was particularly vulnerable because she was asleep when F.B.T. accosted her and that J.R. was particularly vulnerable because she was only three years old. RP 230. F.B.T. contends there is not substantial evidence to support the findings because F.B.T. “possess[ed] the same vulnerability as his victims” and his offenses were “crimes of opportunity resulting from F.B.T.’s momentary loss of control.” Br. of Appellant at 41. The argument is specious.

“When analyzing particular vulnerability, the focus is on the victim. The court determines if the victim is more vulnerable to the offense than other victims and if the defendant knew of that vulnerability.” *State v. Ogden*, 102 Wn. App. 357, 366, 7 P.3d 839 (2000) (citation omitted). F.B.T.’s deficits are irrelevant to whether his victims were particularly vulnerable.

Further, the JJA contemplates that a victim may be particularly vulnerable because of “extreme youth, advanced age, or physical or mental infirmity.” *Id.* J.R. was only three years old when F.B.T. touched her inappropriately and F.B.T. knew that. RP 188. Case law establishes that children this young are particularly vulnerable. *See State v. Fisher*,

108 Wn.2d 419, 425, 739 P.2d 683 (1987) (five and one-half-year old victim particularly vulnerable), *overruled in part on other grounds by State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 216, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); *State v. J.S.*, 70 Wn. App. 659, 667, 855 P.2d 280 (1993) (four-year-old victim was particularly vulnerable because of age); *State v. T.E.H.*, 91 Wn. App. 908, 917, 960 P.2d 441 (1998) (victim was particularly vulnerable because “the 5-year-old child was subject to the transgressions of an 11-year-old child, physically bigger and who had little or no supervision”).

A victim may also be particularly vulnerable because she is asleep when attacked. *State v. Hicks*, 61 Wn. App. 923, 931, 812 P.2d 893 (1991). In *Hicks*, this Court held that the defendant’s second rape victim was particularly vulnerable “[a]lthough her age was not advanced, because she was attacked as she slept, she was quickly rendered incapable of attempting to resist as compared to other rape victims who are awake.” *Id.* Here, the undisputed evidence was that R.M. slept through F.B.T.’s offense against her. RP 93, 96, 103, 159, 183, 184, 209. There was substantial evidence to support the trial court’s finding that R.M. was particularly vulnerable because she was asleep.

F.B.T. also argues that both of these aggravating factors inhere in the offenses themselves and are therefore could not provide the basis for a manifest injustice disposition.

Child molestation in the first degree requires proof that the victim was under 12 years of age and that the perpetrator is at least 36 months older than the victim. RCW 9A.44.083(1). But the fact that an offense contains age-related elements does not foreclose the possibility that a particular victim's age will render her more vulnerable than other victims of the same crime. *Fisher*, 108 Wn.2d at 423-24.

“While the legislature might have reasoned that victims less than [12] years old were more vulnerable in general than those [12] or older, it could not have considered the particular vulnerabilities of specific individuals.” *Id.* Victims of child molestation in the first degree range widely in age from zero to 12 years. “To prohibit consideration of the age of the victim in a particular case in sentencing would be to assume that all victims of this offense were equally vulnerable regardless of their age, an unrealistic proposition. A particular victim's special vulnerability due to age clearly is a factor which may distinguish the crime perpetrated against him from other crimes of [the same type].” *Id.*

J.R. was a three-year-old in a diaper when F.B.T. “stuffed two fingers in her.” RP 117, 123. Even though the first-degree child molestation

statute requires all victims to be children, the inescapable fact is that a three-year-old is more vulnerable to a 13-year-old than an 11-year-old. J.R.'s extreme age was sufficient to distinguish her from other victims of child molestation and adequately supports a manifest injustice finding.

3. The State Concedes That R.M.'s Being Asleep Does Not Distinguish Her From Other Victims of Indecent Liberties as Charged Here.

F.B.T. argues that the juvenile court inappropriately relied on the fact that R.M. was sleeping to find her particularly vulnerable to indecent liberties because that offense, as charged, requires proof that F.B.T. knowingly caused R.M. to have sexual contact with him “[w]hen the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.” RCW 9A.44.100(1)(b). In *State v. Puapuaga*, Division One of this Court held that evidence that a victim was asleep satisfies the element of physical helplessness for purposes of indecent liberties. 54 Wn. App. 857, 860-61, 776 P.2d 170 (1989). “The state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness.” *Id.* at 861.

The State relied on the fact that R.M. was asleep to prove the elements of indecent liberties, and the court specifically found that R.M. was not capable of consent because she was sleeping. RP 201, 209. The State concedes that this element may not also be used to aggravate the

offense. However, because the trial court relied on several other legitimate aggravating factors, it is unnecessary to remand for resentencing.

4. Recent Criminal History and Violation of Diversion Agreement.

The trial court found that a manifest injustice disposition was appropriate, in part, because of F.B.T.'s "recent criminal history that has been out there but unable to be satisfactorily completed and [multiple] diversions that were ordered before this case." RP 229. F.B.T. contends that the court erred in relying on F.B.T.'s violation of a diversion agreement because the State "provided no evidence of a diversion agreement, much less one that was violated, or criminal convictions." Br. of Appellant at 38.

