

70021-9

70021-9

COA NO. 70021-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

L.R.,

Appellant.

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2021/11/11 1:22

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Deborra E. Garrett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's adjudication of guilt under RCW 66.44.270(2).

2. The court erred in entering conclusions of law 1, 2 and 3. CP 60.

Issue Pertaining to Assignments of Error

Whether the State failed to prove beyond a reasonable doubt that appellant, as a minor, consumed/possessed alcohol or that he exhibited the effects of alcohol in a public place?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged L.R. with minor in possession and/or consumption of intoxicants in violation of RCW 66.44.270(2)(a) or (2)(b). CP 3. L.R. entered Drug Court. CP 16-20. He signed an agreement that provided in part "if I am terminated from the Drug Court program, the court will determine the issue of guilt on the pending charge(s) upon the law enforcement/investigative agency reports and/or other materials received by my attorney by the date this agreement is entered by the court unless changed by stipulation of the parties." CP 19.

On December 11, 2012, a superior court commissioner entered an agreed order for voluntary termination from Drug Court due to

noncompliance with its requirements. CP 23; 1RP¹ 3-6. The case proceeded to a stipulated facts trial as per the Drug Court agreement. 1RP 6-12. A commissioner found L.R. guilty under RCW 66.44.270(2)(a) and (2)(b). CP 50-52; 1RP 12-15. The commissioner then imposed an agreed manifest injustice disposition of 30 to 37 weeks with 86 days credit for time served. CP 24-31; 1RP 16-19, 27.

L.R. moved to revise the commissioner's verdict, supplying a memorandum of law in support. CP 32-34, 35-49. On January 16, 2013, a superior court judge ruled L.R. was guilty under RCW 66.44.270(2)(a) and (2)(b). 2RP 3-8; CP 57-60. L.R. filed a notice of appeal. CP 53-56. By notation ruling dated September 24, 2013, a Court of Appeals commissioner denied the State's motion to dismiss the appeal.

2. Substantive Facts

On June 12, 2012, at 5:33 p.m., L.R.'s mother called Bellingham Police and reported her son had consumed alcohol. CP 46-47, 58 (FF 1). At 5:49 p.m., L.R. called Bellingham Police and requested a "PBT." CP 47, 58 (FF 2). The dispatcher noted L.R. sounded drunk. CP 47, 58 (FF 2). At about 6 p.m., Bellingham Police Officer Shannon arrived at L.R.'s home, which is located in Bellingham, Whatcom County, Washington.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 12/11/12; 2RP - 1/16/13.

CP 46-47, 58 (FF 3). L.R.'s mother reported L.R. had been at a friend's house earlier in the day and that the friend had called her to report that L.R. was intoxicated and needed to leave. CP 46, 58 (FF 4). L.R. arrived home just before police arrived. CP 46, 58 (FF 4).

Officer Shannon noticed an overwhelming odor of intoxicating liquor on L.R.'s breath. CP 46, 58 (FF 5). At 6:10 p.m., L.R. provided a portable breath test (PBT) reading of .245 breath alcohol content. CP 46, 58 (FF 5). In Officer Shannon's opinion, L.R. was obviously intoxicated. CP 46, 58 (FF 5).

An ambulance was called to the scene because L.R.'s mother was concerned for her son's safety due to his level of intoxication. CP 46, 58 (FF 6). Emergency medical professionals determined L.R. needed to be transported to the emergency room. CP 46, 58 (FF 6). L.R. was 17 years old as of June 12, 2012. CP 58 (FF 7).

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT L.R. OF VIOLATING RCW 66.44.270(2).

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

Convictions must be reversed for insufficient evidence where, viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a reasonable doubt. Hundley, 126 Wn.2d at 421-22. The evidence is insufficient to convict L.R. of violating either of the alternative means of committing an offense under RCW 66.44.270(2). The conviction must therefore be vacated. Winship, 397 U.S. at 364; U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

a. Standard Of Review

"Once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's." State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). Review is limited to whether substantial evidence supports challenged findings of fact and the findings of fact support the conclusions of law. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008); State v. S.E., 90 Wn. App. 886, 887, 954 P.2d 1338 (1998). Unchallenged findings are verities on appeal. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011).

L.R. does not challenge the superior court's factual findings. He challenges the conclusions of law drawn from those facts. CP 60 (CL 1, 2, 3). Conclusions of law are reviewed de novo. A.M., 163 Wn. App. at 419. Whether the trial court's findings of fact support its conclusions of law is a

question of law reviewed de novo. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). Whether evidence is sufficient to support a conviction is also an issue of law. State v. Drum, 168 Wn.2d 23, 33, 225 P.3d 237 (2010).

b. The Evidence Is Insufficient To Show Possession/Consumption Under RCW 66.44.270(2)(a).

