

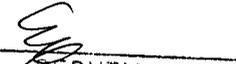
FILED
COURT OF APPEALS
DIVISION II

2013 JUN 18 PM 1:06

NO. 44637-5-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON


DEPUTY

STATE OF WASHINGTON, Petitioner

v.

DWIGHT A. FINCH, Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WAHKIAKUM COUNTY

BRIEF OF PETITIONER

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I. ASSIGNMENT OF ERROR

The trial court erred by ordering A.W., the adolescent sexual assault victim, to submit to a polygraph examination. *See* CP 111.

II. STATEMENT OF ISSUES

1. Whether a court may compel a child rape victim to submit to a polygraph examination?

2. Whether a court, in an adult prosecution for rape of a child, may enter an order modifying or enforcing the alleged child rape victim's disposition order in an unrelated case, at the request of the alleged rapist?

III. STATEMENT OF THE CASE

On June 4, 2012, Dwight A. Finch was charged by information with one count of rape of a child in the first degree in violation of RCW 9A.44.073, and two counts of child molestation in the first degree in violation of RCW 9A.44.083. CP 10. The victim of all three offenses is identified as "A.W." *Id.*

The Wahkiakum County Prosecuting Attorney filed this information after an investigation revealed that A.W. made disclosures of abuse during offender counseling. *See* CP 5. A.W. revealed that he had been the victim of sexual abuse by his great-uncle, Dwight Finch, when A.W. was between the ages of 7 and 11. A.W., who was 14-years-old at the time of disclosure, did not report the abuse sooner because Finch threatened that he would hurt

A.W. if A.W. told anyone about the abuse. A.W.'s treatment provider opined that A.W.'s disclosures were credible. CP 6.

A.W. participated in a forensic interview at the Children's Justice Advocacy Center in Kelso, Washington. During the interview, which was video and audio taped, A.W. indicated that when he was 6 or 7 years old Grandpa took A.W. to his bed and fingered and molested A.W. A.W. remembers crying during the encounter, which culminated with Grandpa inserting a finger in A.W.'s butt, followed by admonitions to not tell anyone about the encounter. CP 6.

A.W. recalled at least five additional incidents of abuse by Grandpa. A.W. identified Grandpa as Dwight Finch. CP 7. Finch is a registered sex offender, who was convicted in 1994 of a child sex offense involving a female child. CP 7.

Finch denies A.W.'s allegations. Finch requested, in his criminal prosecution, that the superior court compel A.W. to submit to a polygraph examination. Finch proposed that the order compelling A.W. to submit to the examination be made a part of A.W.'s ongoing sexual offender treatment in juvenile court. *See* CP 15. Finch, however, did not submit any of the pleadings from A.W.'s juvenile court file in support of this motion. *See* CP 16 ("Defendant . . . for the sake of this motion assumes A.W. received a Special Sex Offender Disposition Alternative (SSODA) sentence."). Finch

also contended that the court had the “inherent authority to compel AW to even undergo another, independent, psychiatric evaluation.” CP 16.

The State opposed Finch’s motion on numerous grounds, including the fact that Finch did not have standing to seek modification of A.W.’s juvenile disposition. The State also contended that polygraph testing as part of a sentencing disposition may only be used to monitor compliance and not as a fishing expedition to discover evidence of other crimes, past or present. *See* CP 19.

After receiving the State’s response, Finch recast his request for a polygraph examination as a “motion to enforce or otherwise modify the SSODA of alleged victim and convicted sex offender AW.” CP 21. Finch took the “position that a polygraph examination should be ordered of AW for therapeutic reasons.” CP 21. Although Finch referenced “Wahkiakum County Superior Court File No. 11-8-0000-3 (sic)” in his modified motion, he did not provide the court with copies of any of the documents contained in that juvenile court file. *See* CP 22. Finch did not serve a copy of his “motion to enforce or otherwise modify the SSODA of alleged victim and convicted sex offender AW,” CP 21, upon A.W. *See* CP 23.