In disposition hearings, "all relevant and material evidence, including oral and written reports, may be ... relied upon to the extent of its probative value, even though such evidence may not be admissible in a hearing on the information." RCW 13.40.150. Here, the record includes the Juvenile Court Administrator's written report detailing F.B.T.'s charged and uncharged recent criminal conduct. CP 23-29. This report asserts that F.B.T. was charged with assault in October 2016 and disorderly conduct in January 2017, and entered diversion both times. CP 24. He continued to assault people, make threats, and destroy property. CP 24-25. He was also charged with assault and malicious mischief in 2018 and entered diversion for those offenses in May 2018. CP 26. About a month later, F.B.T. was

charged in this case. CP 26. Further, the report states that F.B.T. “was still working on his Diversion conditions when the information on the current case was filed.” CP 27.

F.B.T. did not dispute this history at sentencing, as he is entitled to do under RCW 13.40.150(1). His counsel agreed that the Department’s report was “thorough and touches upon many of the problematic issues here.” RP 225. Counsel further conceded, “I don’t have any grounds to argue against findings for the manifest injustice.” RP 226.

On this record, the trial court did not err by relying on the Juvenile Court Administrator’s representations of F.B.T.’s charged and uncharged criminal conduct and existence of uncompleted diversion agreements to support the manifest injustice finding.

**E. THE COURT PROPERLY EXERCISED DISCRETION IN FINDING ADDITIONAL AGGRAVATING FACTORS THAT HAVE BEEN HELD TO BE PROPER CONSIDERATIONS**

F.B.T. contends that the trial court erred in imposing a manifest injustice disposition based on the “prohibited” nonstatutory factors that F.B.T. has a high risk of reoffending and that his parents are incapable of controlling him. Courts have repeatedly affirmed manifest injustice dispositions imposed on these factors. F.B.T.’s argument is without merit.

The disposition court “may consider both statutory and nonstatutory factors” in determining whether to impose a manifest injustice disposition.

*J.V.*, 132 Wn. App. at 540-41 (citing *State v. S.H.*, 75 Wn. App. 1, 11-12, 877 P.2d 205 (1994), *abrogated on other grounds by State v. Sledge*, 83 Wn. App. 639, 922 P.2d 832 (1996), which was in turn *vacated on other grounds by State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1999 (1997)); *see also Minor*, 133 Wn. App. at 646 (“In determining whether a manifest injustice disposition is proper, the trial court may look at statutory and nonstatutory factors, including whether the juvenile is at a high risk to reoffend.”); *In re Welfare of Luft*, 21 Wn. App. 841, 844-46, 589 P.2d 314 (1979) (JJA does not limit court’s discretion to consider nonstatutory aggravating factors when imposing a manifest injustice disposition outside the range).

F.B.T. relies on *State v. Bacon*, 190 Wn.2d 458, 415 P.3d 207 (2018). There, our Supreme Court considered whether a juvenile court had authority to suspend a 65-week disposition on the basis of manifest injustice. *Bacon* is inapposite. As the court noted, the JJA expressly provides that “except as provided under [provisions inapplicable to Bacon], the court shall not suspend or defer the imposition or the execution of the disposition.” 190 Wn.2d at 465-66; RCW 13.40.160(10). There is no similar provision precluding the juvenile court from considering aggravating factors other than those set forth in RCW 13.40.150(3)(i).

Washington courts have long held that the nonstatutory factor of future dangerousness or serious risk to reoffend may support a manifest

injustice sentence above the standard range. *See, e.g., T.J.S.-M.*, 441 P.3d 1181 (upholding manifest injustice disposition based in part on respondent's "high risk to reoffend due to the sexual nature of the offense ... and ... intellectual limitations"); *State v. Duncan*, 90 Wn. App. 808, 815, 960 P.2d 941 (1998) (respondent's "pattern of escalating violence and property destruction and the level of violence exhibited in the current offenses ... indicated Mr. Duncan was a serious risk to reoffend" and "supports beyond reasonable doubt the imposition of a manifest injustice sentence to protect public safety"); *State v. Halstien*, 65 Wn. App. 845, 853-56, 829 P.2d 1145 (1992), *as corrected* (Aug. 10, 1992), *aff'd*, 122 Wn.2d 109, 857 P.2d 270 (1993) (respondent's "obsessive, predatory behavior" and "high risk to reoffend" support manifest injustice finding); *T.E.H.*, 91 Wn. App. at 918 (evidence of prior criminal referrals demonstrating increasingly aggressive behavior supports finding of high risk to reoffend, which supports manifest injustice finding); *S.H.*, 75 Wn. App. at 11 ("A high risk that a juvenile will reoffend is a valid ground for a manifest injustice disposition," and was supported by evidence of the respondent's extraordinary criminal history, obsessive manner of the commission of the present offense, and prior failed community based treatment); *State v. N.E.*, 70 Wn. App. 602, 606-07, 854 P.2d 672 (finding high risk to offend based on lack of parental control, untreated substance

abuse, and frequent criminal history sufficient to justify manifest injustice disposition); *State v. J.N.*, 64 Wn. App. 112, 114, 823 P.2d 1128 (1992) (finding that respondent was a high risk to reoffend justified manifest injustice disposition and was supported by evidence that he continued to deny certain elements of the offense, projected responsibility onto the victim, has significant intellectual limitations, had planned the offense, and had committed the offense knowing there were adults in the house).

