

NO. 63512-3-1

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

---

STATE OF WASHINGTON,

Respondent,

v.

J.A.S. (DOB: 7-17-93)

Appellant.

---

*Respondent*  
BRIEF OF APPELLANT

---

MARK K. ROE  
Prosecuting Attorney

KATHLEEN WEBBER  
Deputy Prosecuting Attorney  
Attorney for Respondent

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2010 JAN 11 AM 11:42

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

**TABLE OF CONTENTS**

I. ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 5

    A. THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE WAS NOT IMPAIRED BY THE LIMITATION PLACED ON HIS CROSS EXAMINATION OF A.W..... 5

    B. THE TREATMENT OF APPELLANT'S STATEMENTS AT TRIAL DO NOT REQUIRE REVERSAL..... 12

        1. A Hearing Regarding The Admissibility Of the Appellant's Statements Was Held During The Juvenile Bench Trial. The Appellant Has Waived Any Objection To Admission Of His Statements..... 12

        2. The Appellant Has Waived Any Issue Regarding The Trial Court's Failure To Follow CrR 3.5 Procedure Requiring Findings And Conclusions As to Admissibility Of The Appellant's Statements. .... 16

IV. CONCLUSION..... 20

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v. Alexander</u> , 55 Wn. App. 102, 776 P.2d 984 (1989), <u>review denied</u> , 119 Wn.2d 1039, (1988).....	14
<u>State v. Boss</u> , 144 Wn. App. 878, 184 P.3d 1264 (2008), <u>affirmed on other grounds</u> , ___ P.3d ___ (2009).....	17
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997) .....	10
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990) .....	18
<u>State v. Fanger</u> , 34 Wn. App. 635, 663 P.2d 120 (1983) .....	17
<u>State v. G.M.V.</u> , 135 Wn. App. 366, 144 P.3d 358 (2006), <u>review denied</u> , 160 Wn.2d 1024, 163 P.3d 794 (2007).....	13
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998).....	19
<u>State v. Heritage</u> , 152 Wn.2d 210, 95 P.3d 345 (2004).....	14
<u>State v. Howard</u> , 127 Wn. App. 862, 113 P.3d 511 (2005), <u>review denied</u> , 156 Wn.2d 1014, 132 P.3d 147 (2006).....	10, 11
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	9
<u>State v. Lord</u> , 161 Wn.2d 276, 165 P.3d 1251 (2007) .....	7, 8, 10
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992) .....	17, 18
<u>State v. Mason</u> , 160 Wn.2d 910, 162 P.3d 396 (2007), <u>cert. denied</u> , ___ U.S. ___, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008).....	9
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.3d 808 (1996) .....	6, 7
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	16
<u>State v. Mee Hui Kim</u> , 134 Wn. App. 27, 139 P.3d 354 (2006), <u>review denied</u> , 159 Wn.2d 1022, 157 P.3d 405 (2007) ..	6, 7, 8, 10
<u>State v. Mustain</u> , 21 Wn. App. 39, 584 P.2d 405 (1978) .....	12
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992), <u>review denied</u> , 120 Wn.2d 1022, 844 P.2d 1018, <u>cert. denied</u> , 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993).....	6, 7
<u>State v. Spearman</u> , 59 Wn. App. 323, 796 P.2d 727, <u>review denied</u> , 115 Wn.2d 1032, 803 P.2d 325 (1990) .....	13
<u>State v. Tim S.</u> , 41 Wn. App. 60, 701 P.2d 1120 (1985) .....	15, 16
<u>State v. Williams</u> , 137 Wn.2d 746, 975 P.2d 963 (1999).....	17
<u>State v. Wolfer</u> , 39 Wn. App. 287, 693 P.2d 154 (1984) .....	14, 17

### FEDERAL CASES

<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) .....	13, 15
--------------------------------------------------------------------------------------	--------

### WASHINGTON CONSTITUTIONAL PROVISIONS

Art. 1, §22.....	6
------------------	---

**U.S. CONSTITUTIONAL PROVISIONS**

Sixth Amendment..... 6

**COURT RULES**

CrR 3.5..... 12, 13, 14, 15, 16, 17  
CrR 3.5(c)..... 16  
ER 401..... 6  
RAP 2.5..... 16  
RAP 2.5(a)(3)..... 17

## **I. ISSUES**

1. When the defendant did not propose to introduce evidence which would create a logical connection between the fact sought to be proved by cross examination and the fact sought to be inferred from that proven fact, has he been denied the right to present a defense when the court sustained an objection to the fact sought to be proved?