Argument was held on Finch’s “motion to enforce or otherwise modify the SSODA of alleged victim and convicted sex offender AW,” CP 21, in *State of Washington v. Dwight Finch*, Wahkiakum County Superior

Court Cause No. 12-1-00007-2, on October 30, 2012. The only parties to the hearing were the State of Washington and Finch. A.W. was not present at the hearing and did not participate. *See* 1RP 1-60.¹

Finch took the position during the hearing that the court “owned” A.W. by virtue of the sentence imposed in the juvenile court proceeding. 1RP 13, 27. Finch, without producing any of the documents from A.W.’s juvenile court file, argued that the treatment plan and evaluation spoke of polygraphs every six months to monitor treatment compliance. 1RP 20-21. Finch contended that “part of [A.W.’s] program is to have law abiding behavior” and since “it is a crime to accuse someone of a sexual molestation when it’s unfounded”, that it would be “therapeutic for [A.W.] to have a polygraph.” 1RP 21-22. *See also* 1RP 23-24. Finch also expressed the hope that the State would dismiss the charges if “this kid flunks the polygraph.” 1RP 23. Finch concluded with an assertion that he passed a polygraph examination and that “if the polygraph is good for one, it’s good for the other.” 1RP 28.

The State submitted that Finch was merely seeking to have A.W. examined about the instant allegations, not about treatment compliance. 1RP

¹The verbatim report of proceedings are in three volumes. These volumes have not been sequentially numbered. The State will cite the transcripts as follows:

1RP – October 30, 2012, hearing
2RP – November 7, 2012, hearing
3RP – March 20, 2013, hearing

26. The State further indicated that the juvenile court disposition placed the decision of whether to require A.W. to submit to polygraph examinations in the treatment provider's discretion. *See* 1RP 26-27, quoting Appendix A of the January 9, 2012, disposition for A.W.

Judge Sullivan, who had signed the disposition order in A.W.'s juvenile court matter, was troubled by his inability to recall why the treatment plan was changed from "shall have a polygraph every six months" to "could be monitored every six months through a polygraph, if available."² 1RP 29-30. Judge Sullivan decided that he needed to hear why, after A.W. reported that Finch had sexually abused him, the treatment provider did not require A.W. to take a polygraph examination. 1RP 30-33. Judge Sullivan, therefore, signed an order to have A.W.'s treatment provider appear for a show cause hearing in *State of Washington v. Dwight Finch*, Wahkiakum County Superior Court Cause No. 12-1-00007-2. 1RP 37-42; CP 33. Judge Sullivan acknowledged that he was breaking new ground here and that he had never gotten involved in a juvenile case post-sentencing absent a request for court intervention from the prosecutor or the juvenile office. 1RP 40-41.

The show cause hearing to determine why A.W.'s treatment provider had not administered a polygraph examination to A.W. was held in *State of Washington v. Dwight Finch*, Wahkiakum County Superior Court Cause No.

²1RP 26, quoting the interlineation on Appendix A.

12-1-00007-2, on November 7, 2012. The only parties to the hearing were the State of Washington and Finch. A.W. was not present at the hearing and did not participate. *See* 2RP 1-51.

Judge Sullivan, himself, questioned Steven Powell during the show cause hearing. *See* 2RP 3-25. Mr. Powell, a licensed clinical social worker, is a certified sex offender treatment therapist in Oregon. 2RP 3-4. A.W. receives services from Mr. Powell in Oregon. 2RP 5. A.W. entered Mr. Powell's caseload in March of 2012, and was participating in weekly sessions. 2RP 5-6.

While Mr. Powell utilizes polygraph examinations with adult clients, he does not utilize them with adolescents. 2RP 7, 22. Mr. Powell does not polygraph minors because such tests are considered coercive because of their developmental maturity. 2RP 7 and 9. Mr. Powell's position is based upon research that he received from the Association of Treatment of Sexual Abusers. 2RP 8. Mr. Powell, through the prosecutor, provided the court with three articles that explained why polygraph examinations of adolescents is counterproductive to treatment. *See* CP 38.

