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**IN THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,  
Appellant/Cross Respondent,  
v.  
J.D.,  
Respondent/Cross Appellant.

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**REPLY BRIEF OF RESPONDENT/CROSS APPELLANT**

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

No. 17-1-00028-8

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT..... 2

    A. THE STATE’S ONLY ARGUMENT FOR REMANDING TO “ADULT” COURT IS CIRCULAR AND WITHOUT MERIT ..... 2

    B. THE STATE CONTINUES TO FUNDAMENTALLY MISAPPREHEND THE HOLDING IN MAYNARD..... 5

    C. J.D. PROPERLY ASSIGNED ERROR TO THE COURT’S WRONGFUL DENIAL OF HIS CRR 3.5 MOTION..... 9

    D. THE STATE FAILS TO DEFEND THE COURT’S WRONGFUL DENIAL OF J.D.’S CRR 3.5 MOTION BECAUSE IT FAILS TO MEANINGFULLY DISTINGUISH CONTROLLING AUTHORITY. .... 11

    E. THERE IS NO AMBIGUITY IN THE MANNER IN WHICH J.D. RAISED THE ISSUE OF THE COURT’S WRONGFUL ADMISSION OF PRIOR CONSISTENT STATEMENT EVIDENCE FROM NINE WITNESSES. .... 14

    F. THE STATE FAILS TO REBUT J.D.’S ARGUMENT THAT THE TRIAL COURT ERRED IN ADMITTING PRIOR CONSISTENT STATEMENT TESTIMONY FROM NINE WITNESSES ..... 17

III. CONCLUSION ..... 25

## TABLE OF AUTHORITIES

### Cases

<u>Ferree v. Doric Co.</u> , 62 Wash. 2d 561, 383 P.2d 900 (1963).....	10, 11
<u>In re Pers. Restraint of Yates</u> , 177 Wash. 2d 1, 296 P.3d 872 (2013) .....	2
<u>Peralta v. State</u> , 191 Wash. App. 931, 366 P.3d 45 (2015).....	18, 19, 21
<u>Ross v. Oklahoma</u> , 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988) .....	2
<u>State v. Aaron</u> , 57 Wn. App. 277, 787 P.2d 949 (1990).....	23
<u>State v. D.R.</u> , 84 Wash. App. 832, 930 P.2d 350 (1997) .....	11, 12, 13
<u>State v. Edwards</u> , 131 Wn. App. 611, 128 P.3d 631 (2006).....	22
<u>State v. Lowrie</u> , 14 Wn. App. 408, 542 P.2d 128 (1975) .....	23
<u>State v. Marintorres</u> , 93 Wn. App. 442, 969 P.2d 501 (1999).....	23
<u>State v. Maynard</u> , 183 Wn.2d 253, 351 P.3d 159 (2015) .....	passim
<u>State v. Posey</u> , 161 Wash. 2d 638, 167 P.3d 560 (2007).....	6
<u>State v. Posey</u> , 174 Wn.2d 131, 272 P.3d 840 (2012) .....	8
<u>State v. Stamm</u> , 16 Wn. App. 603, 559 P.2d 1 (1977).....	23
<u>State v. Tai N.</u> , 127 Wash. App. 733, 113 P.3d 19 (2005) .....	3, 4
<u>State v. Wicker</u> , 66 Wn. App. 409, 832 P.2d 127 (1992) .....	23
<u>Wagner v. Wagner</u> , 1 Wash. App. 328, 461 P.2d 577 (1969) .....	10, 11

### Rules

CrR 3.6.....	9, 10, 11
--------------	-----------

ER 103 .....	20
ER 403 .....	24
ER 801 .....	18, 19, 20, 24
ER 802 .....	24
RAP 10.3.....	10
RAP 2.5.....	20

**Constitutional Provisions**

U.S. Const. Amend. VI.....	2
U.S. Const. Amend. XIV .....	2

**Secondary Sources**

C. McConnick, Evidence, § 249 (2d ed. E. Cleary 1972).....	23
--	----

## I. INTRODUCTION

The State, appellant and cross respondent, appealed from Pierce County cause no. 17-1-00028-8, asserting the trial court erred in retroactively extending jurisdiction under the Juvenile Justice Act (“JJA”), RCW 13.40.010, et seq. after defense counsel failed to timely move for an extension. Respondent and cross appellant, J.D., cross appealed, arguing that his conviction was unlawful due to the trial court’s improper admission of out-of-court allegations from nine State witnesses, its improper denial of J.D.’s CrR 3.5 motion to exclude his prior unmirandized statements to law enforcement, and the cumulative effect of the trial court’s errors. J.D. also argued that in the event the State’s appeal is granted, he will have been prejudiced by his trial counsel’s deficient performance in failing to move to extend JJA jurisdiction.

