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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

J.D., RESPONDENT, CROSS-APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 17-8-00622-7

APPELLANT/CROSS-RESPONDENT'S BRIEF

MARY E. ROBNETT
Prosecuting Attorney

By
Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does the record demonstrate that respondent/cross-appellant—an adult—knowingly, voluntarily and intelligently waived a trial by jury?
2. Is the outcome of defendant's bench trial valid when the record is devoid of any indication that defendant knowingly, voluntarily, and intelligently waived his right to trial by jury?
3. What remedy should this court fashion when an erroneous deprivation of a right to trial by jury is coupled with an ineffective lawyer's failure to extend juvenile court jurisdiction?
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5. Is it necessary or desirable for this Court to determine cross-appellant's evidentiary claim?
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and was free to go at the time he made his statement admitted into evidence?

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13. Has cross-appellant demonstrated that the trial court impermissibly considered any hearsay evidence for the truth of the matter asserted?

B. STATEMENT OF THE CASE.

J.D., an adult (hereinafter respondent), was found to have committed a juvenile offense by the juvenile court following a bench trial. J.D. never waived his right to trial by jury. Defendant's trial counsel failed to move the juvenile trial court to extend juvenile court jurisdiction before his trial commenced.

Facts relating to the conduct of the trial are presented below.

C. ARGUMENT.

1. RESPONDENT WAS NOT AFFORDED HIS RIGHT TO TRIAL BY JURY. THAT ERROR MUST BE REMEDIED.

Respondent is an adult who was found guilty of a juvenile offense in a bench trial. The record contains no indication that respondent knowingly, voluntarily, and intelligently—and on the record—waived his right to trial by jury. Respondent, who is still an adult, still has that right to trial by jury.

The State acknowledges that it would be administratively excellent to simply retain respondent in juvenile court and litigate this case like an ordinary juvenile court case. But that would alter neither the fact of denial

of the right to trial by jury nor the consequences flowing from that denial.¹ The juvenile court's fact finding process simply cannot stand, because absent a knowing, voluntary, and intelligent waiver, on the record only a jury trial can suffice.

This Court has enormous flexibility to determine a remedy in this case. *State v. Maynard*, 183 Wn.2d 253, 261-64, 351 P.3d 159 (2015). The first problem is that respondent must be afforded the right to a trial by jury. That cannot happen in Juvenile Court.² Therefore, the right to trial by jury must necessarily be provided in Superior Court.

Once the right to trial by jury is provided, should defendant be found guilty, the superior court should then conduct “further proceedings in accordance with the [Juvenile Justice Act]”— the same remedy as imposed by the Supreme Court in *Maynard*, 183 Wn.2d at 264.³ This is not a “hybrid” remedy, *Maynard* was an appeal from the adult division of superior court. *Id.*, 183 Wn.2d at 258-59. Nothing in *Maynard* suggests a remand back to the juvenile division of superior court. *Id.* Further argument over this is quibbling—the State agrees that respondent would

¹ The State's interest lies in securing a valid adjudication in this case.

² RCW 13.04.021(2) states most unambiguously that “[c]ases in the juvenile court shall be tried without a jury.”

³ The State asks for remand to the superior court, rather than the juvenile division of the superior court out of respect for the separation of powers. The “juvenile court” is a statutory creation and courts do not rewrite statutes.

be entitled to the full functional equivalent of juvenile court proceedings following any determination of guilt—and if the superior court adds the words “juvenile court” into its caption following any finding of guilt, then that should be of no moment.

2. ALTERNATIVELY, RESPONDENT HAS FAILED TO DEMONSTRATE THAT HIS STATEMENTS WERE IMPROPERLY ADMITTED AT TRIAL.

This Court should find it unnecessary to address the adequacy of respondent’s bench trial.⁴ Should this Court elect to consider the adequacy of petitioner’s bench trial, this court should conclude that defendant’s statements at Puyallup High School were properly admitted.