A.W. disclosed Finch's abuse to Mr. Powell, two or three months after A.W. began treatment. 2RP 13-17. Mr. Powell promptly reported the allegations to law enforcement. 2RP 13-14. Mr. Powell has not discussed the allegations with A.W. after the initial disclosure so as not to contaminate

the investigation and because such abuse is “not traditionally something that you deal with early on in this type of treatment.” 2RP 19. *See also* 2RP 35-36. .

During his questioning of Mr. Powell, Judge Sullivan showed him the disposition order from A.W.’s juvenile case. 2RP 19. This document, however, was not admitted as an exhibit and Judge Sullivan promised to return the disposition order to Finch's counsel. 2RP 20.

Subsequent to A.W.’s treatment provider’s show cause hearing, Finch’s attorney interviewed A.W. During the interview, Finch’s attorney extracted A.W.’s agreement to take a polygraph after he explained to A.W. that “it would make things a lot simpler for everybody” and A.W. had “nothing to lose” by taking the examination. *See* CP 106. Apparently concerned that 14-year-old unrepresented A.W. might change his mind after consulting his parents, treatment provider, or other trusted adult, Finch renewed his motion for an order compelling A.W. to submit to a polygraph examination to determine “the extent of his noncompliance” with his treatment. *See* CP 108. Finch did not serve a copy of his motion to schedule polygraph upon A.W. *See* CP 110.

Although not noted, Finch’s motion to schedule the polygraph examination was heard two days after filing in *State of Washington v. Dwight Finch*, Wahkiakum County Superior Court Cause No. 12-1-00007-2.

3RP 14. The only parties to the hearing were the State of Washington and Finch. A.W. was not present at the hearing and did not participate. *See* 3RP 1-27.

Judge Sullivan orally ordered that a polygraph examination occur. In doing so, Judge Sullivan rejected A.W.'s acquiescence as a basis for the order. 3RP 15. Judge Sullivan determined that the cost of the examination would come from the court fund for indigent defense, rather than from juvenile court treatment funds. 3RP 21-22. Judge Sullivan memorialized his ruling in a written order that identifies no legal authority for compelling a victim to submit to a polygraph examination, and that places no limit upon the questions that may be asked during the polygraph examination. *See* CP 111. Judge Sullivan also continued the trial date to after Finch receives the polygraph result as Finch claimed he could not proceed to trial without the results. *See* 3RP 2-3, 8-9, 25.

The State filed a timely notice of discretionary review from the March 20, 2013, order. CP 114. The State's motion was granted by Commissioner Schmidt on May 16, 2013. The polygraph examination has been stayed pending this Court's decision on the merits. *See* CP 117 and *State of Washington v. Dwight A. Finch*, COA No. 44637-5-II, Ruling Granting Review at 5 (May 16, 2013).

IV. ARGUMENT

Polygraph examinations are not a crystal ball of guilt or innocence. They are, instead, a quasi-scientific test that are generally barred from the courtroom due to their unreliability. *See generally Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 607, 260 P.3d 857 (2011). Judge Sullivan, nonetheless, entered an order compelling a 14-year-old rape victim to submit to a polygraph test. This order violates the victim's privacy rights, due process rights, and his Const. art. I, § 35 right to dignity and respect. This order also violates public policy, as it may deter other witnesses from reporting and cooperating in the prosecution of sexual assaults. The State respectfully submits that this order cannot stand.

A. Polygraphs are Not Admissible Absent a Stipulation from the Parties

Because they are not recognized as reliable evidence, the results of polygraph tests are not admissible in Washington courts absent stipulation from both parties. *State v. Thomas*, 150 Wn.2d 821, 860, 83 P.3d 970 (2004) (citing *State v. Renfro*, 96 Wn.2d 902, 905, 639 P.2d 737 (1982)). The requisite stipulation does not exist in this case.