Both parties submitted opening briefs and the State has submitted its Brief of Respondent (Reply Br.). J.D. now submits this final Reply Brief of Respondent/Cross Appellant. As set forth herein, the State in its Reply Brief presents no legitimate legal or factual challenge to the arguments set forth in J.D.’s Opening Brief. Accordingly, it is respectfully requested that the Court grant J.D.’s appeal and deny that of the State.

## II. ARGUMENT

### A. The State's Only Argument for Remanding to "Adult" Court is Circular and Without Merit

Employing highly spurious circular reasoning, the State takes the position that because J.D. is entitled to a trial by jury, the matter must be remanded for further proceedings in "adult" court.<sup>1</sup> Reply Br. at 3, 17. The circularity, and absurdity, of this argument is apparent – only if the trial court did in fact err in extending JJA jurisdiction would J.D. have the right to a jury trial. However, J.D. had no right to a jury trial in the first place because he has not been subject to a "criminal prosecution".

Defendants in "criminal prosecutions" have a constitutional right to a trial by jury. In re Pers. Restraint of Yates, 177 Wash. 2d 1, 30, 296 P.3d 872, 886-87 (2013) ("A defendant is guaranteed a fair trial before an impartial jury by the Sixth and Fourteenth Amendments") (citing Ross v. Oklahoma, 487 U.S. 81, 85, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988)); see also U.S. Const. Amend. VI ("In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...") (emphasis added). However, there is no right to a

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<sup>1</sup> Although this argument addresses the substance of the State's appeal, it is nonetheless appropriately raised in this Reply Brief because it is relevant to J.D.'s cross-appeal argument that he received ineffective assistance of counsel for which the appropriate remedy is to continue applying the JJA.

trial by jury in the course of proceedings under the JJA because such proceedings are not treated as “criminal prosecutions” for purposes of the Sixth Amendment. See State v. Tai N., 127 Wash. App. 733, 738, 113 P.3d 19, 22 (2005) (recognizing that “juvenile offenders do not have a right to jury trials under the Washington Constitution” and “[j]uvenile adjudicatory proceedings have never been equated with a “criminal prosecution” for purposes of the Sixth Amendment.)

Only after the State obtained a disposition against J.D. under the JJA did it, for the first time, *seek* to commence a “criminal prosecution.” However, the trial court rightly denied that request, and this Court should do the same. Because the State’s attempts to commence a “criminal prosecution” against J.D. have thus far been unsuccessful, no jury trial right has attached. Without commencement of a “criminal prosecution”, there is no right to a jury trial and no basis for remanding to “adult” court.

To argue, as the State does, that remand to “adult” court is necessary *because* J.D. is entitled to a trial by jury is absurd, as J.D. would only be entitled to a trial by jury in the first place if this Court reversed the trial court, vacated J.D.’s juvenile disposition, and instructed the State to re-file the charges in “adult” court. The fact that the right to a jury trial would attach once a criminal prosecution is

commenced is no reason at all for this Court to allow the State to now commence a “criminal prosecution” despite previously having elected to pursue this matter through trial under the JJA.

For these same reasons, the fact that “[t]he record contains no indication that respondent knowingly, voluntarily, and intelligently-and on the record-waived his right to trial by jury” (Reply Br. at 3) is irrelevant because, absent commencement of a “criminal prosecution,” there is no such right to be waived.

In insisting otherwise, the State seems to believe that, unlike other defendants in JJA proceedings, J.D. had a right to a trial by jury because he is over the age of 18. See Reply Br. at 3 (“Respondent, who is still an adult, still has that right to trial by jury”). The State’s belief that the jury trial right attaches upon attainment of the age of majority is wrong. The dispositive issue as to whether J.D. has a right to a trial by jury is not the defendant’s age, but whether a “criminal prosecution” was commenced. See Tai N., 127 Wash. App. at 738. J.D.’s age is entirely irrelevant to this issue, and the State provides no authority suggesting otherwise beyond its own bald assertions.