The trial court found that respondent was not under arrest at the time that he made the statements admitted at trial. 1 VRP 78. The trial court also found that defendant was free to go at that point in time. *Id.* The trial court further found that respondent was told he didn’t need to answer any questions. *Id.* Error is assigned to none of these factual findings. They are verities on appeal.⁵

⁴ The record created at the CrR 3.5 hearing could be more thoroughly developed. There are no written findings of fact. These defects can be remedied on remand.

⁵ “Here, Olsen does not challenge the trial court’s oral ruling that the State proved the three previous instances of misconduct by a preponderance of the evidence. Accordingly, these unchallenged findings are treated as verities on appeal. *State v. Chanthabouly*, 164 Wn. App. 104, 129, 262 P.3d 144 (2011) (unchallenged oral rulings are verities on appeal), *review denied*, 173 Wash.2d 1018, 272 P.3d 247 (2012).” *State v. Olsen*, 175 Wn. App. 269, 281, 309 P.3d 518, 523 (2013), *aff’d*, 180 Wn.2d 468, 325 P.3d 187 (2014).

No *Miranda*⁶ problem is presented by this case because respondent's freedom of action was not curtailed to a degree associated with formal arrest." *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1989). In this case, J.D. was questioned in the assistant principal's office,⁷ but nothing in the record suggests that defendant's freedom was curtailed "to the degree associated with formal arrest." *Id.* The first statement made by Detective Temple (a detective in plain clothes) to defendant were that "I wanted to talk to him about a case I was investigating and that he didn't need to talk to me." 1 VRP 63. All that came out of that conversation was that respondent said that he would talk (*Id.*), that he did not know "person A,"⁸ that he did know "Jaiden," that he knew of Jaiden's sister, and that Zach (Taya's boyfriend) was his friend. 1 VRP 66. This suggests a brief, nonconfrontational exchange. Detective Temple testified that his investigation was just in its initial stages and that he was attempting to get the other side of the story. 1 VRP 64. No questions regarding the allegations of sexual assault or rape were asked at the high school, because respondent informed Detective Temple that he did not know the subjects. 1 VRP 69.

⁶ *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

⁷ The questioning happened at the assistant principal's office. 1 VRP 70.

⁸ The alleged victim in the later trial.

State v. D.R., 84 Wn. App. 832, 930 P.2d 350 (1997) involved the questioning of a fourteen year old eighth grader confronted with allegations of rape in the presence of school authorities in the assistant principal's office. This case involves a seventeen and a half year old⁹ questioned in a non-confrontational manner for a brief period of time. The questioning in this case did not resemble formal arrest in any way.

3. MS. KNUTSEN'S TESTIMONY WAS NOT
PRIOR CONSISTENT STATEMENT
TESTIMONY.

Respondent's argument asserts that nine witnesses related impermissible hearsay when they related A.G.'s prior statements claiming that she had been raped. Respondent's argument does not clearly identify who those nine witnesses are, what each of the nine witness' challenged statements were, or where those challenged statements are to be found in the record. Since both parties in this case agree that this matter should be remanded for a new trial,¹⁰ and since respondent has made neither a reasonably specific assignment of evidentiary error nor a reasonably clear argument of evidentiary error, the State asks this Court to decline to review respondent's hearsay claims presented on appeal.

⁹ 1 VRP 2017 (1/21/17 date of questioning); 3 VRP 251 (respondent's 1/5/200 date of birth).

¹⁰ On this particular issue it should not matter that one party urges a jury trial and the other party apparently acquiesces in a remand for a bench trial. Both parties agree that the matter should be retried.

Alternatively, the record demonstrates that the trial court did not commit reversible error by admitting improper hearsay.

The trial court reserved ruling on respondent's pretrial motion regarding prior consistent statements. 1 VRP 13. Timely objections were required. "When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling." (internal quotation marks, braces, and citations omitted) *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615, 623 (1995).

Ms. Knutsen, a school counselor, testified over objection that in May, 2017¹¹ students told her that A.G had told them that A.G. had been raped. 1 VRP 27. This statement was not admitted for the truth of the matter asserted. *Id.* It was only admitted for explaining what Ms. Knutsen did. *Id.* Ms. Knutsen then contacted A.G. 1 VRP 31.

