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STATE OF WASHINGTON
BY *JML*

NO. 40789-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM N. VALDIVIEZ,

Appellant.

AMENDED BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the trial court's ruling prohibiting defense counsel from cross-examining Rebecca Morgan on the subject of Exhibit K.
2. Appellant assigns error to the entry of a judgment of conviction for the offense of furnishing alcohol to a minor.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the sole defense to the charge of rape of a child in the third degree was that the defendant reasonably believed the child to be 16 years old, did the trial judge violate the defendant's Sixth Amendment right to cross-examination by prohibiting any questioning of Rebecca Morgan on the subject of a U-Tube post in which she falsely identified herself as 19 years of age?

2. Did the trial court's prohibition of cross-examination on the subject of the witness' false representation that she was 19 years old violate the defendant's right under ER 608(b) to cross-examine the witness on specific instances of conduct bearing upon her truthfulness?

3. For purposes of RCW 66.44.270, does the phrase "control of the premises" mean the legal right to control the premises by excluding others from the premises, or does it mean the ability to control the activities of minors on the premises by virtue of being older than the minor and having attained the age of majority?

4. Assuming, for the sake of argument, that the phrase “premises under the control of” is ambiguous, under the rule of lenity must the statute be construed in favor of the convicted defendant?

5. Is there any evidence that the defendant committed the offense of furnishing alcohol to a minor by means of permitting the consumption of alcohol on “premises under his . . . control”?

6. Can the defendant’s conviction for furnishing be affirmed where the jurors were instructed (a) that there were two alternative means of committing this offense; (b) that they did not have to be unanimous as to which means they found in order to return a guilty verdict; (c) a general verdict was returned which did not specify which means were found; and (d) the evidence was not sufficient to support one of the two means because there was no evidence that the defendant controlled the premises where the minor’s drinking occurred?

C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

William Valdiviez was charged by information in Pacific County Superior Court with one count of Rape of a Child in the Third Degree and one count of Furnishing Alcohol to a Minor. CP 1-2. The prosecution moved for permission to amend the information to add an allegation that Valdiviez was armed with a firearm during the commission of the rape of

a child offense charged in count 1 and that motion was granted. CP 9, 10-12, 149, 150-151.

The case was tried before the Honorable Michael J. Sullivan on March 26, 30 and 31, 2010.¹ The jury found Valdiviez guilty of both offenses, but found that he was *not* armed with a firearm in the commission of the rape. CP 175, 176, 177.

On May 14, 2010, the Superior Court sentenced Valdiviez to 13 months in prison on count 1. CP 279. For the crime of furnishing alcohol to a minor the Court sentenced Valdiviez to one year in jail, with all but 30 days of that sentence suspended. CP 279. This sentence on the furnishing count was imposed to run consecutively to the 13 month prison sentence. CP 280. Under the judgment, Valdiviez is also required to register as a sex offender and is on community custody supervision for a period of three years following his release from confinement. CP 287-88. On May 28, 2010, Valdiviez filed a timely notice of appeal to this Court.

2. STATEMENT OF THE FACTS PERTAINING TO THE CHARGE OF FURNISHING ALCOHOL TO A MINOR.

William Valdiviez and Rebecca Morgan are cousins. Rebecca's birthday is December 25, 1993. RP 3/30/10, at 39. Rebecca lives in

¹ The verbatim report of proceedings consists of the following: RP 10/16/09 – pretrial hearing; RP 12/4/09 – pretrial hearing; RP 1/22/10 – pretrial hearing; RP 3/26/10 – trial; RP 3/29/10 – trial; RP 3/30/10 – trial; RP 3/30/10 – trial; RP 3/31/10 – trial; RP 5/14/10 -- sentencing.

Tomball, Texas with her father, Jimmy Morgan, and her two sisters Erica, age 13, and Sarah, age 9. *Id.* at 42. Rebecca turned 15 on Christmas Day, 2008. *Id.* at 55. By the time of the trial in March of 2010, Rebecca was 16 years old. *Id.* at 42.

Rebecca's mother Teresa Morgan is deceased. *Id.* at 43. Rebecca's aunt, Vivian Smith, the sister of Teresa Morgan, also lives in Texas with her husband Bobby Smith. *Id.* at 44. The Smiths have a daughter named Sydney, who was 12 at the time of trial. *Id.* at 44. Rebecca's maternal grandparents, William and Bobbie Hill, live in Weimar, Texas. *Id.* at 43.

William Valdiviez, the son of Vivian Smith, was 25 at the time of trial. *Id.* at 50. William Valdiviez was a member of the United States Army and was stationed for a time at Fort Lewis, Washington. *Id.* at 160-161; RP 3/31/10, at 81.

In December of 2008, the Smith, Morgan, and Hill families made plans to spend the Christmas holiday together on the Long Beach Peninsula in Washington State. Rebecca and her two sisters were brought to Washington by their grandparents, William and Bobbie Hill. RP 3/30/10, at 47-48. The grandparents paid Rebecca's airfare to travel with them to Washington. *Id.* They arrived in Washington on December 19, 2008, and they stayed at a hotel somewhere near SeaTac airport. *Id.* at 49.

The next day William Valdiviez and his girlfriend Donna took Rebecca and her sister Erica to a shopping mall, and then later that day they traveled to the Long Beach Peninsula where they stayed in another hotel called Ocean Park Hotel or something like that. *Id.* at 49-50.

The grandfather, William Hill, rented three hotel rooms. *Id.* at 52, 153. Rebecca's sisters stayed in one room with their grandparents. *Id.* at 51-52. Rebecca stayed in a room with William Valdiviez and his girlfriend Donna. *Id.* at 51. The Smiths, Vivian and Bobby and their daughter Sydney, did not arrive until the next day, and when they arrived they stayed in a third room. *Id.* at 52.

On Christmas Eve all the family members went out to dinner at a nearby restaurant. *Id.* at 53. When they returned to the hotel after the dinner, Rebecca went to the room she shared with William Valdiviez and his girlfriend Donna and she watched TV for a while. *Id.* at 53-54. Rebecca testified that while she was in the hotel room that evening, she consumed alcohol. *Id.* at 54. According to Rebecca:

Well, at around 11 p.m. William tried to give me a beer and I didn't want to – I didn't want anything to drink and he told me if I didn't drink the beer, then I couldn't have any of the Crown Royal so I dumped the beer down the sink and told him that I drank it. And then at midnight we all took a shot and toasted to, you know, my birthday and Christmas.

Okay. Did he make any statements to you about – with regarding – with regard to having a drink because it was your birthday?

Yes.

Q. And what did he say?

Well, at 11:00 whenever he tried to get me to have the beer, he said, “It’s going to be your birthday in an hour and you’re not going to drink?”

Okay. What did – did he make any statements about the Crown Royal?

Yes.

Q. What did he say?

A. Uh, I’d never had it before and he told me he knew I’d like it.

RP 3/30/10, at 55.

When asked to clarify which room she had consumed alcohol in, Rebecca referred to the room as “William’s hotel room.” *Id.* at 56.² She said she started drinking at midnight and continued drinking until about 1:30 a.m. *Id.* When asked how much she consumed she replied:

A lot because we were taking, like, shots but we didn’t have shot glasses, just the cups that they have in hotels that are about this big (indicating) and about half full. I had about six of those.

Q. Okay, so about six of what type of alcohol was it?

² Later she said, “I just said, you know, said that it was his room because that’s like, where – that’s where I was staying but I figured that my grandpa had been the one to pay for it.” RP 3/30/10, at 157.

A. Crown Royal.

RP 3/30/10, at 56.

On cross-examination Rebecca acknowledged that her grandfather had paid for all the hotel rooms and acted as “the host” for this family vacation. *Id.* at 123. She also conceded that William did not spend the night of December 23rd in the hotel room because he went back to his base that night. *Id.* at 123-124.

On redirect, the prosecutor inquired further about the renting of the hotel rooms:

Q. Rebecca, do you remember checking out of the hotel?

A. Yes.

Q. Who dealt with the hotel staff as far as checking out?

A. My grandpa.

Q. Okay. Who had the key to the hotel room?

A. Well, I had been given a key to William’s room but I lost it.

Q. All right. Who else had keys to the hotel room?

A. William.

Q. All right. And besides William, were there any other adults in the room staying with you?

A. Donna.

Q. Okay. Do you have any idea how old Donna is?

A. No.

Q. Okay. Who was the first one to get the hotel room – to go into the hotel room?

A. We all kind of went in at the same time.

Q. All right. And what was your understanding as to whose room it was?

A. Well, I, just, you know, said that it was his room because that's, like, where – that's where I was staying but I figured that my grandpa had been the one to pay for it.