Despite the State’s best efforts, after it pursued the charges against J.D. pursuant to the JJA all the way through trial, it has not yet commenced a “criminal prosecution” against J.D., nor should it be

permitted to do so now. Because it has not commenced a “criminal prosecution” against J.D., J.D. has at no stage of these proceedings been entitled to a trial by jury, and there is no basis for remanding this case for trial by jury in “adult” court. To do so would further unconstitutionally prejudice J.D. for his counsel’s deficient performance in failing to promptly move for extension of application of the JJA and would pose double jeopardy concerns.

**B. The State Continues to Fundamentally Misapprehend the Holding in *Maynard***

In addition to failing to grasp the concept that the right to a jury trial attaches only upon commencement of a “criminal prosecution”, a category that excludes proceedings under the JJA, the State further fails to grasp the straightforward controlling holding in *State v. Maynard*, 183 Wn.2d 253, 261-64, 351 P.3d 159 (2015). In *Maynard*, the Court held, in no uncertain terms, that where, as in J.D.’s case, defense counsel fails to move to extend JJA jurisdiction before a defendant’s 18th birthday, the remedy is “for further proceedings in accordance with the JJA”. *Id.*

For inexplicable reasons, the State believes that “further proceedings in accordance with the JJA” means an “adult” court jury trial followed by imposition of a sentence that comports with the JJA. See Reply Br. at 4-5. It does not. “[F]urther proceedings in accordance with the JJA” means that, on remand, the trial court is to conduct further

proceedings in accordance with the JJA. Trials by jury are not in accordance with the JJA. See RCW 13.40.130 (providing that, rather than jury trials, proceedings under the JJA consist of adjudicatory hearings before the court, sitting without a jury, as the finder of fact). Thus, in Maynard, when the Court remanded for “further proceedings in accordance with the JJA,” the trial court would have blatantly violated the Court’s instructions if it were to do what the State urges here and conduct a trial by jury.

The State’s position, then, is that the guilt phase of the proceedings on remand should be governed by Washington’s generally applicable criminal rules, while the sentencing phase should be conducted in accord with the JJA. It points to no case in Washington history in which this strange hybrid approach was applied, nor does it point to any legislative intent to allow for such an irrational bifurcation of the proceedings.<sup>2</sup>

Despite the straightforward proposition that the Maynard Court remanded for proceedings under the JJA (i.e., juvenile court

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<sup>2</sup> Bifurcated proceedings do in effect occur in some situations not applicable here when a jury acquits on an automatic decline offense and convicts on a non-automatic decline offense. See State v. Posey, 161 Wash. 2d 638, 642, 167 P.3d 560, 561 (2007). However, this narrow exception does not apply here.

proceedings) when it remanded “for further proceedings in accordance with the JJA,” the State argues to the contrary, stating:

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.

Reply Br. at 4-5. That the State manages to interpret the phrase “for further proceedings in accordance with the JJA” to mean “for a trial by jury followed by further proceedings in accordance with the JJA” is confounding. Had the Court intended to remand for a trial by jury followed by further proceedings in accordance with the JJA, it would have so instructed. It did not.

A trial by jury followed by “further proceedings in accordance with the JJA” is indeed a novel “hybrid remedy,” as trials by jury are not permitted under the JJA. See RCW 13.40.130. The State has failed to provide evidence of any instance in Washington history in which the hybrid approach it advocates was implemented. Additionally, why the State would want to put A.G. and the other minors involved in this case through a public jury trial for no apparent reason and based on no competent authority is mystifying.

The State further asserts that the fact that “Maynard was an appeal from the adult division of superior court” somehow supports its

position. The fact that the proceedings in Maynard were conducted in the “adult division of superior court” was precisely the error forming the basis of the Court’s reversal of the defendant’s unconstitutional convictions. The trial court in Maynard should have proceeded under the JJA, i.e. in the juvenile division of the superior court, and it was reversible error for it to fail to do so. Here, the trial court imposed the proper remedy, and the State now asks this Court to reverse and commit the same constitutional error the Court corrected in Maynard.