Ms. Knutsen then contacted A.G. 1 VRP 29-30. A.G.'s statements to Ms. Knutsen were admitted without objection. 1 VRP 29-32. Defendant waived his hearsay objection by failing to present a timely hearsay objection at trial. *State v. Smith*, 155 Wn.2d 496, 501-02, 120 P.3d 559 (2005). "Hearsay evidence admitted without objection may be

¹¹ The statements related to "the school year, September 2016" and were made in May. 1 VRP 25-26.

considered by the trier of fact or the appellate court for its probative value.” *In re Marshall*, 46 Wn. App. 339, 343, 731 P.2d 5 (1986); *Harter v. King County*, 11 Wash.2d 583, 598, 119 P.2d 919 (1941); *State v. Whisler*, 61 Wn. App. 126, 139, 810 P.2d 540 (1991).

Inconsistency relating to A.G.’s statements to Ms. Knutsen was a theme raised in defense counsel’s opening statement:

There is some inconsistency in Amelia’s presentation. She at first, at least it’s my understanding -- we will see what the counselor says -- but it’s my understanding that the counselor is going to indicate that she had first denied any sort of sexual relationship, and then, under pressure, she said yes, there was. So we feel that her presentation was inconsistent.

1 VRP 22. That assertion is an example of “an express or implied charge against the declarant (A.G.) of recent fabrication.” ER 801(d)(1)(ii).

Obviously one of the two statements had to be a recent fabrication—and defense counsel argued in his opening statement that the accusatory statement was the recently fabricated one. Any possible ambiguity on this point is eliminated by defense counsel’s closing argument at 3 VRP 296-97.

The actual inconsistent statements made by A.G. to Ms. Knutsen were elicited—without objection—on direct examination:

After she was -- after I got permission to share with her who had told me, because they were her friends, I said, "I need to know if this is -- if what you have shared with them is true." And she said no. And then I said, "Okay. I need to know

because then I would have to proceed because I am a mandated reporter," and then I said -- oh.

...

I said if she felt she had been violated in any way, I needed to know. And if she hadn't, I felt I had an obligation to the other students to share that she -- that had not happened because that's a lot for other seventh graders to have to carry around with them.

Q. And what did Amelia -- after you explained why you need to know, what did Amelia say or do next?

A. I brought the kids in that had reported it. I said, "You need to let us know because they are worried about you." And she said, "I am really mad at you guys, but yes, Ms. Knutsen, it did happen." And I said, "So let me hear you right; you've been sexually violated?" "Yes." And that was the extent of my conversation with her on that.

1 VRP 28-29. This admission without objection further suggests that defense counsel wanted A.G.'s inconsistencies to Ms. Knutsen to appear before the trial court.

This asserted inconsistency was pressed by defense counsel on cross-examination of Ms. Knutsen: "Why didn't you ask Amelia at that point why -- after she had changed her story, what motivated her to change her story with her friends there?" 1 VRP 34.

Ms. Mouring testified as to what Ms. Knutsen told her, but this information was admitted only "for the limited purpose of what the assistant principal did with the information she received." 1 VRP 40.

That statement, admitted for that purpose, in a bench trial carries no potential for unfair prejudice.

Tristan Krogstadd, a friend of A.G., testified that A.G. told him that she had been raped (1 VRP 47), but the trial court concluded that statement was hearsay. 1 VRP 48. Respondent claims no error relating to Mr. Krogstadd's testimony.

Officer Eller did not testify to any statements made by A.G. 1 VRP 53-59. A "leading" objection was sustained at 1 VRP 58.

Daniela Salazar testified to statements made to her by her friend A.G. in the Spring of 2017. 2 VRP 85-86. Ms. Salazar testified that A.G. said that she had relationships with an older guy named Jullian and that they had sex in the car. 2 VRP 86-88. This statement was objected to and was admitted as a prior consistent statement. 2 VRP 87. Ms. Salazar testified that she reported what A.G. had told her to Ms. Knutsen about a week later. 2 VRP 88-89. A.G.'s prior statements to Ms. Salazar (especially with the accompanying testimony about A.G.'s demeanor) rebutted defendant's implied or express claim that A.G.'s later statement to Ms. Knutsen was a fabrication.