Every jurisdiction that precludes the admission of polygraph tests without a stipulation, prohibits the entry of orders compelling victims to submit to polygraphs upon a defendant's motion. *See, e.g., State v. Dedman*, 230 Kan. 793, 640 P.2d 1266 (1982); *State v. Watson*, 248 N.W.2d 398 (S.D.

1976). These courts recognize that “[a]bsent its evidentiary use, it is difficult to see how the results of the examination could help in the preparation of the appellant’s case.” *Dedman*, 640 P.2d at 1270.

Washington requires more than “helpfulness” to a defendant’s preparation before a court may compel a victim to participate in a defense-requested examination. To avoid the practice of placing victims and witnesses on trial in place of the defendant, the defendant must demonstrate a “compelling reason” to force the victim to submit to an examination. *See generally State v. Hoffman*, 116 Wn.2d 51, 89, 804 P.2d 577 (1991) (psychiatric examination). Simple concerns about the victim or witnesses’s credibility will not support an order compelling the victim or witness to submit to an examination as credibility can be explored through the traditional method of cross-examination. *See, e.g., State v. Israel*, 91 Wn.2d 846, 963 P.2d 897 (1998). The absence of evidence to corroborate the victim’s allegations is also insufficient to compel the victim to submit to an examination. *State v. Tobias*, 53 Wn. App. 635, 637, 769 P.2d 868 (1989) (“a ‘compelling reason’ does not exist, as a matter of law, simply because it is a case of ‘his word against hers’”).³

³Washington eliminated the requirement that a sexual assault victim’s testimony must be corroborated in order to secure a conviction in 1975. *See* Laws of 1975, 1st Ex. Sess. ch. 14, § 2, codified at RCW 9A.44.020(1).

Here, Finch made no attempt to identify, much less prove, the existence of a “compelling reason” to force A.W. to submit to a polygraph examination. Instead, Finch argued that a polygraph would be beneficial to A.W.’s treatment. Even if Finch were acting altruistically in the best interests of A.W., the order must be vacated for the grounds identified *infra* in section C.

It is more likely, however, that Finch sought to compel A.W. to take a polygraph for purely strategic reasons. Presumably, Finch anticipated that if A.W. were to “flunk” the polygraph examination the charges against him would be dismissed. *See* IRP 22-23; CP 106. An adverse polygraph result will not, however, secure Finch’s hoped for result.

First, the prosecuting attorney, not the defendant or the court, determines whether a witness is reliable or credible enough to proceed to trial. This reality has led two courts to reject defense requested polygraphs of victims as an impermissible intrusion into the prosecutor’s function. *See People v. District Court of Tenth Judicial District*, 632 P.2d 1022 (Colo. 1981); *Dedman*, 640 P.2d at 1270.

Here, the Wahkiakum County Prosecuting Attorney has already determined that it is not necessary to subject A.W. to a polygraph.⁴ The

⁴The prosecutor’s refusal to demand that A.W. take a polygraph examination does not, contrary to Judge Sullivan’s concerns, give rise to a *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), violation. *See* IRP 22. *Brady* does not require the police to expand the scope of a criminal investigation. *See In*

Wahkiakum County Prosecuting Attorney has already determined that the prosecution should proceed despite Finch's allegedly successful polygraph examination. *See* 1RP 27. This decision will not be altered by the results of any polygraph examination that may be administered to 14-year-old A.W.⁵

Second, an adverse polygraph result will not provide any basis for the trial court to dismiss the charges over the State's objection. *See* CrR 8.3(c)(3) ("The court may not weigh conflicting statements and base its decision [on the defendant's pre-trial motion to dismiss] on the statement it finds the most credible.").