The assertion “[n]othing in Maynard suggests a remand back to the juvenile division of superior court” indicates further deep confusion. As recognized in Maynard, “[j]urisdictionally, juvenile courts and superior courts are not separate and distinct; juvenile courts exist as a division of the superior court.” Maynard, 183 Wn.2d at 262 (citing State v. Posey, 174 Wn.2d 131, 141, 272 P.3d 840 (2012); RCW 13.04.021). When the Court in Maynard remanded for proceedings under the JJA, it unequivocally remanded to the juvenile division of the superior court, as the juvenile division of the superior court is nothing other than the superior court applying the provisions of the JJA. When a superior court applies the JJA, it acts in its capacity as the juvenile court.

The State is simply wandering blindly in the wilderness in asking this Court to create a hybrid bifurcated adult/JJA proceeding that has not

been authorized by the legislature or the Supreme Court.<sup>3</sup> As held in Maynard, the appropriate remedy for defense counsel's failure to move to extend JJA jurisdiction is to retroactively extend JJA jurisdiction and conduct "further proceedings in accordance with the JJA", i.e. juvenile court proceedings. The trial court did precisely what the Supreme Court mandates in this respect.

**C. J.D. Properly Assigned Error to the Court's Wrongful Denial of his CrR 3.5 Motion**

The State argues J.D. failed to properly assign error to the trial court's findings of fact, and is thus precluded from challenging the basis for the trial court's denial of his CrR 3.5 motion. Reply Br. at 5. This argument ignores the fact that there were no trial court findings to which to assign error. See Reply Br. at 5, n.4. Whereas CrR 3.6(b) requires trial courts to enter written findings of fact and conclusions of law following evidentiary hearings, the court in J.D.'s case never did so. The State cannot now be heard to argue that J.D. is precluded from appealing denial of his CrR 3.5 motion due to the failure to assign error to specific findings of fact that were never entered into the record.

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<sup>3</sup> Note that J.D. would have no objection in principle to a new trial by jury followed by juvenile disposition in the event of conviction. However, because no such procedure exists, and because the State sought nothing other than dismissal of the juvenile matter for re-filing in adult court in its opening brief, J.D. believes after remand to adult court, the State will seek or the court will impose an adult sentence.

Indeed, when a trial court fails to comply with CrR 3.6(b), an appellant's compliance with RAP 10.3(g) is impossible, as that rule requires appellants to assign error to each finding "with reference to the finding by number." RAP 10.3(g). Here, there are no numbered findings to reference, rendering RAP 10.3(g) inapplicable. The State has cited no case enforcing RAP 10.3(g) against an appellant when the trial court violated CrR 3.6, and no such authority appears to exist.

Moreover, rather than accepting a trial court's oral statements as "verities on appeal," the Supreme Court established decades ago:

a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.

Ferree v. Doric Co., 62 Wash. 2d 561, 566-67, 383 P.2d 900, 904 (1963); see also Wagner v. Wagner, 1 Wash. App. 328, 331, 461 P.2d 577, 579 (1969) ("The oral opinion has no final or binding effect unless it is formally incorporated into the findings, conclusions and judgment."). Because no findings were "formally incorporated" into any written decision, there are effectively no findings of fact, much less findings of fact to be taken as verities on appeal.

J.D. assigned error to the trial court's denial of his CrR 3.5 motion and argued this point with detailed references to the evidentiary

hearing record and applicable law. See Opening Br. at 21, 31-33, 39-44. Given the trial court's failure to enter written findings of fact, J.D.'s Opening Brief more than sufficiently presents this argument to this Court for adjudication on the merits.

Although the courts appear to have not yet squarely addressed this issue, it is submitted that, pursuant to Ferree and Wagner, the appropriate manner for reviewing a trial court decision on a CrR 3.5 motion when the court fails to comply with CrR 3.6(b) is to review the CrR 3.5 motion *de novo*, declining to afford any degree of deference to the trial court's oral discussion of the motion. There is certainly no basis for accepting the State's assertion that the trial court's oral statements are to be accepted as verities on appeal.