RCW 66.44.270(2)(a) provides "It is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor." The evidence is insufficient to show L.R. possessed or consumed alcohol in the state of Washington. His conviction under RCW 66.44.270(2)(a) cannot stand for this reason.

A person possesses alcohol "if he or she knows of the substance's presence, it is immediately accessible, and he or she exercises dominion or control over it." State v. A.T. P.-R., 132 Wn. App. 181, 185, 130 P.3d 877 (2006). "Consume" means "putting of liquor to any use, whether by drinking or otherwise." RCW 66.04.010(10).

Once a person ingests alcohol, the alcohol is assimilated into the bloodstream and the person loses dominion and control of the substance, and thus, ceases to possess it. State v. Hornaday, 105 Wn.2d 120, 125-26, 713 P.2d 71 (1986). Similarly, a person ceases to consume alcohol once it is ingested. Hornaday, 105 Wn.2d at 127-28. In short, "the terms

'consume' and 'possession' found in RCW 66.44.270 do not include the stage at which the liquor has already been swallowed but is still being assimilated by the body." Id. at 128-29.

Evidence of assimilation is circumstantial evidence that, when combined with corroborating evidence of probative value, may be sufficient to prove *prior* possession or consumption. State v. Francisco, 148 Wn. App. 168, 175, 199 P.3d 478, review denied, 166 Wn.2d 1027, 217 P.3d 337 (2009); State v. Dalton, 72 Wn. App. 674, 676, 865 P.2d 575 (1994); see State v. Fager, 73 Wn. App. 617, 618, 621, 870 P.2d 336 (1994) (sufficient evidence to support conviction for consumption of alcohol where juvenile was stopped driving vehicle with beer bottles within reach, there was strong odor of alcohol in vehicle, and juvenile had heavy odor of beer on his breath and watery and bloodshot eyes); State v. Preston, 66 Wn. App. 494, 499, 832 P.2d 513 (1992) (sufficient evidence to support conviction for consumption of alcohol where officer detected odor of alcohol on Preston's breath and saw Preston put empty beer bottles in the trash receptacle, and Preston confessed to the officer that he had drunk a number of the beers), aff'd, 122 Wn.2d 553, 859 P.2d 1220 (1993).

The State failed to meet its burden of proof in L.R.'s case. Francisco is instructive. In that case, insufficient evidence supported a conviction for minor in possession/consumption of alcohol where the

evidence only showed the minor exhibited the effects of alcohol. Francisco, 148 Wn. App. at 175-76. A police officer testified that Francisco smelled of alcohol, that it took several minutes to rouse him, and that he was incoherent and unable to walk. Id. at 175. The State, however, offered no corroborating evidence to prove possession, such as alcohol containers or near Francisco or a confession to possessing alcohol. Id. at 176 (citing State v. Allen, 63 Wn. App. 623, 624, 627, 821 P.2d 533 (1991) (evidence of intoxication without more does not support minor in consumption of liquor conviction); A.T.P.-R., 132 Wn. App. at 185-86 (odor of alcohol on juvenile's body and proximity to an open bottle of beer is insufficient to sustain conviction for consumption or possession of alcohol); State v. Roth, 131 Wn. App. 556, 564-65, 128 P.3d 114 (2006) (evidence of intoxication (swaying and odor of alcohol) and proximity to refrigerator full of beer insufficient to support a finding of constructive possession). The evidence was therefore insufficient to establish that Francisco exercised any dominion and control over any alcohol. Francisco, 148 Wn. App. at 176.

L.R. exhibited the effects of alcohol at his house in Bellingham and he had a .245 PBT result, at which point the alcohol had already been assimilated into his body. But there was no corroborating evidence to prove *prior* possession or consumption, such as alcohol containers on or

near L.R. or an admission that he had consumed alcohol. The superior court therefore erred in concluding the State had proved L.R. "consumed alcohol" and that he was guilty of violating RCW 66.44.270(2)(a). CP 60 (CL 2.b., 3).

Even if the evidence shows a prior possession/consumption, the evidence is still insufficient to prove the prior possession/consumption occurred within the relevant jurisdiction. "Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution." State v. Norman, 145 Wn.2d 578, 589, 40 P.3d 1161 (quoting State v. Squally, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997)), cert. denied, 537 U.S. 817, 123 S. Ct. 87, 154 L. Ed. 2d 23 (2002). Generally, proof that the crime was committed in the state of Washington satisfies the jurisdictional element. Norman, 145 Wn.2d at 589.