2. The trial court did not rule on the admissibility of the appellant's statements after a combined bench trial and CrR 3.5 hearing and did not rely on those statements in finding the appellant guilty. Has the appellant shown the trial court's failure to follow the procedure outlined in CrR 3.5(c) is a manifest error affecting a constitutional right permitting him to raise the issue for the first time on appeal?

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

A.W. and J.S., the appellant, went to Scriber Lake High School during 2008. In the spring of 2008 they began to date. On May 24, 2008 the appellant showed up at A.W.'s home unexpectedly for a visit. Although A.W. was annoyed with J.S. for showing up without calling in advance, she agreed to go to Lynndale Park with him. 4-14-09, RP 38-51.

They went to a place in the park that they had been to frequently before. It was a location that was concealed from view. The appellant asked A.W. to have sex. She was reluctant to do so but she agreed to penile vaginal sex. The appellant pulled down A.W. pants and put her over a log, leaned on her shoulder and her lower back, pressing his weight on her while he entered her anus with his penis. A.W. told the appellant no multiple times. She kicked him one time. A.W. is 4'11" and 92 lbs. She is much smaller than the appellant. Despite her protests and kicking the appellant he did not stop anally penetrating her. 4-14-09, RP 41-43.

The appellant eventually turned A.W. around and stuck his penis in her vagina. A.W. fought the appellant by punching his chest. She told him to stop, and that he was hurting her. Nothing A.W. did caused the appellant to stop. Eventually he did stop when she began to bleed. 4-14-09, RP 44.

When the appellant finally pulled out of A.W.'s vagina they went to the skate board park where they called A.W.'s father for a ride home. A.W.'s father picked them up and drove them to their respective homes. A.W. did not tell her parents what happened

because she did not want to believe it was true. 4-14-09, RP 45, 47.

On June 4, 2008 A.W. went to have her yearly gynecological exam. A.W.'s mother went with her. During the course of the examination A.W. disclosed that she had sexual intercourse with the appellant. She was upset and crying when she disclosed. She did not provide all of the details to her mother or the nurse practitioner at that time. She did describe the appellant's initial ineffective attempt at penile vaginal intercourse, then his successful penile anal intercourse, and then successful penile vaginal intercourse. 4-14-09, RP 11-12, 47-48; 4-15-09, RP 5-9.

A.W. and her mother did not immediately report the rape to the police. A.W. did not want her father or anybody to know about it. Eventually they did report the rape to the police in September 2008. They decided to report it after school started and A.W. saw the appellant for the first time since the summer break. The appellant approached A.W. at school, hugged her, and asked her for a date. 4-14-09, RP 12, 48.

After A.W. reported the rape she was examined by Caryn Young, a forensic nurse practitioner. A.W. told Ms. Young what happened, consistent with what she had told her regular OBGYN

nurse practitioner. Ms. Young examined A.W. She noted A.W. had some concerning physical findings on A.W.'s anus. Those findings were consistent with A.W.'s report of anal penetration. 4-14-09, 28-32.

The appellant was charged in juvenile court with one count of second degree rape. 1 CP 70-71.

At trial the investigating officer, Detective Rittgarn, testified that the appellant and his parents voluntarily came to the police department. Upon arrival Detective Rittgarn read the appellant his constitutional rights. The appellant said he understood those rights and agreed to talk to the detective. The appellant's parents were present during the interview. The interview lasted between 15 and 20 minutes. The appellant gave a statement in which he admitted to having voluntary consensual intercourse with A.W. He later amended that statement to say they only had oral intercourse. 4-14-09. RP 70-73.

After Detective Rittgarn testified the court advised the appellant of his right to testify pursuant to CrR 3.5, 4-15-09, RP 3.

At the close of the testimony the court rendered its verdict. The court found A.W. was credible and found the appellant guilty of the charge. The court did not reference the appellant's statement

in its ruling. 4-15-09, RP 35-36. It entered findings and conclusions in accordance with its verdict. 1 CP 4-5.