**D. The State Fails to Defend the Court's Wrongful Denial of J.D.'s CrR 3.5 Motion Because it Fails to Meaningfully Distinguish Controlling Authority.**

In addressing the substance of J.D.'s CrR 3.5 motion, the State asserts State v. D.R., 84 Wash. App. 832, 835-39, 930 P.2d 350, 352-54 (1997) is distinguishable because (1) J.D. was 17 and a half, as opposed to 14 years old, (2) Sgt. Temple told J.D. he did not need to answer questions, and (3) the questioning was brief and nonconfrontational. Reply Br. at 6-7.

As to the first issue, both J.D. and the defendant in D.R. were minors at the time of questioning. Given both defendants were adolescent minors, the State provides no reason for treating the slight difference in their ages as a material, much less dispositive, distinction.

As to the second issue, the fact that Sgt. Temple told J.D. he did not need to answer questions at the outset of the questioning is of no moment because this was also the case in D.R. In D.R., as in J.D.'s case, the detective told the suspect he did not have to answer the detective's questions, but did not advise the suspect of his Miranda rights. Id. Also as in the case *sub judice*, the suspect testified that despite the detective's advisement that he did not need to answer questions, he felt that he was not free to leave. Id.; see also VRP 63, 74. Thus, D.R. and the present case are factually indistinguishable on this point.

As to the third issue, the length of the questioning is immaterial. The State does not seem to challenge that an interrogation took place, nor could it on the facts presented. The only issue is whether a reasonable person in J.D.'s position would have felt free to leave during the questioning. The length of the questioning has no bearing on this issue where, as here, the suspect is in custody from the outset of the questioning. Furthermore, contrary to the State's representations that the questioning was "nonconfrontational," J.D., like the defendant in D.R.,

was flatly accused of rape. VRP 256 (“Q. Did you [Sgt. Temple] indicate to the respondent that Amelia was alleging that he had had sex with her? A. Correct, yes.”)

The dispositive factors warranting suppression in D.R. were (1) the detective’s failure to inform him he was free to leave, (2) D.R.’s youth, (3) the naturally coercive nature of the school and principal’s office environment for children of his age, and (4) the obviously accusatory nature of the interrogation. Id. at 838. Each of these factors are indisputably present in J.D.’s case – like the defendant in D.R., J.D. was not told he was free to leave, he was an adolescent minor, he was summoned to the “naturally coercive nature of the school and principal’s office environment”, and he was told that he was being accused of statutory rape. All of the factors leading the Court to conclude that a custodial interrogation occurred in D.R. are present in this case. The State fails to present any material distinction between the facts here and those in D.R. Consequently, D.R. controls and makes clear that J.D. was subject to an unconstitutional unmirandized custodial interrogation, and the trial court erred in ruling otherwise.

**E. There is No Ambiguity in the Manner in Which J.D. Raised the Issue of the Court’s Wrongful Admission of Prior Consistent Statement Evidence from Nine Witnesses.**

The State argues this Court should summarily reject J.D.’s argument that the trial court erred in admitting prior consistent statement testimony from nine witnesses because J.D. purportedly “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.” Reply Br. at 7. The State further asserts “[t]his court should decline to review respondent's hearsay claim because it is a confusing agglomeration of nonspecific allegations.” Reply Br. at 17. A cursory review of J.D.’s Opening Brief reveals that the State’s representations of the manner in which J.D. presented his challenge to prior consistent testimony are false. There is nothing ambiguous or confusing about the manner in which J.D. challenged the trial court’s improper admission of prior consistent statement testimony from nine State witnesses.

In his Statement of Facts section, J.D. included a section with the subheading “**Prior consistent statement testimony.**” Opening Br. at 25. (emphasis in original) The first paragraph to that section provided “During trial, the court permitted no less than nine witnesses to testify to

A.G.'s prior allegations of rape. As to each witness, defense counsel objected on hearsay grounds but was overruled." Id.

J.D. then proceeded to detail the challenged prior consistent testimony of the nine State witnesses with quotations, citations to the record, and references to defense counsel's objections. Opening Br. at 25-31. These nine witnesses, as detailed clearly in J.D.'s Statement of the case, are (1) Ms. Knutsen, (2) D.S., (3) M.S., (4) J.B., (5) A.G., (6) Keri Arnold, (7) Shawna Hood, (8) A.G.'s father, and (9) Sgt. Temple. Opening Br. at 25-31. To the extent there is any confusion as to which prior consistent testimony J.D. challenges, the challenged prior consistent statement testimony is that detailed in the "**Prior consistent statement testimony**" subsection of his Opening Brief.