Washington courts have likewise acknowledged that lack of parental control is a valid nonstatutory factor supporting a manifest injustice disposition. In *T.E.H.*, the court noted that a serious lack of family control “is recognized as an aggravating factor where the inability to control the child is related to the degree of risk to society.” 91 Wn. App. at 918. “If a child cannot be controlled by his or her parent or guardian, the danger or risk to society is commensurately increased.” *Id.*; *see also N.E.*, 70 Wn. App. at 607 (respondent’s untreated substance abuse and lack of parental control demonstrates high risk to reoffend); *State v. T.E.C.*, 122 Wn. App. 9, 22, 92 P.3d 263 (2004) (lack of parental control was valid aggravating factor even though respondent would not reside at home while serving Special Sex Offender Disposition Alternative sentence).

This case is a good example of why lack of parental control is a valid aggravating factor supporting a manifest injustice disposition. The record

indicates that F.B.T.'s parents resorted to calling the police 29 times in less than two years for help controlling F.B.T.'s violent outbursts. CP 24-26. They also frequently sought help with F.B.T. from the juvenile department and diversion counselor. CP 24-26. Juvenile Court Administrator Barker told the court that F.B.T.'s parents "have used local law enforcement as a first line of offense or defense ... regarding parenting skills." RP 36. F.B.T. was mainly assaultive toward his parents; he slammed his stepmother's fingers in doors, threatened to kill his parents, punched doors, broke windows, kicked walls, punched both parents, destroyed their property, and frequently threatened to kill himself. CP 24-26. His parents reported that they are afraid of F.B.T. and "simply don't know what to do with him." CP 28. There was evidence that F.B.T. was not even living at home at the time of the current offenses. RP 151. F.B.T.'s parents' inability to control his behavior significantly increases his risk to reoffend and the danger he presents to the community, and supports a manifest injustice disposition meant to provide structured treatment and education to make F.B.T. safe for release.

**F. THE JUVENILE COURT DID NOT COMMIT F.B.T. TO AN INSTITUTION "SOLELY BECAUSE OF THE LACK OF FACILITIES IN THE COMMUNITY."**

The JJA prohibits courts from committing a juvenile to an institution "*solely* because of the lack of facilities, including treatment facilities,

existing in the community.” RCW 13.40.150(5) (emphasis added). F.B.T. suggests that is what the trial court did in this case, highlighting how miserably F.B.T. has fared in the community and asserting without support that no one investigated whether community-based treatment would have adequately met F.B.T.’s needs. Br. of Appellant at 47-49. The State does not dispute that F.B.T. is unsafe in the community or that he desperately needs significant treatment. But the trial court never indicated that the “lack of facilities in the community” was the “sole” reason for the manifest injustice disposition. Rather, the court relied on the victims’ particular vulnerability, F.B.T.’s “horrific” recent history of assaultive criminal conduct, his high risk to reoffend due to his parents’ inability to control him, F.B.T.’s admitted inability to control himself when he has sexual “urges,” and his intellectual deficits and mental health issues. RP 228-31. A trial court does not contravene RCW 13.40.150(5) when lack of treatment facilities in the community is not the “sole” reason for committing a juvenile to an institution. *T.E.C.*, 122 Wn. App. at 30. Since the trial court here relied on a number of aggravating factors, none of which was the lack of treatment facilities in the community, it did not err.

**G. MODIFIED DISPOSITION ORDER WAS ENTERED WITHOUT PERMISSION AND HAS NO EFFECT; REMAND IS REQUIRED TO MAKE THE NECESSARY CORRECTION.**

After review is accepted by the Court of Appeals, RAP 7.2(e) prohibits the trial court from modifying the decision being reviewed without prior permission of the appellate court. In this case, the trial court entered an order modifying the disposition that is presently on review without permission from this Court. CP 40, 51. “If, after the acceptance of review, the trial court, without permission, takes action on a subject matter not given it under the rule, that action will be a nullity.” Karl Tegland, 2A Wash. Prac., Rules Practice RAP 7.2 (8th ed.) (citing *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 423 P.2d 624 (1967); *Fairview Lumber Co. v. Makos*, 44 Wn.2d 131, 265 P.2d 837 (1954)). Accordingly, this Court should simply disregard the trial court’s attempted modification of F.B.T.’s disposition.

**IV. CONCLUSION**

The State respectfully asks this Court to affirm.

Dated this 12 day of August, 2019.

DAVID QUESNEL  
Prosecuting Attorney



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Attorney for Respondent

**KLICKITAT COUNTY PROSECUTING ATTORNEY**

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