Madeline Shakotko was another friend of A.G. 2 VRP 96. Ms. Shakotko testified, over objection, that A.G. told her in May of 2017¹² that she had been raped. 2 VRP 98. Ms. Shakotko also testified that A.G. “said that she was out of the house and she met a boy and she got in the car with him and he raped her. 2 VRP 100. The statements were admitted as prior consistent statements. *Id.* Ms. Shakotko testified that she and Ms. Salazar went to Ms. Knutsen and told her what A.G. had told them. 2 VRP 100-01. These consistent statements were not hearsay for the same reasons Ms. Salazar’s statements were not hearsay—they rebutted defendant’s implied or express claim that A.G.’s later statement to Ms. Knutsen was a fabrication. Furthermore, the trial court did not admit these non-hearsay statements for the truth of the matter asserted. *Id.*

Taya Barney’s testimony was admitted without objection. 2 VRP 104-08. Respondent has no objection to present on appeal. *State v. Smith, supra.*

Jaiden Barney testified over objection regarding A.G.’s statements to her. 2 VRP 123-24. Ms. Barney clearly dated those statements before “the school got involved with it.” 2 VRP 125. These consistent statements were not hearsay for the same reasons Ms. Salazar’s statements

¹² The timing of the disclosure is established at 2 VRP 96-97.

were not hearsay—they rebutted defendant’s implied or express claim that A.G.’s later statement to Ms. Knutsen was a fabrication. It should be noted, also that the trial court concluded that it was not going to consider Ms. Barney’s statements regarding what A.G. told her for the truth of the matter asserted. 2 VRP 122-23.

A.G. corroborated Ms. Shakotko’s testimony by testifying, over objection, that she had “told her about what [her] relationship with Jullian had been” and “it was rape.” 2 VRP 152. The trial court admitted the testimony as a prior consistent statement, but also stated that it was not going to consider the statements for the truth of the matter asserted. 2 VRP 151.

Keri Arnold, a child interviewer who works in the Pierce County Prosecuting Attorney’s office testified that she interviewed A.G. 2 VRP 175, 178. Ms. Arnold testified that A.G. made disclosures to her that were part of the investigation. 2 VRP 184. Since no assertions were related, this is plainly not hearsay, and the hearsay objection was properly overruled. Ms. Arnold later testified, without objection, that there was a disclosure of sexual abuse. 2 VRP 185. Respondent has no objection to present on appeal. *State v. Smith, supra*. Ms. Arnold was not permitted to testify that A.G.’s interview with her was consistent with what Ms. Arnold had reviewed for purposes of her investigation. 2 VRP 186.

Defense counsel unsuccessfully objected to demeanor questions, but those do not implicate hearsay or anyone's prior out of court statements. 2 VRP 187. Defense counsel also successfully objected to Ms. Arnold testifying to any identification related by A.G. to Ms. Arnold. 2 VRP 188-90. Ms. Arnold testified, over objection and without relating content, that A.G. was able to tell her what happened, when it happened, and who it happened with. 2 VRP 192. Given that respondent does not identify how any specific part of Ms. Arnold's testimony was objected-to inadmissible hearsay, respondent has failed to demonstrate that the trial court abused its discretion by admitting hearsay through Ms. Arnold.