In the argument section, J.D. referenced this testimony again in detail, again naming each of the nine witnesses, and explaining that their testimony fell into four categories as follows: (1) witnesses who testified to statements made prior to Ms. Knutsen's involvement (D.S. and M.S.); (2) a witness (J.B.) who was unclear as to when the statements were made vis-à-vis Ms. Knutsen's involvement; (3) a witness (A.G.) who testified to her prior statements made both before and after her disclosure to Ms. Knutsen, (4) and six witnesses (Ms. Knutsen, Ms. Arnold, Ms. Hood, Sgt. Temple, A.G.'s father, plus A.G. with respect to

a portion of her testimony) who testified to statements made after or during A.G.'s disclosure to Ms. Knutsen. Opening Br. at 36-39. J.D. then explained why each category of testimony was improperly admitted. Id. Obviously, this line of argument was in reference to the prior consistent statement testimony detailed in the "**Prior consistent statement testimony**" subsection of the Statement of Facts.

The State's argument implies that J.D. was obligated to copy and paste that entire subsection into the argument section of his brief. It provides no authority for that proposition, and the results of adopting that proposition would be absurd. To the extent there is any ambiguity as to whether J.D.'s argument that the trial court erred in admitting prior consistent statement testimony from nine State witnesses was in reference to the testimony detailed in "**Prior consistent statement testimony**" subsection of the Statement of Facts, J.D. hereby expressly incorporates that subsection into the argument section of his brief as if fully set forth therein.

J.D. detailed the prior consistent testimony he challenges in the Statement of Facts section of his Opening Brief and then presented his argument in the Argument section of his brief, with clear reference to that testimony, that the trial court should not have allowed the testimony. There was no ambiguity whatsoever in the manner in which this

argument was presented. The State has only itself to blame for its apparent confusion, and the Court must address J.D.'s clearly presented evidentiary challenge on the merits.

**F. The State Fails to Rebut J.D.'s Argument that the Trial Court Erred in Admitting Prior Consistent Statement Testimony from Nine Witnesses**

The State fails to provide a legitimate justification for admitting any of the prior consistent statement testimony that J.D. has challenged as follows:

*i. D.S., M.S., and J.B.*

With respect to A.G.'s friend D.S., the State argues her recitation of A.G.'s prior consistent rape allegation was admissible because it "rebutted defendant's implied or express claim that A.G.'s later statement to Ms. Knutsen was a fabrication." Reply Br. at 11. The State makes the same argument regarding M.S. and J.B.'s testimony repeating A.G.'s prior out-of-court rape allegations. Reply Br. at 12-13. This argument fails as to all three witnesses because J.D. never argued that A.G. developed a motive to falsify between the time of her disclosures to D.S., M.S., and J.B. and her disclosure to Ms. Knutsen.

Contrary to the State's argument, prior consistent statements cannot be admitted simply to rebut a claim that a later statement was a fabrication. If this were the case, admission of prior consistent statements

would be the rule rather than the exception. To be admissible under ER 801(d)(ii), “there must be an express or implied charge of *recent* fabrication or improper influence or motive”. Peralta v. State, 191 Wash. App. 931, 952-53, 366 P.3d 45, 55-56 (2015) (emphasis added). This exemption from the hearsay rules applies only when “the witness's prior consistent statements *were made before the date of facts from which the motive to falsify can be inferred*”. Id. (emphasis added).

In this case, the defense argued that A.G. had a motive to falsify the allegations of rape against J.D. because she was upset that J.D. broke off their relationship when he discovered she was 12 years old. VRP 281. A.G.’s prior consistent statements testified to by D.S., M.S., and J.B. all occurred weeks or months following the last date of contact between A.G. and J.D.. The State does not point to any asserted motive to falsify arising between the time of A.G.’s disclosures to D.S., M.S., and J.B. and her disclosures to Ms. Knutsen. Therefore, the disclosures to D.S., M.S., and J.B. were not made “*before the date of facts from which the motive to falsify can be inferred*”. Peralta, 191 Wash. App. at 952-53. Testimony regarding these disclosures was therefore inadmissible hearsay with no applicable hearsay exception. Only if A.G. made disclosures prior to the termination of her relationship with J.D. would they be admissible under Peralta. Because no such disclosures

were made, none of the State's prior consistent statement evidence is admissible under the ER 801(d)(ii) hearsay exemption.