Q. But did your grandpa stay in the room?

A. No.

Q. All right. Thank you.

RP 3/30/10, at 156-157.

William also admitted that Rebecca drank alcohol while she was in the hotel room, although he denied that he provided it to her:

Q. Okay. Well, and let's talk about alcohol a little bit. She's – she's indicated that she drank on her own. It was her own decision to drink. What do you recall about her – how she accessed alcohol that evening, or that early morning?

A. Well, to tell the truth, it started out – I mean, like – like she said, *she had her own key to the place. I was in and out.* You know, I went in to reach in the freezer and -- where I kept the Crown Royal and it was opened whenever I first got into it to pour my first drink, and *I asked my girlfriend, I was like, "Did you open this?" You know, and she was like, "No, I mean, you know I don't even really like Crown Royal that much." You know, so I assumed, you know, that it was – that it was Rebecca I assumed.*

RP 3/31/10, at 78 (emphasis added).

3. STATEMENT OF THE FACTS PERTAINING TO THE CHARGE OF RAPE OF A CHILD IN THE THIRD DEGREE AND THE AFFIRMATIVE DEFENSE OF REASONABLE MISTAKE AS TO THE CHILD'S AGE.

At 1:30 a.m. Rebecca said that she and William decided it would be fun to go and drive on the beach in William's truck. *Id.* at 57, 73. When they got to the beach William and Rebecca engaged in vaginal and oral intercourse. *Id.* at 84-85. According to Rebecca, William carried a gun with him in his jacket and he brought the gun with him to the beach. *Id.* at 77, 80. She said when they got to the beach he took his gun out of his jacket pocket, and then set it on the center console. *Id.* at 80. According to Rebecca, she asked him to stop during vaginal intercourse because he was hurting her, and he stopped. *Id.* at 85-86. She claims he then complained that he needed some release and wanted her to agree to perform oral sex. *Id.* at 87. Rebecca claims that she agreed to engage in oral sex because his hand was resting on the center console of the truck near his gun, and that she was scared and thought he was going to use it. *Id.* at 89. After they engaged in oral sex they returned to the hotel room. *Id.* at 90, 92.

William Valdiviez testified at trial. He admitted that he had had sex with Rebecca, but he said that the sex was purely consensual. RP 3/31/10, at 72, 90. He admitted that he owned a gun, and that he had it with him in his jacket pocket when he traveled to the Long Beach Peninsula, but he

denied taking the gun with him to the beach. *Id.* at 81. He said the gun remained in his jacket pocket and the jacket remained on a chair in a corner of the hotel room when he went to the beach with Rebecca. *Id.* He acknowledged that he did have a Concealed Weapons Permit, but he denied taking the gun with him to the beach. *Id.* at 81-82. Ultimately, the jury found that William was *not* armed with a firearm at the time of the commission of the acts of sexual intercourse. CP 177.

William's sole defense to the rape charge was his contention that he reasonably believed, based on Rebecca's own statements to him, that Rebecca had just turned 16 years old. This affirmative defense is specifically provided for in RCW 9A.44.030(2) & (3).³

William testified that Rebecca told him that she had just turned 16 years old on Christmas Day, 2008. RP 3/31/10, at 72, 73, 74. He said that on Christmas Eve during dinner at a restaurant Rebecca said, "Hey, you know tonight's going to be my birthday and I'd like to drive." *Id.*, at 75. He said she told him that she had a driver's permit and that she had some

³“(2) In any prosecution under this chapter in which the degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

“(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated: . . . (c) For a defendant charged with rape of a child in the third degree, that the victim was at least sixteen, or was less than forty eight months younger than the defendant.”

experience driving. *Id.*, at 76. Although he did not agree to let her drive, he did agree to take her for a drive on the beach that night. *Id.*, at 73. At the stroke of midnight, Rebecca took a drink and said, “Hey, it’s my 16th birthday.” *Id.*, at 73.

William testified that before the family trip to the Long Beach Peninsula took place, his mother Vivian Smith had told him that Rebecca was going to be turning 16 that Christmas and that he should get her a birthday present and spend a little more on it than he might otherwise spend because 16 was a special birthday. RP 3/31/10, at 77. Thus, William said that when he had sex with Rebecca on Christmas morning, “I believed it was her birthday and that she had just turned 16.” RP 3/31/10, at 77. *See also* RP 3/31/10, at 86.

Rebecca testified that she never told William that she was turning 16. RP 3/31/10, at 102. She denied that prior to the trip to Washington State that she told William over the telephone that she was going to be turning 16. RP 3/30/10, at 126-127. She denied telling *anyone* that she was turning 16, RP 3/31/10, at 102, and she also specifically denied telling her aunt, William’s mother, that she was going to be turning 16. RP 3/30/10, at 127; RP 3/31/10, at 104.

William’s mother Vivian Smith testified that Rebecca *did* tell her that she was turning 16, and Vivian confirmed that approximately three weeks

before the trip to Washington State took place, she told her son William, “We need to get [Rebecca] something really nice for her birthday. She’s turning 16.” *Id.*, at 44-45. She also testified that at dinner on Christmas Eve, Rebecca said, “I’m turning 16 at midnight.” *Id.*, at 46. Vivian testified that she believed Rebecca when she said this. *Id.*, at 51.

Rebecca’s father, Jimmy Morgan, testified that in previous years Vivian Smith had attended Rebecca’s family birthday celebrations in Texas, and that at those prior birthday parties there had always been candles on Rebecca’s birthday cake to show what number birthday was being celebrated. *Id.*, at 96. On this particular birthday in 2008, however, Rebecca herself acknowledged that there were no birthday candles on her birthday cake. *Id.*, at 104-05. She said that her grandparents stated, in William’s presence, that they had gone to a store in Long Beach looking for birthday cake candles, but that they could not find any and they “apologized for not having fifteen candles on my cake.” RP 3/31/10, at 105.

4. PROHIBITION OF ANY CROSS-EXAMINATION ON THE SUBJECT OF REBECCA'S YOU-TUBE POST THAT CONTAINED THE FALSE ASSERTION THAT SHE WAS 19 YEARS OF AGE.

At the outset of the trial, defense counsel made it known to the trial judge and the prosecutor that he wished to cross-examine Rebecca on the subject of a You-Tube video that Rebecca and her friend Caley Byers had

posted on the Internet. RP 3/30/10, at 27, 29-31. The content of the video itself was not of any real significance; the salient fact was that on the YouTube post Rebecca falsely represented herself to be older than she really was at the time of the posting. *Id.* at 29. A print out of the computer screen showing the YouTube post was marked and referred to as Exhibit K. *Id.* at 29; CP 153. A copy of Exhibit K is attached to this brief as Appendix A. The copy shows that Rebecca and Caley represented themselves to be 19 years old, when in fact neither had reached that age by the time of trial. Exhibit K.

The prosecution made a motion in limine to prohibit defense counsel from playing the YouTube video, or from cross-examining Rebecca about her having lied about her age on the Internet by posting the YouTube video with a false statement that she was 19 years old. RP 3/30/10, at 27-28; CP 89. The prosecutor argued that the fact that Rebecca lied on the internet was “improper character evidence.” RP 3/30/10, at 27. Defense counsel responded that the central issue in the case was “whether Mr. Valdiviez has relied upon her representations” about her age, and that if she had “projected herself as being older than she really is” on the internet, then he was entitled to show that she had in fact lied by falsely telling the world that she was 19. *Id.* at 29. The trial judge acknowledged that “this is an important issue,” and indicated that he would give both counsel a

chance to make additional argument on the issue later in the trial. *Id.* at 32, 38.

The State then called Rebecca to testify. During her direct examination, Rebecca testified that as of that day – March 30, 2010 – she was 16 years old, and her friend Caley was 17 years old. *Id.*, at 39, 47. Thus, neither Rebecca nor Caley was 19 years old by the time of the trial.