re Personal Restraint of Gentry, 137 Wn.2d 378, 399, 972 P.2d 1250 (1999) ("While the prosecution cannot avoid *Brady* by keeping itself ignorant of matters known to other state agents, *United States v. Hamilton*, 107 F.3d 499, 509 (7th Cir. 1997), the State has no duty to search for exculpatory evidence."); *State v. Entzel*, 116 Wn.2d 435, 442, 808 P.2d 228 (1991) ("while the State may in some instances have a duty to preserve potentially material and exculpatory evidence, it is not required to search for exculpatory evidence"; no obligation to offer a driver, who has been arrested for DUI, a breath or blood test); *State v. Judge*, 100 Wn.2d 706, 717-18, 675 P.2d 219 (1984) ("Neither *Brady* nor *Wright*, or their progeny, imposes a duty on the State to expand the scope of a criminal investigation."); *State v. Jones*, 26 Wn. App. 551, 554, 614 P.2d 190 (1980) ("The State 'is required to preserve all potentially material and favorable evidence.' This rule, however, has not been interpreted to require police or other investigators to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case. The police are required only to preserve that which comes into their possession either as a tangible object or a sense impression, if it is reasonably apparent the object or sense impression potentially constitute material evidence."). Polygraph tests, moreover, due to their inadmissibility can never satisfy the "materiality" prong of *Brady*. *See Wood v. Bartholomew*, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995).

⁵Studies have demonstrated that the emotional nature of the "relevant questions" that are asked of rape victims, in themselves, can result in the registering of a falsehood. *See State v. Brown*, 297 Ore. 404, 687 P.2d 751, 768 (1984) (citing D. T. Lykken, *A Tremor in the Blood* 114, 126 (1981)).

Finally, even if Finch were to waive a jury, Judge Sullivan could not consider the results of either Finch's polygraph or A.W.'s polygraph in determining whether the State met its burden of proof. *State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991) (the court will disregard inadmissible matters in a bench trial).

This Court should, therefore, vacate the order compelling 14-year-old A.W. to submit to a polygraph examination.

B. Compelling a Victim to Submit to a Polygraph is Contrary to Public Policy

Victim participation in the prosecution of suspected criminals is a key ingredient in the criminal justice system's ability to incapacitate or deter actual or potential offenders, and thus reduce the social costs of crime.⁶ Since these societal benefits may often be outweighed by substantial psychological and financial costs incurred by the victim as a result of participating in a trial, victims are likely to report crimes and testify in court against criminals at

⁶*See generally* Const. art. I, § 35 ("Effective law enforcement depends on cooperation from victims of crime."); RCW 7.69.010 (recognizing "the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state"); RCW 7.69A.010 ("The legislature recognizes that it is important that child victims and child witnesses of crime cooperate with law enforcement and prosecutorial agencies and that their assistance contributes to state and local enforcement efforts and the general effectiveness of the criminal justice system of this state."); RCW 7.69B.010 ("The legislature recognizes that it is important that dependent persons who are witnesses and victims of crime cooperate with law enforcement and prosecutorial agencies and that their assistance contributes to state and local enforcement efforts and the general effectiveness of the criminal justice system.").

rates that are less than optimal. Indeed, less than 50% of rapes are even reported to the police.⁷

Among the more commonly cited reasons for a victim's reluctance to report a rape or to see a prosecution through to the end are (1) embarrassment of answering a stranger's questions about what happened; (2) self-blame or a feeling that the rape was somehow the victim's fault; (3) fear of an assailant's retaliation; (4) desire to conceal the victim's own behavior before the rape, such as the use of drugs or alcohol; and (5) fear of the societal and official skepticism about the legitimacy of the complaint. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1201-54 (1997) (summarizing the research about why rape victims choose not to report sexual assaults, why police clear reported rapes at such a low level, and why the attrition rate for rape cases is so high).

Lawmakers have attempted to reduce barriers to victim participation in sexual assault prosecutions. In addition to rape shield laws which generally exclude the complaining witness's sexual behavior unrelated to the offense being prosecuted,⁸ many legislatures prohibit law enforcement

⁷Callie Marie Rennison, Bureau of Justice Statistics, Dep't of Justice, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, NCJ 194530 (Aug. 2002), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1133> (Last visited Mar. 21, 2013).