### III. ARGUMENT

#### **A. THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE WAS NOT IMPAIRED BY THE LIMITATION PLACED ON HIS CROSS EXAMINATION OF A.W.**

A.W. testified to her relationship with the appellant, the rape, how and when she disclosed the rape, and the circumstances surrounding her decision to report the rape to the police. During cross examination defense counsel asked A.W. about injuring herself.

Q: Do you know what SI stands for?

A: Yes

Q: Okay. And you've done that to yourself?

(prosecutor) Objection. Relevance, Judge

A: Yes

(prosecutor) I don't see how that's indicative of her credibility or what happened here. There's no link.

(defense attorney) I'll move on, Your Honor.

The Court: The objection will be sustained

(defense attorney) Why do you cut yourself?

(prosecutor) Objection. Same basis.

The Court: What's the relevance?

(defense attorney) Your Honor, the theory of the case is the—that [A.W.] was seeking attention. She was angry. This is an attention seeking behavior and that is why it's relevant to this case.

4-14-09, RP 61-62.

The prosecutor objected on the basis that there was no foundation because there was no evidence that self injury is done in order to get attention. The prosecutor further argued the line of question was only designed to intimidate the witness. The Court sustained the objection. 4-14-09, RP 62

The appellant argues the Court's ruling deprived him of the opportunity to present evidence relevant to his defense that the accusation had been fabricated.

The defendant's constitutional right to compel the attendance of witnesses pursuant to the Sixth Amendment and Art. 1, §22 necessarily includes the right to present a defense. State v. Maupin, 128 Wn.2d 918, 913 P.3d 808 (1996), State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, 844 P.2d 1018, cert. denied, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993). However a defendant has no

constitutional right to present evidence which is not relevant or otherwise inadmissible. Rehak, 67 Wn. App. at 162, State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006), review denied, 159 Wn.2d 1022, 157 P.3d 405 (2007).

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. ER 401. A trial court's decision to exclude evidence is reviewed for an abuse of discretion. State v. Lord, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

In Maupin the defendant who was charged with the kidnap and murder of a 6 year old girl sought to introduce evidence that the girl had been seen in the company of a third person one day after she disappeared. The Court held the evidence had been erroneously excluded where the evidence directly refuted the State's theory that the victim had been killed shortly after she was kidnapped, even though it did not necessarily exculpate the defendant. Maupin, 128 Wn.2d at 928.

However where only speculation links the evidence sought to be introduced and the defendant's theory of the case that evidence is not relevant. In Mee Hui Kim the defendant was

charged with Vehicular Homicide under a DUI theory. The defendant sought to introduce evidence that date rape drugs have a short half life and would not necessarily be detected in a blood test. The defendant's theory was that her boyfriend may have given her a date rape drug and if he had it would have been a superseding cause of the collision. Because she offered no forensic or other evidence that her boyfriend had actually given her a drug before driving the proposed evidence was speculative. The trial court did not abuse its discretion in excluding it. Mee Hui Kim, 134 Wn. App. at 42-43.

Similarly in Lord the Court found the trial court was well within its discretion when it refused evidence of a dog track done shortly after a murder victim disappeared. The victim was frequently in the area where the dog track occurred before her disappearance. The dog was capable of detecting a scent up to two weeks old. Thus the dog handler could not state the scent detected came from the date of the crime, a fact that may have made the evidence relevant. Lord, 161 Wn.2d at 295.

Here there was evidence that A.W. had a history of self harm.<sup>1</sup> 4-14-09, RP 19. The only evidence the trial court actually excluded was evidence as to why A.W. hurt herself. 4-14-09, RP 62. At trial the appellant argued evidence she harmed herself, and the reason she did so was relevant because it was an attention getting behavior. On appeal the appellant alters the rationale by arguing that his theory was that A.W. harmed herself in order to support her false claim of non-consensual intercourse. BOA at 8. The Court should not consider this alternative justification.

A party who fails to object to evidence on one ground may not raise a second ground for that objection on review. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007), cert. denied, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008). The purpose of the objection is to give the trial court the opportunity to prevent or cure an error. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). That rationale should equally apply here where the appellant seeks to justify introduction of evidence on a basis different than asserted at trial.

---

<sup>1</sup> The appellant characterizes A.W. as developmentally delayed. BOA at 4. The evidence does not support that characterization. Rather A.W.'s mother testified that A.W. has a learning disability. 4-14-09, RP 10-11.