On direct examination the prosecutor asked Rebecca:

Q. Did William know that you were – that it was going to be your fifteenth birthday?

A. Yes.

Q. Why do you say that?

A. He told me that I was going to – you know, he said, “I can’t believe how old you’re getting. You’re going to be able to get your learner’s permit and a year from now you’ll be driving.”

Q. Okay. So where you live in Texas, how old do you have to be to get a learner’s permit?

A. Fifteen.

Q. And how old do you have to be to get a driver’s license?

A. Sixteen.

Q. So was what he said accurate, that – in other words, if you were turning 15 on December 25, 2008, that a year from then you’d be eligible for a driver’s license?

A. Yes.

Q. Okay. Because you’d be 16 in a year, right?

A. Yes, sir.

RP 3/30/10, at 55-56.

Later that day, the trial judge heard more argument on the question of whether defense counsel could cross-examine Rebecca about her having falsely claimed to be 19 on her You-Tube posting. Defense counsel again argued that an admittedly false representation as to her age was highly relevant to the defense that Mr. Valdiviez reasonably believed Rebecca to be 16 at the time he had sex with her. *Id.* at 108.

The prosecutor contended that before the defense could ask Rebecca about this particular lie, the defense had to lay a foundation for that evidence by showing that before he had sex with Rebecca (before December 25, 2008) Valdiviez had actually seen the age representation of 19 on the You-Tube post, and that he had relied upon it. *Id.* at 108. Since the State had not yet rested and the defense case had not yet even started, the prosecutor argued that the defense could not cross-examine Rebecca about her You-Tube lie. *Id.* at 108-109.⁴

⁴ “I would say they have a foundational requirement before they can even ask – raise this in cross-examination. They have to show that he believed it, which would come in their – logically in their – when they present their case. There has to be some testimony by Mr. Valdiviez that he believed it. And then the second requirement is that it’s – the declarations were by the alleged victim and that they – and that these – and that this was reasonable. [¶] So I mean, I just think it’s premature to – for him to be able to cross-examine her on it without some prior testimony by him that he reasonably relied on it as in thinking that she was actually 19 instead of what her age was. And then if he then wants to present her testimony as part of that and maybe try and introduce that page, that would be – that would come in his defense case after he’s laid the proper foundation.”

The trial judge asked defense counsel to respond, and defense counsel argued that the State had already opened up the subject of what Rebecca said on Christmas Eve 2008 about her age. Since Rebecca had sworn under oath that she said she was turning 15 that night, defense counsel argued that he was entitled to impeach her by pointing out that on another occasion she had claimed to be 19:

What I guess I would be concerned about is I think that I'm entitled to explore issues that have been raised by this and any other witness related to this defense. ***She has certainly testified as to representations she made about her age and birthday and so forth*** and so, much like a self-defense case or any other case that has a defense, I don't think that there's anything about the way this statute reads that requires me to, for instance, recall her as a witness in my case-in-chief. ***I think I can get into those things that have been addressed through her direct testimony during the State's – the State's case.*** So just – just so we're clear on that, that's an area that I believe is absolutely ripe and relevant to her testimony.

RP 3/30/10, at 112 (emphasis added).

Defense counsel then suggested that could stop his cross-examination at the point where he would want to question her about the You-Tube posting with the false representation of being 19, and at that point the Court could excuse the jury and make a ruling as to whether such questioning would be permitted. *Id.* at 112. The trial agreed with defense counsel that Rebecca had testified on direct about statements she had

made about her age, and he accepted defense counsel's proposed way of handling the issue:

THE COURT: I tend to agree with that whole line of reasoning you just stated because certainly the witness testified as to it was a birthday party or something and said she was 15 or you get your driver's license or whatever. Certainly you can go into that. I tend to agree with your last statement that I just wait and see but you won't bring this up in the presence of the jury.

RP 3/30/10, at 112-113.

Defense counsel then conducted his cross-examination and elicited testimony from Rebecca that she spoke to William on several occasions during the Christmas trip to the Long Beach Peninsula. *Id.* at 126. When asked, however, she denied that she had told either William or his mother Vivian Smith that she would be turning 16 during the trip. *Id.* at 127. At this point, defense counsel asked to be heard outside the presence of the jury and the jury was excused. *Id.* Defense counsel then renewed his request that he be allowed to cross-examine Rebecca about her statement made in her You-Tube post that she was 19 years old so as to elicit the fact that she had lied to the whole world about her age:

Your Honor, I just, -- you know, I mean, I have to make sure that I have a record in a case like this and I probably, you know, out of respect to you should indicate that I think I know what your ruling's going to be, but this is exactly where I would be -- this is in my examination where I would plan on asking if she in fact represented beyond William and beyond the family, in fact including the internet world, that she is older than 16, and I frankly

would expect some sort of denial but who knows, and if she denied it, then this Exhibit would become relevant.

Id. at 129.

The prosecutor then argued that the question would be improper for two reasons:

First, it is beyond the scope of direct. Second, he's eliciting hearsay and there's no exception to hearsay that I am aware of.

Id. at 130.⁵ The trial judge asked defense counsel to respond to the prosecutor's first contention that his proposed cross-examination was beyond the scope of direct. *Id.* at 148. Defense counsel replied:

MR. HESTER: I couldn't disagree more. I think that they've addressed this, or the State's addressed this on direct when it talked about those claimed conversations; that the purpose of those conversations was to assert Mr. — that Mr. Valdiviez believed her age to be 15 rather than 16. It's ripe and it's relevant to cross examination.

THE COURT: How are you going to lead into this again, into that, what I'm going to call "K", although it will be — if it's identified, it will certainly be another — it will be a number. How are you planning on leading into that?

MR. HESTER: I'm sorry, I was just talking about the subject matter of —

THE COURT: Oh.

MR. HESTER: -- prior incon — what I believe would be characterized as prior inconsistent statements on the issue

⁵ Since defense counsel wanted to elicit the You-Tube statement to show that she had *lied* to the world on the internet, the statement clearly was not hearsay because it was not being offered for the truth of the matter asserted. ER 801(c).

of age representation, the statutory defense that we've discussed at 9A.44.030.

THE COURT: Let's say for the sake of argument I agree with you and I say go ahead for both judicial economy and the fact that it's probably all going to come out anyway either on your calling her on direct or whatever, what about – how are you planning again to try to bring in “K”? Because I have some real concerns about “K”.

MR. HESTER: Well, and I – again, I don't mean to be – well, I guess to do mean to be redundant. I just want to make sure that I lodge my objection. I have some level of expectation of what your ruling's going to be based upon our prior discussion and I want to make sure at the appropriate point that I believe I've laid the right foundation to do this now. But I think that it's appropriate because it says, “based upon declarations as to age to the alleged victim,” and it doesn't – doesn't go on to say to the defendant particularly. It doesn't use that sort of language. It says, “based upon the declarations as to age by the alleged victim.” So that's why I think that it's – at this point the foundation's been laid and it's ripe to ask the question.

RP 3/30/10, at 149-150.

The trial judge then ruled that absent testimony that the defendant had seen that particular statement on the You-Tube post, the defense could not cross-examine Rebecca about it because that would be putting “the car before the horse.”

I don't know how you can rely on a declaration if – if there's no testimony of any mind at this point that he even knew about it. And there's no reference in time. Even if it was prior to December 25, 2008 – well, I just believe the statute's clear. We're just reading it differently, and I could be wrong. . . .

RP 3/30/10, at 150. Thus, defense counsel was never allowed to question Rebecca about her You-Tube statement that she was 19.

5. CLOSING ARGUMENTS REGARDING WILLIAM'S BELIEF THAT REBECCA WAS SIXTEEN YEARS OF AGE AND THE CREDIBILITY OF WILLIAM, REBECCA AND VIVIAN SMITH.

In closing argument, the prosecutor argued at great length that William had not carried his burden of proving the affirmative defense of reasonable belief that Rebecca was 16:

Because of the requirements of Mr. Valdiviez's special defense which you'll read in a minute, he says -- it says that he had a burden of proving that defense by a preponderance of the evidence, and I would argue to you that he has not met his burden. Preponderance means that you have to believe more likely than not that he reasonably believed that Rebecca was 16 years of age at the time, he reasonably believed that based on her declarations, and there's many reasons why you should not find that. But it says right there in that -- Jury -- that's your Jury Instruction No. 17, that it's his burden, not the State's burden to disprove it. It's his burden to prove it and by a preponderance, so you have to think at least 51% sure that he's met his burden and that he did reasonably rely on her declarations in believing that she was 16, that he believes that she was 16.