⁸See, e.g., RCW 9A.44.020.

agencies, prosecutors, and other government officials from asking or requiring that a sexual assault victim submit to a polygraph examination or any other form of a mechanical or electrical lie detector examination as a condition for proceeding with any criminal investigation or prosecution of an offense.⁹ In many of these jurisdictions, the refusal of a sexual assault victim, whether an adult or a child, to submit to a polygraph examination cannot be the sole basis for refusing to investigate, charge, or prosecute the alleged sex offense.¹⁰

Washington's Legislature enacted a similar prohibition in 2007.

RCW 10.58.038 states that:

A law enforcement officer, prosecuting attorney, or other government official may not ask or require a victim of an alleged sex offense to submit to a polygraph examination or other truth telling device as a condition for proceeding with

⁹See A.C.A. § 12-12-106 (Ark. 2012); C.R.S. 18-3-407.5 (Colo. 2012); 11 Del. C. § 9420 (2013); Fla. Stat. § 960.001(1)(t) (2012); O.C.G.A. § 17-5-73 (Ga. 2012); 725 ILCS 200/1 (Ill. 2013); Burns Ind. Code Ann. § 35-37-4.5-2 (2012); Iowa Code § 915.44(1) (2012); K.S.A. § 2204614 (Kan. 2011); K.R.S. §§ 16.062, 70.065, and 95.021 (Ky. 2012); La. R. S. 15:241(B) (2012); MCL § 776.21(2) (Mich. 2012); Miss. Code Ann. § 99-1-27 (2012); N.M. Stat. Ann. § 30-9-17.1 (2012); N.C. Gen. Stat. § 15A-831.1(a) (2013); ORC Ann. 2907.10 (Ohio 2013); ORS § 163.705 (Ore. 2011); S.C. Code Ann. § 16-3-750 (2012); Tenn. Code Ann. § 38-3-123 (2012) (limited to law enforcement officers); Va. Code Ann. § 19.2-9.1(B) (2013); W. Va. Code § 62-6-8 (2012); Wis. Stat. § 968.265 (2012).

¹⁰See A.C.A. § 12-12-106 (Ark. 2012); 11 Del. C. § 9420 (2013); Fla. Stat. § 960.001(1)(t) (2012); O.C.G.A. § 17-5-73 (Ga. 2012); 725 ILCS 200/1 (Ill. 2013); Burns Ind. Code Ann. § 35-37-4.5-3 (2012); La. R. S. 15:241(C) (2012); Miss. Code Ann. § 99-1-27 (2012); N.M. Stat. Ann. § 30-9-17.1 (2012); N.C. Gen. Stat. § 15A-831.1(b)(3) (2013); ORC Ann. 2907.10 (Ohio 2013); S.C. Code Ann. § 16-3-750 (2012); Va. Code Ann. § 19.2-9.1(B) (2013); W. Va. Code § 62-6-8 (2012).

the investigation of the offense. The refusal of a victim to submit to a polygraph examination or other truth telling device shall not by itself prevent the investigation, charging, or prosecution of the offense. For the purposes of this section, "sex offense" is any offense under chapter 9A.44 RCW.

This Court should hold, consistent with the above legislative policy and with Const. art. I, § 35's mandate that victims be accorded "due dignity and respect" in the criminal justice system, that a trial court may not compel a victim of sexual assault to submit to a polygraph examination. Victims of sexual assaults should not be presumed to be liars. Instead, they, like all other witnesses, are entitled to an initial presumption that they will honor their oath to tell the truth when testifying.

This holding will not violate any rights of criminal defendants, as polygraph results are inadmissible in a criminal trial absent a stipulation from both parties. Furthermore, barring criminal defendants from impeaching a witness or victim with an adverse polygraph result does not violate a criminal defendant's right of confrontation. *United States v. Scheffer*, 523 U.S. 303, 316-317, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (upholding exclusion of polygraph evidence in part because this rule "does not implicate any significant interest of the accused").