*ii. A.G.*

A.G. testified extensively regarding all of her prior disclosures. VRP 149-55. The State argues that this prior consistent statement testimony was admissible because it "corroborated Ms. Shakotko's testimony" that A.G. told Ms. Shakotko that J.D. had raped her. Reply Br. at 13. However, it provides no authority for the proposition that prior consistent statement testimony is admissible simply because it corroborates other prior consistent statement testimony. Because none of A.G.'s prior consistent statement testimony related to statements made "before the date of facts from which the motive to falsify can be inferred", i.e. J.D.'s termination of their relationship, none of it was admissible. See Peralta, 191 Wash. App. at 952-53.

*i. Ms. Knutsen*

With respect to Ms. Knutsen's testimony, the State argues defense counsel waived any hearsay argument by failing to object at trial.<sup>4</sup> Reply

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<sup>4</sup> The State also asserts that defense counsel did not object to the prior consistent statement testimony of Shawna Hood and A.G.'s father, Michael Payne. Reply Br. at 14. J.D. concedes this point, and therefore withdraws his challenge of this testimony. However, the testimony of Ms. Hood and Mr. Payne is nonetheless relevant in evaluating J.D.'s challenge to the wrongful admission of prior consistent statement evidence because

Br. at 9. The record refutes this argument. As described in J.D.'s Opening Brief, defense counsel objected to Ms. Knutsen's testimony that A.G.'s friends told her that A.G. "told them that she had been raped", but the court allowed this statement. VRP 27. In a continuation of this testimony, Ms. Knutsen testified to what A.G. told her as well. VRP 29. Because counsel objected to Ms. Knutsen's prior consistent statement testimony on hearsay grounds, this challenge is preserved for appeal. See ER 103(a); RAP 2.5(a).

The State argues further that Ms. Knutsen's testimony regarding A.G.'s rape allegations was nonetheless admissible because defense counsel challenged A.G.'s credibility on the basis of the conflicting statements she made to Ms. Knutsen, which the State characterizes as "an express or implied charge against the declarant (A.G.) of recent fabrication." Reply Br. at 9 (citing ER 801(d)(1)(ii)). However, J.D. did not assert an intervening motive to falsify occurring between A.G.'s initial denial to Ms. Knutsen and her subsequent rape allegations. Rather, the asserted motive to falsify was J.D.'s termination of their relationship, which transpired months prior to A.G.'s conversation with Ms. Knutsen. Therefore, A.G.'s prior consistent statements to Ms. Knutsen did not occur

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it demonstrates that the State was able to obtain a conviction through pervasive use of this inadmissible evidence.

“before the date of facts from which the motive to falsify can be inferred,” and was thus inadmissible. See Peralta, 191 Wash. App. at 952-53.

*ii. Keri Arnold*

The only defense the State presents of Ms. Arnold’s prior consistent statement testimony is that “Respondent has no objection to present on appeal”. Reply Br. at 13. The record again refutes the State’s argument, as defense counsel clearly and unequivocally objected numerous times throughout Ms. Arnold’s repetition of A.G.’s prior rape allegations. See VRP 184-89. In fact, the defendant expressly asserted a “continuing objection” to Ms. Arnold’s improper hearsay testimony, and separately objected no less than 11 times during Ms. Arnold’s prior consistent statement testimony taking place between VRP 184 and 193. VRP 187. While the court sustained some of these objections, it nonetheless allowed Ms. Arnold to testify over counsel’s “continuing objection” and repeated specific objections that A.G. disclosed sexual abuse to her, that A.G. did not seem unsure of what happened to her, that she did not seem confused about who had done “these things” to her, that she was able to tell Ms. Arnold when these things occurred, and that she was “certain about who had done these things.” VRP 184, 187-89. Also over defense counsel’s individual and continuing objections, Ms.

Arnold testified that A.G. was able to tell her what happened, when “it” happened, and who “it” happened with. VRP 192.