Shawna Hood testified without objection. 2 VRP 197-206. Respondent has no objection to present on appeal. *State v. Smith, supra.*

A.G.'s mother, Victoria Garcia-Tamayo testified without objection. Respondent has no objection to present on appeal. *State v. Smith, supra.*

Michael Payne, A.G.'s father testified largely without objection. None of the objections to his testimony related to hearsay or prior consistent statements.¹³ Respondent has no objection to present on appeal. *State v. Smith, supra.*

¹³ There was a relevance objection at 2 VRP 213, a form of the question objection at 2 VRP 215, a nonresponsive objection at 2 VRP 225, None of these objections related to statements made by A.G. *Id.*

Sgt. Temple, a sergeant with the Sumner Police Department, testified that he investigated the instant case. 3 VRP 243-45. The trial court allowed testimony that Sgt. Temple had gathered information regarding the nature of the sexual contact and that that information was sexual intercourse. 3 VRP 247. The prosecution only sought to admit this testimony for the following purpose: “Well, his investigation goes to information he gathered to take his next steps. It becomes state of mind, what he did after he received the information.” 3 VRP 247. Such information is not particularly relevant, but was not hearsay when admitted for that purpose.¹⁴ After the trial court voiced concerns, defense counsel asked no further questions about any information Sgt. Temple may have received. His direct examination proceeded without objection. 3 VRP 248-60.

Respondent asserts that hearsay was improperly admitted, but fails to demonstrate any instance where the trial court impermissibly considered any prior statements by A.G. to third parties for the truth of the

¹⁴ The trial court initially sustained the objection. 3 VRP at 247. The trial court only admitted the testimony after the prosecutor offered the testimony for the limited non-hearsay purpose. 3 VRP at 247-48. The trial court remained conscious of the concerns about hearsay: “All right, I will allow that, but I do think we are going to get into hearsay.” 3 VRP 247-48.

matter asserted. The testimony of Ms. Salazar, Ms. Shakotko, Jaiden Barney, and A.G. were properly admitted prior consistent statements. The testimony of Ms. Knutsen, Ms. Mouring, Ms. Shakotko, Jaiden Barney, and Sgt. Temple cannot be hearsay because those statements were explicitly not admitted to for the truth of the matter asserted.¹⁵

Respondent appears to complain about hearsay related by Shawna Hood and Mr. Payne (A.G.’s father),¹⁶ but the record reveals no hearsay objections in Mr. Payne’s testimony and no objections at all to Ms. Hood’s testimony. Testimony by Taya Barney and Ms. Garza-Tamayo was presented without objection. Respondent identifies no specific hearsay testimony of Keri Arnold that was admitted over a reasonably specific objection.

Respondent presents his evidentiary claims in a confusing way which does not provide an adequate opportunity meaningful appellate review. The testimony of Shawna Hood (at 2 VRP 197-206) is a good example. Respondent complains of Ms. Hood’s hearsay testimony at page 36 of his brief, but does not say what that testimony was. Respondent also

¹⁵ Respondent has not rebutted the presumption that the trial court in a bench trial considered no evidence for an impermissible purpose. *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002). See also *State v. Gower*, 179 Wn.2d 851, 855-56, 321 P.3d 1178 (2014).

¹⁶ Amended Brief of Respondent at 36.

asserts that the testimony of “nine witnesses” was admitted “over objection.” Amended Brief of Respondent at 33. Respondent implies, but does not say that Ms. Hood was one of the “nine.” *Id.* at 36. Furthermore, Ms. Hood’s testimony was never objected to. *See* 2 VRP 197-208. This court should decline to review respondent’s hearsay claim because it is a confusing agglomeration of nonspecific allegations, and because, at any event, this Court should remand this matter to the Superior Court to give respondent the opportunity of a jury trial.

D. CONCLUSION.

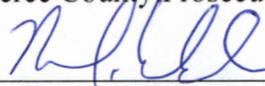
Respondent must be afforded the opportunity for a jury trial. The only place that can happen is the adult division of the superior court. This matter should be remanded to the superior court so that he can be afforded the opportunity for a jury trial. After that issue is resolved, *Maynard* controls: Further proceedings should be in accordance with the Juvenile Justice Act.

Cross-appellant’s arguments relating to the conduct of the trial need not be considered, as they may necessarily be reconsidered on remand. Should this Court elect to review the issues presented on cross-appeal, this Court should find that the admission of respondent’s

statements comported with *Miranda* and that cross-appellant has not demonstrated that the trial court abuse its discretion in the admission of the alleged victim's prior consistent statements.

DATED: March 7, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.7.19 theunkar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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