Even if the Court were to consider both theories advanced by the appellant the trial court did not abuse its discretion when it sustained the State's objection. Even if the appellant had produced evidence that would tend to show young people who harm themselves do so to get attention, the appellant had no evidence to suggest that people who hurt themselves also make false reports that they have been victimized in order to gain attention. The link between why A.W. may have hurt herself and the appellant's theory that she reported the rape in order to get attention is just as speculative as the evidence rejected in Mee Hui Kim and Lord. Thus the trial court did not abuse its discretion when it excluded evidence of why A.W. hurt herself in the past.

Even if the trial court erred the appellant is not entitled to a new trial because he was not prejudiced when the court excluded evidence regarding why A.W. hurt herself. Error in exclusion of evidence is harmless if, within reasonable probabilities, the outcome or the trial would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). To assess whether the error was harmless the court measures the admissible evidence of guilt against the prejudice, if any, caused by the erroneous exclusion. State v. Howard, 127 Wn.

App. 862, 871, 113 P.3d 511 (2005), review denied, 156 Wn.2d 1014, 132 P.3d 147 (2006).

The appellant sought to introduce the evidence in an attempt to discredit A.W.'s credibility. The appellant was permitted to introduce other evidence which more clearly bore on whether or not she was credible. Counsel explored A.W.'s actions after the rape which he argued were inconsistent with someone who had been violently assaulted. Through cross examination he introduced evidence that she did not immediately break up with the appellant. He examined her on the various reasons that she broke up with the appellant, not all of which were related to the rape. He was permitted to question A.W. about a letter that she allegedly wrote the appellant regarding her wishes to be near the appellant. Counsel thoroughly explored the reasons A.W. delayed in reporting the rape. He cross examined A.W. about her reaction just after the rape occurred when she walked to the skate park with the appellant where they met A.W.'s father who drove them home. He also explored A.W.'s embarrassment at revealing to her mother that she had been sexually active. 4-14-09, RP 50-56, 60-61.

The kind of evidence the appellant did introduce did bear on A.W.'s credibility. Counsel relied on this evidence to argue her

reaction shortly after the incident was inconsistent with rape. He also used the evidence to argue the timing of the disclosure was also reason to doubt her credibility. 4-15-09, RP 25-27. Thus the appellant had a significant amount of evidence from which the trier of fact could have found A.W. was not credible. Excluding evidence regarding why A.W. had hurt herself had virtually no impact on whether the court was going to find A.W. credible or not. Any exclusion of that evidence was therefore harmless if it was error to exclude it.

**B. THE TREATMENT OF APPELLANT'S STATEMENTS AT TRIAL DO NOT REQUIRE REVERSAL.**

**1. A Hearing Regarding The Admissibility Of the Appellant's Statements Was Held During The Juvenile Bench Trial. The Appellant Has Waived Any Objection To Admission Of His Statements.**

The appellant alleges that the trial court did not hold a CrR 3.5 hearing before admitting his statements at trial. He argues this omission requires reversal. The failure to hold a CrR 3.5 hearing does not make an accused's statements inadmissible at trial. State v. Mustain, 21 Wn. App. 39, 42-43, 584 P.2d 405 (1978). In Mustain the Court refused to reverse the defendant's conviction despite the trial court's failure to hold a CrR 3.5 hearing when it was clear from the record that the defendant had been advised of his

Miranda<sup>2</sup> rights, there was nothing in the record to suggest that the statements were not voluntary and counsel on appeal did not argue to the contrary. Id. at 43.

Similarly, the record here shows that the appellant was advised of his rights, he understood those rights, and there is no argument that his statements were involuntary. The argument that the officer's testimony that the appellant was not cross-examined about whether the appellant had been read his rights for the purposes of a CrR 3.5 hearing should be rejected. The defense had every opportunity to do so when counsel cross-examined the officer at trial.

Additionally any challenge to the admissibility of the appellants statements on appeal has been waived because he did not challenge the admission of his statements at trial. State v. Spearman, 59 Wn. App. 323, 796 P.2d 727, review denied, 115 Wn.2d 1032, 803 P.2d 325 (1990), State v. G.M.V., 135 Wn. App. 366, 372-373, 144 P.3d 358 (2006), review denied, 160 Wn.2d 1024, 163 P.3d 794 (2007). Rather counsel relied on the appellant's statements as evidence which contradicted A.W.'s testimony and supported his theory of innocence. In closing

---

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

argument he emphasized the appellant had been cooperative with police in providing a statement, implicitly conceding that the statement was knowingly and voluntarily provided. 4-15-09, RP 29.