RP 3/31/10, at 143.

The prosecutor then proceeded to argue that the testimony of Vivian Smith, the defendant's mother, was not credible:

Well, let's look at some of the evidence that the Defense has offered to prove that. We have the testimony of Ms. Vivian Smith who is the aunt of Rebecca Morgan. She's known her all her life, was very close to her mother at the time she was born, lived about fifteen minutes away from

the hospital, was aware when she was born. Her kids played together. Rebecca had an older sister that used to – that was about a year younger than William. William was exact – well not exactly but ten years apart from Rebecca. That’s an easy number to remember. ***How credible is that evidence that Ms. Vivian Smith offered to you that she reasonably believed on Rebecca’s declarations that she was really 16 and that she then told William?*** Well, credibility is another one of those things that you have to find. You are the sole judge of credibility. And what are some of the things that you can use to determine a witness’s credibility? Well, one is the opportunity to observe or to have knowledge. Vivian Smith had the opportunity because she was a close sister of Rebecca’s mother; she lived fifteen minutes away from the hospital where Rebecca was born; she went to many family celebrations, birthday celebrations; according to Rebecca, she gave her, regularly gave her birthday cards in which she put down in the card, you know, whatever the age was that year, happy tenth birthday, happy 12th birthday. Furthermore, Mr. William Valdiviez, the Defendant, was at most of those celebrations also. And we heard testimony that there was candles on the cake and that this family always made a point of putting the candles on the cake, so much so, in fact, that on Rebecca’s 15th birthday her grandparents publicly apologized because they didn’t have 15 candles to put on the cake. Okay? So consider her opportunity to observe or have knowledge. ***I would argue to you that her claims that she reasonably believed Rebecca was a year younger are not credible.***

Memory quality. For her statement to be accurate, she would have to have forgotten Rebecca’s age. She would have to have forgotten it. So think logically now. If she could forget her age, couldn’t she also have forgotten what exactly happened two years ago, December – or a year, rather, a little over a year ago?

Personal interest in the outcome of the case. She is William’s mother and she came here from Texas to testify in his behalf. She naturally wants to protect him, to save him for some of the less pleasant consequences of his choices. ***She has a personal interest.***

So does William, by the way, have a personal interest in the outcome of this case. You take into account bias. That kind of goes along with personal interest.

And then – this is a big huge one here – the last one, the reasonableness of the witness’s testimony in light of the other evidence of the case. Okay, so what was some of that testimony about. Well, she claims – Vivian Smith claims that Rebecca publicly announced in front of all the other family members, “*Oh, I’m 16 now and I’m going to be legal to drive.*” Becca, of course, disputes that ***so if you find Rebecca’s testimony more credible, then you don’t have to believe Vivian Smith’s testimony.***

RP 3/31/10, at 143-146 (emphasis added).

The prosecutor argued that it was not plausible that Rebecca would lie about her age in front of her sisters and her grandparents:

But consider this. Rebecca had two younger sisters that went along with the trip and Rebecca’s two younger sisters would certainly have known Rebecca’s true age so if Rebecca is there announcing to everybody that, “*Hey, I’m 16 now,*” what’s the likelihood that one of her sisters isn’t going to correct her and say, “*Hey, you’re not 16. You’re 15. You can’t say you’re 16.*” ***What’s the likelihood that she would lie like that in front of her sisters who knew her true age?***

What about her grandparents? Her grandparents were there too, and they had paid for this whole trip. For Becca to make that statement in front of her grandparents, certainly they would have had to have forgotten her birthday as well. Not just Vivian Smith, not just William Valdiviez, but Rebecca’s own grandparents would have to have completely forgotten, completely wiped out of their memory the fact that she was really 15. How reasonable is that?

RP 3/31/10, at 146-147 (emphasis added).

The prosecutor pointed out that Rebecca had flatly denied making the statements that Vivian Smith attributed to her, and he urged the jurors to find Rebecca more credible than her aunt:

Rebecca came up, got on the stand and denied several of the allegations that Vivian made. She said she never told Ge-Ge that she wanted the truck. She doesn't even like trucks. She said the plan was her dad was going to buy her a car of her own and it wasn't going to be a truck. And she never wanted to drive on the beach. She said she never asked William about driving on the beach.

So I would ask you to please consider all these strange facts when you consider Vivian Smith's credibility, and that's your job to weigh credibility and that's in your instruction.

RP 3/31/10, at 147.

The prosecutor argued that William Smith was not believable either, and that he had not carried his burden of proof:

So ladies and gentlemen, it's really a simply matter when you get down to it. Rebecca provided testimony about what actually occurred there on the beach and for all intents and purposes, William agreed what happened. . . . The bottom line in this case is William admits it happened but his defense is that he was misled as to her age and as a result of those, that he reasonably believed – and again, I would argue that he certainly hasn't met his burden of showing that his belief was a reasonable one.

RP 3/31/10, at 148-149.

In reply, defense counsel argued that common sense suggested that kids lie about their age all the time, and that Rebecca Morgan had simply

done what children often do; she misrepresented her age in an attempt to persuade William to let her drive his truck on the beach:

[I]t's often said that you don't check you common sense at the door when you go into the jury room, okay? You arrived with common sense. You told us about a lot of the common sense that you've experienced as you were seated out there during voir dire. And the reason I'm mentioning this is age representation, okay? *We talked during voir dire about age representation and how widespread it is among kids these days, okay? It doesn't feel like a lie perhaps to many kids. What can you get away with by representing yourself to be a different age than you really are?* Is your cousin going to let you drive on the beach? Is that the ultimate goal? Think it through from that perspective. Think it through from a kid's perspective of, I don't know, bragging rights when you get back home or bragging rights two days later on the space needle when you're telling your aunt you tried to get your cousin to let you drive but he wouldn't – he wouldn't fall for it. Continuing theme seems to be going on throughout the course of this trip, so much so that it actually predates it. You heard Ms. Smith testify that a few months earlier at a family reunion that she was given this explicit representation, okay? They're just taking it for granted at that point. They're – they're not placed in a situation where they're – say, now wait a minute let's get out the calendar and let's go back and see if we can get a mail receipt – return receipt on the last birthday card we went. This is just what was represented to them and they – they went along with it, including William. He acted on it by buying her special gifts for her 16th birthday, as did Vivian Smith.

These things continued over the – these representations continued over the Christmas Eve dinner. They continued at the stroke of midnight. They continued out on the patio just before the decision was made to go down to the water when William basically made a concession that, okay, I'll take you for a ride but I'm not going to let you drive. Even documenting that she had a permit and had driven with her

friends previously. Again, William – neither William nor his mother had a reason to scrutinize that.

RP 3/31/10, at 166-168 (emphasis added).

Defense counsel concluded by arguing that the defense had carried its burden of proving the affirmative defense of reasonable mistake of age based on Rebecca's false representation that she had just turned 16:

The second paragraph [of Jury Instruction No. 17] says that "It is a defense to the charge of Rape of a Child in the Third Degree that at the time of the acts the Defendant reasonably believed that Rebecca Morgan was at least 16 years of age or was less than 48 months younger than the defendant based upon declarations as to age made by Rebecca Morgan. The Defendant has the burden of proving this by a preponderance of the evidence."

It is our position certainly that we've done this today. And preponderance of the evidence is further defined here. When you go back there and you sit down and you decide to discuss the issues in Instruction Number 17, that's what I want you to consider, okay? I want you to consider the reasonableness of Vivian Smith's testimony; the reasonableness of William Valdiviez's testimony. . . .

RP 3/31/10, at 170.

6. JURY INSTRUCTION NUMBER 14 INFORMED THE JURY THAT THERE WERE TWO DIFFERENT WAYS THAT A PERSON COULD COMMIT THE CRIME OF FURNISHING ALCOHOL TO A MINOR. THE PROSECUTOR ARGUED THAT THE STATE HAD PROVED BOTH.

Jury Instruction No. 14 informed the jurors that there were two alternative ways in which a person could commit the crime of furnishing alcohol to a minor:

To convict the defendant of the crime of furnishing liquor to a minor, each of the following elements of the crime must be proved beyond a reasonable doubt.