The evidence does not show L.R. consumed or possessed alcohol in the state of Washington. The court therefore erred in concluding it "has jurisdiction over the parties and the subject matter of this case." CP 60 (CL 1).

Again, a person ceases to possess or consume alcohol under RCW 66.44.270(2) once it is assimilated into the body. Hornaday, 105 Wn.2d at 128-29. To satisfy the jurisdictional element, the State therefore needed to prove L.R. possessed or consumed alcohol in the state of Washington

before it was assimilated. No evidence whatsoever was produced showing the location of the friend's house where L.R. was reportedly intoxicated. CP 58 (FF 4). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Bellingham, where L.R. lived, is a short drive from the Canada border. It is possible that the friend's house where L.R. consumed or possessed alcohol was in Canada, not Washington. In the absence of evidence showing the friend's house was in the state of Washington, it is speculation that L.R. consumed or possessed alcohol in the state.

"No reasonable trier of fact could reach subjective certitude on the fact at issue here." Hundley, 126 Wn.2d at 422. The evidence is therefore insufficient to prove all the elements of the offense under RCW 66.44.270(2)(a).

c. The Evidence Is Insufficient To Show L.R. Exhibited The Effects Of Having Consumed Liquor In A Public Place Under RCW 66.44.270(2)(b).

The superior court concluded L.R. was also guilty of violating RCW 66.44.270(2)(b), which provides "It is unlawful for a person under the age of twenty-one years to be in a public place, or to be in a motor vehicle in a public place, while exhibiting the effects of having consumed liquor. For purposes of this subsection, exhibiting the effects of having

consumed liquor means that a person has the odor of liquor on his or her breath and either: (i) Is in possession of or close proximity to a container that has or recently had liquor in it; or (ii) by speech, manner, appearance, behavior, lack of coordination, or otherwise, exhibits that he or she is under the influence of liquor." CP 60 (CL 2.d., 3). The term "public place" includes "streets and alleys of incorporated cities and towns" and "state or county or township highways or roads." RCW 66.04.010(35).

The court found "travelling to the [R]s' apartment from any other location, whether by automobile or on foot, would require travel through public thoroughfares." CP 59 (FF 10(e)). L.R. agrees he was in a "public place" when he was transported back to his home. Further, because he necessarily traveled to his home in Bellingham, there is no jurisdictional barrier to conviction of the kind presented in section C. 1. b., supra. But that is not the end of the legal analysis.

The court did not find that L.R., while being transported from his friend's house to his house, had the odor of liquor on his breath *and* was "in possession of or close proximity to a container that has or recently had liquor in it." RCW 66.44.270(2)(b)(i). The court likewise did not find that L.R., while being transported from his friend's house to his house, had the odor of liquor on his breath *and* "by speech, manner, appearance, behavior, lack of coordination, or otherwise, exhibits that he or she is

under the influence of liquor." RCW 66.44.270(2)(b)(ii). The court's findings show L.R. was intoxicated when he arrived at his home, but they do not show he exhibited the effect of that intoxication while he was en route to his home. CP 59 (FF 10). The court's findings of fact must support its conclusions of law. Enlow, 143 Wn. App. at 467. The court's findings do not support the conclusion that L.R. violated RCW 66.44.270(2)(b) by exhibiting the effect of alcohol consumption in a public place. CP 60 (CL 3).

"A person exhibits the effects of having consumed liquor if her breath smelled of liquor, and she possessed or was in close proximity to a container that had liquor in it." State v. C.N.H., 90 Wn. App. 947, 951, 954 P.2d 1345 (1998) (sufficient evidence to show violation of RCW 66.44.270(2)(b) where officer encountered minor in a car at a park and ride, the minor's breath smelled of alcohol, and officer found a partially full beer bottle near her in the car).

There is no evidence in L.R.'s case that he possessed or was in close proximity to a liquor container while he traveled from his friend's house to his own. There is insufficient evidence that L.R. exhibited the effects of alcohol in a public place, i.e. while he was being transported to his home. The court therefore erred in concluding the State had proved L.R. "was intoxicated, and exhibited the effects of such intoxication, in a

public place in Bellingham, Whatcom County" and that he was guilty of violating RCW 66.44.270(2)(b). CP 60 (CL 2.d., 3).

L.R.'s conviction must be reversed and the charge dismissed with prejudice due to insufficient evidence. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports verdict).

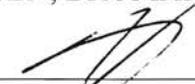
D. CONCLUSION

For the reasons set forth, L.R. respectfully requests that this Court reverse the adjudication of guilt and dismiss the charge with prejudice.

DATED this 31st day of October 2013

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70021-9-1
)	
LEEVI ROSSO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE
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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2013.

X *Patrick Mayovsky*