Moreover in effect a CrR 3.5 hearing was conducted during the course of the juvenile court bench trial. The officer testified regarding the circumstances surrounding the appellant making his statements and the appellant was given the opportunity to testify regarding making those statements. He chose not to exercise that right. There is no requirement in a juvenile bench trial that the court hold a CrR 3.5 hearing separate from the trial. State v. Alexander, 55 Wn. App. 102, 104, 776 P.2d 984 (1989), review denied, 119 Wn.2d 1039, (1988)<sup>3</sup> State v. Wolfer, 39 Wn. App. 287, 292, 693 P.2d 154 (1984), abrogated on other grounds, State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004). (“[m]ost courts have held that there is no need for a separate voluntariness hearing in the case of a bench trial, reasoning that a judge is presumed to rely only upon admissible evidence in reaching a decision. Washington courts also presume that evidence is considered by a trial judge only for its proper purpose.” Id. at 292 citations omitted).

---

<sup>3</sup> The date of opinion and decision denying review as reported in the official reporters is not consistent

Tim S., cited by the appellant, does not support his position that the court failed to hold a separate CrR 3.5 hearing and he is thus entitled to reversal. State v. Tim S., 41 Wn. App. 60, 701 P.2d 1120 (1985). In Tim S. it was clear no CrR 3.5 hearing was conducted so the court never considered the propriety of holding one during the course of a juvenile bench trial. It was clear from the record that Tim S's statements were not preceded by Miranda warnings, and were thus presumptively involuntary. Nevertheless the trial court considered the statements on the substantive issue of guilt, rather than for impeachment purposes. In this circumstance the failure to hold a hearing of any sort was error, and the Court reversed.

As discussed, this case presents significantly different facts. The appellant had been given Miranda warnings before his statement. The testimonial phase of a CrR 3.5 hearing was conducted when the officer testified regarding the circumstances of the statement and the appellant was given the opportunity to testify in response. Appellant's trial counsel emphasized the appellant's statements were voluntary in closing argument to support the argument that the appellant's version of consensual sexual intercourse was credible, and A.W.'s version was not. In these

regards this case is nothing like Tim S. and that case does not support the appellant's position.

**2. The Appellant Has Waived Any Issue Regarding The Trial Court's Failure To Follow CrR 3.5 Procedure Requiring Findings And Conclusions As to Admissibility Of The Appellant's Statements.**

The court based its decision to find the appellant had committed the offense on A.W.'s testimony and the medical evidence. 4-15-09, RP 35-36; 1 CP 4-5. At no time did the court decide whether the appellant's statements that Detective Rittgarn had testified to were admissible pursuant to CrR 3.5. Accordingly it did not enter written findings regarding the admissibility of his statements. The appellant did not raise the issue of the court's failure to decide that issue or enter written findings in compliance with CrR 3.5 at any time in the trial court. He argues for the first time on appeal that the trial court's failure to follow the procedure outlined in CrR 3.5(c) entitles him to reversal or in the alternative remand for entry of those findings.

Generally the Court will not review an issue that was not raised in the trial court. RAP 2.5, State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). A Court may review an issue for the first time on appeal if it is manifest and truly of constitutional

dimensions. RAP 2.5(a)(3), State v. Boss, 144 Wn. App. 878, 890-91, 184 P.3d 1264 (2008), affirmed on other grounds, \_\_\_ P.3d \_\_\_ (2009). The appellant bears the burden to prove that the alleged error is a manifest constitutional error. State v. Williams, 137 Wn.2d 746, 749, 975 P.2d 963 (1999).

This Court has established a four part approach when analyzing errors alleged for the first time on appeal in State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992). The first question is whether the alleged error in fact suggests a constitutional issue. Id at 345. The issue here involves the trial court's failure to follow the procedure outlined in CrR 3.5(c). Whether the correct procedure was followed under CrR 3.5 is not an issue of constitutional magnitude. Wolfer, 39 Wn. App. at 291, Williams, 137 Wn.2d at 753-745, State v. Fanger, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). Thus this Court should decline to consider whether the trial court's failure to enter written findings after a CrR 3.5 hearing should entitle the appellant to a new trial.