1a) That on or about December 25, 2008, the defendant did knowingly give alcohol to a person under the age of twenty-one years; or

1b) That on or about December 25, 2008, the defendant did knowingly permit any person under that age to consume liquor on his or her premises or on any premises under his or her control; and

2) That any of these acts occurred in the State of Washington.

If you find from the evidence that element (2) and either of the alternative elements (1)(a) or (1)(b) have been proved beyond a reasonable doubts [sic], then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements in (1)(a) or (1)(b) and (2), then it will be your duty to return a verdict of not guilty.

CP 170 (Appendix B).

In closing argument, the prosecution argued that there was evidence to prove both of the two alternative ways of committing the crime:

Oh, one other thing. I haven't talked about – sorry. I haven't talked about the furnishing liquor charge. There is – there are two prongs in to that. One is that the defendant furnished liquor directly to Rebecca. Her testimony was that he was; that he bought it; that he got her to drink the beer. Said, "Come on, you're not going to drink? It's your birthday, you gotta have a drink." And then proceeded to furnish her several shots of Crown Royal. ***That's one way that that crime would have been committed.*** He told Deputy Jacobson that he had gone out and bought the alcohol.

The other way is if a person permits someone underage to consume the liquor in premises under his control. How, I'm sure that Mr. Hester will have an argument about whether those premises were really under his control. It was a hotel room but, I mean, certainly it wasn't paid for by him ***but he had a key and Donna had a key.*** Donna was his girlfriend. Those were the two adults there. Rebecca was the – was the child there. And ***I would argue to you that in that situation when people are sharing a hotel room, two adults are sharing a hotel room, that hotel room is under their control.*** While they are there, while they're staying in that room, ***maybe somebody else is paying for the room, but that hotel is under their control and all of the evidence suggests that William Valdiviez did permit Rebecca to drink.***

So you have two different prongs by which we can prove this offense. And you don't have – on that one you don't have to be -- ***you don't have to be unanimous.*** All you have to prove is that at least one of those ways was – because there's two ways of committing the same crime. . . . [I]n the furnishing liquor, we're saying there's one crime that it – that one crime could be committed in one of two different ways, ***so you don't have to be unanimous as to***

which way, you just have to be unanimous that at least one of them was committed.

RP 3/31/10, at 155-156 (emphasis added).

Defense counsel also addressed the furnishing alcohol charge in his closing, and he took issue with the contention that the State had proved the alternate means of proving that William permitted Rebecca to drink alcohol on premises under his control:

You have a witness who's testified that at what she has now divulged as 15 years old, she had six larger than regular shots of Crown Royal, very, you know, serious liquor, in the early morning hours and she has told you by her own admission that this was something she was doing on her own. Okay? She dumped out that beer that apparently she claims that Mr. Valdiviez gave her and she drank on her own. Now kids do this all the time.

There's another issue that you're going to see in your Instruction, and I heard the State go over it with you a few moments ago, ***and that's this issue as to control over the room. She's told you she had a key. There was a time she lost it and so forth. You heard testimony that he wasn't even there one of the nights. You've also heard un rebutted testimony that a guy named Mr. Bill Hill, the grandfather in this situation, was the one who rented these rooms and was responsible for these rooms. You can't hold him to that standard for these rooms.*** You can't hold him to that standard under this particular Instruction. So please, amongst yourselves discuss – you know, take a close look at that Instruction, subpart 1a), 1b), and section 2) of that.

RP 3/31//10, at 160-161 (emphasis added).

D. ARGUMENT

1. BY PROHIBITING THE DEFENDANT FROM CROSS-EXAMINING THE KEY WITNESS IN THE CASE REGARDING THE FACT THAT SHE LIED TO THE WORLD WHEN SHE POSTED A STATEMENT ON THE INTERNET IN WHICH SHE CLAIMED TO BE 19 YEARS OLD, THE TRIAL COURT VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION.

“It is fundamental that a defendant charged with commission of a crime should be given great latitude in the cross-examination of a prosecution witness to show motive or credibility.” *State v. Peterson*, 2 Wn. App. 464, 466, 469 P.2d 980 (1970), quoted with approval in *State v. Smith*, 130 Wn.2d 215, 227, 922 P.2d 811 (1996). “Where a case stands or falls on the jury’s belief or disbelief of essentially one witness, that witness’s credibility or motive must be subject to close scrutiny.” *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980), quoted with approval in *Smith*, 130 Wn.2d at 227. *Accord State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1981) (“defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular witness is essential to the State’s case.”) “Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue.” *Id.*

This especially so in the prosecution of sex crimes where, owing to natural instincts and laudable sentiments on the part of the jury, the usual circumstances of the offense and the understandable lack of objective corroborative

evidence, *the defendant is often disproportionately at the mercy of the complaining witness' testimony.*

Peterson, 2 Wn. App. at 466-67 (emphasis added).

Where a criminal defendant has been denied the right to cross-examine a key witness in order to impeach the witness' credibility, Washington appellate courts have not hesitated to reverse their convictions. *See, e.g., Roberts, supra* (reversing rape conviction because defense precluded from cross-examining alleged victim about external pressure from her parent to cooperate with the prosecution); *State v. Wilder*, 4 Wn. App. 850, 486 P.2d 319 (1971) (reversing conviction for carnal knowledge because trial court improperly limited cross-examination of the child's mother); *Peterson, supra* (reversing indecent liberties with a child under the age of 15 because defendant precluded from asking witness if the charges were a fabrication initiated by alleged victim's older sister); *State v. Moneymaker*, 100 Wash. 463, 171 P. 253 (1918)(reversing conviction for rape of a 13 year old); *State v. Perez*, 139 Wn. App. 522, 162 P.3d 461 (2007)(reversing burglary and assault convictions because of trial court's limitation on defense counsel's cross-examination of alleged victim). *See also Smith*, 130 Wn.2d at 227 (trial judge "abused its discretion in ruling Trooper Wiley could not be cross-examined on his recollection of the PBT test for the limited purpose of testing his recollection," but because

“evidence of Smith’s intoxication” was “overwhelmingly established” the error was harmless beyond a reasonable doubt).

Here, as in *Roberts*, “it is undisputed that the defendant and [the alleged victim] engaged in sexual intercourse.” *Roberts*, 25 Wn. App. at 835. “Credibility, therefore, was a key, if not determinative factor.” *Id.* In *Roberts* the only contested issue was consent; in this case the only contested issue was whether the underage girl had misrepresented her age. Rebecca testified that she told the defendant she was turning 15; the defendant testified she told him she was turning 16. The You-Tube post demonstrated that on a different occasion Rebecca had falsely told the world that she was 19. Evidence of the fact that she had told this world this lie was critical to impeach Rebecca. Other than evidence of this lie, Valdiviez had no other means of impeaching her credibility. This impeachment evidence was crucial to the defense, and yet the trial court excluded it and prohibited any cross-examination about it. Here, as in *Roberts*, *Wilder* and *Peterson*, this Court should reverse the defendant’s conviction because the restriction placed on his cross-examination of the key witness violated his Sixth Amendment right to confrontation.

2. BY PROHIBITING HIM FROM CROSS-EXAMINING THE ALLEGED VICTIM ABOUT HER PRIOR LIE CONCERNING HER AGE, THE TRIAL COURT ALSO VIOLATED THE DEFENDANT'S RIGHTS UNDER EVIDENCE RULE 608(b) WHICH ENTITLES HIM TO INQUIRE INTO INSTANCES OF PAST CONDUCT WHICH ARE PROBATIVE OF TRUTHFULNESS.

In addition to violating Valdiviez's constitutional right of cross-examination under the Sixth Amendment, the trial court's prohibition against cross-examining Rebecca Morgan about her having falsely stated to be 19 years old also violated Evidence Rule 608(b). That rule provides as follows:

Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than the conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness.

“Washington case law allows cross-examination under ER 608(b) to specific instances that are relevant to veracity.” *State v. Wilson*, 60 Wn. App. 887, 893, 808 P.2d 754 (1991) (trial court properly ruled under Rule 608(b) that the defendant's wife could be questioned on cross-examination about her prior false statement). As the Supreme Court stated in *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001):

Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment.

In the present case, it was undisputed that Rebecca lied to the world when she said she was 19 in her You Tube post, since she was only 16 at the time of trial. RP 3/30/10, at 42. This lie was obviously probative of her character for truthfulness or untruthfulness. She was clearly the State's crucial witness and the lie she told on the Internet was the only available impeachment evidence. Finally, this particular lie was extremely relevant because it was a lie about her age in which she claimed to be older than she really was. This was exactly the same type of lie which Valdiviez testified she told him. He claimed she told him she was turning 16. On the internet she told the world that she was 19. Since the *only* disputed issue in the case was whether Valdiviez reasonably relied on her statement – which she denied making – that she was turning 16, the fact that she had told an even bigger lie about her age to the entire world was extremely relevant to her credibility.

In *State v. McSorley*, 128 Wn. App. 598, 116 P.3d 431 (2005), this Court reversed the defendant's conviction for child luring and then proceeded to address additional issues likely to recur on remand at the retrial. This Court noted that the trial judge had prohibited the defense from cross-examining the child about two specific instances of misconduct which were probative of the child's truthfulness. In those prior incidents the child (1) had falsely pretended to have been injured, thus causing a

passing motorist to stop to provide aid, and (2) had ‘gestured wildly’ for a passing car to stop and then laughed at a driver who did stop. *Id.* at 602. This Court noted that the child was the State’s “crucial” witness who was “essential to the State’s case,” and that the two prior incidents “were highly probative of his credibility at trial.” *Id.* at 613. The record did not show when these two pranks had occurred, thus leaving open the possibility that perhaps they were too remote in time to be probative of the child’s truthfulness. This Court concluded that if McSorley shows after remand that one or both “pranks” are not too remote in time, *York* applies, and he shall be entitled to cross-examine accordingly.” *Id.* at 614.

Similarly, in *State v. McDaniel*, 83 Wn. App. 179, 920 P.2d 1218 (1996), a defendant convicted of assault argued that a restriction placed on his cross-examination violated both the Sixth Amendment and ER 608(b). The defendant sought to cross-examine the alleged victim, Ms. Erlasu Graham. She testified he kicked her; he testified he had no contact with her and that another man kicked her. McDaniel claimed that Graham used drugs on the day of the assault incident. He argued that her drug use on the day of the incident affected her ability to accurately perceive what happened that day. Graham denied that she used any drugs that day.

In order to impeach Graham, McDaniel’s attorney sought to ask her about the fact that she had lied at her deposition in a civil case. There she

testified that she had not used drugs after 1988. But when interviewed by defense counsel in the presence of the prosecutor, she admitted that she had used drugs after 1988. So she had admitted to lying on the subject of her drug use. McDaniel's counsel explained why he wanted to cross-examine her on this subject: "I'm not offering this to disparage her with her drug use. . . I only do it to offer it to show that she has in the past not told the truth. I think it is appropriate for cross-examination." *McDaniel*, 83 Wn. App. at 182, n.3. The trial judge, however, forbade defense counsel to inquire into this subject on cross-examination.

On appeal, McDaniel argued that the trial judge's ruling violated both the Sixth Amendment and ER 608(b). The Court of Appeals reversed McDaniel's conviction finding constitutional error, and found it unnecessary to reach the issue of whether the restriction on cross-examination also violated ER 608(b):

McDaniel argues in the alternative that evidence of Graham's false testimony was also admissible under ER 608(b) and ER 609(a). Because we reverse on constitutional grounds, we need not reach this issue, but nevertheless observe that even if the evidence at issue here was not admissible under the rules of evidence, on the facts presented McDaniel's constitutional right to confrontation must take precedence. [Citation omitted].

McDaniel, 83 Wn. App. at 188, n.5.

The same option is present in this case. This Court can reverse Valdiviez's conviction on the ground that his Sixth Amendment

constitutional rights were violated, and thus not reach the issue regarding ER 608(b). Alternatively, this Court can reverse the conviction on the grounds that the trial judge's restriction on cross-examination violated ER 608(b), and thereby avoid deciding the constitutional issue.

3. THE STATUTE DEFINING THE CRIME OF FURNISHING ALCOHOL TO A MINOR PROVIDES TWO ALTERNATIVE WAYS OF COMMITTING THE CRIME.

The statute which defines the crime of furnishing alcohol to a minor provides that there are two different ways of committing this crime. RCW 66.44.270 provides:

It is unlawful; for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor *on his or her premises or on premises under his or her control*. For purposes of this subsection, "premises" includes real property, houses, buildings, and other structures, and motor vehicles and watercraft. A violation of this subsection is a gross misdemeanor punishable as provided for in chapter 9A.20 RCW.

(Emphasis added)(Appendix C). In this case the State specifically chose to charge both of the alternative means of committing the offense.

4. **IN A CASE WHERE A DEFENDANT IS CHARGED WITH COMMITTING ONE CRIME BY MULTIPLE ALTERNATIVE MEANS, THE RIGHT TO A UNANIMOUS JURY VERDICT IS VIOLATED IF A JURY RETURNS A GENERAL VERDICT AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT ANY ONE OF THE MEANS SUBMITTED TO THE JURY.**

In this State criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). “In certain situations, the right to a unanimous jury trial includes the right to express jury unanimity on the *means* by which the defendant is found to have committed the crime.” *Id.*

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. [Citations]. On the other hand, **if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.**

Ortega-Martinez, 124 Wn.2d at 707-08 (bold emphasis added; italics in original). *Accord State v. Boiko*, 131 Wn. App. 595, 599 ¶ 11, 128 P.3d 143 (2006); *State v. Kinchen*, 92 Wn. App. 442, 451, 963 P.2d 918 (1998); *State v. Allen*, 127 Wn. App. 125, 130 ¶ 13, 110 P.3d 849 (2005). “A general verdict of guilty on a single count charging the commission of a

crime by alternative means will be upheld only if sufficient evidence supports each alternative means.” *State v. Kintz*, 169 Wn.2d 537, 552 ¶ 33, 238 P.3d 470 (2010).

On numerous occasions, Washington appellate courts have applied this rule by reversing convictions where there was insufficient evidence of one of the alternative means of committing an offense which was charged and then argued to the jury. *See, e.g., State v. Boiko*, 131 Wn. App. at 601 ¶ 15 (“Because there was insufficient evidence to support a conviction on at least two of the alternative means set forth in the statute, Mr. Boiko’s conviction [for intimidating a witness] must be reversed.”); *State v. Lobe*, 140 Wn. App. 897, 167 P.3d 627 (2007) (reversing two witness tampering convictions because the evidence was not sufficient to support some of the alternative means charged); *State v. Kinchen*, 92 Wn. App. at 452 (reversing unlawful imprisonment convictions because while evidence was sufficient on one of two charged alternative means it was not sufficient on the other); *State v. Maupin*, 63 Wn. App. 887, 893-94, 822 P.2d 355 (1992) (felony murder conviction for murder committed either in the course of kidnapping or in the course of rape reversed because there was insufficient evidence to find murder in the course of rape and the jury was not given a special verdict form which showed which of the alternative means the jury was relying upon).

5. TO SUPPORT A CONVICTION UNDER THE ALTERNATIVE MEANS OF PERMITTING A MINOR TO CONSUME ALCOHOL ON PREMISES UNDER THE DEFENDANT'S CONTROL, THE DEFENDANT MUST HAVE THE LEGAL RIGHT TO EXCLUDE PEOPLE FROM THE PREMISES. SINCE VALDIVIEZ HAD NO SUCH RIGHT, HE DID NOT HAVE CONTROL OVER THE PREMISES, AND AS A MATTER OF LAW THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THIS ALTERNATIVE MEANS OF COMMITTING THE CRIME.

The statute at issue here, RCW 66.44.270, criminalizes the act of permitting a minor to consume liquor “on his or her premises or on premises under his or her control.” There are few reported Washington cases which construe this statutory language, but the case law which does exist demonstrates that in order to violate this portion of the statute the defendant must have had the legal right to control who comes onto the premises. Absent a legal right to exclude people from the premises, the “premises” cannot be under the defendant’s control, and thus he cannot be convicted under this subsection of the statute.

The decision in *Houck v. University of Washington*, 60 Wn. App. 189, 803 P.2d 47 (1991) demonstrates this point. In that case an underage student who drank liquor in a student dormitory room fell down an open elevator shaft and was seriously injured. The student then sued the university arguing that it was responsible because it had a duty to prevent him from drinking in a college dorm room:

Houck contends that the University has a statutory and common law duty to control (i.e. prevent) under-age

drinking in student dormitories and that the court erred in instructing the jury to the contrary. [Footnote omitted].

Houck, 60 Wn. App. at 198. Houck attempted to rely on the language of RCW 66.44.270 which prohibits people from permitting minors to consume alcohol on premises under their control. This Court rejected Houck's argument on the ground that the dorm rooms were *not* under the University's control. Having rented the dorm rooms to students, this Court noted that under *State v. Chrisman*, 100 Wn,2d 814, 676 P.2d 419 (1984), the University did not have the legal authority (without a warrant) to enter those rooms, and thus had no control over those premises:

Not only were the dormitory rooms not premises under the control of the University, but the failure of the University to prevent consumption of alcohol does not fit within the statutory meaning of "[to] permit" in RCW 66.44.270. "Permit" in this statute "refers to something more than a mere passive indifference or passive sufferance, and requires an affirmative assent."

Houck, 60 Wn. App. at 199 (emphasis added).

In the present case, there was no testimony or evidence that the "premises" – the hotel room that Valdiviez stayed in -- was under his control. It was undisputed that the room was rented by Rebecca's grandfather William Hill. Hill rented all the rooms that his family members occupied, and Hill is the one who checked out of the rooms when they left the hotel. RP 3/30/10, at 52, 153, 156.

Admittedly, Valdiviez was one of the three occupants of the room, and he had a key to the room. *Id.* at 157. But Rebecca was also an occupant of the room, and she also was given a key to the room by her grandfather. *Id.* Valdiviez had no legal authority to exclude Rebecca from the hotel room, and no one ever testified that he did. Thus, Valdiviez had no control over “the premises.”

This Court’s opinion in *S & S Market v. Washington State Liquor Control Board*, 65 Wn. App. 517, 828 P.2d 1154 (1992), made it clear that it is the *legal authority* to control premises which is referenced by the state statutes in Title 66 and in the administrative regulations adopted pursuant to the authority granted by that Title. In that case this Court reversed the decision of an administrative law judge who had upheld the denial of an application to renew a liquor license on the ground that the applicant, the owner of a small convenience store, had violated the provisions of WAC 314-16-040 and 314-16-120(2). Both of these regulations referred to premises “under the control” of a Liquor Control Board licensee:

No retail licensee shall possess or allow any person to consume or possess any liquor other than that permitted by his license in or on the licensed premises, ***or on any public premises adjacent thereto which are under his control*** except under the authority of a banquet permit . . .

WAC 314-16-040 (emphasis added).

No licensee or employee thereof, shall be disorderly, boisterous or intoxicated on the licensed premises, or on

any public premises adjacent thereto *which are under the licensee's control*,

WAC 314-16-120(2) (emphasis added).

The issue in *S & S Market* was whether the public sidewalk next to the storeowner's property was an area "under his control." This Court recognized that "[t]he language 'under his control' is not defined in the Board's administrative regulations, nor is a definition set out anywhere in RCW Title 66, the title governing liquor control." *S & S Market*, 65 Wn. App. at 522. This Court examined the definition of the word "control" set forth in *Webster's Dictionary*: "to exercise authority over; direct; command." *Id.* Applying this definition, this Court held that "in order for the regulations to apply to S & S Market, it must be shown that the owners were *entitled to exercise authority* over the streets and sidewalks adjacent to the store." (Emphasis added).

The Liquor Control Board attempted to argue that the store owner did have "the legal ability" to control activity in that location:

Respondents contend that various sections of the Tacoma Municipal Code demonstrate that the owners of property adjacent to public streets and sidewalk have *the legal ability* to control third party conduct on those public ways. .

After examining several statutes and ordinances, this Court rejected the Board's argument because it concluded that no statute gave the store owner any such legal authority:

The above codes do not, however, suggest that the abutting landowner has “control” over the streets and sidewalks, rather they show that landowners have, in certain situations, particular duties with respect to the streets and sidewalks. ***No authority declares that S & S Market has a legal duty, or even a legal right, to control third party conduct on city owned property. . . .***

Id. at 523 (emphasis added). Since the premises adjacent to his store were *not* legally under his control, the storeowner had no duty to stop people from drinking on those premises. Accordingly, this Court found that there had been no violation of the regulations, and reversed the denial of the store owner’s application for renewal of his liquor license. *Id.* at 524.⁶

The prosecution never argued that Valdiviez had any legal authority to exercise control over the hotel room. The State never contended that Valdiviez had any legal right to determine who could be admitted to, or excluded from, the hotel room. Instead, the prosecutor argued that Valdiviez, simply by virtue of the fact that he was an adult, and was ten years older than Rebecca, was in control of Rebecca. The prosecutor’s closing argument remarks were to the effect that the jury could find

⁶ See also *Estate of Bruce Templeton v. Daffern*, 98 Wn. App. 677, 990 P.2d 968 (2000), the Court stated: “We hold that RCW 66.44.[2]70(1) imposes a statutory duty not to permit a minor to consume alcohol *on the host’s* premises.” (Italics added). (There is a typo in the *Daffern* opinion. In the quoted passage the opinion refers to the statute as RCW 66.44.370(1); but the proper section number, .270(1) is given in the preceding sentence, and it is obvious that the Court meant to say .270.

William Valdiviez was not the “host” of these premises, and thus the command of RCW 66.44.270(1) not to permit a minor to consume alcohol on premises under his control was simply not applicable to him at all. Rebecca Morgan acknowledged that William Hill, her grandfather, was “the host.” RP 3/30/10, at 123.

Valdiviez guilty because as an adult he had “de facto” control of the minor in the room, not because he had any legal control over the room:

Those were the two adults there. Rebecca was the – was the child there. And *I would argue to you that in that situation when people are sharing a hotel room, two adults are sharing a hotel room, that hotel room is under their control.*

RP 3/31/10, at 155.

But this argument was legally improper for two reasons. First, simply as a factual matter, there was never any testimony that even indirectly implied that Valdiviez was given authority to act as the guardian or as the supervising adult agent who could “control” Rebecca. No one ever testified that grandma or grandpa Hill ever said to either Rebecca or to Valdiviez that Valdiviez was in charge of Rebecca as long as she stayed in that hotel room. *But even if there had been* such testimony, it would not provide a sufficient basis for a conviction under the alternative means of committing the crime charged by permitting a minor to consume alcohol on “premises under his . . . control.”

Baynes v. Rustler’s Gulch Syndicate, 142 Wn. App. 335, 173 P.3d 1000 (2007) further illustrates the same principle by holding that even a landowner – a person who *does* have the power to exclude people from the premises – is not liable for violating RCW 66.44.270 if the landowner does not know that anyone is drinking on his property and he made

reasonable efforts to exclude them. In *Baynes* the corporate owner of 3,000 acres of remote, rugged, undeveloped land, was unaware that teenagers held drinking parties on its land. The owner posted the land with no trespassing signs, but despite such signs minors came onto the land and held drinking parties. The Court of Appeals held that the landowner had no duty to third parties who were injured by an intoxicated teenager who trespassed and consumed alcohol on the land:

RCW 66.44.270 does not impose legal liability on a landowner to a third person who is injured because of the illegal conduct and underage drinking of a trespasser.

Baynes, 142 Wn. App. at 340.

Under *Baynes*, the person with legal control of the premises was the person who had the legal right to exclude someone from that room. That person was William Hill. If William Hill had been aware of the fact that Rebecca was drinking alcohol in the hotel room that he had rented for her to stay in, *then William Hill would have been guilty* of permitting a minor to consume alcohol on “premises under his control.” Hill had the power to tell Rebecca she could not be in that room. Valdiviez did not. Even if Valdiviez had wanted to exclude Rebecca from the room he was sharing with her, he could not have done so because William Hill, as the lessee of the room and the person with the legal right to control it, had already made the decision as to who had permission to be in that room. Valdiviez was

in the room because William Hill said he could stay in the room. Rebecca Morgan was in the same position. She was also in the room with the permission of William Hill. Neither could exclude the other. Thus, the premises were not under the control of either one of them.

Whether a person “has a duty, or even a right, to monitor and control the activity” of others on certain premises “is a question of law and an error of law standard applies.” *S & S Market*, 65 Wn. App. at 522. A reviewing court decides independently whether such a legal right of control exists. *Id.* In the present case, as in *S & S Market*, as a matter of law William Valdiviez had no right to control the premises. Since he had no such authority, the evidence in this case was insufficient as a matter of law to sustain a conviction under the second alternative means of committing the offense of furnishing liquor to a minor by permitting a minor to consume alcohol on premises under his control.