C. A Juvenile Disposition Order May Only Be Modified In Accordance With RCW 13.40.190 and 13.40.200

Finch requested that the court order A.W. to submit to a polygraph examination as part of his RCW 13.40.162 Special sex offender disposition

alternative (SSODA) that was imposed in juvenile court.¹¹ *See* CP 21 (“This Court has before it Defendant’s motion to enforce or otherwise modify the SSODA of alleged victim and convicted sex offender A.W.”). Finch, however, lacked standing to request any modification of A.W.’s SSODA. Finch, moreover, made the request in the wrong forum.

The juvenile courts have exclusive jurisdiction over 14-year-old offenders. *See* RCW 13.04.030. A juvenile offender is entitled to the same constitutional rights of due process, counsel, and confrontation as is an adult. *See generally* RCW 13.40.140. Key among these rights is notice of all proceedings related to the offender. *See* JuCR 11.2.

The only parties to a juvenile prosecution are the juvenile offender and the State of Washington. The State may only appear in a juvenile offender proceeding through a prosecuting attorney, the attorney general, or the juvenile court probation officer. *See* RCW 10.01.190; RCW 13.40.090; RCW 36.27.020(4) and (6). Non-parties may not intervene in criminal matters. *See, e.g., State v. Savoie*, 164 Wn. App. 156, 262 P.3d 535 (2011) (error to allow victim’s family to intervene in murder prosecution); *State v.*

¹¹Neither A.W.’s disposition order nor any other document contained in A.W.’s juvenile court file was ever made a part of Finch’s trial court record. None of the documents in A.W.’s juvenile court file may be considered by this Court in the instant appeal. *See generally State v. Hughes*, 106 Wn.2d 176, 206, 720 P.2d 838 (1986) (matters referred to in a brief but not included in the record cannot be considered on appeal); RAP 9.1(a) (the composition of the record on appeal is limited to a report of the trial court proceedings, the papers filed with the superior court clerk, and any exhibits admitted in the trial court proceedings).

Cloud, 95 Wn. App. 606; 976 P.2d 649 (1999) (error to allow defendant's former counsel to intervene in ineffective assistance of counsel hearing).

A disposition order is entered when a juvenile offender is found guilty of an offense. *See* JuCR 7.12. Once entered, the disposition order may only be modified by the juvenile court pursuant to a motion filed by a party or the court. JuCR 7.14(b). The juvenile offender must receive notice of the motion and of any hearing date to be held on the motion and all the other rights that an adult probationer is entitled to receive. JuCR 7.14(e); RCW 13.40.200; RCW 13.40.162(8)(a). The juvenile offender is entitled to counsel at such a hearing. *See* RCW 13.40.140(2).

While polygraph examinations may be ordered as part of a SSODA, either initially or in a subsequent modification of the SSODA, the polygraph examination must serve a therapeutic purpose. The polygraph examination may only be used to monitor the offender's compliance with the conditions of the sentence. It is inappropriate to use a polygraph examination as a fishing expedition to discover evidence of other crimes, past or present. *State v. Combs*, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000). In the instant case, A.W.'s treatment provider testified that a polygraph examination was contraindicated.

Finch's motion seeking a polygraph of A.W. as part of A.W.'s SSODA disposition violated all of the above. Finch, who is not a party to the

action that resulted in the SSODA disposition, filed the motion in superior court, not juvenile court. Finch filed the motion in an action to which A.W. was not a party. Finch did not give notice to A.W. of the numerous hearings regarding whether the trial court should require A.W. to submit to a polygraph. A.W. was never appointed counsel and was not provided with a chance to participate in the show cause hearing involving A.W.'s treatment provider. As a result, the order requiring A.W. to submit to a polygraph pursuant to A.W.'s juvenile disposition is void and must be vacated. *See, e.g., Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977) ("An order based on a hearing in which there was not adequate notice or opportunity to be heard is void.").

V. CONCLUSION

The State respectfully requests that this Court vacate the order compelling A.W. to submit to a polygraph examination.

Respectfully submitted this 7th day of June, 2013.

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