Even if this Court does decide to consider the issue the appellant fails to show how a lack of written findings on admissibility of his statement is a manifest error. To satisfy this showing this Court has required the appellant to make a plausible showing that

the asserted error had practical and identifiable consequences in the trial of the case. Lynn, 67 Wn. App. at 354. The appellant cannot make that showing.

Had the trial court entered findings that the appellant's statements were voluntary and admissible the appellant would still have been found guilty. The trial court based its decision on A.W.'s testimony which it found credible. Credibility determinations are not reviewed by the appellate court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Had the trial court entered findings the appellant's statements were involuntary, and inadmissible, the outcome would again have been the same. The trial court gave no indication that it included consideration of those statements in its analysis. Rather it relied solely on A.W.'s statements and medical evidence which was not inconsistent with her statements. Thus, what ever decision the trial court would have made had it addressed the admissibility of the appellant's statements and entered written findings, the appellant would still have been found to have committed the crime. Any error in the trial court's failure to address that issue is not manifest.

Should the Court consider the issue the Court should still affirm trial court's determination that the appellant committed the

rape. Alternatively this Court should remand for the court to consider the admissibility of the appellant's statements and memorialize its decision in written findings and conclusions. The reason for either outcome lies in the complete lack of prejudice to the appellant from the trial court's failure to address the issue and enter written findings. The Court has stated that reversal is only a possible remedy when a defendant can show actual prejudice resulting from the absence of written findings. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

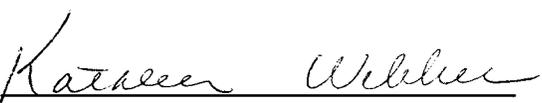
The only potential prejudice identified by the appellant here is that he must speculate as to what facts and law were relied up on by the trial court in admitting his statements. BOA at 18. Where there is no indication the trial court ever ruled on the admission of his statements, and there is no indication that the statements played any part in the trial court's determination of guilt, the appellant has not been prejudiced.

**IV. CONCLUSION**

For the forgoing reasons the State asks the Court to affirm the appellant's conviction.

Respectfully submitted on January 8, 2010.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
KATHLEEN WEBBER WSBA #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent



**Snohomish County  
Prosecuting Attorney**

Criminal Division  
Joanie Cavagnaro, Chief Deputy  
Mission Building  
3000 Rockefeller Ave., M/S 504  
Everett, WA 98201-4046  
(425) 388-3333  
Fax (425) 388-3572

January 7, 2010

Richard D. Johnson, Court Administrator/Clerk  
The Court of Appeals - Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-4170

**Re: STATE v. J.A.S. (DOB: 7-17-93)  
COURT OF APPEALS NO. 63512-3-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2010 JAN 11 AM 11:42

Sincerely yours,

KATHLEEN WEBBER, #16040  
Deputy Prosecuting Attorney

cc: Washington Appellate Project  
Appellant's attorney

I have enclosed a properly stamped envelope addressed to the attorney for the defendant that contains a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office  
this 9th day of Jan 2010

Administration  
Bob Lenz, Operations Manager  
Admin East 7<sup>th</sup> Floor  
(425) 388-3333  
Fax (425) 388-7172

Civil Division  
Jason Cummings, Chief Deputy  
Admin East 7<sup>th</sup> Floor  
(425) 388-6330  
Fax (425) 388-6333

Family Support Division  
Marie Turk, Chief Deputy  
Admin East 6<sup>th</sup> Floor  
(425) 388-7280  
Fax (425) 388-7295

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

THE STATE OF WASHINGTON,

Respondent,

v.

J.A.S. (DOB: 7-17-93)

Appellant.

No. 63512-3-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 9<sup>th</sup> day of January, 2010, affiant deposited the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

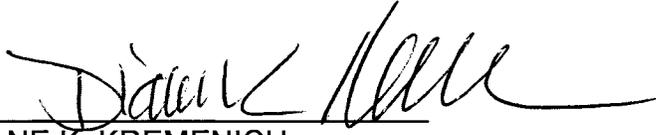
containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2010 JAN 11 AM 11:42

Signed at the Snohomish County Prosecutor's Office this 8<sup>th</sup> day of January, 2010.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit