

NO. 44637-5-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

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DIVISION II

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STATE OF WASHINGTON

BY WJL
DEPUTY

STATE OF WASHINGTON, Petitioner

v.

DWIGHT A. FINCH, Respondent

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

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

The State of Washington will not repeat the arguments it previously set forth in the Brief of Petitioner in this reply brief. This Reply Brief will only deal with gaps in Dwight Finch's arguments or with specific matters in his brief which seem in most urgent need of correction. The State's decision not to address certain arguments made by Finch in his brief should not be considered as an acknowledgment of the validity of Finch's analysis.

II. ARGUMENT

A. **All References to and Arguments Based upon Documents Not Contained in the Appellate Court Record must Be Disregarded by this Court.**

The composition of the record on appeal is limited by RAP 9.1(a) 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. *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. *State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977). When a party refers to matters in a brief that are not included in the record, the error should be brought to the appellate court's attention in a responsive pleading. *Engstrom v. Goodman*, 166 Wn. App. 905, 909 n. 2, 271 P.3d 959, *review denied*, 175 Wn.2d 1004 (2012) (" So long as there is an opportunity (as there was here) to include argument in the

party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.”).

Appendices A-F to Finch’s Brief of Respondent are all documents from a separate and distinct juvenile court matter. None of these documents appear in the trial court record of this case. All of these documents must be disregarded by this Court in ruling upon the merits of this appeal. All argument based upon these documents that is contained in Finch’s Brief of Respondent must be disregarded by this Court in ruling upon the merits of this appeal.¹

Finch contends that RAP 9.1(a) does not apply because “the trial court apparently took judicial notice of a number of documents in the Wahkiakum County Juvenile Court file in *State v. ALW*, No. 11-8-00005-3.” Brief of Respondent at 1 n. 1. Finch, however, cites to nothing in the record to support a finding that Judge Sullivan took judicial notice of these documents. While the record does establish that Judge Sullivan was the sentencing judge in A.W.’s juvenile case, *see* 1RP 26, “[a] judge may not dispense with the

¹The improper portions of the Brief of Respondent include:

- a. Statement of the Case pages 1 through the first full paragraph on page 5.
- b. The paragraph on page 10 that begins with “Third” and continues onto page 11.
- c. The sentence on page 12 that begins with “Rather”.

requirement of formal proof simply because he or she already ‘knows; that something is true.’ 5 K. Tegland, Wash. Prac., *Evidence Law and Practice* § 201.3, at 160 (5th ed. 2007).

Finch cites² a single Washington case that, in discussing the reliability of a DISCIS printout. The cited case stated in a footnote that:

We note that the JIS and DISCIS systems are electronic databases and that the sentencing court itself could easily and quickly verify from the bench the accuracy of any printouts presented if there are specific questions as to its accuracy. We draw an analogy to a trial court’s ability to take judicial notice of records where the information is readily verifiable by sources whose accuracy cannot reasonably be questioned, as in its own files. ER 201(b)(2).

State v. Cross, 156 Wn. App. 568, 589 n. 14, 234 P.3d 288 (2010), *review granted in part on other grounds and remanded by State v. Cross*, 172 Wn.2d 1009, 260 P.3d 208 (2011). This language, however, is *dicta*. *Cross*, moreover, is distinguishable from the instant case, as the “court-generated DISCUS printout” was made a part of the trial court record. *See Cross*, at 586.

Finch concedes that none of the documents from A.W.’s juvenile offender case were made part of the superior court record. *See* Brief of Respondent, at 1 n.1. In light of this concession, Finch’s attaching documents from A.W.’s juvenile file to his brief violates binding Washington Supreme Court precedent. *See generally Spokane Research v. City of*

²See Brief of Respondent, at 1 n.1.

Spokane, 155 Wn.2d 89, 97-99, 117 P.3d 1117 (2005) (refusing to consider documents from a related proceedings where the party that asked the appellate court to consider the documents did not address RAP 9.11); *In re the Adoption of B.T.*, 150 Wn.2d 409, 414-16, 78 P.3d 634 (2003) (an appellate court may not take judicial notice of the record of another independent and separate judicial proceeding; rule applies even when the separate proceedings involve the same parties); *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 762 P.2d 1141 (1988) (RAP 9.11 motion to admit insurance policy endorsement into appellate record denied because it was inequitable to excuse the insurance company's failure to offer the evidence earlier).

Finally, Finch attempts to justify his conduct by claiming that the juvenile court files were made a part of the record on appeal records by his attaching them to the Amended Response Opposing Motion for Discretionary Review. Brief of Respondent, at 1, n.1. This argument fails for three reasons. First, the State made a timely objection to Finch's submission of the documents. *See Reply in Support of RAP 2.3(b) Motion for Discretionary Review*, at 3-4. Second, the motion rules contemplate that documents will be included in appendices to the motions that are not part of the "record." *See generally* RAP 17.3(b)(8); RAP 17.4(f). Finally, RAP 9.1(a), which defines the "record on review," does not include documents attached to appellate court motions.

B. “Alleged Victims” and “Complaining Witnesses” are Entitled to Protection from Harassment.

Finch contends that the public policy against requiring a victim or complaining witness to submit to a polygraph is inapplicable because Finch has not yet been convicted of the crime. *See* Brief of Respondent at 9. Finch’s insertion of the word “alleged” before the word “victim” does not change the analysis.

First, the statutory definitions of “victim” do not require a conviction. The Sentencing Reform Act of 1981 (ch. 9.94A RCW) defines the word “victim” to “mean[] any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.94A.110(53). That a person can be a “victim” prior to a conviction is established by other sections of the Sentencing Reform Act (SRA) which allow “victims” to request that charges not be filed, RCW 9.94A.411(1)(i), to be involved in the selection of charges, RCW 9.94A.411(2)(b)(v), and to receive restitution when charges are dismissed or not filed, RCW 9.94A.750(5).

The Crime Victims’ Compensation Act (ch. 7.68 RCW), states that a “victim” is “a person who suffers bodily injury or death as a proximate result of a criminal act of another person, the victim's own good faith and reasonable effort to prevent a criminal act, or his or her good faith effort to apprehend a person reasonably suspected of engaging in a criminal act.”

RCW 7.68.020(15). A “victim” cannot generally be denied benefits under the act solely because the accused perpetrator was acquitted at trial or never apprehended. *See* RCW 7.68.020(d)(5)(ii) (“Neither an acquittal in a criminal prosecution nor the absence of any such prosecution is admissible in any claim or proceeding under this chapter as evidence of the noncriminal character of the acts giving rise to such claim or proceeding . . .”).

The fact that a person can be a “victim” of a crime prior to the alleged perpetrator’s conviction is also implicit in other statutes and in the State Constitution. For instance, the rape shield law, RCW 9A.44.020, prohibits the introduction of evidence of the “victim’s past sexual behavior” in the trial that will determine the alleged perpetrator’s guilt. Const. art. I, § 35 grants rights to “a victim of a crime” upon the filing of felony charges—not upon conviction. RCW 9A.20.080(5)(a), which precludes charging a “victim” of a crime as an accomplice, protects a “victim” in cases in which the perpetrator of the crime is neither charged nor convicted of the offense. *See, e.g., City of Auburn v. Hedlund*, 165 Wn.2d 645, 201 P.3d 315 (2009) (passenger in vehicle was a “victim” of the deceased driver’s reckless driving and driving under the influence). RCW 9A.04.080(b)(iii) increases the usual statute of limitations for filing sex offenses based upon the age of the “victim”.

Second, case law extends protection from harassment to “alleged rape

victims,” to “victims” and to “complaining witnesses.” *State v. Gonzalez*, 110 Wn.2d 738, 742-43, 757 P.2d 925 (1988). For instance, the Court held that a defendant charged with rape may not ordinarily use the discovery process to probe the complainant’s sexual history. To make such an inquiry, the defendant must make a showing of materiality that outweighs a rape victim’s compelling interest in maintaining the privacy of his or her prior sexual relations and the State’s equally compelling interest in encouraging rape victims to notify the police and to testify against their assailants. *Gonzalez*, 110 Wn.2d at 747-48. The Court went on to state that it would be an “extraordinary case where such evidence would be come material.” *Gonzalez*, 110 Wn.2d at 750-51.

Case law also prohibits a court from ordering a “crime witness or victim” to submit to a pre-trial psychiatric or other examination absent a “compelling reason.” *State v. Hoffman*, 116 Wn.2d 51, 89, 804 P.2d 577 (1991); *State v. Israel*, 91 Wn. App. 846, 849-51, 963 P.2d 897 (1998). The court’s stated basis for this rule – to limit or reduce the “practice of placing victims and witnesses on trial in place of defendants” – supports the proposition that a person can be a “victim” prior to the alleged perpetrator’s conviction.

The bottom line is whether A.W. is identified as a “victim”, an “alleged victim” or a “complaining witness”, the polygraph order in this case

must be vacated as Finch cannot establish the materiality of the test to his defense. “Materiality” cannot be established as a matter of law, because polygraph results are not admissible at trial. *See United States v. Scheffer*, 523 U.S. 303, 316-317, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (excluding polygraph evidence “does not implicate any significant interest of the accused”); *Wood v. Bartholomew*, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995) (polygraph tests, due to their inadmissibility, can never satisfy the “materiality” prong of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)); *State v. Thomas*, 150 Wn.2d 821, 860, 83 P.3d 970 (2004) (polygraph test results are not admissible at trial absent a stipulation from both parties).

III. CONCLUSION

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

Respectfully submitted this 16th day of September, 2013.

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A handwritten signature in black ink that reads "Pamela Beth Loginsky". The signature is written in a cursive style with a large, stylized initial 'P' and a long, sweeping tail.

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Special Deputy Prosecuting Attorney