Other than its patently false assertion that defense counsel did not object to Ms. Arnold’s prior consistent statement testimony, the State offers no other defense of the trial court’s ruling. This testimony constituted inadmissible hearsay to which no recognized exception applies, and its admission constituted clear abuse of discretion.

*iii. Sgt. Temple and the “state of mind” exception*

With respect to Sgt. Temple, the State asserts his prior consistent statement testimony was properly admitted because it was admitted for the purpose of showing his state of mind rather than the truth of the matter asserted. Reply Br. at 15. It makes this same argument with respect to Ms. Knutsen and J.B.’s testimony. Reply Br. at 16.

Washington courts have repeatedly rejected such attempts to introduce highly prejudicial hearsay under the pretext that it is being offered for some other marginally relevant or irrelevant purpose. See State v. Edwards, 131 Wn. App. 611, 614-615, 128 P.3d 631 (2006) (officer's testimony relating confidential informant's statements was not admissible under theory testimony was offered for nonhearsay purpose of explaining why officer commenced his investigation because reason why investigation began was not at issue); State v. Marintorres, 93 Wn.

App. 442, 449, 969 P.2d 501 (1999) (evidence offered for non-hearsay purpose of proving statements' effect on hearer's state of mind admissible only where the effect of statement on hearer is relevant to an issue at trial).

The courts have also repeatedly applied this rule in rejecting the precise "state of mind" justification the State proffers here. See State v. Wicker, 66 Wn. App. 409, 412, 832 P.2d 127 (1992) (in rejecting admission of information for non-hearsay purpose of explaining "police department procedures," which were neither challenged nor at issue, the court held, "The State cannot volunteer an unnecessary explanation as an excuse to introduce otherwise inadmissible hearsay."); State v. Aaron, 57 Wn. App. 277, 280-81, 787 P.2d 949 (1990) (officer's state of mind in reacting to dispatch information was not in issue and was not valid nonhearsay reason to admit information); State v. Stamm, 16 Wn. App. 603, 611, 559 P.2d 1 (1977) ("Out of court statements are admissible to show a declarant's state of mind only if said state of mind is 'relevant to a material issue in the cause.'") (quoting C. McConnick, Evidence, § 249 (2d ed. E. Cleary 1972)); State v. Lowrie, 14 Wn. App. 408, 412-13, 542 P.2d 128 (1975) (admission of officer's recitation of out-of-court statement for nonhearsay purpose of "showing that the statement was made and that it in turn resulted in police action" improper because

"neither the making of the statement ... nor the resultant police action was in issue. "), review denied, 86 Wn.2d 1010 (1976).

In this case, A.G.'s prior rape allegations were inadmissible hearsay not relevant to any material issue other than whether J.D. raped her. To the extent these allegations had relevance to any other issue in the case, such as the state of mind of Sgt. Temple, Ms. Knutsen, or J.B., that relevance was *de minimis*, substantially outweighed by its unfair prejudicial impact, and thus inadmissible under ER 403, 801, and 802. Sgt. Temple, Ms. Knutsen, and J.B.'s actions and states of mind were not material issues in this case. Pursuant to the foregoing authority, the State is not permitted to bring in A.G.'s out-of-court statements under the pretext that they are relevant to explain the irrelevant actions of other State witnesses. Accordingly, the trial court abused its discretion in allowing Sgt. Temple, Ms. Knutsen, and J.B.'s testimony regarding A.G.'s prior statements, regardless of the purported alternative purposes for which they were offered.

Additionally, the State does not challenge J.D.'s assertion that he was prejudiced by these errors or the cumulative impact of all errors raised in his appeal. For the reasons set forth in J.D.'s Opening Brief, the trial court's abuses of discretion in admitting abundant hearsay testimony over objection caused prejudice warranting reversal, and that

prejudice was compounded by the trial court's error in admitting J.D.'s pretrial statements to law enforcement.

### III. CONCLUSION

For the reasons stated herein and in J.D.'s Opening Brief, the State's appeal should be denied, J.D.'s convictions should be reversed, and this matter should be remanded for further proceedings in accordance with the JJA. Alternatively, in the event the court rejects the arguments in J.D.'s cross appeal, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted this 22nd day of April, 2019.

LAW OFFICE OF COREY EVAN PARKER

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**CERTIFICATE OF SERVICE**

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on April 22, 2019 I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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