6. ASSUMING, ARGUENDO, THAT RCW 66.44.270(1) IS AMBIGUOUS, AND THAT IT IS POSSIBLE TO CONSTRUE IT AS THE PROSECUTOR DID IN HIS CLOSING, UNDER THE RULE OF LENITY THE STATUTE MUST BE CONSTRUED IN FAVOR OF VALDIVIEZ, AND THUS THE PROSECUTOR’S CONSTRUCTION MUST BE REJECTED.

Appellant Valdiviez submits that the meaning of “premises under his or her control” clearly requires that the actor has to have the legal authority to control the premises, and that so construed his conviction

cannot stand. But even assuming, *arguendo*, that the meaning of “under his or her control” was not clear, and that the statute was ambiguous, under the rule of lenity Valdiviez’s conviction still cannot stand.

It is well established that whenever a criminal statute is found to be ambiguous, absent legislative intent to the contrary, the rule of lenity requires a court to interpret the statute in favor of the defendant. *State v. Kintz*, 169 Wn.2d 537, 548, 238 P.3d 470 (2010); *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009); *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005); *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). A statute is deemed ambiguous if it is susceptible to two or more reasonable interpretations. *City of Seattle v. Holifield*, 170 Wn.2d 230, 241, 240 P.3d 1162 (2010); *State v. Coucil*, 170 Wn.2d 704, 706, 245 P.3d 222 (2010); *Jacobs*, 154 Wn.2d at 600-601.

In *State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986), the Supreme Court applied the rule of lenity to the same statute that is at issue in this case. The issue in *Hornaday* was the meaning of the word “possession” in the phrase “possession of intoxicating liquor.” The arresting officer did not see the defendant in possession of any container of liquor. But he could smell it on the defendant’s breath. The question was whether the fact that there was alcohol in the defendant’s stomach or bloodstream was sufficient to constitute “possession.” The Court held that

the word “possession” did not include possession inside the body of liquor that had already been consumed. In the alternative, the Court went on to hold that even if the statute could be deemed ambiguous and thus susceptible to the interpretation that liquor inside the body did constitute the possession of liquor, under the rule of lenity the Court was obligated to adopt the interpretation that favored the defendant:

Even if we were to find the term “possession” ambiguous and the State’s argument a plausible interpretation of the term, among others, fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found.

Hornaday, 105 Wn.2d at 127.

Here, as in *Hornaday*, even if this Court were to conclude that the statute is susceptible to two plausible interpretations, one of which would support the State’s theory of guilt argued to the jury, under the rule of lenity the existence of the other plausible interpretation compels the Court to adopt the construction most favorable to the defendant. Accordingly, the issue remains whether there is any evidence from which a rational jury could find that the defendant had the legal authority to control the premises. As noted above, there is no such evidence. Accordingly, under the rule of *Ortega-Martinez*, the conviction must be vacated.

7. SINCE THE JURY RETURNED A GENERAL VERDICT WHICH DOES NOT SPECIFY THAT THEY FOUND VALDIVIEZ GUILTY UNDER THE FIRST ALTERNATIVE MEANS, THE CONVICTION MUST BE REVERSED.

The jury was specifically advised that it did *not* have to be unanimous as to which alternative means of furnishing liquor to a minor had been proved, so long as they all agreed that at least one or the other had been proved. The prosecutor specifically argued that the State had proved both alternatives. RP 3/31/10, at 155-156. The jury returned a general verdict which did not specify which means it found. CP 176 (Appendix D). In this situation, there is no way of knowing whether the jury was unanimous in finding Valdiviez guilty under the first alternative of actually giving liquor to Rebecca. Valdiviez *denied* supplying Rebecca with any liquor and testified that when he discovered that someone had been drinking his Crown Royal liquor he assumed that Rebecca had consumed it *without* his knowledge. RP 3/31/10, at 78. It was undisputed that on one of the three nights that Rebecca stayed in that room, Valdiviez had not even been there because he went back to Ft. Lewis to sleep there one night. RP 3/30/10, at 124. Thus, it is very possible that one or more jurors decided to find Valdiviez guilty under the second alternative that, according to the prosecutor, covered Valdiviez because he, as an adult, was in control of whatever happened inside that hotel room.

Accordingly, here, as in *State v. Maupin*, “the trial court declined to provide the jury with a special verdict form which would have shown which of the [State’s two alternative means theories] the jury relied upon in reaching its verdict.” *Maupin*, 63 Wn. App. at 894. Accordingly, [t]here is no way for this court to know whether the jury based its verdict on a unanimous determination” that Valdiviez gave Rebecca liquor to consume. *Id.* Here, as in *Boiko*, *Kinchen*, *Maupin*, and *Lobe*, the defendant’s conviction must be reversed and a new trial ordered.

E. CONCLUSION

For the reasons stated above appellant asks this Court to reverse his convictions for rape of a child in the third degree and for furnishing alcohol to a minor, and to remand for retrial on these charges.

DATED this 5th day of May, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSPA No. 8787
Of Attorneys for Appellant

APPENDIX A

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blutundtod66 (2 years ago)
hi its me Jeremy, just seeing your channel



burgerking2121 (2 years ago)
hay whats up



AppleMac55 (2 years ago)
I haven't been up to much . I have already made some friends who can speak English, and we usually take a tram into the city where we can look into shops and go to Mcdonalds, because Switzerland is not like texas where you see a fast food restaurant everywhere you go. The closest mcdonalds to me is a 15 min tram into the city. Also, I have been doing some snowboarding in the mountains, although most of the snow is gone.



AppleMac55 (2 years ago)
Hi, thanks for the comment, and sorry it took me 4 hours to reply, but there is a big time difference from where I am and from where you are But Switzerland is 1,000,000 times better than texas!!



Austindudebobman (2 years ago)

Subscriptions (2)



makemeb



Veneta

Subscribers (4)



icingo



Moz3616



BROKENB.

see all



hey! add me on friends!

AppleMac55 (3 years ago)

Hey Becca, it's me. Kevin!!!!!!
Send me a message so I can make sure that my shit computer is working!!!!



Austindudebobman (3 years ago)

WTF
o my god
o my god



Friends (17)



jadiech



Austind



AppleMac55

see all

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APPENDIX B

Instruction No. 14

To convict the defendant of the crime of furnishing liquor to a minor, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1a) That on or about December 25, 2008, the defendant did knowingly give alcohol to a person under the age of twenty-one years; or
- 1b) That on or about December 25, 2008, the defendant did knowingly permit any person under that age to consume liquor on his or her premises or on any premises under his or her control; and
- 2) That any of these acts occurred in the State of Washington.

If you find from the evidence that element (2) and either of the alternative elements (1)(a) or (1)(b) have been proved beyond a reasonable doubts, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements in (1)(a) or (1)(b) and (2), then it will be your duty to return a verdict of not guilty.

APPENDIX C

West's RCWA 66.44.270

West's Revised Code of Washington Annotated Currentness

Title 66. Alcoholic Beverage Control (Refs & Annos)

Chapter 66.44. Enforcement--Penalties (Refs & Annos)

**→66.44.270. Furnishing liquor to minors--Possession, use--
Penalties--Exhibition of effects--Exceptions**

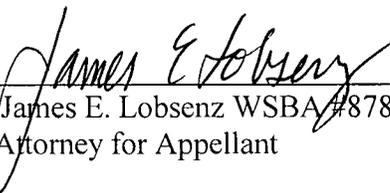
(1) It is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control. For the purposes of this subsection, "premises" includes real property, houses, buildings, and other structures, and motor vehicles and watercraft. A violation of this subsection is a gross misdemeanor punishable as provided for in chapter 9A.20 RCW.

APPENDIX D

He has instructed me not to give him or mail to him copies of paperwork in connection with his case. However, on March 11, 2011, I sent a copy of Amended Brief of Appellant to Appellant's mother Vivian Smith who resides in Houston, Texas. She keeps his legal paperwork for him.

DATED: May 5, 2011.

CARNEY BADLEY SPELLMAN PS

By  _____
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Entitled exactly:

AMENDED BRIEF OF APPELLANT



Lily T. Laemmle

CERTIFICATE OF SERVICE- 2